

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1973

Volume I

*Summary records
of the twenty-fifth session*

7 May—13 July 1973

UNITED NATIONS



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INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents.

The Special Rapporteurs' reports discussed at the session and certain other documents, including the Commission's report to the General Assembly, are printed in volume II of this *Yearbook*.

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MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Roberto AGO	Italy	Mr. Paul REUTER	France
Mr. Milan BARTOŠ	Yugoslavia	Mr. Zenon ROSSIDES	Cyprus
Mr. Mohammed BEDJAOUTI	Algeria	Mr. José SETTE CÂMARA	Brazil
Mr. Suat BILGE	Turkey	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Juan José CALLE y CALLE	Peru	Mr. Arnold J. P. TAMMES	Netherlands
Mr. Jorge CASTAÑEDA	Mexico	Mr. Doudou THIAM	Senegal
Mr. Abdullah EL-ERIAN	Egypt	Mr. Senjin TSURUOKA	Japan
Mr. Taslim O. ELIAS	Nigeria	Mr. Nikolai USHAKOV	Union of Soviet Socialist Republics
Mr. Edvard HAMBRO	Norway		
Mr. Richard D. KEARNEY	United States of America	Mr. Endre USTOR	Hungary
Mr. Alfredo MARTINEZ MORENO	El Salvador	Sir Francis VALLAT	United Kingdom of Great Britain and Northern Ireland
Mr. C. W. PINTO	Sri Lanka		
Mr. Robert Q. QUENTIN-BAXTER	New Zealand		
Mr. Alfred RAMANGASOAVINA	Madagascar	Mr. Mustafa Kamil YASSEEN	Iraq

OFFICERS

<i>Chairman:</i>	Mr. Jorge CASTAÑEDA
<i>First Vice-Chairman:</i>	Mr. Mustafa Kamil YASSEEN
<i>Second Vice-Chairman:</i>	Mr. Milan BARTOŠ
<i>Rapporteur:</i>	Mr. Arnold J. P. TAMMES

Mr. Yuri M. RYBAKOV, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

The Commission adopted the following agenda at its 1200th meeting, held on 7 May 1973:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. State responsibility
3. Succession of States in respect of matters other than treaties
4. Question of treaties concluded between States and international organizations or between two or more international organizations
5. (a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245);
(b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII))
6. Most-favoured-nation clause
7. Organization of future work
8. Co-operation with other bodies
9. Date and place of the twenty-sixth session
10. Other business

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-FIFTH SESSION

Held at Geneva from 7 May to 13 July 1973

1200th MEETING

Monday, 7 May 1973, at 3.20 p.m.

Chairman: Mr. Richard D. KEARNEY

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN declared open the twenty-fifth session of the International Law Commission.

Tribute to the memory of Mr. Gonzalo Alcívar

2. The CHAIRMAN said that it was a matter of extreme regret for him to have to announce the death of a member of the Commission, Mr. Gonzalo Alcívar, who had been not only a distinguished jurist, but also a man with an endearing personality and a keen sense of humour. He had already sent the following telegram to Mr. Alcívar's widow, Mrs. Eugenia Calderón de Alcívar: "As Chairman of the United Nations International Law Commission, I wish to extend on behalf of all the members of the Commission our profound sense of loss upon learning of the death of our esteemed colleague, Gonzalo Alcívar, and to send our most sincere expressions of sympathy. Gonzalo Alcívar served on the Commission with great distinction and unwavering devotion to the legal ideals in which he believed. His contribution to the development of international law, both in the Commission and in the General Assembly of the United Nations, will be his most enduring monument".

At the suggestion of the Chairman, the members of the Commission stood and observed one minute's silence in memory of Mr. Alcívar.

3. Mr. CASTAÑEDA said that Mr. Alcívar, after teaching as a professor of international law at the University of Guayaquil, had had a distinguished political career, in the course of which he had represented his country in the Sixth Committee of the General Assembly,

which he had served both as Vice-Chairman and as Chairman. He had represented his country at the Vienna Conference on the Law of Treaties, in the Special Committee on the Question of Defining Aggression and in the Preparatory Committee for the Conference on the Law of the Sea. He had always identified himself with the interests of Latin America, which he had defended with passion and conviction. He had won the respect and esteem of his colleagues in the Commission for his splendid personal qualities, and all members would, he was sure, wish to join in transmitting the expression of their sympathy and grief to his widow.

4. Mr. SETTE CÂMARA said that he had known Mr. Alcívar for many years and had worked closely with him in the Sixth Committee of the General Assembly in New York, where Mr. Alcívar had distinguished himself by his special sensibility for political problems and by his pragmatic approach to them. His presence would be greatly missed, and if there was a place for international lawyers in the world to come, he himself was confident, as a firm believer in the immortality of the soul, that Mr. Alcívar's generous laughter would continue to be heard on the other side of the veil.

5. Mr. BARTOŠ said he wished to associate himself with the tributes paid to Mr. Alcívar. As Chairman of the Sixth Committee in 1969, Mr. Alcívar had defended the Commission's draft articles on special missions in a masterly fashion.

6. Mr. YASSEEN said he deplored the loss of Gonzalo Alcívar, an eminent, sincere and conscientious lawyer, an excellent representative of Ecuador and a devoted friend.

7. Mr. USHAKOV said that Mr. Alcívar had possessed outstanding qualities as a jurist. His death meant the loss of an eminent colleague for members of the Commission and of a great diplomat for the Government of Ecuador.

8. Mr. ELIAS said that he had first come to know Mr. Alcívar during the difficult days of negotiations at the Vienna Conference on the Law of Treaties. He had possessed a warmly human personality and had been an energetic defender of the cause of peace. He had always been humorous but firm, and had pursued his ideals with sincerity and tenacity. When he had heard the news of Mr. Alcívar's death, he had asked his country's representative at United Nations Headquarters to

express the sincere regrets of Nigeria and of all other African countries.

9. Mr. RYBAKOV (Secretary to the Commission) said that, on behalf of the Secretary-General and of the Legal Division of the United Nations, he wished to pay a warm tribute to Mr. Alcívar, who for many years had defended the cause of international peace, security and justice in the United Nations.

10. The CHAIRMAN suggested that the Commission request the Secretariat to prepare a suitable message of condolence to Mrs. Eugenia Calderón de Alcívar.

It was so agreed.

Statement by the outgoing Chairman

11. The CHAIRMAN said that, after his return to the United States in the summer of 1972, he had been invited to address the International Law Association in New York City on the work of the Commission's twenty-fourth session, in particular its study of succession in respect of treaties. He had also reviewed the Commission's activities at the twenty-seventh session of the General Assembly, where there had been long and substantive discussion of its draft articles on succession in respect of treaties and on the protection of diplomatic agents.

12. The Commission's draft articles on succession in respect of treaties had been generally accepted as representing the existing law on the subject, although a variety of questions had been raised with respect to the articles in part IV on uniting of States and the dissolution and separation of States. There had also been an extensive debate on the two articles in part V concerning succession in respect of boundary régimes and other territorial régimes established by treaties. He looked forward with interest to receiving the comments of governments on those matters.

13. With regard to the protection of diplomatic agents, there had been a long and penetrating debate in which a wide variety of views had been expressed. The Sixth Committee had decided to take up that subject at its next session, to study the proposed articles in depth and to decide whether they should be opened for signature by States.

14. In December 1972, he had attended a meeting of the Council of Europe, but he had unfortunately been prevented by illness from attending the meeting of the Asian-African Legal Consultative Committee at New Delhi. However, he had been represented there by Mr. Tabibi, who had presented a thorough and complete analysis of the Commission's work.

15. After recovering from his illness, he had been able to attend a meeting of the Inter-American Juridical Committee at Rio de Janeiro, at which much attention had been devoted to the problems of the sea-bed, ocean fisheries and the law of the sea.

16. Lastly, he must mention that the Commission on Human Rights had requested the International Law Commission to comment on the Report of the *Ad Hoc* Working Group of Experts of the Commission on Human

Rights concerning the question of *Apartheid* from the point of view of international penal law (A/CN.4/L.193). That request raised a number of complicated procedural problems which would have to be dealt with by his successor.

Election of officers

17. The CHAIRMAN called for nominations for the office of Chairman.

18. Mr. SETTE CÂMARA, after paying a tribute to the outgoing Chairman for his outstanding leadership during a difficult session, proposed Mr. Castañeda, whose achievements as an international lawyer, diplomat and participant in the legal activities of the United Nations, eminently fitted him for that office. It was a great privilege for him, as a citizen of a Latin American country, to put forward the name of such a distinguished Latin American jurist.

19. Mr. USTOR said he wholeheartedly associated himself with the tribute to the outgoing Chairman. He seconded the nomination of Mr. Castañeda.

20. Mr. TAMMES, Mr. AGO, Mr. ELIAS, Mr. USHAKOV and Mr. BARTOŠ also associated themselves with the tributes to the outgoing Chairman and supported the nomination.

Mr. Castañeda was unanimously elected Chairman and took the Chair.

21. The CHAIRMAN thanked the Commission for the honour it had done him and called for nominations for the office of First Vice-Chairman.

22. Mr. TSURUOKA proposed Mr. Yasseen.

23. Mr. AGO seconded and Mr. ELIAS supported that proposal.

Mr. Yasseen was unanimously elected First Vice-Chairman.

24. Mr. YASSEEN thanked the Commission for the honour it had done him.

25. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

26. Mr. USHAKOV proposed Mr. Bartoš.

Mr. Bartoš was unanimously elected Second Vice-Chairman.

27. Mr. BARTOŠ thanked the Commission for the honour it had done him.

28. The CHAIRMAN called for nominations for the office of Rapporteur.

29. Mr. REUTER said he wished to associate himself with the tributes already paid to the outgoing Chairman. He proposed Mr. Tammes for the office of Rapporteur.

Mr. Tammes was unanimously elected Rapporteur.

30. Mr. TAMMES, expressing his appreciation of the honour done him, said that he would do his best to maintain the high standard set by his predecessor, the greatly regretted Mr. Alcívar.

Adoption of the agenda

31. The CHAIRMAN said that the provisional agenda (A/CN.4/265) had been prepared by the Secretariat on the basis of the programme of work approved by the Commission at its previous session, and therefore contained no reference to the decision of the Economic and Social Council to transmit to the International Law Commission, for its comments, the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *Apartheid* from the point of view of international penal law (A/CN.4/L.193, para. 3). That decision had not been officially communicated to the Secretariat until after the conclusion of the Commission's twenty-fourth session, and since it raised a number of delicate procedural problems, he suggested that, before the Commission expressed its views, those problems should be referred to the officers of the Commission, together with the former Chairmen and the Special Rapporteurs, who would consider them with particular reference to the Commission's programme of work. If there were no comments, he would take it that the Commission agreed to that suggestion.

It was so agreed.

The provisional agenda (A/CN.4/265) was adopted.

Communication from the Secretary-General

32. The CHAIRMAN said he had been asked to remind the Commission of the communication received from the Secretary-General at the previous session,¹ which read:

"The Secretary-General is preoccupied with the increasingly adverse effects of the critical financial situation of the United Nations on the reputation of the Organization, as well as on the efficiency and effectiveness of its future operations. While the relationship between this financial situation, which has many intractable aspects of a political nature, and the level of the budget estimates can be a matter of controversy, as has been amply demonstrated in the course of the General Assembly debate on the budget estimates for 1972, the Secretary-General is convinced that in view of the continuing financial difficulties of the Organization, some measure of budgetary restraint is unavoidable.

"As far as 1972 is concerned, he has made it clear that the budget appropriations need to be administered in such a manner as to achieve a final unexpended balance in the amount of \$4 million, i.e. the approximate equivalent of the anticipated shortfall in the payment of assessed contributions. As for 1973, on the assumption that no real progress will be made in the immediate future towards a basic solution of the deficit situation, the Secretary-General has stated that it is essential that the level of the estimates should demonstrate maximum self-restraint and fiscal care on the part of the Secretariat. He has indicated, in particular, that

even in those circumstances where a legitimate case could be made for the strengthening in 1973 of particular offices and departments, he would not seek the necessary provisions for such purposes until present difficulties have been resolved.

"To attain these objectives, the Secretary-General has called for the co-operation of all members of the Secretariat, and it is now apparent that he is receiving a positive response. It is evident, however, that if the goals which he seeks to achieve are to be reached, it will be necessary to enlist also the full support of the various United Nations bodies where new programmes and activities are originated. The Secretary-General therefore feels it to be his duty to make all United Nations Councils, Commissions and Committees aware of his preoccupations and his objectives. The Secretary-General does not believe that the application of a policy of financial restraint necessarily means that new programmes and activities cannot be undertaken. The aim should rather be to seek to accommodate such new responsibilities within the staff resources which will have become available as a result of the completion of prior tasks, or by the assignment of a lower order of priority to certain continuing activities.

"While the extent to which the members of the International Law Commission will wish to associate themselves with the Secretary-General's preoccupations and policies is undoubtedly a matter for them to decide, the Secretary-General trusts that they will wish to assist him in attaining objectives which, in his view and in present circumstances, are in the best interest of the Organization."

33. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to take note of the Secretary-General's communication.

It was so agreed.

34. The CHAIRMAN said that a telegram of good wishes for the success of the present session, addressed to the Chairman of the International Law Commission, had been received from Judges Lachs, Gros, Ignacio Pinto, Jiménez de Aréchaga, Waldock, Nagendra Singh and Ruda, of the International Court of Justice, all of whom were former members of the Commission. He would reply with a telegram of appreciation on behalf of the Commission.

The meeting rose at 5.0 p.m.

1201st MEETING

Tuesday, 8 May 1973, at 11.40 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

¹ See *Yearbook of the International Law Commission*, 1972, vol. I, p. 4, para. 56.

Organization of Work

1. The CHAIRMAN said that the officers of the Commission, together with the Special Rapporteurs and former Chairmen, had met that morning and considered three questions: first, the organization of the work of the Commission during its present session; secondly, the action to be taken on the request from the Economic and Social Council for the International Law Commission's comments on the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* from the point of view of international penal law (A/CN.4/L.193); thirdly, the date of the elections to fill the casual vacancies in the Commission in accordance with article 11 of its Statute (item 1 of the agenda).

2. On the first question, they had taken into account the fact that the Commission had been instructed by the General Assembly to give the highest priority to the topics of State responsibility (item 2 of the agenda) and succession of States in respect of matters other than treaties (item 3 of the agenda).¹ They therefore recommended that the Commission should consider the topic of State responsibility first, and allocate about three weeks or fifteen meetings to it. The Commission should then consider the topic of succession of States in respect of matters other than treaties, to which it should also allocate about fifteen meetings. If the Special Rapporteur for that topic preferred a later opening date, the Commission might deal first with the topic of the most-favoured-nation clause (item 6 of the agenda). It was suggested that five meetings should be allocated to the latter topic, although some members had thought that seven or eight would be more appropriate.

3. The Commission should next consider, for about five meetings, item 5 (a): Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General; and then, for two or three meetings, item 5 (b): Priority to be given to the topic of the law of the non-navigational uses of international watercourses. Finally, the Commission should examine item 4: Question of treaties concluded between States and international organizations or between two or more international organizations. If it allocated two or three meetings to that topic, that would leave approximately one week at the end of the session for consideration of the Commission's draft report.

4. On the second question, which was far from easy, it had been noted that it was open to any of the main organs of the United Nations to request the Commission to study a subject. It was not at all certain, however, that the Economic and Social Council's request for the Commission's comments on the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* came within the scope of the Commission's object as specified in its Statute, namely, the promotion of the progressive development of international law and its codification.

5. Even if the Commission's role were interpreted as requiring it not to revise the *Ad Hoc* Working Group's draft, but rather to determine the compatibility of the provisions of the draft with the basic principles of international penal law, such an investigation would undoubtedly involve a protracted study. The Commission, however, had to abide by its agenda and the order of priorities laid down for it by the General Assembly, and it could not set them aside to meet a request from another organ.

6. There had been general agreement on the importance of the subject and on the need to respond to the request made by the Economic and Social Council. It was therefore suggested that a small group, consisting of the first Vice-Chairman (Mr. Yasseen), Mr. Reuter and Mr. Ustor, should examine the question and report to the larger group, consisting of the officers of the Commission, the Special Rapporteurs and former Chairmen, which could then make recommendations to the Commission on the action to be taken.

7. With regard to the third question, it was necessary to reconcile two conflicting needs: first, that the casual vacancies on the Commission should be filled as soon as possible, and secondly, that as many members as possible should participate in the election. It was therefore recommended that the Secretariat be asked to get in touch with those members who had not yet arrived at Geneva in order to ensure that some of them at least would be present for the election. The date of the election would be decided in the light of the results of the Secretariat's enquiries, but would not be later than Tuesday, 15 May.

8. If there were no comments, he would take it that the Commission endorsed the Group's recommendations on those three questions.

It was so agreed.

The meeting rose at 12.5 p.m.

1202nd MEETING

Wednesday, 9 May 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Filling of casual vacancies in the Commission

(A/CN.4/268 and Add.1 and 2)

[Item 1 of the agenda]

1. The CHAIRMAN suggested that the election to fill the four casual vacancies in the Commission should be held on Tuesday, 15 May 1973. Four members of the Commission were absent, but two of them, Mr. Bedjaoui and Mr. El-Erian, had intimated that they would be

¹ See General Assembly resolution 2926 (XXVII).

able to attend on that date. He suggested that the other two, Mr. Rossides and Mr. Tabibi, should be notified of the date of the election by telegram.

It was so agreed.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

2. The CHAIRMAN invited the Special Rapporteur to introduce his reports on State responsibility.

3. Mr. AGO (Special Rapporteur), introducing his third and fourth reports on State responsibility (A/CN.4/246 and Add.1 to 3, A/CN.4/264 and Add.1), began by reminding the Commission that, in the history of the topic he had given in his first report,¹ he had tried to show why previous attempts to codify the law of State responsibility had failed and to point out the great difficulties of such an undertaking. In particular, he had given warning that when dealing with State responsibility it was dangerous to try at the same time to define the rules placing obligations on States, the violation of which could engage their responsibility: that would mean trying to codify the whole of international law from the point of view of responsibility. The sphere of responsibility properly so called included only the examination of the conditions in which it was possible to establish that an international obligation had been violated by a State and to determine the consequences. The reason why the attempts at codification undertaken so far—in particular by the Hague Conference of 1930, which had studied the responsibility of States for injury caused to aliens in their territory—had failed, was because they had not managed to avoid that danger; by connecting the subject of responsibility with that of the treatment of aliens, the codifiers had confused the definition of the rules governing that particular branch of law with the definition of the rules relating to responsibility proper.

4. The Commission itself had not avoided making the same mistake when it had first placed the topic of State responsibility on its agenda, and it was only after a first unsuccessful attempt at codification that it had reached the conclusion that the international responsibility of States should be studied as a separate and single general problem, in other words, as a situation resulting from any violation of any international obligation whatsoever.² It was necessary to postulate the existence of the various substantive rules of international law and to confine the investigation to ascertaining the consequences of violation of the obligations deriving from these rules.

5. He would remind the Commission that, after it had examined the history of the earlier work on the subject, which he had submitted in his first report, it had been

agreed that the topic of responsibility should be divided into two main parts: the origin of international responsibility and the content of that responsibility.³

6. It was necessary, first, to define the conditions which made it possible to establish the existence of an internationally wrongful act—the source of responsibility—it being understood that an internationally lawful act could also entail responsibility, but that it was preferable to study the consequences of the two kinds of act separately; and secondly, to determine the consequence of the internationally wrongful act or, in other words, to define the content of the responsibility. At the present stage, the Commission was only called upon to study the former aspect of the question, which was the subject of the third and fourth reports he had already submitted, and would be further examined in subsequent reports.

7. The first task was to define the conditions in which an internationally wrongful act could be attributed to the State, in other words, since the State acted through individuals, the conditions in which the act of an individual could be regarded as an act of the State.

8. The next task—and that would be the subject of his fifth report—was to establish what acts of the State were characterized as internationally wrongful, in other words, in what conditions such acts constituted violation of an international obligation of the State. That would involve another very complex notion, that of infringement, for the definition of which it would be necessary to take into consideration a whole group of questions. He had already had occasion, in the past, to mention that a distinction should not be made according to the source of the international obligation infringed—whether it was customary, treaty or other law—and to refer to the distinction which should, on the other hand, be made between wrongful conduct and a wrongful event. He had also pointed out the need to define the scope of the rule of prior exhaustion of local remedies and to settle questions concerning the determination of the *tempus commissi delicti*.

9. In the same context, however, other questions would also have to be taken into consideration, and there the Commission might wish to introduce some progressive development of international law. Up to the present, most writers had considered that in international law responsibility meant, essentially, civil responsibility. But it should now be decided whether internationally wrongful acts as a whole did not include a category of acts, the nature and consequences of which could be different—acts for which, in particular, it was unthinkable that reparation could be made by mere indemnification. That applied, for example, to some international crimes such as the violation of certain obligations essential to the maintenance of peace—in particular, aggression or genocide—the gravity of which could not be compared with the revocation of a mining concession, granted to an alien, for instance. It was in the same spirit that, in the law of treaties, it had been found necessary to recognize the existence of certain peremptory norms, or rules of *jus cogens*. It had to be acknowledged that the rules

¹ See *Yearbook of the International Law Commission*, 1969, vol. II, p. 125.

² *Ibid.*, 1963, vol. II, pp. 227-228 and vol. I, p. 86, para. 75.

³ *Ibid.*, 1970, vol. II, p. 306, para. 66 (d).

of international law varied in degree of importance. That would be seen in the part of his work devoted to the consequences of an internationally wrongful act, but already in the context of the study of infringement, in other words, of the violation of an international obligation, that difference would have to be brought out by drafting an article which would establish a distinction between two categories of infringement. Some infringements must be considered more serious, because fulfilment of the obligations imposed by certain rules of international law was essential to the international community.

10. The Commission would also have to consider, in the first part of its study, problems such as the participation of several States in one and the same wrongful act, and the responsibility of one State for the act of another. There would then remain to be considered, in another chapter, the circumstances, such as *force majeure*, act of God, consent of the injured State, legitimate application of a sanction, self-defence, and so on which, exceptionally, prevented an otherwise wrongful act from being wrongful.

11. That was an outline on the work before the Commission. From now on it should no longer consider the topic in general terms, but proceed to examine the concrete problems. It should begin by considering whether it could propose articles stating the general principles governing the topic as a whole, then pass on to deciding what constituted an act of the State in international law, in other words, to the question of the attribution of certain conduct to the State as a subject of international law, and finally, it should establish in what circumstances such conduct could be characterized as an international infringement and hence as an internationally wrongful act. The broad lines of the plan he proposed had received general support in the Sixth Committee.

12. With regard to article 1 (A/CN.4/246) which laid down as a principle that every internationally wrongful act of a State involved the international responsibility of that State, the real problem in stating such an apparently obvious principle was to avoid saying something which might subsequently prove incorrect or embarrassing. For instance, it would be a mistake to say that an internationally wrongful act entailed the obligation to make reparation, for the simple reason that the Commission did not yet know what conclusions it would reach on the consequences of an internationally wrongful act, which might be something other than reparation. Similarly, it would be wrong to reverse the proposition and say that responsibility was the consequence of an internationally wrongful act, since responsibility, though of a different character, could also result from a lawful act. The formulation used in article 1 thus left the way open for subsequent study of responsibility for acts which were not internationally wrongful.

13. Unlike some writers, who had felt it necessary to specify the reasons why a wrongful act engaged the responsibility of the State, the Commission did not have to find theoretical justifications for the rule; it need only state the principle in international law. That being so, the Commission would notice that the articles he had

proposed did not precede his explanations of the reasons for their formulation, but, on the contrary, followed the reasoning of which they were the outcome, which was itself based on a study of the practice of States, case law, the literature and the earlier attempts at codification. That had seemed to him to be the best way to avoid introducing into the text of the draft articles any difficulties which might subsequently make it necessary to recast them.

14. He thought the best way to proceed would be for members to express their opinions on the draft in general and then examine the various articles in turn, as he introduced them.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

15. The CHAIRMAN invited the Commission to begin consideration of the Special Rapporteur's draft articles.

ARTICLE 1

16. *Article 1*
Principle attaching responsibility to every internationally wrongful act of the State

Every internationally wrongful act of a State involves the international responsibility of that State.

17. Mr. YASSEEN said that the Special Rapporteur, in his excellent introduction, had clearly explained why the Commission had chosen a certain method. A clear distinction had to be drawn between the rules of responsibility proper and the substantive rules, violation of which could engage the responsibility of the State. In that respect, he approved of the procedure followed by the Special Rapporteur and adopted by the Commission. He also approved of the method of work proposed by the Special Rapporteur, which was to consider the draft, article by article.

18. Article 1 was the key article, because it laid down the principle of responsibility in international law. The lapidary wording suggested by the Special Rapporteur was entirely appropriate. The principle needed no justification; it was already part of positive international law and was essential to any legal system worthy of the name. He therefore approved of the formulation proposed by the Special Rapporteur.

19. Mr. ELIAS said that the draft articles submitted by the Special Rapporteur represented an accurate summary of the viewpoints of those members who had participated in the first debate on the subject.⁴

20. The principle of State responsibility was a universal one and almost as indispensable, in another sphere, as that of *jus cogens*. There was no real difference of opinion on that point, and the bases for general uniformity and unanimity were well set out in paragraphs 31 and 32 of the Special Rapporteur's third report (A/CN.4/246). Of course, those members who had not participated in

⁴ See *Yearbook of the International Law Commission*, 1967, vol. I, pp. 225-228 and 1969, vol. I, pp. 104-117.

the first discussion were entitled to express their views, but he personally considered that article 1, as formulated by the Special Rapporteur, was correct and indeed indispensable.

21. Mr. KEARNEY, congratulating the Special Rapporteur on his reports, said he could testify from his own experience that they had already elicited highly favourable reactions in legal circles. During the previous year, for example, he had served on a study group on environmental law appointed by the American Society of International Law, where the reports had attracted much attention and had been referred to on a number of occasions in most flattering terms.

22. The only point he wished to raise at present was the difference between the responsibility of a State for an internationally wrongful act and its responsibility for an act which was not wrongful as such, or, to use the common-law expression, a case in which there was "liability without fault".

23. Current developments were tending to make the distinction between those two cases less and less clear. Environmental pollution raised a whole series of problems of responsibility as to circumstances in which the probability of risks as compared with the fact of wrongful action was a governing factor. The use of outer space involved similar problems. He need only refer to an experiment carried out by his own country a few years ago, in which a vast quantity of small copper needles had been launched by rocket into the upper atmosphere in order to obtain certain scientific information. That experiment had called forth protests by astronomers all over the world, who had feared that it might interfere with their own scientific work. Was there a question of responsibility there? Protests had also been made against the proposed introduction of supersonic transport aircraft, since it had been feared that their discharges might change the ozone content of the upper atmosphere and thus indirectly increase the incidence of cancer. As problems of that character would inevitably become more numerous and more urgent, he hoped the Special Rapporteur would give some thought to the question how soon the Commission would be able to deal with that aspect of State responsibility.

24. Lastly, he fully agreed with the Special Rapporteur's formulation of article 1, although he was inclined to question whether the English word "involves" had quite the same connotation as the French word "*engage*".

25. The CHAIRMAN said he had similar doubts about the use of the Spanish word "*entraña*".

26. Mr. BARTOŠ said he wished to commend the Special Rapporteur on the clarity of his statement. In article 1, he had been right to lay down the principle of the responsibility of the State for any internationally wrongful act, without qualifying it with exceptions which might nullify the principle. Exceptions should be kept to the minimum where the principle of State responsibility was concerned. That principle was particularly necessary at the present time and should be formulated as clearly as possible. That was what the Special Rapporteur had done in article 1, the wording of which he found perfectly acceptable.

27. Exceptions were very dangerous, because some States considered that they were entitled to make *de facto* changes in the international public order, which was tantamount to reneging on their international obligations. Wrongful acts were sometimes justified on the grounds that it was by unlawful means that a lawful order had been established—an argument advanced by certain heads of State and even by some jurists. It was therefore necessary to affirm objectively that every internationally wrongful act of a State involved its international responsibility, without restriction. The degree of gravity of the responsibility would not be always the same, as the Special Rapporteur had said, since it would depend on the gravity of the wrongful act, but the existence of such responsibility, whatever its degree, must be affirmed.

28. The principle formulated in article 1 thus satisfied the requirements of the international public order, in its new, present-day sense, which the Commission had approved. As soon as an international public order existed, any violation of it was a source of international responsibility and liable to sanctions which should be provided for in international law. If a wrongful act could be attributed to a State, the international responsibility of that State was engaged automatically. The responsibility would not be the same in every case, but it must be determined by international law. What had to be done at the moment was not to define wrongful acts and degrees of responsibility, but to establish the actual principle of the responsibility of the State. The formulation proposed by the Special Rapporteur was entirely satisfactory in that respect, since it did not allow States to plead exceptions.

29. Mr. HAMBRO said that he found himself in agreement with nearly all the contents of the Special Rapporteur's impressive reports.

30. Work on State responsibility was somewhat different from the work undertaken by the Commission on other topics. Because of the approach adopted by the Special Rapporteur, the articles on State responsibility would be much more general than the provisions in the Commission's other drafts; that fact would to some extent colour the treatment of the topic.

31. As the Special Rapporteur had pointed out, it might become necessary at a later stage to deal with different qualities of responsibility according to the acts involved, such as international criminal acts. There was, however, one kind of act which deserved special attention: he was thinking of problems connected with the protection of the human environment, which had been much in the minds of international lawyers ever since the *Trail Smelter* arbitration.⁵

32. Similarly, consideration would have to be given to the problem of State responsibility for acts which had formerly been regarded as lawful, but which in the light of recent scientific developments must now be considered wrongful, and there progressive lawyers had a role to play; it was their duty to shift the frontier

⁵ See *American Journal of International Law*, vol. 35, 1941, pp. 684-736.

between what was legal and what was illegal. They had to come out squarely in favour of international law, international responsibility and international organization, and move away from an unduly narrow emphasis on national interests and national sovereignty.

33. He fully approved of the formulation of draft article 1.

34. Mr. REUTER said he wished to join in the tributes paid to the Special Rapporteur on his report. He approved of his order of priorities. The relationship between responsibility for wrongful acts and responsibility for lawful acts was very important, but it raised a delicate question which it would be preferable to examine later. The same applied to the concept of an "international crime", which the Special Rapporteur had been a little reluctant to define.

35. He had very mixed feelings about article 1 and could only accept it with reservations. For the term "*engage*", used in the French version, meant that State responsibility came into existence from the moment when an internationally wrongful act was committed, which was not necessarily the case. The expression "*met en cause*" might be preferable, because as soon as a wrongful act occurred the question of the international responsibility of the State arose, which did not mean that such responsibility necessarily existed.

36. It might be asked whether the existence of injury was essential for affirming the existence of responsibility. But did that mean material or moral injury? It could even be argued that every wrongful act involved moral injury and that the whole world sustained moral injury every time an internationally wrongful act was committed somewhere, which was obviously difficult to accept. Thus it could be said that an internationally wrongful act of a State engaged its international responsibility indirectly—which meant affirming that such responsibility existed—only on condition that the relationship between the concept of injury and the concept of responsibility was defined.

37. He agreed with Mr. Bartoš about the impossibility of admitting legal exceptions without restriction. But there could be justifying circumstances, as in the case of reprisals other than by force of arms, in so far as they were permitted by international law. Hence he could only accept article 1 in its present form subject to exceptions.

38. Mr. THIAM said he joined with the other members of the Commission in congratulating the Special Rapporteur on his report. He would, however, appreciate some further particulars as to the scope of his subject. The Special Rapporteur had expressed his intention of examining, during the initial phase, the problem of State responsibility for internationally wrongful acts. Was that merely a first stage, or did the Special Rapporteur consider that his task was only to consider that aspect of the problem of responsibility? That seemed to him to be an important point, since responsibility also existed for acts that were not wrongful.

39. Then again, with regard to article 1, if it was accepted that the concept of international responsibility was more or less linked with the concept of injury, was

it possible to affirm that every internationally wrongful act of a State involved that State's international responsibility, without reference to the question of injury? It might, indeed, be asked whether every internationally wrongful act automatically caused injury and consequently involved the responsibility of the State. Personally, he was of the opinion that so long as an act caused no injury it did not involve responsibility, because there was no injury to redress.

40. Mr. SETTE CÂMARA, after paying a tribute to the high quality of the Special Rapporteur's reports, said that the clear-cut provision of article 1 gave evidence of the objectivity and pragmatic approach which were apparent throughout his treatment of the subject of State responsibility. The Special Rapporteur had admirably disentangled the subject from the fetters of its past connexion with the treatment of aliens.

41. Article 1 contained the basic norm which governed the whole topic. As pointed out by the Special Rapporteur, it was important not only because of what it contained, but because of what it omitted. In its present wording, it avoided a number of controversial subjects, such as responsibility arising from lawful acts, without closing the door to their consideration at a later stage. The doubts expressed by Mr. Reuter and Mr. Thiam could be examined when the Commission took up certain other articles of the draft.

42. On the question of drafting, he agreed with those members who had expressed doubts about the English and Spanish words used to render the French verb "*engage*".

43. Mr. RAMANGASOAVINA said he was not completely satisfied with the wording of article 1, because in his opinion the idea of State responsibility was linked with a number of concepts, not only with that of the internationally wrongful act.

44. He agreed with Mr. Thiam that lawful acts could also cause injury and, consequently, engage the responsibility of the State. In private law, any act causing injury involved the responsibility of the person who committed it, and required reparation, even if the act causing the injury was not intentional. Similarly, a State might, without any intention to harm, and even in a humanitarian spirit, carry out scientific experiments the consequences of which caused injury requiring reparation. It should therefore be stated from the outset that the responsibility of the State could be engaged by acts other than internationally wrongful acts.

The meeting rose at 12.35 p.m.

1203rd MEETING

Thursday, 10 May 1973, at 10.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State Responsibility

(A/CN.4/217 and Add.1 ; A/CN.4/233 ; A/CN.4/246 and Add. 1 to 3 ; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 1 (Principle attaching responsibility to every internationally wrongful act of the State) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 1 in the Special Rapporteur's third report (A/CN.4/246).
2. Mr. TSURUOKA said the Special Rapporteur was to be congratulated on his report, which contained essential information, together with a penetrating analysis and excellent conclusions.
3. He was willing to agree to the method and plan of work proposed by the Special Rapporteur, but would like certain points to be clarified. First of all, the articles should make it possible to establish the existence of responsibility with sufficient precision and to determine which subject of law would be entitled to invoke the responsibility. In no case should the articles allow a State which was not responsible to be regarded as being responsible or, conversely, allow a responsible State to evade its responsibility. The Commission should also clearly define the wrongful acts and the exceptional circumstances, such as *force majeure*, which could result in exoneration. As to the subjects of law entitled to invoke the responsibility, in his opinion the capacity to do so should be limited where States were not directly injured by the wrongful act.
4. He would like to know when the Special Rapporteur was going to take up the question of responsibility arising from lawful acts, which was not dealt with in the articles under consideration. Another question was whether the existence of injury should be taken into account in determining responsibility. That was of particular importance where treaty obligations of States were concerned.
5. Subject to the answer to the latter question, he approved of the very concise wording of article 1.
6. Mr. TAMMES said that the Special Rapporteur had submitted a series of articles which not only covered an important part of the traditional doctrine of State responsibility, but included a number of remarkable innovations. That achievement was largely due to the Special Rapporteur's new approach of drawing a clear distinction between substantive rules of international law and rules on the imputation of violations of those substantive rules. A commendable success had been achieved by abstaining from any major attempt at codification, such as that undertaken in the past with respect to the treatment of aliens under cover of the formal rules of responsibility.
7. He himself had supported that approach in previous discussions of the topic and believed it was still sound. Since the Commission's last discussion on State responsibility in 1970, however, certain new trends had emerged which had raised doubts in his mind, and those doubts had been strengthened by the remarks of Mr. Kearney

and Mr. Hambro at the previous meeting on certain consequences of modern technology.

8. A study of such instruments as the Declaration of the United Nations Conference on the Human Environment held at Stockholm in 1972,¹ and the recent Oslo and London Conventions on dumping,² as well as of several of the drafts to be considered by the forthcoming United Nations Conference on the Law of the Sea, revealed two trends. The first related to acts which were neither acts of the State, being in fact acts of private individuals or enterprises, nor internationally lawful acts. It was precisely that category of acts to which reference was made in the introduction of the Special Rapporteur's third report (A/CN.4/246, para. 21).

9. There was still a third category of acts of international concern, namely, international wrongs (*faits illicites internationaux*), as was clear from the texts to which he had referred and from the remarks of speakers at the previous meeting. The second trend was in the direction of making the State absolutely responsible for such internationally wrongful acts of all persons under its jurisdiction or control. Principle 21 of the 1972 Stockholm Declaration laid down that States had "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction", in other words, throughout the world. If that principle were hardened into a strict rule, it would mean that in certain important matters the State would become identified with its subjects and that it would be difficult to determine the borderline between acts of the State and private acts. The responsibility was absolute and not restricted by due diligence or similar excuses, which had to be excluded in view of the tremendous interests at stake.

10. The study of those new principles also showed that it was not quite clear whether they belonged to the substantive or primary rules of international law, or to the formal or secondary rules of State responsibility. The Commission could not, however, postpone the study of those problems of absolute responsibility of the State for wrongful acts by private persons under its jurisdiction or control. Those acts were already being discussed in a great many places and must be considered when the Commission came to discuss the excellent articles of the Special Rapporteur's draft.

11. Subject to those remarks, he approved of article 1.

12. The CHAIRMAN, speaking as a member of the Commission, said it was a great satisfaction to him that the Commission was at last starting on a thorough examination of the topic of State responsibility, which had been on its agenda for twenty-five years. The work done from 1949 to 1962 had led to a dead end, so in that year the Commission had adopted a new approach. Since then, although the General Assembly had repeatedly given the topic a high priority, the Commission had had only one discussion on the substance of State respon-

¹ A/CONF.48/14, part I.

² See *International Legal Materials*, vol. XI, 1972, pp. 262 and 1294.

sibility, which had taken place in 1970 and lasted only four meetings.

13. The Commission should be particularly grateful to the Special Rapporteur for having adopted the only method and plan of work that were likely to lead to fruitful results. No progress would have been possible without making a radical distinction between the rules governing State responsibility and the substantive rules of international law, the violation of which gave rise to international responsibility. If the efforts undertaken in the past to codify the rules governing injury to aliens had been pursued, some limited results might perhaps have been achieved, but there would have been no codified rules on State responsibility in itself which could govern much more important matters than the treatment of aliens—matters which related to the conduct of States in their mutual relations.

14. He welcomed the approach adopted by the Special Rapporteur in making a thorough analysis of the relevant legal writings and judicial precedents in each case. That allowed the reader to form his own opinion of the scope and effect of the provisions which the Commission would later be asked to adopt. He also welcomed the Special Rapporteur's innovation of starting with the explanatory observations and concluding with the text of the article. In the case of article 1, the brief text clearly appeared as the logical and necessary conclusion of the learned analysis which preceded it.

15. He approved of the method and plan of work adopted by the Special Rapporteur. Perhaps the latter could give some indication of the proposed timing of his submission of the various sections of his draft.

16. He agreed with Mr. Kearney's remarks on State responsibility resulting from certain activities which were at present not wrongful, such as placing a vast quantity of copper needles in orbit and, in general, activities connected with the preservation of the human environment. Such rules of international law as existed in the matter originated from the award in the *Trail Smelter* arbitration.³ The whole subject, however, had acquired new dimensions as a result of technological progress and a better understanding of ecological phenomena. Mr. Kearney had rightly pointed out that the distinction between responsibility for wrongful acts and objective responsibility for certain lawful acts was gradually becoming blurred under the impact of such developments.

17. A valuable idea had been introduced into the discussion by Mr. Hambro, namely, that certain previously lawful acts could no longer be considered lawful because of changed circumstances. Since time immemorial, man had used the sea to dispose of waste material. In fact, the freedom to dump waste might be said to have preceded all the four traditional freedoms specified in article 2 of the 1958 Geneva Convention on the High Seas.⁴ Use of the sea as humanity's *cloaca maxima* had not been a wrongful act so long as the waste dumped was well within the natural capacity of the sea for regeneration, but with the growth of the industrial society, a

change of attitude had become imperative. Particularly in closed seas like the Mediterranean, whole sale dumping could cause irreparable damage to the coastal States. The risk involved in the possible shipwreck of a 20,000 ton oil tanker was perhaps tolerable, but the concern of Spain, for example, at the possibility of an accident to a 500,000-ton tanker in the straits of Gibraltar was understandable. A catastrophe of such magnitude could put an end for ten years or more to the use of the beaches in the south of Spain which were essential for its tourist trade.

18. In his third report, the Special Rapporteur had explained that the acts in question were halfway between wrongful acts and lawful acts. Consequently, although from a logical point of view he approved of the Special Rapporteur's method of considering first the cases of State responsibility for wrongful acts, he thought that no time should be lost in dealing with State responsibility for lawful acts. Such instruments as the 1972 Stockholm Declaration and the London Convention on the Prevention of Marine Pollution already contained provisions dealing with objective responsibility, sometimes referred to as "liability without fault" or "liability for created hazards" (*responsabilité pour risque créé*), and the Committee on the Peaceful Uses of the Sea-Bed had a special sub-committee to examine the many proposals on marine pollution which would in due course be submitted to the forthcoming Conference on the Law of the Sea. Some of those drafts provided for the objective responsibility of States for acts which had hitherto been regarded as lawful. There was a real danger that the subject might be codified in piecemeal fashion. The Commission should try to prevent that by offering a coherent and general legal framework within which all those cases of objective State responsibility could be set.

19. The Special Rapporteur had pointed out in his report that internationally wrongful acts gave rise to new legal relationships, and had discerned three schools of thought, or doctrines, regarding the character of those relationships and the parties involved. He himself would examine one aspect of that problem, namely, the question whether a State injured by a wrongful act was entitled to apply a sanction to the State responsible for the act.

20. The doctrine which regarded reparation as having a punitive character and recognized the right of the injured State to use coercive measures to obtain reparation was now in need of revision. A leading exponent of that doctrine, Kelsen, considered war and reprisals as the two types of coercive measures which a State might apply. As far as war was concerned, it had been outlawed by the Charter. As to reprisals, the very first of the Principles of International Law concerning Friendly Relations and Co-operation Among States embodied in the declaration adopted by the General Assembly by resolution 2625 (XXV) stated unambiguously that "States have a duty to refrain from acts of reprisal involving the use of force". The United Nations doctrine in the matter in fact went back to a Security Council resolution of 1964 which condemned armed reprisals as being contrary to the Charter.⁵

³ See *American Journal of International Law*, vol. 35, 1941 pp. 684-736.

⁴ United Nations, *Treaty Series*, vol. 450, p. 82.

⁵ Security Council resolution 188 (1964) of 9 April 1964.

21. Kelsen himself recognized that the United Nations Charter had created a monopoly of the use of force for the benefit of the Organization. That doctrine left very little scope for the exercise of reprisals. In any case, it was difficult to see what other conclusion could be drawn from the explicit terms of Article 2(4) of the Charter, which required all Members to refrain in their international relations from the threat or use of force. In the inter-American sphere the position was even clearer: not only armed reprisals, but economic and political coercive measures were banned by article 15 of the Charter of the Organization of American States.⁶

22. There remained the question of possible action by the United Nations itself under a Security Council resolution. Kelsen himself had written that such action was more in the nature of discretionary political steps taken by the Council for the purpose of restoring peace than of legal sanctions properly so called. That interpretation was consistent with the markedly political conception of the drafters of the United Nations Charter.

23. It was important to remember that the relevant provisions of the Charter, unlike Article 16 of the League of Nations Covenant, made no provision for automatic joint action by Member States against a State convicted of aggression. The role of the Security Council was not a punitive one; any coercive action it might take was not for the purpose of restoring the legal order violated, but of re-establishing peace, which might not be the same. The legal possibility of the application of sanctions, even by the Council, was rather doubtful.

24. In support of his thesis that the injured State could apply sanctions against the offending State, the Special Rapporteur quoted from certain legal writings, the most valuable of which was the course of lectures he himself had given at the Hague Academy in 1939. But since then the signing of the United Nations Charter had undoubtedly brought about changes in that respect. The Special Rapporteur had also quoted from the writings of such authors as Eagleton and Borchard on the subject of injuries done to aliens. The doctrines put forward by those writers were based on the nineteenth century idea that a certain group of States which considered themselves "the civilized nations" were invested with the mission of maintaining order throughout the world and of punishing, in the name of the international community, States which committed internationally wrongful acts. He naturally had the greatest distaste for that obsolete doctrine.

25. With regard to the subject as a whole, however, he agreed with the Special Rapporteur's conclusion that, under general international law, an internationally wrongful act did not establish any legal relationship between the guilty State and the international community as such, since the community was not recognized as an international legal person (A/CN.4/246, para. 40).

26. He also agreed that there were certain international obligations of States which constituted obligations *erga omnes*; the violation of any such obligation, for example by genocide, constituted an international crime. A trend

in the direction of recognizing the international community's personality in international law was discernible in the ruling by the International Court of Justice in the *Barcelona Traction* case.⁷

27. The Special Rapporteur had cited as a step in the same direction the statement in the first principle of the declaration adopted by General Assembly resolution 2625 (XXV): "A war of aggression constitutes a crime against the peace, for which there is responsibility under international law". He himself was of the same opinion; indeed, it was his own country's delegation which had proposed the introduction of that statement.

28. One of the merits of the present work of codification of State responsibility might be its contribution to the recognition of the international community as a subject of international law. It was worth recalling the concept of the "common heritage of mankind" which had emerged from the United Nations work on the resources of the sea-bed and ocean floor beyond the limits of national jurisdiction. It was significant that all the relevant proposals submitted to the Committee which was preparing for the forthcoming United Nations Conference on the Law of the Sea made provision for the setting up of an international body to represent the interests of the international community, to administer its property and perhaps, as a corollary, to invoke the international responsibility of States.

29. Mr. Reuter's suggestion that the word "*engager*" in the French version of article 1 should be replaced by the words "*met en cause*"⁸ involved more than a mere matter of terminology; it had implications of substance. Undoubtedly, discussion on the point was coloured by reminiscences of internal criminal law. An unlawful act punishable under criminal law might well involve (*met en cause*) a person without that person being liable to punishment (*sans engager sa responsabilité*), because of some circumstance, such as self-defence, which exonerated him.

30. Although exonerating circumstances of a similar kind were recognized in international law, the position with respect to internationally wrongful acts was different. The draft was based precisely on the assumption that where such exonerating circumstances existed, they removed the wrongful character of the act.

31. Mr. USTOR said the Special Rapporteur had produced a series of valuable reports containing a wealth of material for which he deserved the Commission's commendation.

32. The Special Rapporteur had complied with the Commission's decision and concentrated for the time being on international responsibility for wrongful acts of States, while reserving the possibility of dealing later with State responsibility for damage caused by lawful acts. The Special Rapporteur had even suggested that the title of the topic should be expanded to read "State responsibility for internationally wrongful acts". He wondered whether that was the best course to follow. Reference had already been made in the discussion to

⁶ United Nations, *Treaty Series*, vol. 119, p. 56.

⁷ *I.C.J. Reports 1970*, p. 32.

⁸ See previous meeting, para. 35.

modern technical developments which made the problem of responsibility for damage resulting from so-called lawful acts much more timely, and the frontier between unlawful and lawful acts more fluid. The Commission should not, therefore, make any move which might be interpreted as indicating that State responsibility for lawful acts would only be dealt with at some remote future time.

33. In order to dispel any such impression, he would suggest that the title "State responsibility" be retained and that the rules governing State responsibility for unlawful acts be presented as one part of the whole topic, not necessarily the first part. A change in presentation could be made which would not affect the substance of the articles. What was now chapter II, dealing with the "Act of the State" according to international law, would become the first part of the draft. Its contents were more general than those of chapter I and were applicable both to responsibility for lawful acts and to responsibility for unlawful acts. A convenient title for that chapter would be "Introduction" or "General provisions".

34. He did not approve of the title "General Principles". As had recently been pointed out by a number of writers, including Professor Virally and Madame Bastid, the term "principle" could have very different meanings. It could mean a basic rule of international law, but it could also mean a rule that was only in the process of formation.

35. That general chapter would be followed by two parts, the first dealing with responsibility for wrongful acts and the second with the responsibility arising from lawful acts. A presentation on those lines would reassure the reader of the draft that the subject of responsibility for lawful acts would be treated later as an important part of the whole topic. There was much truth in the idea that some acts which had formerly been lawful had now become wrongful, but there would still remain many lawful acts that could entail the international responsibility of the State.

36. His criticism of the use of the term "principle" applied also to the titles and texts of the articles themselves. It was significant that that term did not appear in the corresponding articles of the 1969 Vienna Convention on the Law of Treaties.⁹

37. With regard to article I, although he shared some of the views expressed during the discussion, he found the text basically satisfactory and supported the suggestion that it be referred to the Drafting Committee.

38. Mr. USHAKOV said that he approved in principle of the plan of work proposed by the Special Rapporteur in his introductory statement, but would like to comment on some of the main points.

39. First, he agreed that responsibility should be studied as such, independently of the rules of international law. It had to be assumed that such rules existed and that they were rules of general international law, whatever their source. But there could be no responsibility without

rules. It was hardly possible to envisage the existence of responsibility in the case of a violation of rules of law which did not yet exist, for example, rules on the protection of the environment. That was not a matter of responsibility, but of the formulation of new rules, in other words, of progressive development of international law, with which the Commission was not concerned for the moment.

40. With regard to the source of State responsibility he thought it was to be found in the existence of law, since it was the property of legal rules to engage responsibility. For every legal rule was designed to protect the interests of subjects of law, whether States or individuals, and that presupposed that those interests could be injured. There was no responsibility without injury. Injury, however, should not be interpreted in the narrow sense of "material injury", as in internal law, since injury in international law could also be political or moral.

41. An internationally wrongful act engaged the responsibility of the subject of international law who committed it, because it harmed someone's interests and there was therefore injury. But, as the Special Rapporteur had pointed out, responsibility could also be engaged by a lawful act. That was what was known in international law as absolute responsibility; it derived from lawful conduct. In that case too, the existence of rules was a precondition for the existence of responsibility. Such rules did exist. They had recently been stated in the conventions governing, for example, damage caused by nuclear ships or space craft. But, that was a branch of international law which dealt with exceptions rather than general rules, and was still little developed. That was why the Commission had rightly decided, at the twenty-first session, to defer consideration of it.¹⁰

42. Injury caused by one subject of international law to another did not necessarily entail responsibility. For it was not enough that a rule had been violated; there must also be a rule making the consequences of the violation attributable to its author.

43. Unlike internal law, which recognized three categories of responsibility—criminal, civil and administrative—international law recognized only one, namely, international responsibility. It might be divided, for reasons of convenience, into political and material responsibility, but those categories were an integral part of one and the same responsibility. When a State committed an internationally wrongful act which caused injury engaging its material responsibility, it was obvious that the reparation demanded could not always be equal to the injury, since it might exceed the author's capacity to pay. An example was the war damage suffered by the Soviet Union; in a case like that, reparation was only partial. He accepted the views set out by the Special Rapporteur in his report and agreed with his interpretation of the term "international responsibility".

44. Some members had mentioned sanctions, which could be lawful or unlawful, depending on how they were applied. Everything depended on the rules of inter-

⁹ 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.

¹⁰ See *Yearbook of the International Law Commission, 1969, vol. II, p. 233, para. 83.*

national law. There was a general prohibition of the use of force, and any violation of that rule engaged the responsibility of its author even if he had acted to protect himself against a wrongful act by another subject of law. Sooner or later, therefore, the Special Rapporteur and the Commission would have to consider the existing rules and draw up rules governing responsibility, but not at the present stage.

45. He agreed with the Special Rapporteur that it was desirable to establish different categories of rules according to the gravity of the offence. He himself had suggested that at the twenty-first session, during the consideration of the Special Rapporteur's first report.¹¹

46. He could accept article 1, in principle, provided a suitable translation was found for the French word "*engage*".

47. Mr. BILGE said he fully approved of the plan of work proposed by the Special Rapporteur and the method he had adopted. The Special Rapporteur had had to do an enormous amount of work, because of the wealth of literature and jurisprudence on his subject; he had the great merit of having made a clear distinction between existing rules and rules which might come into being: for example, on the legitimacy of the use of force or the legal force of decisions of the Security Council. For the time being, however, the Commission should keep to the existing rules and international responsibility proper, which must not be confused with responsibility, criminal or civil, as understood in internal law.

48. Article 1, as drafted, was acceptable as an initial rule, and required no justification. No State would challenge such a rule, which was essential for the maintenance of international order.

49. The Special Rapporteur had been right in proposing that the Commission should confine itself, for the time being, to considering responsibility arising from internationally wrongful acts. Although he had no wish to ignore recent developments in international law, at the present stage it would be premature to study responsibility arising from lawful acts.

50. Mr. BARTOŠ said that, as he understood it, article 1 laid down as a general principle that any violation of international law, in any form whatever, engaged responsibility; in other words, that every rule of international law was a source of responsibility. He asked the Special Rapporteur to confirm that interpretation.

51. Some members of the Commission, of whom Mr. Tammes was one, had raised the question of the responsibility of the State for acts of individuals. Although that question did not arise directly out of article 1, it deserved attention. When considering responsibility, it was necessary to make a distinction, in international law, between acts and omissions. The State was responsible for preventing the commission in its territory of any act contrary to international law. If there was a direct breach of international law, whether the State had been negligent or whether it had been impossible for it to act, it incurred responsibility.

52. When the Commission came to examine the question of the attribution to the State of acts of individuals, it should include in its study the acts of established bodies such as trade unions, co-operatives, and collective enterprises, which were not State organs, but exercised a great influence on the internal order. Given the existence of those semi-public—or semi-private—bodies, the division between the public and the private domain was no longer absolute where the international responsibility of the State was concerned.

The meeting rose at 1 p.m.

1204th MEETING

Friday, 11 May 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State Responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 1 (Principle attaching responsibility to every internationally wrongful act of the State) (continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 1.

2. Mr. AGO (Special Rapporteur) said that at its twenty-first session, the Commission had decided in principle provisionally to leave aside the study of certain matters. World public opinion was becoming increasingly concerned with those matters, however, and it was not surprising that members of the Commission had also raised them.

3. Mr. Kearney had been the first to do so, when he had pointed out that it was becoming increasingly difficult to make a clear distinction between responsibility deriving from a wrongful act and responsibility deriving from a lawful act. It was not so much that the distinction between those two kinds of act was becoming blurred, as that, as Mr. Hambro had observed, activities which international law had hitherto regarded as lawful were now considered wrongful,¹ and that unwritten law was developing quickly and now imposed obligations and prohibitions in fields it had not previously entered. But where that was the case, violation of such obligations and prohibitions was an internationally wrongful act, and it was from such an act that the responsibility derived.

¹¹ *Ibid.*, 1969, vol. I, p. 112, para. 38.

¹ See 1202nd meeting, para. 32.

4. Mr. Ushakov had rightly said that there was a general principle linking responsibility for a wrongful act with any breach of rules of law, whereas a lawful act generated responsibility only if a substantive or primary rule so provided. If injury caused by a lawful activity—that was to say, one that was not prohibited, such as activities in outer space—entailed an obligation to make reparation, that was not, strictly speaking, a matter of responsibility, but of a guarantee. There could be a violation if the person causing the damage refused to make reparation, thus failing to fulfil an international obligation and committing an infringement which generated responsibility. Once again it could be seen that a distinction must be made between the rules which attached responsibility proper to the violation of an obligation and the rules which imposed the obligations whose violation could entail responsibility. Whatever the field of law—obligations concerning the treatment of aliens, prohibition of aggression, obligations of States with respect to the environment, and so on—the formulation of the substantive rules and that of the rules on responsibility for failure to fulfil the obligations deriving from the substantive rules were entirely separate and it was only when there was failure to fulfil an obligation that there was responsibility in the proper sense of the term, namely, responsibility for an internationally wrongful act.

5. He saw no reason why the Commission should not also study responsibility for risk, that was to say, the guarantee which States must give against possible injury from certain “lawful” activities, but that was not part of the topic of responsibility for wrongful acts, and the two studies should therefore be conducted separately, by different special rapporteurs. In any case, he doubted whether the subject was yet ripe for codification. The rules governing it—conventions, declarations and so on—were still in gestation; others would certainly follow them. Thus it could not be said that unwritten general rules already existed which placed an obligation on the State to make reparation for injury caused by a lawful but dangerous activity; there were only instruments covering certain parts of that very extensive subject-matter.

6. He did not believe, like Mr. Ustor, that it was necessary to change the new title of his report, which clearly showed what was the subject dealt with. In defining the fundamental principles, the Commission should indicate that it was referring to responsibility for internationally wrongful acts, but should not give the impression that in its opinion only wrongful acts gave rise to international responsibility.

7. As to what should be understood by “international responsibility”, he had indicated in the considerations preceding the formulation of article 1 that he understood that expression to mean the whole set of new legal relationships created by a wrongful act. The expression had been used by many writers—old ones such as Anzilotti and modern ones like Jiménez de Aréchaga; it was also to be found, in practically the same form, in a collective work by Soviet writers. What must be emphasized was the novelty of the legal relationships established as the result of failure to fulfil an international obligation.

As the Chairman had rightly observed, it was too early to say what those relationships were. That would be the last stage to be reached.

8. It was only to enable the Commission to form a judgment based on full knowledge that he had set out the main theories in his report: the traditional theory, according to which the new relationships were bilateral relationships of an obligatory nature—the obligation of the State committing the breach to make reparation and the subjective right of the injured State to claim reparation; the theory of Kelsen, which assumed that the legal order was an order based on constraint and characterized by sanction; and the theory he himself supported, according to which the consequences of a wrongful act included both the obligation to make reparation and subjection to a sanction, depending on the nature of the wrongful act, the injury it had caused and other circumstances.

9. It was therefore important that members of the Commission should digest the idea, emphasized by Mr. Ushakov, that notions of internal law—civil law in particular—could not be simply transferred to international law and that international law did not recognize the same categories of responsibility—civil, criminal and administrative—as internal law, but only one single responsibility, which was the same for the whole of the international legal order, but could have different aspects in different cases.

10. The question raised by Mr. Reuter and Mr. Raman-gasoavina—whether the factors combining to make an act wrongful did or did not include injury as an additional element—would be discussed in another chapter.

11. Several members of the Commission had pointed out that there were so-called exceptional circumstances such as *force majeure*, accident, self-defence, consent of the injured State, imposition of a sanction and state of necessity, in which the act did not entail responsibility. Not only did those circumstances exist, but they were so important that it would be necessary to devote a whole chapter to them; it was, however, too soon to deal with them at the present stage of the work. All he wished to say about them for the moment was that, in all those cases, the absence of responsibility was not an exception to the rule; in reality there was no responsibility because there was no wrongful act. The exceptional circumstances eliminated not the responsibility, but the wrongfulness.

12. Mr Tamme had raised a question which was worth considering: that of the attribution to the State of the acts of private persons. There again, a distinction must be made between the sphere of lawful activities—acts of private persons for the possible consequences of which the State assumed responsibility—and that of unlawful activities. In the latter sphere it was necessary to distinguish between certain acts of private persons which could, exceptionally, be considered as acts of the State generating responsibility, and the more frequent cases in which the act of the State generating responsibility was merely an omission on the part of the State to take the necessary precautions to prevent an act from being committed by private persons. Those were questions

relating to determination of the act of the State, and the Commission would revert to them in due course.

13. With regard to the point of terminology raised by Mr. Reuter, the essential was to find what form of words best expressed the idea that the internationally wrongful act was a "source of new relationships".

14. Finally, although the definition of international responsibility would, of course, be the result of all the work done on the subject by the Special Rapporteur and the Commission, he felt bound to remind the Commission once again of his own understanding of responsibility. "International responsibility" meant, globally, all the forms of new legal relationships which could result in international law from a wrongful act of a State, irrespective of whether they were limited to a relationship between the State which committed the wrongful act and the State directly injured by it or extended to other subjects of international law as well, and irrespective of whether they were centred on the guilty State's obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involved the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law. The Commission was not called upon at that stage to decide on the nature of the relationships established by the wrongful act, but simply to note that that set of new relationships was the inevitable consequence of the internationally wrongful act.

15. Article 1 had been compared in importance with *jus cogens*. In his opinion, its importance was comparable with that of the *pacta sunt servanda* principle in the law of treaties.

16. The CHAIRMAN suggested that, since there was a link between articles 1 and 2, the Commission might accept article 1 provisionally and refer it to the Drafting Committee after it had discussed article 2.

17. Mr. YASSEEN suggested that article 1 be referred to the Drafting Committee on the understanding that it would have several articles before it at the same time.

18. Mr. AGO said he hoped the Commission would have completed its examination of article 2 by the time the Drafting Committee was set up.

19. Mr. ELIAS said that, since the Commission was considering the draft article by article, it would be in accordance with its normal practice to refer article 1 to the Drafting Committee, subject to whatever might be decided later.

20. The CHAIRMAN said that the composition of the Drafting Committee would be decided at the next meeting; meanwhile, the Commission would continue its discussion.

21. Mr. USTOR said he wished to assure the Special Rapporteur that he was quite aware of the difference between the responsibility of a State for wrongful acts committed by it and its responsibility for damage caused by lawful acts. He fully expected, however, that the comments made by Mr. Kearney, Mr. Hambro and Mr. Tammes at the two previous meetings would be repeated in the Sixth Committee.

22. If, however, the Special Rapporteur and the Commission wished to deal with the two questions separately, then it was quite possible that the title of the draft ought to be changed to make it clear that it referred only to wrongful acts, and that some wording should be introduced to indicate that for the time being the Commission was dealing only with internationally wrongful acts and that it might consider the question of responsibility for lawful acts later.

23. Mr. KEARNEY said that he did not propose any basic change in the approach adopted by the Special Rapporteur who, in paragraph 5 of his third report (A/CN.4/246), had himself drawn attention to the two aspects of State responsibility, namely, responsibility for wrongful acts and responsibility for lawful acts. His own concern was solely with ensuring that the Commission took into account the problem of acts whose results were not entirely predictable, but might be irreversible if damage occurred.

24. Owing to the rapid advance of technological developments, the world was moving into an era in which all countries were becoming increasingly concerned about the risks connected with those developments. Many countries, for example, had already prohibited the use of certain additives in foodstuffs, although it had not yet been fully proved, except on the basis of animal experiments, that they could induce cancer in human beings. As he had previously mentioned, there was similar uncertainty about supersonic aircraft, which might disrupt the ozone layer of the upper atmosphere and cause it to admit excessive sunlight to the earth's surface, thus increasing the incidence of skin cancer. In dealing with State responsibility the Commission was bound to take those questions into account.

25. The CHAIRMAN, speaking as a member of the Commission, said that, while he agreed with the Special Rapporteur's basic approach, he thought it solved only part of the problem of State responsibility. As Mr. Kearney had pointed out, the whole question of possible risk from technological developments was still in such a fluid state that it was difficult to apply to it the existing rules of international law. For example, article 2 of the Geneva Convention on the High Seas,² of 29 April 1958, proclaimed certain freedoms with respect to the use of the high seas by all nations, but also stated that "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas". It was not clear, however, whether that provision would cover the case of an "oil spill" in the territorial waters of one State, which might spread to the waters of another State and cause pollution there.

26. Similarly, the decision in the *Trail Smelter* arbitration³ had recognized no specific rule of international law, but had been based merely on principles of equity. Such cases arose from situations in which a lawful act

² United Nations, *Treaty Series*, vol. 450, p. 82.

³ See *American Journal of International Law*, vol. 35, 1941, pp. 684-736.

had caused material damage and had thus created responsibility on the part of a State to make reparation. Too much reliance should not be placed on comparisons with internal law, but he might refer to the responsibility of a factory owner to one of his workmen who was injured by an intrinsically dangerous machine, the use of which was certainly not unlawful. Problems of that kind of responsibility came within a related field of international law, which in his opinion was so important that the Commission should begin to study it.

27. Mr. YASSEEN said he was not sure that new legal relationships arising from a lawful act could be termed "responsibility". The question was undoubtedly of great importance in modern international life and warranted examination, but it could be considered as an independent question. It would be better not to prejudge the issue, and keep to the method adopted by the Special Rapporteur.

28. To allay the concern of certain members and define the Commission's attitude, however, the Special Rapporteur should state clearly in his commentaries that the Commission had not wished to prejudge the nature of the question of new relationships arising from a lawful act, that that question could be examined later and dealt with separately, and that the Commission was fully aware of the need to examine it in view of its importance in the modern world.

29. Mr. BARTOŠ said that he, too, was still in favour of the method adopted by the Special Rapporteur.

30. Of course, Mr. Ustor, Mr. Kearney and the Chairman were not wrong. The concepts of the quasi-offence and guarantee against risk of injury also existed in international law and there could be other sources of responsibility than wrongful acts. The Special Rapporteur should therefore say so clearly in the report to be submitted to the General Assembly, as Mr. Yasseen had proposed. It would be premature to begin studying those questions immediately, at the risk of obscuring the concept of international responsibility so clearly expounded by the Special Rapporteur.

31. Mr. HAMBRO said he regretted that the Commission could not enter into a long discussion of the moving frontiers of international law which had been created by modern scientific developments. The Commission was not an academy of theorists; it was expected to achieve practical results. Some self-abnegation on its part was obviously necessary, and the Special Rapporteur had given proof of it in his report, although perhaps it should be stated somewhat more explicitly that the Commission was fully aware of all the implications of the problem of State responsibility.

32. Mr. USHAKOV said that the Special Rapporteur had mentioned a collective work by Soviet writers and he would like to add that in the Soviet Union the question of the new legal relationships arising from failure to fulfil an obligation was always dealt with in a branch of law known as "the theory of law". The philosophy of law laid down that the violation of a legal rule always gave rise to new legal relationships.

33. Mr. BILGE said that the Commission's position was clearly set out in paragraph 5 of the Special Rap-

porteur's third report. It would therefore be sufficient to indicate in the Commission's report that the question had arisen again and that the Commission had confirmed its position.

34. Mr. SETTE CÂMARA said he was convinced that the Special Rapporteur's approach to the problem was absolutely correct. It could hardly be claimed that there were at present any clear-cut rules of international law covering responsibility created by modern technological developments. The few cases which had arisen had been solved in an anarchic fashion and it would be premature for the Commission to attempt to deal with the problem.

35. He agreed that it was a problem which could not be ignored, but he did not think the Commission could discuss it simultaneously with the problem of a State's responsibility for its internationally wrongful acts. After all, article 1 did not refer to such acts only; if certain acts which were lawful at the present time should become unlawful in the future, they would automatically be covered by article 1.

36. Mr. RAMANGASOAVINA said he thought it was simply a matter of procedure, since all the members of the Commission agreed with the Special Rapporteur that responsibility for wrongful acts should be considered separately.

37. Some members, however, wished to show that the Commission was aware that responsibility might also arise from lawful acts and that the Special Rapporteur's draft would be incomplete unless a part of it was devoted to that question. Consequently, not only the Commission's report, but also the draft itself should state what it was proposed to do later, and include an assurance that the question of the consequences of lawful acts would be examined in another part of the report or in another study.

38. Unlike the Special Rapporteur, he did not think that the obligation to make reparation for any injury resulting from a lawful act was simply a matter of guarantee. It was undoubtedly a matter of responsibility. The existing conventions allowed great freedom to States which had the means to conduct experiments or engage in enterprises that involved increasingly great risks, for example, the exploitation of the sea-bed or outer space, the consequences of which could be very serious for other States.

39. Nor did he quite share the view that responsibility for lawful acts was still vague. The 1944 Chicago Convention on International Civil Aviation,⁴ for instance, had already clearly delimited a part of it. There was every reason to believe that the law would continue to evolve in that direction, in view of the rapid development of science and technology and the increasing risk of injury it entailed.

40. Mr. ELIAS said he agreed with Mr. Sette Câmara and Mr. Hambro; if the Commission attempted to deal with responsibility for lawful acts, there was a danger that the subject might become so complicated that it would prove impossible to produce any draft articles at all.

⁴ United Nations, *Treaty Series*, vol. 15, p. 296.

41. The subject had been properly delimited during the discussion in 1970, as the Special Rapporteur had correctly reported in the following sentence in his third report. "The majority of the members of the Commission observed that owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp" (A/CN.4/246, para. 5).

42. The Commission should therefore avoid indulging in philosophical subtleties and concentrate on responsibility for internationally wrongful acts, without, however, shutting its eyes to the responsibility that might be created by lawful acts. As Mr. Sette Câmara had rightly observed, once such acts became unlawful, they would automatically fall within the purview of article 1. As Mr. Hambro had pointed out, the Commission was not an academy where lectures were given on the purely theoretical side of international law, but a body which was expected to produce practical results in the form of concrete rules which could be accepted by the General Assembly and by the international legal community at large.

43. It would be sufficient, therefore, if the Commission merely indicated in its commentary to article 1 that, while concerned over the possible risks from new developments of technology, it had decided to confine itself, for the present, to State responsibility for internationally wrongful acts.

44. The CHAIRMAN said that two issues had been raised during the discussion. The first was the proposal by the Special Rapporteur that State responsibility for wrongful acts and State responsibility for risk, which meant responsibility for lawful acts, should be treated quite separately. The second issue was whether, in the Commission's report to the General Assembly on the work of the present session, a passage should be included on the lines of paragraph 5 of the Special Rapporteur's third report.

45. There was another passage in that report which dealt with the same question in slightly different terms. It was in paragraph 20 and stated that nothing prevented the Commission "from also undertaking, if it sees fit, a study of this other form of responsibility, which is the safeguard against the risks of certain lawful activities"; it added that "It could do so after the study on responsibility for wrongful acts has been completed, or it could even do so simultaneously but separately".

46. Mr. AGO said he must point out, once again, that the fact that he had not dealt in his report with the question of responsibility arising from lawful acts did not mean that he did not appreciate the topical importance of that new phenomenon. If the Commission thought the subject was ripe for codification, it could consider the advisability of placing it on its agenda and appointing a special rapporteur to study it. But it should not add further obstacles to those which it already had to face in the codification of responsibility for wrongful acts; for if it introduced the question of responsibility for lawful acts, it might meet with another setback.

47. He was afraid the distinction between lawful and wrongful acts might become too fluid. It was, indeed, difficult to accept that some acts fell midway between lawfulness and unlawfulness, since it was infringement of the rules of international law that generated responsibility. But those rules were constantly evolving and a rule prohibiting certain activities was now in process of formation. That was why, in some fields, no decision could yet be taken on the wrongfulness of certain acts. There could be no wrongful act without violation of an obligation existing at the time the act was committed. Hence it could not be claimed that an act which had been lawful at the time it was committed had since become unlawful.

48. It was true that the consequences of certain activities which had been lawful up to the present were now causing serious concern in view of the rapid progress of science and technology in the modern world. And if an activity came to be recognized as really dangerous for mankind, it should be prohibited, and would then become wrongful. Activities such as flying supersonic aircraft or operating giant tankers, which could not be prohibited at present, but which involved risks and could cause material damage, should be made subject to certain safeguards required under international law, and the person exercising the activity should be liable for reparation in the event of damage. Where such activities were made the subjects of treaties, such as the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, any violation of the treaty constituted a wrongful act.

49. With regard to the need for separate consideration of the questions of responsibility for wrongful acts and responsibility for lawful acts, he would refer to the Commission's reports for 1969 (para. 83) and 1970 (paras. 66 and 74) and to paragraph 5 of his third report, which indicated that the Commission had decided to proceed first to consider the topic of the responsibility of States for internationally wrongful acts and to consider separately the topic of responsibility arising from lawful activities, as soon as progress with its programme of work permitted.

50. With regard to the title of the draft, it might be useful to indicate that, in accordance with the Commission's conclusions, the topic under consideration was State responsibility for internationally wrongful acts. It would then be known that the general principles the Commission was considering related to that question. When the Commission had made sufficient progress on that first question, it might propose to the Sixth Committee that it should place the question of responsibility for lawful acts on its agenda. For the time being, however, the two questions should not be confused.

51. The CHAIRMAN said he feared that the General Assembly would have serious reservations on any suggestion of delay in considering such a serious and urgent question as responsibility for lawful acts. That should be borne in mind when drafting the passage of the Commission's report which would record the conclusions of the present debate.

52. Mr. AGO pointed out that it would even be necessary to study the two questions together, for if the second

study were begun after the first study had been concluded, it might give the impression that they were two successive stages of the same question rather than two separate questions.

53. Mr. KEARNEY said that the English version of paragraph 5 of the Special Rapporteur's third report made it clear that the Commission was not in any way inhibited in the timing of its consideration of the subject of responsibility for risk. The last sentence of that paragraph stated that the Commission "intends to consider separately the topic of responsibility arising from lawful activities", subject only to one qualification "as soon as progress with its programme of work permits".

54. He was therefore led to think that the question of responsibility for risk should perhaps be considered by the Commission in connexion with the review of its long-term programme of work, particularly as the Commission was also to examine the priority to be given to the topic of the law of the non-navigational uses of international watercourses,⁵ a subject which gave rise to problems of responsibility for lawful activities.

55. Mr. ELIAS said that, while it was technically possible for the Commission to undertake a parallel study of responsibility for risk, he wished to warn his colleagues of the danger of confusion that would result from the consideration of two sets of papers—one dealing with responsibility for wrongful acts and the other with responsibility for lawful acts. There would inevitably be a danger of members transferring their thoughts on one subject to the other and of the discussion on one subject having an undesirable impact on the discussion of the other.

56. To make real progress, the Commission should concentrate on the present topic and clarify its thoughts before going on to examine supplementary rules on responsibility for lawful acts. That, of course, would not prevent members from referring to the question of responsibility for risk when discussing problems of the environment or of the non-navigational uses of international watercourses.

57. Mr. BILGE said that, in internal law too, there was always a responsibility based on risk. He did not think the word "separately", used by the Special Rapporteur, was sufficient. As Mr. Elias had said, it should be made clear that it was a new topic.

58. Mr. TSURUOKA said he did not think it necessary to decide immediately on the procedure to be followed in considering the question of responsibility for lawful acts. The Commission should first examine the Special Rapporteur's reports. In the meantime, the officers of the Commission could discuss how to deal with the second topic.

59. He would like the Drafting Committee to pay particular attention to the use of the words "international" and "internationally". The term "internationally wrongful" did not seem clear. Did it mean an act that was wrongful under international law? In his view, the word "internationally" had political overtones.

⁵ Item 5 of the agenda.

60. Mr. AGO said that he had begun by using the expression "*fait illicite international*" ("international illicit act") in his report.⁶ As far as he could see, the two terms were synonymous and interchangeable.

61. The CHAIRMAN said that no formal proposal had been made during the discussion that the Commission should undertake a study of the question of responsibility for risk. The problem of the action to be taken by the Commission with regard to the new topic could, of course, be raised in connexion with item 5. Meanwhile, if there were no further comments, he would take it that the Commission agreed to refer article 1 to the Drafting Committee which would be set up, for consideration in the light of the discussion.

*It was so agreed.*⁷

The meeting rose at 12.50 p.m.

⁶ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, footnote to table of contents of the second report.

⁷ For resumption of the discussion see 1225th meeting, para. 50.

1205th MEETING

Monday, 14 May 1973, at 3.15 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov.

Co-operation with other bodies

[Item 8 of the agenda]

1. The CHAIRMAN said that the European Committee on Legal Co-operation had invited the Commission to be represented at the session it was to hold from 21 to 25 May. As the Commission could not delegate one of its members while it was itself in session, he proposed that it should convey its regrets to the Committee and request it to send the Commission its report as usual.

It was so agreed.

State Responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

2. The CHAIRMAN invited the Commission to resume consideration of the draft articles submitted by the Special Rapporteur.

ARTICLE 2

3. *Article 2**Conditions for the existence of an internationally wrongful act*

An internationally wrongful act exists when:

(a) Conduct consisting of an action or omission is attributed to the State in virtue of international law; and

(b) That conduct constitutes a failure to comply with an international obligation of the State.

4. The CHAIRMAN invited the Special Rapporteur to introduce article 2 of his draft.

5. Mr. AGO (Special Rapporteur), introducing article 2, pointed out that according to the basic principle laid down in article 1, there was not, in international law, any wrongful act which did not involve responsibility. The continuation of his study hinged on two notions following from that principle: the internationally wrongful act and the consequences of that act. Once the principle stated in article 1 was accepted, the conditions for establishing the existence of an internationally wrongful act should be stated, and that was the purpose of article 2.

6. Writers, jurisprudence and the practice of States were practically unanimous in recognizing that at least two elements—one subjective and one objective—were required for that purpose. First, there must be an act or omission capable of being attributed to the State, in other words of being considered as an act of the State; and secondly, that act must constitute failure to fulfil an international obligation of the State which committed it. Reading his third and fourth reports, members would have appreciated the number of problems raised by the questions of attribution of an act to the State. It would subsequently be necessary to solve another group of problems—those raised by the recognition of an international violation, that was to say, the conditions in which an act or omission attributed to the State under international law constituted failure to fulfil an international obligation, bearing in mind the cases in which there was no violation because an exceptional circumstance had relieved the act of its wrongful nature.

7. Certain fundamental points should nevertheless be made clear from the start. First, it was necessary to state precisely the general principle that the two elements he had mentioned must be present for there to be an internationally wrongful act.

8. It was clear from the practice, doctrine and jurisprudence, and also from the previous attempts at codification, in particular the 1930 Codification Conference and the replies given by States to the request for information submitted to them by the Preparatory Committee, that the act of the State could equally well be an omission as an act. To attribute an act or omission to the State, it was not necessary to find a natural link of causality between the author of the act and the act itself. Attribution to the State, as subject, of conduct that was necessarily the conduct of human beings, was always an operation of legal connexion.

9. Further, the State to which conduct was attributed was the State as a person, as a subject of law, not the State in the sense of the legal order. What was more, it was the State as a subject of international law, not as a

person in internal law. The attribution of an act to the State in international law was made with respect to a subject which was not the same as the subject of internal law.

10. The act was attributed to the State as a subject of international law, and was attributed to it at the level of the international legal order. Thus there were three essential points which the Commission should keep in view: the attribution of an act to the State was an operation of legal connexion; it was carried out under international law; and the act was attributed to the State as a subject of international law, not as a subject of internal law.

11. He had said that the second condition for the existence of an internationally wrongful act was that the conduct attributed to the State must constitute failure by the State to fulfil an international obligation incumbent on it. Opinions were unanimous on that point, but it should be emphasized that the failure must be defined from the point of view of subjective law, in other words, not as the breach of a rule, but as the violation by a subject of law of the obligation imposed on it by the rule. In international law, the idea of failure to fulfil an obligation was equivalent to the idea of infringement of the subjective right of another.

12. Three other questions arose in connexion with article 2: the abuse of rights, the possible distinction between different kinds of violation, and injury. With regard to the abuse of rights, the Commission had decided, at its twenty-second session, to revert to that question later.¹ He himself still thought there was no need to examine the substance of the problem; for if there were situations in international law in which the exercise of a right was subject to limits, that was because there was a rule which imposed the obligation not to exceed those limits. In other words, the abusive exercise of a right then constituted failure to fulfil an obligation. Hence the statement of the principle that an internationally wrongful act was considered to be the violation of an obligation was enough to cover the case of abuse of a right.

13. As to the possible distinction between different kinds of violation, the conduct as such might alone be sufficient to constitute failure to fulfil an international obligation of the State: for example, if the State failed to carry out a treaty by which it had undertaken to enact certain legislation.

14. In other cases an additional element, an outside event, must be added to the conduct to make it an internationally wrongful act: for instance, if in time of war the aircraft of a State bombarded a town without taking the necessary precautions not to damage hospitals, there would nevertheless be failure to fulfil the international obligation to spare enemy hospitals only if a hospital were hit. It could thus be seen that the offence relating to mere conduct and the offence relating to an event existed in international law, as in internal law. He had considered whether he should refer to that distinction in article 2, but reached the conclusion that it was prefer-

¹ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 308, para. 79.

able not to do so and to revert to the matter when the Commission came to consider the question of violation of an obligation in its various aspects. For the time being it was enough to say that the conduct of the State must constitute failure to fulfil an international obligation. That covered all cases.

15. Lastly, should injury be included as a further separate element among the constituent elements of the internationally wrongful act? There again, the Commission should try to exclude internal law. In internal law there could be a criminal offence without injury. In several countries, for example, attempted suicide was a punishable offence. The idea of injury in international law normally related to injury as recognized in civil law, that was to say, economic injury. The French word "*préjudice*"—in English "injury"—which was the term used by Mr. Reuter in his course,² meant the harm naturally caused by any action which constituted failure to fulfil an international obligation. But it was not necessarily injury in the economic sense generally ascribed to that term. The reason why certain writers considered injury to be a third constituent element of the internationally wrongful act was that they had considered responsibility only in connexion with injury caused to aliens, that was to say in a sphere in which the obligation violated was, precisely, an obligation not to cause, and to prevent, injury. In other cases, the injury was confused with the event, that was to say, with the external element which must sometimes be added to conduct if injury was to be caused to others.

16. There were, however, many examples showing that in international law there could be failure to fulfil an obligation without injury. For instance, a State which did not enact the legislation it had undertaken by treaty to enact, did not, strictly speaking, inflict an injury on the other States parties to the treaty, though it had failed to fulfil an obligation. Nevertheless, all writers recognized that every failure to fulfil an obligation entailed an injury. Consequently, it could not be said that the element called "injury" was the third condition necessary for the existence of an internationally wrongful act, for there were internationally wrongful acts which did not result in economic injury, and if it was true that every failure to fulfil an obligation entailed injury, then the element of injury was already covered by the failure to fulfil the obligation.

17. Mr. TAMMES said he wished to make a few remarks, not so much on article 2 as on the considerations which preceded it in the Special Rapporteur's third report (A/CN.4/246).

18. In paragraphs 66 to 70 the Special Rapporteur dealt with the concept of abuse of rights and gave his reasons for believing that it would be premature to include it among the objective elements of the wrongful act. The concept had certain obviously dangerous aspects and its formulation would involve making a substantive or primary rule of international law, as distinct from the typical rules of State responsibility.

19. He did not wish to enter into a discussion of the contents of the doctrine, but he was convinced that, at some later date, the Commission would have to decide whether abuse of rights should be included among the objective elements of the internationally wrongful act. Several members had already noted that international legal convictions were at present in a stage of fluidity and rapid development. There was an increasing probability that an international court would respond to that change in legal convictions by means of general concepts, even before those convictions were embodied in progressive rules.

20. There might be legal danger in applying a concept such as abuse of rights, but there would also be factual danger in ignoring it. There were many formulations of abuse of rights in international texts which did not actually use that expression. One example was article 2 of the 1958 Geneva Convention on the High Seas,³ in which the exercise by States of the four freedoms of the sea set forth in that article was made subject to "reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

21. He agreed with the Special Rapporteur that any non-tautological formulation of the concept of abuse of rights as an objective element of State responsibility would involve working on a substantive rule. Such a rule, however, would not be any more substantive than such concepts as self-defence, state of necessity and due diligence, which would be dealt with later. As indicated in the Special Rapporteur's note of 15 June 1967,⁴ those subjects belonged to State responsibility and could not be dealt with as separate topics. If the Commission did not deal with them in the context of responsibility, which was the only place for them, they would not be dealt with at all.

22. In a later passage of his report (paras. 70 *et seq.*), the Special Rapporteur drew attention to cases in which the wrongful act did not lead to any physical or otherwise ascertainable effects. In his view, guidance should be sought in those cases from the distinction made in subparagraph (a) of article 2, between conduct by action and conduct by omission. Conduct by action was the manner in which a State would violate an international prohibition. As he saw it, in most cases of that kind, the State would be responsible for an attempt at violation, even if no physically harmful effects resulted.

23. Conduct by omission, on the other hand, would create a situation of latent danger which the law intended to prevent by imposing upon the State an international responsibility, even though proof would be extremely difficult and no interests of any particular State were as yet affected. He himself would not object to such a radical rule, but was not at all certain that that was the real intention of the Special Rapporteur in subparagraph (b) of article 2.

24. Perhaps the point could be clarified in the commentary to article 2. As it stood at present, the text of

² United Nations, *Treaty Series*, vol. 450, p. 82.

⁴ See *Yearbook of the International Law Commission*, 1967, vol. II, pp. 325-327.

sub-paragraph (b) would entail responsibility for the frustration of any state of affairs aimed at by the law. There might be some restrictive rules, as suggested in the report, but it did not seem possible to place those restrictions systematically in the draft as a whole without affecting the final formulation of article 2 itself.

25. Mr. ELIAS said that, subject to some points of drafting, he could accept both sub-paragraphs of article 2. The reason was that the new text of that article took into account most of the objections to the original text which had been voiced in the Commission's extensive debate in 1970 and in the subsequent discussions in the Sixth Committee. Moreover, it would be sound law to accept the two conditions set out in sub-paragraphs (a) and (b) for engaging the international responsibility of States.

26. As far as the subjective element was concerned, the criterion laid down in sub-paragraph (a) was that the conduct in question must be attributed to the State as a subject of international law; if a particular conduct could be attributed to a State rather than to an individual or to a group, then that State could be held responsible.

27. The objective element, set out in sub-paragraph (b), was that the conduct must constitute failure to fulfil an international obligation. Conduct in that sense covered both acts and omissions, but the Special Rapporteur had rightly observed that the omissions were probably more numerous than the acts. That was well illustrated by the cases which had come before the former Permanent Court of International Justice and the present International Court of Justice.

28. It was important to remember that the act of the State had to be an act attributed to it by the law, but the question was whether in that case the law meant internal law or international law. The generally accepted view was that it meant in international law and that view had been accepted even by writers like Anzilotti and Kelsen, who had at first thought differently. Personally, he thought it could hardly be otherwise, since the violation was specifically a breach of international law; although considerations of internal law could not be overlooked, the standard must be that laid down by international law.

29. He agreed with the Special Rapporteur that the somewhat ambiguous doctrine of abuse of rights should not be introduced into article 2 as one of the elements of an internationally wrongful act. The article was concerned with violations of international obligations, of duties laid upon States by international law, and not with the exercise, whether excessive or otherwise, of a right by a State. If the Special Rapporteur could include a provision on the subject of abuse of rights at a later stage, he would have no objection, but there was no place for it in article 2.

30. There were a number of references in the report to the question of damage, which some writers had considered as a third element for the existence of State responsibility. The Special Rapporteur had been right to leave that question outside the scope of article 2; the concept of damage had been introduced into the subject of State responsibility at a time when the subject was confused with that of injury to individual aliens. The

Commission was at present concerned only with the injury which one State could do to another international law and not with the injury that might be caused by a State organ or official to an individual alien.

31. In his view, the concept of economic damage was not strictly relevant to the topic of State responsibility. Mere failure to comply with an international obligation involved an injury to the State to which the obligation was due.

32. Lastly, there were two points of drafting in sub-paragraph (a) that he wished to mention. First, the formula "act or omission" was more appropriate in English than "action or omission". Secondly, the words "in virtue of", before "international law", should be replaced by a preposition such as "by" or "under", in order to render better the intended meaning.

33. Mr. SETTE CÂMARA said the Special Rapporteur considered that the wrongful act contained two elements. The first was the subjective element, consisting of conduct which had to be attributed to the State and not to individuals or groups of individuals who were the physical instrument of that conduct. When the Special Rapporteur referred to the State in that context, he meant the State as a subject of international law and not the State as a system of norms. The second was the objective element, which was the fact that, by its conduct, the State had failed to fulfil an international obligation incumbent on it.

34. In his carefully chosen wording, the Special Rapporteur had avoided the traditional terminology, which had sometimes favoured the term "imputability"; in so doing he had deliberately refrained from drawing dangerous analogies with concepts of internal criminal law. Indeed, the notion of imputability in criminal law involved elements such as the intent, or *voluntas sceleris*, which obviously could not be taken into account in international law.

35. The Special Rapporteur had also been very cautious in his drafting when dealing with the objective element: he spoke of "failure to comply with an international obligation" instead of using such broad expressions as "breach of a rule" or "breach of a norm of international law". Responsibility arose from a new legal relationship deriving from an objective situation in which an international obligation had not been fulfilled. That nuance was very important, since the majority of cases in which responsibility would be in question would not involve a breach of a rule or norm of international law, but merely failure to carry out an international obligation. The phraseology used by the Special Rapporteur was supported by practice and was in conformity with the solution which the Commission itself had favoured when it had examined the subject previously. The use of terms such as "breach of an international norm" would unduly restrict the field of application of responsibility and would be contrary to the practice of States.

36. With regard to sub-paragraph (a) of article 2, nobody would question that conduct which could be considered a violation of an obligation might be the result of either an act or an omission. As the Special Rapporteur had pointed out in paragraph 55 of his third

report, it could be said that the cases in which the international responsibility of a State had been invoked on the basis of an omission were perhaps more numerous than those based on action taken by a State.

37. With regard to the important problems of determining when and how an act by an individual or group of individuals could be considered an act of the State, the Special Rapporteur contended that the attribution to the State was a legal connecting operation which had nothing in common with a link of natural causality. That point was very important in the development of the whole philosophy of the draft, since State responsibility would depend on some special relationship existing between the individual or group of individuals who were the physical instruments of the conduct, and the State itself.

38. Another important aspect of the text proposed by the Special Rapporteur was the one emphasized in paragraph 60 of his third report (A/CN.4/246), namely, that an individual's conduct could be attributed to the State as an internationally wrongful act only under international law. It was obvious that if responsibility was considered under internal law, an entirely different problem was involved: the case of an individual who was seeking redress from the State under its own system of norms, for a wrong he had suffered and which could be attributed to the State. That would be a purely internal matter not involving relations between one State and another. It was only when the internal remedies were exhausted and when the conduct was attributed to the State as a subject of international law that the problem of international responsibility, as such, arose.

39. In his opinion, the Special Rapporteur had been right in not dealing in the text of the articles, with the problem of the abusive exercise of a right. The doctrine of abuse of rights was far from being established by the practice of States in international decisions. In paragraph 68 of his report, the Special Rapporteur had adopted a pragmatic approach to the problem. If there was international recognition of the existence of a rule establishing limitations on the use of rights, the abusive exercise of such rights would constitute a violation of an international obligation, namely, the obligation to respect those limitations. In such a case, the objective element of the wrongful act would be duly established. That solution was very much in the spirit of what the Commission itself had decided at its twenty-second session.

40. In paragraph 73 of his report, the Special Rapporteur had discussed at length the question whether "damage" should be included as an element of the wrongful act. He had drawn a distinction between the concept of damage as such, and the necessity of the existence of an external event to trigger the mechanism of international responsibility. He considered insistence on the inclusion of the element of damage to be the result of the habit of thinking in terms of municipal law and of considering only cases in which responsibility arose from injuries to individual aliens. In the view of the Special Rapporteur, the problem of the economic element of damage was fully covered by the rule which established the obligation not to cause injury to aliens. However, there was still some doubt in the Commission about the necessity of considering damage as an essential element of the

wrongful act. Mr. Reuter had expressed some misgivings on that point and Mr. Thiam had been very clear in expressing his doubts.⁵ He thought the Special Rapporteur should give further thought to the matter, in order to dispel any remaining hesitation.

41. The problem of responsibility in fact should also be considered from a practical point of view. It was not enough to establish clearly that every wrongful act of the State involved its international responsibility, since in practical terms that principle was the source of a new relationship between one State and another, based always on the concept of injury and reparation for injury. If there was no injury, and no claim for reparation of any kind, responsibility would remain a theoretical principle from which no consequences would follow.

42. When the Special Rapporteur had discarded the idea of including damage as an element of the wrongful act, he had had in mind a very specific notion, that of "economic damage"—concrete injury to individuals which could be measured in material terms. But there was a very wide range of damage that went far beyond the material losses of individuals. Such damage could be suffered by the State and not by an individual. If a Customs Officer opened the diplomatic pouch belonging to a State, for example, that was a wrongful act capable of entailing international responsibility, even if the pouch did not contain any confidential documents or materials. No direct material damage could be alleged, but there was a moral injury to the dignity of the State which was the victim of the wrongful act—an injury to its right to carry on its diplomatic work in a normal way, in addition to the violation of an international duty proper.

43. It was always the element of damage that entitled one State to make a claim against another and demand redress. It had been traditionally recognized by doctrine that in practice an internationally wrongful act, or "an international delinquency", to use the old terminology, gave rise to a right of the wronged State to request from the delinquent State reparation for the wrong done. He hoped that the Special Rapporteur would clarify that point on the basis of a broader concept of damage than the one discussed by him in paragraphs 73 and 74 of his third report.

44. Article 2 provided the Commission with new elements for tackling the problem of responsibility arising from lawful acts of the State. As the discussion had clearly demonstrated, the key to the problem was the fact that the modern practice of States with respect to new technological activities would necessarily lead to rules imposing new obligations on States. Those rules were still in the process of development and, as Mr. Hambro had observed, many activities which had hitherto been considered lawful were now becoming unlawful.

45. Mr. HAMBRO said that he hesitated to encourage a debate on the question of abuse of rights, since he feared that it might be only a "red herring". In his opinion, one of the most interesting parts of the Special Rapporteur's third report was paragraph 60, in which he emphasized the importance of distinguishing between national law

⁵ See 1202nd meeting, paras. 36 and 39.

and international law. However, he hoped that that distinction would not be taken as precluding useful analogies with municipal law, when appropriate. He underlined, in particular, the importance of the "general principles of law" and warned the Commission against accepting the statement of the Permanent Court of International Justice that national law should only be regarded as a fact.

46. Mr. KEARNEY said he was flattered that the Special Rapporteur, in footnote 69 to his third report, had referred to the fact that he (Mr. Kearney) had particularly stressed the close connexion between the subjective and the objective elements of an internationally wrongful act. He was prepared to accept the substance of article 2, as formulated by the Special Rapporteur.

47. He was not sure that the question of abuse of rights would necessarily become the "red herring" Mr. Hambro feared; it did arise in connexion with article 1, in regard to the changes occurring in international law, though he agreed that it was a problem which could be left for future consideration. That was also true of the problem of damage, which, while not an essential element in the definition of an internationally wrongful act, was a difficult subject that would probably call for a special chapter in view of the many aspects it presented.

48. He could agree to the two proposed amendments to the wording of sub-paragraph (a) of article 2, and was himself inclined to question the wording of sub-paragraph (b). He suggested that, instead of the words "That conduct constitutes a failure to comply with an international obligation of the State", it would be better to use the wording of Article 36, paragraph 2, c, of the Statute of the International Court of Justice and say "That conduct constitutes a breach of an international obligation of the State". He considered that a particularly clear formulation, since the fact of an omission itself constituted a breach of an international obligation, as, for example, when a State failed to provide an adequate number of security guards for a foreign embassy.

49. Mr. REUTER said that, at first sight, he could accept article 2 as it stood.

50. In his drafting, the Special Rapporteur seemed to have considered internationally wrongful acts from an entirely general standpoint, which had led him to conclude that only two conditions had to be met in all cases. That was why he had discarded, as not constituting an absolutely general condition, the existence of damage or even of injury. But he had not meant that those two conditions were always sufficient; he had recognized that, in a number of cases of responsibility arising from a wrongful act concerning private persons, damage was an element that had to be taken into account. That was not always the case, however: for instance, when a State acted contrary to the European Convention on Human Rights, a complaint could be lodged against it by a State other than that to which the injured person belonged; that was none the less enough to set international reparation machinery in motion. Nor had the Special Rapporteur said that the existence of damage was never a requirement when a State was the direct victim of failure to comply with an international obligation.

51. It would therefore be advisable to specify, later, in what cases damage must have been suffered and of what kind it must be. For to limit the criteria for the existence of an internationally wrongful act to the two conditions selected by the Special Rapporteur would mean adhering to something like the criminal machinery of internal law. Yet classical international law tended to measure the rights of States according to the nature of the injury they had suffered. For instance, article 60 of the Vienna Convention on the Law of Treaties⁶ established distinctions according to the nature of the injury caused by the breach of a treaty.

52. The Special Rapporteur had duly explained why the term "obligation" should be preferred to the term "rule", but he had not specified to whom the obligation was owed. Presumably he was contemplating both wrongful acts which injured the international community as a whole and acts which injured certain States. But a distinction should be drawn between those different sorts of internationally wrongful act.

53. The Special Rapporteur appeared to consider that the element of damage or injury was contained in the concept of obligation, but that it did not constitute a third element, because it was not of a sufficiently general character. It was from that angle that the draft article should be interpreted at present.

54. Mr. USHAKOV said he supported the substance of article 2 in principle, but wished to make a few comments on the drafting. The wording "An internationally wrongful act exists when" called for a statement of the facts of the case. The next phrase, on the other hand, particularly the expression "is attributed to the State in virtue of international law", implied that somebody must attribute a certain conduct to a State. Perhaps it might be better to use the word "attributable".

55. The words "in virtue of international law" could be deleted, since an internationally wrongful act could sometimes take place by reason of the very existence of a State's conduct, without any need to refer to international law.

56. As for the concept of "obligation", to which the Special Rapporteur had given preference, it was so close to that of "duty" that it might perhaps be well to mention both in article 2, unless the Commission defined the term "obligation" later, in the article containing definitions.

The meeting rose at 6 p.m.

⁶ 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.

1206th MEETING

Tuesday, 15 May 1973, at 11.55 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter,

Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Yasseen.

Filling of casual vacancies in the Commission

(A/CN.4/268 and Add.1 and 2)

[Item 1 of the agenda]

(*resumed from the 1202nd meeting*)

1. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Juan José Calle y Calle, of Peru, Mr. C. W. Pinto, of Sri Lanka, Mr. Alfredo Martínez Moreno, of El Salvador, and Sir Francis Vallat, of the United Kingdom, to fill, respectively, the casual vacancies caused by the death of Mr. Gonzalo Alcívar and the resignations of Mr. Nagen-dra Singh, Mr. José María Ruda and Sir Humphrey Waldock, on their election as Judges of the International Court of Justice.

State Responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.446 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(*resumed from the previous meeting*)

ARTICLE 2 (Conditions for the existence of an internationally wrongful act) (*continued*)

2. The CHAIRMAN invited the Commission to resume consideration of article 2 in the Special Rapporteur's third report (A/CN.4/246).

3. Mr. YASSEEN said he approved in principle of the wording proposed by the Special Rapporteur for article 2. The two elements set out were undoubtedly the essential constituent elements of an internationally wrongful act.

4. He agreed with the Special Rapporteur that for an internationally wrongful act to exist there must be conduct—an act or omission—attributed to the State, that was so attributed in virtue of international law. It was clear that the wrongful act could be either an act or an omission, and that it must be attributed to the State as a subject of law, not as a legal order, and as a subject of international law, not of internal law. Lastly, it was essential that all that should take place entirely under international law. The attribution meant that the act of an individual or group of individuals was regarded by international law as an act of the State. It was not a matter of natural causality, but of a legal bond created in accordance with the rules of positive international law, to the exclusion of all other rules.

5. The existence of the internationally wrongful act was also subject to the existence of the second element mentioned in the article—the objective element. The Special Rapporteur had been right to use the words "failure to comply with an international obligation", since the expression "failure to comply" was more neutral than "violation" and the term "obligation" was more

appropriate than "rule". He doubted whether it was necessary to add other elements to the conditions for the existence of an internationally wrongful act.

6. Some members had raised the question whether the notions of abuse of rights and damage should not also be taken into account. With regard to abuse of rights, he agreed with the Special Rapporteur that it would be better to leave that question aside for the time being. The topic which the Commission was called upon to codify was international responsibility; to introduce the notion of abuse of rights—the importance of which he did not underestimate—would entail making a detailed study which was not within the scope of that topic. If it were accepted, as it was by certain jurists, that the right ended where the abuse began, the consequences of abuse of a right could easily fall within the province of responsibility. But the concept of abuse of rights might follow a course of its own and suitable means might be found for remedying the consequences of the abuse. It would therefore be better for the Commission not to study that question for the moment.

7. With regard to damage, it was difficult to conceive that there could be responsibility in the absence of any damage or injury. The maxim that no one could maintain an action unless he had an interest seemed as valid in international law, as in internal law. The damage or injury might take the form of infringement of a right. But as the Special Rapporteur had said, every failure to fulfil an international obligation entailed infringement of a subjective right. Consequently, the idea of damage or injury was implicit in that of failure to fulfil an obligation, though of course the damage need not be material. Hence it was not necessary to mention damage separately as a third constituent element of an internationally wrongful act.

8. For all those reasons he believed that article 2, as drafted, reflected positive international law.

9. Mr. TSURUOKA said he thought that article 2, the wording of which he approved in principle, was in its right place in the general plan of the draft. It was a basic article which stated an essential general rule. It was clear and unambiguous, and the settlement of subsidiary questions such as injury and abuse of rights could therefore be left until later. The practical value of the article would depend to a great extent on the way those questions were settled, or even on the position taken by the Commission with regard to them in the commentary.

10. Mr. BEDJAoui said he agreed, in general, with the conditions for the existence of an internationally wrongful act, as clearly and simply set out in article 2. There was no doubt that the subjective element must exist and that it entailed legal attribution of an act to a State as a subject of international law. It was not difficult, either, to accept the objective element, that was to say the existence of conduct constituting failure to fulfil an international obligation, the violation of an obligation or failure to perform a duty, though he did not see much difference between those two terms.

11. He also approved of the wording adopted by the Special Rapporteur, including the formula "in virtue

of international law", which should be retained in spite of the criticisms it had received. It was, indeed, only to a State as a subject of international law and in conformity with the rules of international law, not of internal law, that an act could be attributed.

12. He regretted, however, that the subject of abuse of rights had been provisionally left aside. He hoped the Commission would revert to it at a later stage in its work of codification, for it was a subject that offered very great possibilities for progressive development. The characteristic feature of abuse of rights was not a limit fixed by a legal rule which blocked the exercise of the right, but rather the existence of a potential rule in process of formation; otherwise there would merely be conflict between two rules.

13. He was grateful to the Special Rapporteur for not having adopted the prior existence of damage or injury as a third condition for the existence of an internationally wrongful act. The exclusion of that notion might be a way of including injury in the wider sense of the term, since there could be, if not material injury, at least a moral injury deriving from impairment of the dignity of the State.

14. Mr. THIAM said he approved of article 2 as proposed by the Special Rapporteur. He agreed that the questions of injury and abuse of rights were not within the scope of the article, but it was obvious that, for practical reasons, the Commission would have to revert to those questions sooner or later, examine them thoroughly and decide whether they should be dealt with in the draft and if so where.

15. Mr. BILGE said that he had not been a member of the Commission when it had decided how to deal with the topic of State responsibility, but he fully endorsed the decisions taken.¹

16. He fully approved of article 2. The two conditions it laid down were always required, both by international jurisprudence and by State practice and doctrine. The subjective element raised no difficulty: the attribution of a certain conduct to a State as a subject of law was made in virtue of international law.

17. The objective element, on the other hand, raised three questions. First, should the concept of abuse of rights be introduced into article 2? He was convinced that it had its place in the international legal order, but neither doctrine nor international jurisprudence seemed ready to accept it in the context of the internationally wrongful act. It would therefore be better to leave the question aside for the time being.

18. Secondly, should a distinction be drawn between different kinds of failure to comply with an obligation, particularly between conduct which it itself constituted a wrongful act and conduct which needed the addition of some external event? Like the Special Rapporteur, he saw no need to make such distinctions and thought that attention should be confined to the nature and purpose of the obligation.

19. Thirdly, should injury be regarded as a third condition of the existence of an internationally wrongful act? Was it possible to dissociate the internationally wrongful act from injury, and treat the latter element as a separate issue? It would appear not, for although wrongfulness was always linked with the concept of injury an internal law, the existence of injury was not a decisive factor in inter-State relations. Moreover, where injury to aliens was concerned, the State did not intervene, as in internal law, as a genuine holder of rights. Consequently, only two conditions should be adopted for the existence of an internationally wrongful act.

20. Article 2 was therefore acceptable as it stood. At most, the Drafting Committee might make a few drafting changes in accordance with the suggestions made during the discussion, and perhaps reverse the order of sub-paragraphs (a) and (b) since, chronologically, a failure to comply with an international obligation of the State must already have occurred before it could be attributed to the State in virtue of international law.

21. Mr. BARTOŠ said he approved of article 2 as proposed by the Special Rapporteur. Nevertheless, he wished to draw attention to a possible situation which would admittedly make the drafting awkward if it were introduced, but which should at least be considered by the Commission. It might happen that certain conduct, without being really proved and attributed to a State, constituted a simple presumption of responsibility. Thus it was sometimes merely presumed that a State had failed to comply with an international obligation, before certain conduct could be attributed to it with certainty.

22. In his opinion, abuse of rights could be a source of responsibility only if rules specifying the limits to the exercise of a particular right had been broken. In internal law, there could be abuse of rights if the limits to the exercise of a particular right had been laid down and then transgressed, or if the abuse was so manifest that it was contrary to the normal interpretation of a rule. But in international law it was essential, in the interests of world security, to lay down limits to the exercise of rights. Without such limits, it was difficult to determine at what point failure to comply with an obligation engaged the international responsibility of a State.

23. The question was not only of theoretical interest. State practice could constitute a source of law. Any conduct not in conformity with that practice should be treated as a violation of the international legal order. Without changing the proposed text, the Commission should therefore agree on the notion of normal exercise of rights.

24. His position with regard to injury as an element of the internationally wrongful act was that it was essential to determine whether any interest had been injured. In the case of failure to comply with an international obligation, it was the international order which was injured. Generally speaking, States had an interest in maintaining the international order. They also had a duty to protect it since, in the event of violation of an international obligation, they were the direct or indirect victims.

¹ See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 227-228 and vol. I, p. 86, para. 75.

25. Article 2 as proposed by the Special Rapporteur was therefore satisfactory, subject to any improvements the Drafting Committee could make in the light of the discussion.

26. The CHAIRMAN, speaking as a member of the Commission, said he was in agreement with the formulation of article 2 and with the theoretical and practical considerations which preceded it in the Special Rapporteur's third report (A/CN.4/246, paras. 49 to 74).

27. He supported the basic conception of State responsibility as consisting of two elements: a subjective one and an objective one. The subjective element was constituted by conduct capable of being attributed to the State concerned, not to an individual or a group of individuals. That link with the State was of a legal character. It was not a natural connexion. As Kelsen had pointed out, the link was not that which connected cause and effect but, like all legal links, that which connected means and ends.

28. In that respect, he fully agreed with the view that the legal connexion in question had to be established in international law and not in internal law. The attribution of responsibility to the State was a matter governed by international law, not by internal law.

29. With regard to the objective element, he agreed with the Special Rapporteur that what gave rise to State responsibility was not the breach of a primary rule of international law, but failure to comply with an international obligation incumbent upon the State. Such an obligation could have its source, for example, in treaty rights or in a judgement or arbitral award.

30. He supported the Special Rapporteur's treatment of the problem of abuse of rights. The importance of that problem in the context of State responsibility was not in doubt, but it did not affect the secondary rules governing State responsibility as such. The problem was really whether there was a primary rule of international law which limited the exercise by the State of its rights or capacities. If international law recognized such a limitation, the abuse of a right by a State would then necessarily constitute a breach of the primary rule which laid down that limitation.

31. The Special Rapporteur had rightly not included injury among the constituent elements of State responsibility. Some confusion had arisen on that point because in regard to the treatment of aliens it had been repeatedly held that no claim could be preferred in the absence of an injury to the alien concerned. The reason was, of course, that a State's obligation in the matter was, essentially, not to injure aliens wrongfully or allow them to be injured under certain circumstances. Where no injury could be established, there was no breach of the relevant primary rule of international law, so that State responsibility did not come into play. That did not mean, however, that the existence of injury was a necessary component of State responsibility.

32. Lastly, there were certain omissions which in themselves constituted violations of an obligation under international law and generated State responsibility. An example was a treaty which required a State to enact certain legislation as part of its national law; failure to

do so would engage its international responsibility. The omission was in itself sufficient, since injury—moral or material—to the other States parties to the treaty was inherent in such a situation. Treaties dealing with human rights laid an obligation on States to take certain legislative measures for the benefit of their own citizens; failure to do so could be invoked by any of the other States parties to the treaty since it was sufficient in itself to cause injury to them.

33. He supported the proposal that article 2 should be referred to the Drafting Committee for consideration in the light of the discussion.

The meeting rose at 1 p.m.

1207th MEETING

Wednesday, 16 May 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Welcome to Sir Francis Vallat

1. The CHAIRMAN welcomed Sir Francis Vallat, who had been elected a member of the Commission to fill one of the four casual vacancies which had occurred since the last session. Sir Francis had been known to many members of the Commission since 1950 as a distinguished and friendly colleague in the Sixth Committee of the General Assembly at United Nations Headquarters.

2. Sir Francis VALLAT said he regarded election to the Commission as one of the greatest honours which could be paid to an international lawyer. He was grateful for the warmth of the welcome he had received and, while not wishing to intervene at the present stage of the discussion, he hoped little by little to be able to make some contribution to it.

Appointment of a drafting committee

3. The CHAIRMAN suggested that the Commission appoint a drafting committee of eleven members, consisting of the First Vice Chairman as Chairman, the General Rapporteur, and the following members of the Commission: Mr. Ago, Mr. Elias, Mr. Kearney, Mr. Pinto, Mr. Reuter, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat, together with one of the two newly elected Latin American members—either Mr. Martínez Moreno or Mr. Calle y Calle.

It was so agreed.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 2 (Conditions for the existence of an internationally wrongful act) (*continued*)

4. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 2.

5. Mr. AGO (Special Rapporteur) said that the comments made during the discussion related mainly to points which he had dealt with in his introduction, suggesting that it would not be advisable to mention them in the text of article 2. Generally speaking, members had spoken in favour of the proposed text, subject to a few drafting amendments.

6. Reference had been made to the case in which, for an internationally wrongful situation to be complete, some external event must be added to the conduct of the State. Members appeared to agree that that case should be dealt with later, in connexion with the violation itself, and need not be mentioned in the definition of conditions for the existence of an internationally wrongful act.

7. Several members had expressed their attachment to the notion of abuse of rights, though they had not asked that it be introduced into article 2. In their opinion, although, when dealing with State responsibility, no attempt should be made to define the substantive or primary rules, it was nevertheless frequently necessary to refer to the content of those rules. It was necessary in certain cases, to rely on the content of the rules for assessing the gravity of an internationally wrongful act. And some rules, such as those on self-defence and *force majeure*, might remove the wrongful character of conduct which would otherwise appear to be a violation of an obligation. That would be the case if military aircraft of a State were compelled by *force majeure* to fly over the territory of another State which they were normally prohibited from flying over. In the case of abuse of rights the situation was reversed: the exercise of a right became unlawful only from the moment when the limits imposed on its exercise by international law were exceeded.

8. As the Commission appeared to consider that the notion of abuse of rights should not be introduced into article 2, he would confine himself to considering the possibility of drafting an article on abuse of rights for inclusion in the section relating to the violation; but it was important that such a provision should be really justified by the special nature of the situation. Moreover, the Commission should not enter a field which was so extensive that it deserved to be explored for its own sake, independently of the question of State responsibility.

9. Members had also recognized that the notion of damage should not be introduced into article 2, since it was not a third constituent element of the internationally wrongful act. On the other hand, it would sometimes have to be taken into consideration as an element of the substantive rule. It would have to be discussed twice: first, when the Commission dealt with the question of

the violation, since in some cases the obligation violated was, precisely, an obligation not to cause damage, so that without damage there could be no violation. That was true, in particular, of all State obligations not to cause injury to aliens, or to ensure that no injury was caused to them by other persons. Secondly, it would have to be taken into account when the Commission examined the consequences of the internationally wrongful act. At that stage, damage would be a necessary element of reference, for example, for determining the amount of reparation.

10. It should be noted that the existence of an internationally wrongful act and hence of State responsibility did not in itself imply the existence of a situation which would justify an action before an international court. The right of action depended on special rules and often on conventions.

11. As Mr. Reuter had pointed out, when determining the conditions for the existence of an internationally wrongful act, it was necessary to ensure that a State could not escape the consequences of an unlawful situation. It was established doctrine that when a State had given another State an undertaking to do or not to do something, any act or omission on its part which was contrary to that undertaking constituted an injury. The existence of material or moral damage in addition to that injury was not necessary to make an internationally wrongful act. In all cases there was infringement of the international legal order. That situation was duly covered by the simple statement that an internationally wrongful act existed in the case of failure to fulfil an international obligation.

12. In most cases, of course, there was damage in addition to the injury inherent in the violation of an international obligation, but the existence of such damage was not indispensable. In addition to the examples already given by other members of the Commission, there were the conventions of the International Labour Organisation dealing with the freedom of trade unions and the prohibition of forced labour. If a State party to those conventions did not grant its trade unions the treatment provided for in the rules of the conventions, or if it subjected its own nationals to forced labour, it infringed the human rights of its citizens. In doing so it did not cause damage to any other State; but if the conventions were to have any meaning, the other States parties must be able to hold it responsible for an internationally wrongful act.

13. With regard to the drafting of article 2, Mr. Elias had suggested that the expression "act or omission" should be used rather than "action or omission". In its original form, the English version of the provision had contained the word "act", but Sir Humphrey Waldock, then a member of the Commission, had pointed out that the expression "*fait internationalement illicite*" could only be rendered in English by the expression "internationally wrongful act", since the word "fact" was not a precise legal notion;¹ that was why he had suggested

¹ See *Yearbook of the International Law Commission*, 1970, vol. I, p. 189, para. 28.

using the word "action" in contrast to "omission". That difficult question could be considered by the Drafting Committee.

14. As Mr. Ushakov had suggested, the objective word "attributable" should be used instead of "attributed", since conduct might have been wrongfully attributed by one State to another. Some members had proposed using the word "imputable", as against "imputed".

15. On the other hand, the reference to international law should be retained, since everything depended on knowing whether international law could, in certain cases, depart from internal law and consider a particular act as being an act of the State.

16. With regard to the expression "in virtue of", it was true that it might not perhaps entirely correspond to the French expression "*en vertu de*". In the original version of the provision² he had used the words "under international law", but in view of the Commission's discussion he had replaced them by "in virtue of" which seemed to him appropriate, though that expression might possibly be replaced by the words "according to". It would be for the Drafting Committee to find a solution.

17. As to the difference in wording between the Statute of the International Court of Justice and the article under consideration, he did not see any important difference in meaning between the French words "*violation*" and "*manquement*"; perhaps the latter was not so strong as the former. The Drafting Committee should consider whether the word "breach" would not be a suitable rendering of "*manquement*", or whether it would be better to say "*violation*" in the French version.

18. Lastly, he appealed to Mr. Bilge not to press for the transposition of sub-paragraphs (a) and (b). It was customary to mention the subjective before the objective criterion, and in the case in point it was necessary to find out whether certain conduct attributable to the State existed before determining whether it constituted failure to comply with an international obligation.

19. Mr. USTOR said he was satisfied with the ideas advanced by the Special Rapporteur in support of article 2, but wondered if it would not be simpler merely to say that an internationally wrongful act existed when an act of State was of such a character that it failed to comply with the international obligations of the State. That would eliminate the reference to "conduct", and in fact the whole subjective element would disappear, while the notion of an "act of State" would be explained in article 5 and the succeeding articles.

20. Secondly, he wondered whether article 2 should not precede article 1; chapter I would then begin by stating what was an internationally wrongful act and go on to describe the consequences of such an act.

21. Mr. KEARNEY said that the use of the expression "act of State" would raise certain technical complications, at least in the English version. The expression had been the subject of interpretation by the United States Supreme Court in the quite complicated case of *Banco Nacional*

de Cuba v Sabbatino,³ as well as decisions in numerous other cases. The phrase was used in a completely different sense in those cases, which concerned the issue whether a foreign court would review the validity of an act by a foreign government under its internal legislation. The same issue had been the subject of consideration in a number of cases in the courts of other States. 22. He suggested that the introductory phrase in article 2 be amended to read: "An act is internationally wrongful when:", which would be more consistent with the French version.

23. The CHAIRMAN, speaking as a member of the Commission, said he wondered whether the present formulation of article 2, with its subdivision into sub-paragraphs (a) and (b), might not be rather too schematic. After all, it was the "conduct" of the offending State which violated the international obligation and that "conduct" constituted a single element.

24. Mr. AGO (Special Rapporteur) said he thought it would be both difficult and inadvisable to draft article 2 as a single sentence, since it was essential to indicate that the conduct was attributed to the State in virtue of international law and to state two ideas, corresponding to two main chapters which would follow, namely, that the conduct was an act of the State and that it constituted failure to comply with an international obligation.

25. The expression "act of the State", must first be distinguished from the expression "act of State". In French, the expression "*fait de l'Etat*" denoted conduct attributed to the State, whereas the expression "act of State" expressed a different idea; it was, precisely, in order to avoid that expression that he had refrained from using the French term "*acte de l'Etat*".

26. The CHAIRMAN suggested that article 2 be referred to the Drafting Committee.

*It was so agreed.*⁴

ARTICLE 3

27.

Article 3

Subjects which may commit internationally wrongful acts

Every State may be considered the author of an internationally wrongful act.

28. The CHAIRMAN invited the Special Rapporteur to introduce article 3 in his third report (A/CN.4/246).

29. Mr. AGO (Special Rapporteur) said that when the Commission had examined his first draft of article 3⁵ at its twenty-second session, it had decided against using the words "capacity to commit internationally wrongful acts", because they might be interpreted as meaning that international law authorized its subjects to contravene the legal order it was establishing, which was absurd. The Commission had recognized that capacity was a subjective legal situation—a sort of power attributed to

² *Ibid.*, 1970, vol. II, p. 195.

³ 367 US 398 (1964).

⁴ For resumption of the discussion see 1225th meeting, para. 68.

⁵ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 197.

subjects of law—and that the capacity to act, for instance, to conclude treaties, was a concept entirely different from delictual capacity, which in fact contained the idea that in certain circumstances a person was not capable of committing a wrongful act. It had therefore been necessary to find suitable wording to express that idea in international law, and that was why he proposed saying that the State was capable of committing a wrongful act or, better, “may be considered the author of a wrongful act”.

30. The importance of the principle set out in article 3 was bound up with the principle of the equality of States. It was useful to establish clearly that in international law all States were equal in regard to the possibility of having an internationally wrongful act and the consequent responsibility attributed to them. It would, for example, be unthinkable for a State to argue that, because it had only just acceded to independence it was not capable of committing an internationally wrongful act. International law did not recognize anything equivalent to the status of a minor, in other words, of a person not possessing delictual capacity, as recognized in internal law. At its twenty-second session, the Commission had not contested that principle, though it had considered the possibility of introducing restrictions in two kinds of exceptional situations.

31. The first was that of the component states of a federal State which had preserved some measure of international personality, for example, the capacity to conclude international agreements in certain fields specified in the constitution. That was the case, for instance, of the Swiss cantons. Personally, he was not really convinced that such capacity had any consequences in regard to responsibility. Indeed, as the Commission would see later when it came to consider the question of attributability, it was to the federal State that failure by a member state to comply with an international obligation was generally attributed. Moreover, at the Vienna Conference on the Law of Treaties, the federal States had firmly opposed any allusion to the separate international personality of their component states. To simplify matters, it would be better not to take account of that situation in article 3.

32. The second exceptional situation was that in which the organs of one State acted in the territory of another State for and on behalf of the latter. For example, that was the case—increasingly rare, it was true—of States that were not yet independent or were under military occupation. There, too, he was willing to adopt the view, expressed by the Commission at its twenty-second session, that it would be better not to touch on that question in connexion with article 3.

33. In each case, everything depended on whom the failure to comply with the obligation should be attributed to. The Commission could confine itself to affirming the basic principle that there was no distinction between States in regard to the possibility of committing an internationally wrongful act. That rule was a consequence of the equality of States.

34. Mr. USHAKOV said he approved the principle stated in article 3, but had reservations about the wording. In the first place, the only subject of law referred to in

the article was the State, so the plural should not be used in the title. Next, the Commission was dealing with responsibility, yet no idea of responsibility was to be found in the present wording of article 3, which merely stated the principle that an internationally wrongful act could be attributed to a State.

35. What was needed, therefore, was a formula indicating both that a State could be the author of a wrongful act and that it could be held responsible for that act. As it stood, article 3 left some doubt about the responsibility a State incurred for any internationally wrongful acts it committed. Obviously, any State could be the author of an international offence, but if it was said that a State was responsible for a wrongful act, that clearly meant that it might commit such an act. The wording of the article should bring out the idea of responsibility.

36. Mr. YASSEEN said he was glad the Special Rapporteur had decided not to use the expression “capacity to commit internationally wrongful acts”, since it could have given rise to misunderstanding.

37. Like Mr. Ushakov, he noted that article 3 spoke not of responsibility, but of attributability, that was to say only of the legal link connecting an act or omission with a subject of law—the State. There was, in fact, no need to specify in article 3 that the State could be held responsible for the wrongful act attributed to it, since that principle had already been laid down in article 1, which stated that every internationally wrongful act of a State involved its international responsibility. Thus the problem was solved.

38. Similarly, there was no need to devote an article to attribution itself, independently of its effects, since article 2 already provided that conduct consisting of an action or omission could be attributed to the State in virtue of international law.

39. He agreed that there was no need to cover the exceptional situations mentioned by the Special Rapporteur in article 3, assuming it was retained, since obviously one could not attribute to a State an act which it had not been capable of committing. It should be clearly understood, however, that one of the consequences of sovereignty was to make States equal in regard to internationally wrongful acts, and that the concepts of “majority” and “minority” did not exist in international law.

40. Mr. AGO (Special Rapporteur) said that, as Mr. Yasseen had clearly seen, article 3 was concerned with the attribution of a wrongful act to the State, not with the determination of responsibility. It was intended to express the idea that a State could not claim, on grounds of youth, that it did not possess the capacity to have an internationally wrongful act attributed to it. Viewed from that angle, attributability was the counterpart of sovereignty.

41. The problem Mr. Ushakov had raised was different; it was the problem of capacity to be held responsible. If the Commission wished to draft an article on that point, the content of the rule it expressed would have to be different, for although every State was capable of committing an internationally wrongful act, it did not follow that it could always be made to suffer the consequences of the wrongful act attributed to it.

42. Where attribution was concerned, it was sovereignty that counted. In the case of responsibility, it was freedom, in other words the conditions which enabled a sovereign State to act freely. If a State acted under constraint or the control of others, the responsibility would be attributed to another State. The theory had been worked out with particular regard to situations which were now rare—for instance, the case of protectorates—though they still existed in the case of military occupation. If the organs of an occupied State committed a wrongful act, it was the State under whose control the act had been committed that would be held responsible. The difference between attribution and responsibility was that in the case of attribution there were no exceptions to the rule, whereas in the case of responsibility exceptions were inevitable.

43. Mr. SETTE CÂMARA said that article 3 dealt with the problem of what was commonly known as the “international delictual capacity” of the State. He congratulated the Special Rapporteur on the very ingenious manner in which he had drafted the article so as to avoid using the word “capacity” with reference to a breach of an international obligation, while at the same time, by the use of the passive voice, ruling out any unreasonable suggestion of a faculty to commit wrongful acts.

44. The Special Rapporteur had explained that he had considered it necessary to include in the draft an express provision to the effect that no State, whatever the circumstances, might claim that it was not capable of committing a wrongful act. The concept of limitations on delictual capacity existed, of course, in municipal law with regard to minors and persons of unsound mind. International law, however, did not know any concept of that kind.

45. The Special Rapporteur had been right in disposing of the possibility that a component unit of a federal State might be deemed to have committed an internationally wrongful act. Such remnants as still existed of the international personality of states members of federations were mere historical curiosities and did not merit consideration in article 3.

46. In his third report the Special Rapporteur had considered the different case of the territory of a State in which another State, or subject of international law, acted in its place (A/CN.4/246, para. 83). In that case, the responsibility for wrongful acts would be transferred to the State that was acting on behalf of the State to which the territory belonged. No one could quarrel with the Special Rapporteur's conclusions on that point.

47. It was obvious that the so-called “international delictual capacity” was not confined to States, but pertained to all subjects of international law. An international crime could be committed even by an individual, as in the traditional case of piracy and the modern case of war crimes. The Special Rapporteur had, however, been right in not going into those problems, but confining his attention to the topic of State responsibility. Nevertheless, a passage should be included in the commentary to make it clear that the absence from the draft of any mention of the “delictual capacity” of subjects other than States, such as insurgents or international organizations,

did not mean that those subjects could not be held responsible for the commission of internationally wrongful acts.

48. Mr. RAMANGASOAVINA said he had no criticism of the principle set out in article 3, which was the corollary of article 1. It was logical that a sovereign State should be held responsible for any wrongful act of which it was the author. But article 3 stated a truth so obvious that it might be asked whether it was not superfluous.

49. The use of the word “subjects” in the title made it broader in scope than the body of the article, which related solely to the State. If the article was retained, therefore, its title should be brought into line with the statement of principle.

50. Mr. ELIAS said that during the Commission's discussion of the Special Rapporteur's earlier draft in 1970,⁶ several members had objected to any formulation based on the concept of “capacity” to commit internationally wrongful acts. They had taken that position despite the Special Rapporteur's explanation that the notion of capacity was not being used in the sense in which it was used, for example, in article 6 of the Vienna Convention on the Law of Treaties.⁷

51. The Special Rapporteur had then made it clear that he wished to rule out the notion that a State might be able to escape liability by arguing that it was of recent creation or that its freedom of action in international relations was restricted. He had also wished to dispose of the problem of protectorates and of component members of a federal union.

52. The amended text now introduced by the Special Rapporteur had considerably clarified the position, but had not completely dispelled the doubts expressed in 1970. He did not wish to re-open the discussion on the question of component members of federal unions, but he had serious doubts about the explanations given in paragraph 82 of the Special Rapporteur's third report. It was suggested there that, in the event of failure of a component member of a federal State to fulfil an international obligation directly contracted by that component member, such failure might be attributed, at the international level, to the federal State rather than to its component member.

53. But it was not at all certain that that would be the position in all cases. For instance, there was the problem which had arisen recently when the Province of Quebec had purported, under the British North America Act of 1867, to enter into a cultural agreement with France concerning education. In the hypothetical case of liability being incurred by Quebec for a breach in that connexion, it would hardly seem right to place the responsibility on the shoulders of the Federal Government of Canada, which had protested against the conclusion of the agreement at the time. In any case, he did not think it was necessary to pursue that matter for purposes of the formulation of article 3.

⁶ See *Yearbook of the International Law Commission*, 1970, vol. I, pp. 175-178, 181-192 and 209-227.

⁷ 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. 290.

54. The Special Rapporteur had also drawn attention to the situation which could arise when, in the territory of a given State, another subject of international law was acting in its place (A/CN.4/246, para. 83). The subject in question could be an international organization, as had been the case of the United Nations in the Congo, where the police forces of a number of countries had been deployed by the Organization. The Special Rapporteur's third report indicated that international responsibility in that case rested with the Organization, rather than with the State part of whose sovereignty was being temporarily exercised by the United Nations.

55. He would not dwell on the title of article 3, which would obviously be adjusted when the final formulation was adopted, but wished to examine the text in the light of the statement that what it sought to express was "primarily the idea that every State is on an equal footing with others with regard to the possibility of having its conduct characterized as internationally wrongful" and that where all the conditions for the existence of an internationally wrongful act were present, no State could hope to prevent its own actions or omissions from being regarded as reprehensible by international law (A/CN.4/246, para. 81). As he saw it, that essential point appeared to be already covered by the absolute terms of article 1, which laid down that "Every internationally wrongful act of a State involves the international responsibility of that State".

56. In the context of the law of treaties, it was appropriate to deal with the question of capacity to conclude treaties; but in the case of internationally wrongful acts it was not essential to stress the question of so-called "capacity". His own suggestion would be that article 3 should be redrafted in terms of liability, which was the correlative of power, on some such lines as "Every State is liable for its internationally wrongful acts". That formulation would cover the two points raised by Mr. Ushakov.

The meeting rose at 1.5 p.m.

1208th MEETING

Thursday, 17 May 1973, at 10.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 3 (Subjects which may commit internationally wrongful acts) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 3 in the Special Rapporteur's third report (A/CN.4/246).

2. Mr. TSURUOKA said he approved of the principle stated in article 3, which he could accept as it stood. Although it was clear that that principle was a consequence of the equality of States, he did not believe, like some other members of the Commission, that there was no need to formulate it expressly in the draft articles. It had its place in the part of the draft devoted to general principles.

3. Article 3 was, however, open to two criticisms: first, although it appeared to be a corollary to article 1, it was differently constructed; secondly, it did not refer to responsibility, but to the attribution of a wrongful act to the State, that was to say, only to the link attaching an act to the State. To clarify the idea it was desired to express, a supplementary article should be drafted on the attribution of responsibility, and if such an article was not included immediately after article 3, it should at least be indicated in the commentary that the matter would be separately dealt with later.

4. With regard to the drafting, the word "considered" could be deleted for the sake of simplicity.

5. Mr. KEARNEY said the discussion had shown that article 3 was a difficult one. In his view, it stated not so much a legal rule as a basic principle on which international society functioned, namely, that no State, whatever its circumstances, could escape the application of the rules of international law on State responsibility.

6. The Special Rapporteur had cited as an example the case of a new State, which could not claim that it was so inexperienced in international affairs that it could not be held responsible for its internationally wrongful acts. It was equally possible to imagine the case of a State that was so old and exhausted that it could not be held responsible. Other grounds could also be imagined for claiming exoneration.

7. The subject of the present discussion was a fundamental principle of international order, namely, that the obligations of international law must apply equally to all States without exception. There were many theories regarding the basis for general acceptance of international law. He himself favoured the simple proposition that acceptance was essential to the maintenance of peace and respect for human dignity.

8. He was in favour of retaining in the draft the idea expressed in article 3, despite the suggestion by some members that it was so basic and obvious that it need not be stated. The idea was not covered by the provisions of article 1. The statement that every internationally wrongful act of a State involved its international responsibility left open the question of what constituted an internationally wrongful act for that State. Article 2 went some way towards providing an answer to that question by stating that a State committed an internationally wrongful act when it failed to comply with an international obligation incumbent upon it. It did not, however, provide a complete answer, because the question still arose whether, under certain circumstances,¹ a State was considered not to be required to comply with its

international obligations because its character as a State, or some element thereof, afforded a defence. He believed that no such excuse should be authorized, and that the proposition could only be stated in the form of the basic principle to which he had referred.

9. With regard to the formulation, a number of suggestions had been made during the discussion. Possibly a preamble would be the best place for so fundamental a principle, but the Commission unfortunately did not prepare preambles for its drafts. The idea should therefore be incorporated in the text of the articles. His own suggestion, for the consideration of the Drafting Committee, would be to delete article 3 and transfer its contents to article 1 by redrafting that article on the following lines:

“In consequence of the application of the rules of international law to all States equally and without exception, every internationally wrongful act of a State involves the international responsibility of that State”.

10. Mr. HAMBRO said that, after studying the Special Rapporteur's explanations in section 3 of his third report, he was strongly in favour of article 3.

11. It had been suggested during the discussion that it was not necessary to state the principle embodied in article 3, because there was general agreement on it. That approach revealed a dangerous frame of mind. Carried to its logical conclusion, it would lead to a division of the rules proposed for codification into two categories, one comprising rules which were so obvious that they did not need to be stated, and the other rules that were controversial and therefore should not be codified. Certain truths were worth stressing time and time again. He was reminded of Ibsen's saying that the average life-span of any well-constructed truth was about fourteen years.

12. With regard to the formulation of article 3, some of the suggestions appeared to over-simplify the problem and to ignore the distinction which the Special Rapporteur had been careful to make between the commission of an internationally wrongful act and the attribution of the act to the State.

13. He suggested that the Drafting Committee should try to avoid using the word “may”, which normally had a permissive connotation.

14. Although he would not oppose the previous speaker's suggestion that article 3 should be combined with article 1, his own suggestion would be to merge it with article 4. Using the French text of the two articles, he would accordingly suggest a wording on the following lines for the combined new article:

Chaque Etat est susceptible d'être considéré comme l'auteur d'un fait internationalement illicite et son droit interne ne peut être invoqué pour empêcher qu'un fait de cet Etat soit qualifié d'illicite selon le droit international. [“Every State may be considered the author of an internationally wrongful act and its municipal law cannot be invoked to prevent an act of that State from being characterized as wrongful in international law”].

15. A provision of that kind would underline the equality of the rights and obligations of all States by ruling out all pretended grounds of exoneration.

16. Mr. REUTER said that the basic question was whether the idea expressed in article 3 should be the subject of a separate article, or whether it should be expressed either in article 1 or in an article merging articles 3 and 4. That raised problems of substance as well as drafting. But the main problem was to decide exactly what was the idea to be expressed or, more precisely, at what level of generality the Commission wished to define the idea which all members had in mind.

17. The lack of concordance between the title and the content of article 3 showed that the Special Rapporteur himself had been hesitant. His true thought seemed to be discernible in the title. What he had meant to say was that responsibility could not be dissociated from law; as soon as there was legal personality, there was responsibility. If that was the general idea, it was on the lines of the title of the article that it should be expressed.

18. But if the Commission did not wish to express the idea on such a general level and preferred to confine itself to States, the title of article 3 would have to be changed. The idea to be expressed would then no longer be the same. The Special Rapporteur had produced other versions of the idea, one of which, that might perhaps reflect his deepest thought, was linked to article 2. What had to be said was that every State could have attributed to it conduct constituting failure to comply with an international obligation. It would be possible to generalize still further and, going back to article 1, to say that every State was subject to the general principles of responsibility, in other words that the law of responsibility applied to every State. It was in that direction that the Commission should seek a solution.

19. The question was not purely theoretical. It had, indeed, been said that the political or economic situation of a State did not exempt it from the rule of responsibility, that was to say that responsibility was linked with sovereignty. But the jurisprudence showed that underdevelopment, and certain political situations, had sometimes been taken into consideration. For the sake of caution, it would therefore be better to express the underlying principle of article 3 in the most general form possible.

20. With regard to the drafting, the French version should not speak of “*Chaque Etat*”, but “*Tout Etat*”. Again, the word “*considéré*” was not felicitous and the words “*comme l'auteur*” should read “*comme auteur*”, since several States could be authors of the same offence. Moreover, the word “*auteur*” was not used in the other articles of the draft and was not appropriate.

21. Mr. BARTOŠ said he shared Mr. Ushakov's opinion¹ and hoped the Special Rapporteur and the Drafting Committee would take it into account when recasting the article.

22. As to whether article 3 should be retained, although he was generally in favour of limiting the number of

¹ See previous meeting, paras. 34 and 35.

articles, he thought that in the present case the most important point was to be absolutely clear and not to put several ideas into one and the same article. Articles 1, 2 and 3 formed a logical sequence which would be less clear if the ideas they contained were not expressed separately.

23. Mr. TAMMES said that the purpose of article 3 had been illustrated by the Special Rapporteur by an example: it would prevent a very new State from successfully invoking the immaturity or inadequacy of its structure to disclaim the authorship of an internationally wrongful act. In that respect, article 3 ran parallel with article 4, which precluded any State from invoking its municipal law to dispute the international wrongfulness of its conduct. Articles 3 and 4 were thus placed in a logical order in chapter I; whence the suggestion by Mr. Hambro that they should be merged. The practice behind article 4, however, was very rich, whereas there were no clear precedents to back article 3. He was therefore inclined to favour retaining article 4 as a separate article, since it dealt with an issue which had its roots in the long history of the doctrine of international law.

24. Perhaps the link that had been sought with article 1 could be established by making a slight change in the wording of that article to make it read: "Every internationally wrongful act of any State involves the international responsibility of that State" instead of "Every internationally wrongful act of a State...". The wording suggested by Mr. Kearney to cover that point was, of course, much fuller.

25. As it stood, article 3 dealt with sovereign States, so that the component units of a federal union were not considered as possible authors of an internationally wrongful act, any more than other political entities that were not sovereign States. It might be useful, however, to bear in mind the situation which had been examined at the previous session during the discussion on the topic of Succession of States in respect of treaties. Cases could occur in which, during the process of formation of a union of States, the participating entities should still be classed as sovereign States under international law, in contrast with the component units of a federation, even though they could no longer be considered as the authors of all their external acts.

26. Mr. THIAM said that the principle in article 3 was so fundamental that at first sight it seemed unnecessary to state it in the text. It was obvious that if States were equal in law they were also subject to the principle of responsibility. The important point was not whether that should be expressly stated, but whether certain restrictions should not be applied to the principle later. It was mainly with the situation of newly independent States in mind that the Special Rapporteur had thought it necessary to state that principle, although it was often the more powerful States which tried to evade their obligations.

27. Whether the Drafting Committee decided to retain article 3 or not, there was bound to come a time when the Special Rapporteur would have to say whether there were circumstances which diminished the responsibility of a State or even relieved it of responsibility altogether.

28. Mr. USHAKOV said he did not agree with the Special Rapporteur that a State which had committed an internationally wrongful act might, in certain circumstances—for example, military occupation—not be held responsible for it. When reference was made to a State, it was always a sovereign State that was meant. When article 6 of the Vienna Convention on the Law of Treaties said that every State possessed capacity to conclude treaties, it did not mean that an occupied State had that capacity. It was always understood that what meant was a sovereign State subject to international law. In that sense, every State was capable of being responsible in accordance with international law and was capable of committing an internationally wrongful act. Reversing the reasoning, it could be said that an occupied State was not responsible since it was not free and, at the same time, that it was not capable of committing an internationally wrongful act. The absence of responsibility precluded the possibility of committing a wrongful act. Consequently, it should be emphasized in the draft that the word "State" always meant a "sovereign State".

29. The Special Rapporteur had recognized that article 3, as drafted, did not relate to responsibility, which he considered to be a separate question. He (Mr. Ushakov) did not see any need to dissociate the wrongful act from responsibility. In his opinion, the reasoning of article 3 should be reversed. For why say that every State was capable of committing an internationally wrongful act, but that that did not mean that it was responsible, when if it was said that every State could be held responsible for an internationally wrongful act, that implied that it was capable of committing one? It would therefore be sufficient to express the idea in one and the same article.

30. Mr. BILGE said he did not agree with those who cast doubt on the usefulness of article 3. To say that a State could be held responsible for a wrongful act and to say that an offence could be attributed to it, were two different things. Perhaps the drafting might be changed, but the idea should be retained.

31. The article was not intended merely to state an evident truth, but to preclude the possibility of a State invoking certain circumstances in order to escape the attribution. In view of the failure of the first attempts to codify the law of State responsibility, there was no harm in specifying what those circumstances were, and it was with that idea in mind that the Special Rapporteur had wished to remove all ambiguity. Hence the article was useful.

32. With regard to the drafting, a term would have to be found other than "author", which was not used in the other articles. Subject to that amendment he could accept article 3, as completed by article 4.

33. Sir Francis VALLAT said he shared the general agreement, revealed by the discussion, that a principle such as that set out in article 3 was basically a proper principle of international law.

34. The difficulties which had arisen during the discussion related to the question whether that principle should be stated in the draft and, if so, in what manner. He himself believed that the principle should be stated. The

reason was that if, in the future, States were asked to apply the general provision in article 1, a State might claim that, because of its own particular circumstances, it did not fall within that general provision. Experience showed that grounds not unlike those described by Mr. Kearney had been invoked in the past as an excuse for not applying a general rule of international law.

35. Article 3 could be said to be a corollary of article 1; the provisions of the one could be said to follow from those of the other. Article 3 was closely linked in principle to the very concept of State responsibility; it was almost as much a starting point for the Commission's work on State responsibility as article 1 itself.

36. For those reasons, he would favour a rearrangement that would merge articles 1 and 3 so as to place in a sub-paragraph (a) the positive principle stated in article 1 and in a sub-paragraph (b) the negative principle now contained in article 3.

37. He did not favour the suggestion that article 3, which dealt essentially with attribution, should be combined with article 4, which dealt with the characterization of an act. The contents of article 4 were connected with article 2 (Conditions for the existence of an internationally wrongful act) rather than with article 3.

38. His suggestion that article 3 should be combined with article 1 would have the additional advantage of eliminating the difficulty created by the present title of article 3, in which the word "subjects" was used in the plural in a manner seeming to imply that the article was exhaustive, although, of course, its provisions were far from dealing with all the subjects which could commit internationally wrongful acts. If the two articles were merged, the present title of article 1 might or might not have to be adjusted in order to serve as a title for the combined article.

39. With regard to the drafting, he found the word "author" unsatisfactory. Moreover, the language used in the English version did not fully reflect the French original; for example, the words "may be considered" did not render adequately the meaning of the French "*est susceptible d'être considéré*".

40. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had been justified in dealing separately with the two situations envisaged in articles 1 and 3. The first of those articles stated that every internationally wrongful act of a State involved its international responsibility. The second dealt with the so-called "capacity" to commit internationally wrongful acts.

41. In the form in which it was drafted, article 3 appeared more as a statement of fact than as a legal rule, partly because of the use of the term "author". The content of article 3 did not add anything to the body of legal rules that would govern State responsibility. If the Commission did not include it in the draft, the legal position would remain the same. It would still be true that no State could, for example, invoke its inexperience to claim that its wrongful act could not be attributed to it.

42. He agreed with Mr. Hambro that the fact that the content of article 3 expressed a generally accepted truth

was not a sufficient reason for dropping it. The article would serve to stress an existing situation. He himself believed that the Special Rapporteur's purpose in article 3 had been to make it clear that no State could escape being considered the author of an internationally wrongful act. That being so, he would suggest that article 3 be couched in negative terms, as article 4 already was.

43. It might be possible to go even further and combine the two articles in a single provision to the effect that neither the municipal law of a State nor any other circumstance could be invoked to prevent an act of that State from being characterized as wrongful in international law.

44. Mr. USTOR said that the commentary to article 3 should mention all the valuable ideas which had been put forward during the discussion. The provisions of the article itself, however, had to be brief.

45. He was in favour of retaining article 3. Its provisions, like those of article 6 of the Vienna Convention on the Law of Treaties,² were a corollary of the principle of the sovereign equality of States. The inclusion of article 6 in the Vienna Convention was an argument in favour of including article 3 in the present draft.

46. He also believed that the provisions of article 3 deserved to be placed in a separate article, rather than combined with those of article 4.

47. As to the formulation, the article might begin: "Every State is capable of being considered...". It might also be useful to add the thought expressed by Mr. Ushakov and Mr. Elias that no State could escape responsibility for any internationally wrongful act that could be attributed to it.

48. It was true that the provisions of article 3 overlapped those of article 1, but only to a limited extent. Article 1 laid down that every internationally wrongful act of a State involved its international responsibility, whereas article 3 provided that every State could be held responsible.

49. Mr. AGO (Special Rapporteur), summing up the discussion on article 3, said that the difficulties which had arisen were mainly due to the fact that the concept on which that provision was based, namely, delictual capacity, was unknown to some legal systems.

50. It was clear that the wording of the proposed article was not entirely satisfactory, as Mr. Reuter had pointed out; but in view of the Commission's previous discussion, he had been obliged to adopt a positive formula beginning with the expression "Every State", although he would have preferred something close to the Chairman's suggestion.

51. As to the substance, he would remind members who wished to affirm the principle that every State must bear the responsibility for its own wrongful acts, that that principle had already been clearly stated in article 1. The idea expressed in article 3 was quite different and should be retained, though he would prefer to drop it

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. 290.

rather than have to incorporate it in article 1 at the risk of impairing the clarity of that provision.

52. As Mr. Hambro had suggested, it would be simpler to combine articles 3 and 4, although article 4 stated such a classical principle, so hallowed by international jurisprudence and State practice, that any change in the scope of that article would reduce its effectiveness and might give the impression that the Commission had been reluctant to confirm the principle it stated. He was therefore rather opposed to merging articles 3 and 4.

53. Strictly speaking, the concern expressed by Mr. Thiam related only to a later stage of the Commission's work. Admittedly, extenuating circumstances would have to be taken into account when the Commission examined the consequences of an internationally wrongful act, particularly the nature and amount of reparation, but for the time being that aspect need not be considered. It was only necessary to affirm the basic principle that there was no State to which an act characterized as wrongful could not be attributed.

54. Most members agreed with him that it would be better to reaffirm the principle stated in article 3, even though some thought it self-evident. It should first be laid down as a principle that any internationally wrongful act by a State engaged its international responsibility; that had been done in article 1. But a State might try to evade the international responsibility which was the necessary consequence of an internationally wrongful act by claiming that its circumstances were such that it could not commit a wrongful act. It was for the Commission to decide whether it should deal with that situation.

55. The wording proposed by Mr. Kearney tended to give a philosophical basis to the rule in article 3. Personally, he thought it would be better not to do that, so as not to run the risk of restricting the scope of the provision. On the other hand, he saw no immediate objection to the idea put forward by Sir Francis Vallat, of adding a second paragraph to article 1 to replace the present article 3, or, better, reversing the order of articles 2 and 3.

56. The real problem was how to express the idea contained in article 3. At present there was certainly a contradiction between the title and the content of that provision, which was explained by the successive changes that had been made to it. In its present form, the title might give the impression that the Commission considered that States were not the only subjects of international law capable of committing internationally wrongful acts, whereas it had decided to confine itself to the study of State responsibility. Hence the title must be amended.

57. As to the wording of the article, there were several possibilities. Mr. Reuter favoured a positive formula such as "Every State may have an internationally wrongful act attributed to it", whereas the Chairman had stated his preference for a negative formula, which might read: "No State may escape the attribution to itself of an internationally wrongful act if the necessary conditions are satisfied, or escape the resultant responsibility". Such a detailed negative formula would also allay the concern of Mr. Ushakov and Mr. Ustor. Personally, he did not

attach very great importance to article 3, though he thought it preferable to restate the principle it contained. It would now be for the Commission or the Drafting Committee to examine the various formulas proposed and adopt one of them.

58. Mr. YASSEEN said that any negative wording which covered both attributability and responsibility might encroach on another sphere, namely, that of justification or perhaps of grounds for exoneration. It did not seem feasible to lay down a hard and fast rule without taking justification or grounds for exoneration into account.

59. Mr. AGO (Special Rapporteur) said he had always considered that the circumstances mentioned by Mr. Yasseen excluded the wrongfulness of the act, not merely the responsibility for it. If it were otherwise, article 1 would not be satisfactory. For if it were accepted that in such circumstances there could be a wrongful act without responsibility, that would give the impression that there was responsibility when a wrongful act was committed, but only provided that certain circumstances were absent.

60. Mr. USHAKOV, supported by Mr. YASSEEN, proposed that, in accordance with the Commission's usual practice, article 3 should be referred to the Drafting Committee.

61. Mr. BILGE said that the Drafting Committee should confine itself to seeking a formula relating to attributability, since there was already a satisfactory provision concerning responsibility.

62. The CHAIRMAN suggested that it would be better to refer article 3 to the Drafting Committee on the usual terms.

*It was so agreed.*³

The meeting rose at 12.35 p.m.

³ For resumption of the discussion see 1225th meeting, para. 57.

1209th MEETING

Friday, 18 May 1973, at 10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]
(continued)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 4 in his third report (A/CN.4/246).

ARTICLE 4

2. Article 4

Irrelevance of municipal law to the characterization of an act as internationally wrongful

The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law.

3. Mr. AGO (Special Rapporteur) said that article 4 was important because it asserted the independence of the international legal order from the internal legal order in regard to the characterization of an act as internationally wrongful. Certain aspects of that independence had already become apparent during the examination of previous articles.

4. For instance, it had been established that the attribution of conduct to a State, irrespective of whether it was wrongful or not, must be made under international law, not under internal law. There were, indeed, acts which were not considered as acts of the State under internal law, but were so considered under international law. In attributing certain conduct to a State, international law was sometimes guided by internal law, but it could depart from internal law if it was considered preferable to follow a different course. It was certain that attribution of conduct to a State as a subject of international law was not the same things as attribution of conduct to a State as a subject of internal law.

5. The same independence of international law came into play when an act was to be characterized as internationally wrongful. In the internal legal order there were acts which were not wrongful and sometimes even resulted from the fulfilment of obligations, but were regarded as wrongful in international law. For example, a judge who applied a law promulgated by a State was doing his duty under the national law, but the judgement he delivered might constitute an internationally wrongful act if the application of the law in question was not in conformity with the requirements of a treaty to which that State was a party.

6. The independence of the internal and international legal orders had two consequences. First, the conduct of an organ of a State might be considered wrongful in internal law, but not in international law, since no rule of international law required the State concerned to abstain from such conduct. International jurisprudence provided many examples of such situations. Mixed commissions had frequently had to reject claims because they were based on branches of internal law which did not constitute failure to fulfil international obligations. In such cases, the commissions had referred the claimants back to the national courts. It should be noted, however, that such situations could involve violation of an international obligation if it could be established that, besides a breach of internal law, there was a denial of justice consisting, for example, in not giving an alien an opportunity to assert his rights before the national courts.

7. Both international jurisprudence, illustrated by the advisory opinion of 4 February 1932 of the Permanent Court of International Justice concerning the *Treat-*

ment of Polish Nationals in Danzig,¹ and the practice of States had established that a violation of an international obligation did not necessarily follow from a mere breach of internal law. The 1930 Codification Conference had also recognized that principle.² The preparatory Committee for that Conference had submitted a questionnaire to States, called a request for information, in which that problem had been raised, and the replies from governments had been very valuable in the preparation of the present draft. The principle in question had been widely recognized by States and by private persons and private institutions which had prepared drafts codifying the law of State responsibility.

8. The proposition that a breach of internal law did not necessarily entail a breach of international law had as its counterpart the proposition that the absence of a breach of internal law did not preclude the existence of an internationally wrongful act if an international obligation was violated. The latter principle was, in that connexion, the second and most important consequence of the independence of the international legal order from the internal legal order. It had been one of the cornerstones of the jurisprudence of the Permanent Court of International Justice and of the International Court of Justice. It was useful to refer to the observations by Lord Finlay on the advisory opinion of the Permanent Court, delivered in 1923, on the question of the *Acquisition of Polish Nationality*.³ Lord Finlay had maintained that just as a State could not rely on a provision of its internal law as an excuse for violating an international obligation, neither could it rely on a deficiency in its internal law. Both arbitral awards and the practice of States had widely recognized the second principle following from the independence of the internal and the international legal orders.

9. The rule which prevented the pleading, in international law, of any exception based on the conformity of the State's conduct with its own internal law had been generally recognized by the 1930 Codification Conference, for which it had been stated as a basis of discussion in the following form: "A State cannot escape its responsibility under international law by invoking the provisions of its municipal law". In 1949, the International Law Commission had drawn up a draft Declaration on rights and duties of States,⁴ article 13 of which provided that: "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty". A similar formulation was to be found in article 1, paragraph 3, of the preliminary draft prepared in 1957 by Mr. García Amador, the Special Rapporteur on the topic of State responsibility: "3. The State may not plead any provision of its municipal law for the purpose of repudiating the responsibility which arises

¹ P.C.I.J., Series A/B, No. 44, pp. 24 and 25.

² See League of Nations, *Acts of the Conference for the Codification of International Law* (1930).

³ P.C.I.J., Series B, No. 7, pp. 22-26.

⁴ See *Yearbook of the International Law Commission*, 1949, p. 287.

out of the breach or non-observance of an international obligation".⁵ As to the Vienna Convention on the Law of Treaties, article 27 was worded as follows: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46". That principle also found expression in most of the codification drafts on the responsibility of States prepared by private persons or private institutions.

10. He was therefore proposing an article based on numerous precedents, particularly from jurisprudence, and modelled as closely as possible on article 27 of the Vienna Convention on the Law of Treaties. To avoid any lacuna or ambiguity, it was important to avoid the expression "internal legislation". Certain States might, indeed, seek a loophole in the fact that it was not their internal legislation, but administrative acts, judgements or other acts of the judicial authorities which were involved. For that reason, the expression "internal law" was preferable; it covered not only legislative provisions, but also constitutional rules, the supremacy of which over their ordinary laws was recognized by certain States, which might be tempted to invoke them as a means of escape.

11. Mr. RAMANGASOAVINA said the Special Rapporteur was to be congratulated on his excellent drafting and presentation of article 4. The provision was important, because it confirmed a recognized principle of international law which was solidly based on jurisprudence and practice.

12. It was essential that members of the international community should accept certain limits to their sovereignty, though reserving their laws and their constitution, which came within the "reserved domain". Just as in the internal order each State set its constitution above all other legislative provisions, so in the international order the United Nations Charter provided, in Article 103, that in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the former obligations prevailed. A similar principle was stated in article 27 of the Vienna Convention on the Law of Treaties. In addition, most national constitutions contained a provision confirming the precedence of international treaties over internal law.

13. The principle stated in article 4 was therefore entirely necessary. It must be acknowledged, however, that in view of the present state of public international law, its validity was not absolute. Although, under the terms of article 38 of its Statute, the International Court of Justice applied international conventions, international custom, the general principles of law recognized by civilized nations and the teachings of publicists, it was not unusual for States to contest the effect of those foundations of its work.

14. For instance, certain customs that had been established for centuries were sometimes challenged. The *Lotus* case⁶ was a famous example. Collisions at

sea had long been recognized as coming under the jurisdiction of the flag State. But the penal code of Turkey authorized the Turkish courts to try those responsible for collisions occurring in its territorial waters. The Turkish courts had therefore declared themselves competent to try the officer of the watch of the ship *Lotus*, when it had called at a Turkish port. France, the flag State, had invoked the custom he had referred to, but the Permanent Court had decided in favour of Turkey, which had invoked its internal law. In that case, it seemed that in the view of the Permanent Court the custom had not been sufficiently well established. It should be noted, however, that it had subsequently been confirmed by the Geneva Conference on the Law of the Sea.⁷ At the present time certain States were claiming air space and territorial sea which went beyond the recognized limits.

15. It was also to be feared that States were not always ready and willing to agree to certain of their acts being characterized as internationally wrongful. He wondered what authority would be competent so to characterize an act and to settle disputes. Difficulties could also arise when a State tried to exonerate itself, not by invoking internal law, but on purely political grounds.

16. Lastly, the title of the article was not very satisfactory. It might perhaps be redrafted to read "Non-application (or non-applicability) of internal law for preventing the characterization of an act as internationally wrongful".

17. Mr. TSURUOKA said he had no difficulty in accepting the idea expressed in article 4, which had a firm basis in jurisprudence and State practice. It was necessary to include that principle in the draft, if only to recall it to States, which were sometimes tempted to invoke their internal law. The reminder was less necessary for those few States which, like Japan, recognized in their constitutions the supremacy of international law over internal law.

18. With regard to the wording of the article, he would have preferred something which read less like a rule of procedure and better expressed the substantive rule confirmed by the article. He therefore suggested that the words "be invoked to" and "characterized as" be deleted, so that the provision would read: "The municipal law of a State cannot prevent an act of that State from being wrongful in international law".

19. It was understandable that the Special Rapporteur should have diverged from the wording used in judicial and arbitral decisions, since he was engaged in codification, not in compiling judicial decisions.

20. Mr. YASSEEN said that the subject under study was of an eminently international character. Everything took place within the framework of the international legal order: an internationally wrongful act was linked, by virtue of international law, to a State as a subject of international law. Consequently, no other legal order should be invoked to characterize the act as wrongful.

⁶ *Ibid.*, 1957, vol. II, p. 105.

⁷ *P.C.I.J.*, Series A, No. 10.

⁷ See article 11 of the Convention on the High Seas, in United Nations, *Treaty Series*, vol. 450, p. 88.

The Special Rapporteur had given a masterly exposition of the problem by going back to all the existing sources.

21. But although the idea on which article 4 rested was uncontested and incontestable, the form of the article perhaps left something to be desired. Its wording would be appropriate for a judicial decision or an arbitral award, but seemed rather limitative as the expression of a codified general rule. Article 4 should not refer solely to cases in which the internal law of a State was invoked to prevent a characterization. The formula proposed for the title covered a greater number of cases than the text of the article.

22. There was another aspect of the rule in question which should not be overlooked: a State could not rely on the internal law of another State to claim that an act by that State constituted an internationally wrongful act. It was therefore necessary to stipulate the irrelevance of internal law both for affirming and for contesting the internationally wrongful character of an act by a State. That was a point the Drafting Committee should consider.

23. He approved the use of the expression "*droit interne*" which could be taken to include both the existing provisions and the deficiencies of the law of a State.

24. Mr. KEARNEY, speaking of the draft articles in general, said that the titles seemed rather too long, particularly the title of article 8 (A/CN.4/246/Add.3, para. 197), and that it might be advisable to shorten them.

25. The principle stated in article 4 was absolutely essential in the modern development of the doctrine of State responsibility. He had some doubts, however, about the use of the word "characterized" in the English version, which seemed rather vague; perhaps the Special Rapporteur had gone too far in his attempt to make the article as universal as possible.

26. As defined in article 2, an "internationally wrongful act" had two aspects: first, attribution to the State of an act or omission, and secondly, failure to comply with an international obligation. When article 4 stated that the municipal law of a State could not be invoked to prevent an act of that State from being characterized as wrongful in international law in any circumstances, that involved the aspect of attribution and might create difficulties in connexion with the subsequent articles, particularly article 10 (Conduct of organs acting outside their competence or contrary to the rules concerning their activity) (A/CN.4/264). Paragraph 2 of article 10 read: "However, such conduct is not considered to be an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest". Yet in order to determine the functions of the organ in question, it would surely be necessary to refer to the internal law of the State, and the possibility of doing so should not be ruled out in article 4.

27. He suggested that the words "municipal law" in article 4 be replaced by "internal law", which was the expression used in the Vienna Convention on the Law of Treaties, and that the text of the article be replaced by the following: "The internal law of a State cannot,

except as specifically provided in these articles, be invoked as a defence against the attribution of conduct to that State or against the violation of an international obligation of that State".

28. Mr. SETTE CÂMARA said that the characterization of an act of State as an internationally wrongful act, that was to say the ascertainment of the fact that a State had failed to fulfil an international obligation, was made by reference to international law alone. The classical principle that municipal law could not be invoked as the basis for an exception to the rule of responsibility was beyond dispute. In support of his text, the Special Rapporteur had cited an impressive number of international decisions, mainly of the Permanent Court of International Justice, and a series of categorical statements made by States on different occasions, as well as doctrinal opinions, both of writers and of academic institutions.

29. He agreed with Mr. Kearney that the title of article 4 was too long and suggested that it be replaced by the words "The internationally wrongful act and municipal law". That would offer the advantage of avoiding the use of the word "irrelevance", which seemed to him too weak to express the meaning of the principle. It was more than "irrelevance", since it meant the exclusion of any exception based on provisions of national law.

30. Article 5 (A/CN.4/246/Add.1, para. 135), which dealt with the attribution to the State, as a subject of international law, of acts of its organs, provided an example of a specific reference to the internal order of a State for the purpose of deciding whether an individual or group of individuals possessed the status of organs of that State. There was, therefore, an apparent contradiction between the absolute and categorical rule in article 4, and a case in which provisions of municipal law were obviously pertinent for the characterization of the wrongful act. In other words, a State might invoke municipal law to prevent an act from being characterized as wrongful, if it contended that, according to its own internal legal order, individuals or a group of individuals whose conduct was considered to be internationally wrongful did not possess the status of organs of the State. That situation might be avoided simply by mentioning the hypothesis of article 5 as an exception to article 4.

31. The points he had raised were minor ones which could be dealt with by the Drafting Committee; he had no difficulty in accepting the substance of article 4 as proposed by the Special Rapporteur.

32. Mr. HAMBRO said that, in his opinion, the points made by Mr. Tsuruoka could be dealt with by the Drafting Committee.

33. The apparent contradiction, mentioned by Mr. Sette Câmara, between the categorical rule in article 4 and a case in which the provisions of municipal law were obviously relevant for the characterization of the wrongful act, certainly did raise difficult problems, but he did not think that a State's invocation of municipal law in such a case would necessarily mean that it was giving its own national law precedence over international law. In the present context, it was clear that article 4 referred to the primacy of international law in international

courts and fora, although the cases in question might be decided differently *in foro domestico*.

34. One reason why he was particularly satisfied with the Special Rapporteur's text was that it tended to strengthen the concept of the primacy of international law—something which was often forgotten by national politicians and legislators.

35. Mr. USHAKOV said he did not dispute the existence of the principle it was intended to express in article 4, but he thought that, as far as possible, the articles of the draft should deal directly with responsibility, not with the circumstances from which it derived.

36. Moreover, in the comments on article 4, in the Special Rapporteur's third report, several of the opinions quoted, particularly in paragraphs 98 and 100, related to responsibility, not to the characterization of an international act. They held that a State could not escape its responsibility under international law by invoking its internal law. Some members of the Commission had expressed the view that if internal law could not be invoked to prevent an act from being characterized as wrongful under international law, that was tantamount to saying that it could not be invoked by a State which had committed a wrongful act in order to escape its responsibility.

37. Personally, he thought it would be better to state the principle on the basis of responsibility, since there could be no responsibility without a wrongful act, whereas the converse was not true. As in the case of article 3, the reasoning of article 4 should be reversed. A single provision would be enough to express the idea that a State could not invoke its internal law in order to escape its international responsibility; but if the Commission also wished to express the idea that internal law could not be invoked to prove that an act was not wrongful, a second provision would be required. Generally speaking, States invoked their internal law to justify themselves rather than to establish that an act they had committed was not wrongful.

38. As to the drafting of article 4, he shared the objections of Mr. Ramangasoavina to the use of the words "from being characterized as"; that was more in the nature of a procedural formula. Furthermore, it might be asked who was to characterize the act as wrongful. It would be better to cast the sentence in positive than in negative terms, for on a literal interpretation it might be thought that municipal law could be invoked to prevent an act from being characterized as lawful.

39. Mr. ELIAS said that article 4 was a very necessary provision in the draft. It emphasized the primacy of international law over municipal law in the area of State responsibility. That principle was so axiomatic that it needed no proof.

40. The situation dealt with in article 4 was similar to that covered by article 27 (Internal law and observance of treaties) of the Vienna Convention on the Law of Treaties.⁸ The position became still clearer when considered

in the light of article 46 (Provisions of internal law regarding competence to conclude treaties) and article 47 (Specific restrictions on authority to express the consent of a State) of the same Convention,⁹ which elaborated the principle of the primacy of international law.

41. The Special Rapporteur had cited an impressive body of international judicial decisions and State practice in support of article 4. The present discussion could therefore add little to the arguments justifying the inclusion of that article. The main difficulties which had arisen centred on the problem of finding an acceptable formulation.

42. The wording proposed by the Special Rapporteur was ingenious, but the Commission should try to improve it. It was desirable not only to adopt a positive instead of a negative formulation, but also to avoid some of the other difficulties which had been mentioned. He would suggest that the Drafting Committee consider the possibility of rewording article 4 to read: "A State may not plead its municipal law as an excuse for its internationally wrongful act".

43. Wording of that kind would make it clear that a State could not invoke its municipal law to prevent its act or omission from being characterized as an internationally wrongful act. At the same time, it would avoid the use of the procedural terms "invoke" and "characterization". Those terms could lead to misunderstanding and did not bring out clearly the essentially defensive character of article 4.

44. The Drafting Committee should seek a generally acceptable formulation which would emphasize the fact that the rule embodied in article 4 was intended to be used as a weapon of defence rather than attack.

45. Sir Francis VALLAT said that the learned and enlightening commentary on article 4 submitted by the Special Rapporteur contained a passage which caused him serious misgivings. It was the statement in the first sentence of paragraph 103 of the third report (A/CN.4/246): "There is no exception to the principle that municipal law has no effect on the characterization of an act of the State as internationally wrongful". He could follow the reasoning in the subsequent sentences of that paragraph, but he could not accept as it stood the statement in the first sentence, for there were many instances in which municipal law—the existence or non-existence of municipal law, or the application or non-application of such law—was in fact relevant to the question whether an internationally wrongful act had been committed.

46. For that reason, he would find it very difficult to accept an article 4 which reflected the thought in the first sentence of paragraph 103. His objection on that point was very close to Mr. Kearney's objection to the use of the unsatisfactory term "characterization". It was possible to speak in general terms of the "qualification" of an act. The "characterization" of a particular act, however, would depend on the particular circum-

⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293.

⁹ *Ibid.*, p. 295.

stances of the case. Municipal law might thus well be relevant to determining whether the particular act constituted a breach of an international obligation.

47. As they stood, neither the title nor the text of article 4 were satisfactory. At the same time, he was strongly in favour of retaining that article. The principle it embodied had to be stated firmly and clearly. Indeed, he would venture to say that the adoption of an article on those lines would represent a considerable achievement by the Commission.

48. With regard to the drafting, he agreed with those speakers who had criticized the procedural formulation of the article. That type of formulation was not suitable for the opening articles of the draft, which dealt essentially with principles. It would be well to remember the difficulties that had arisen, during the discussions which had led to the adoption of the Vienna Convention on the Law of Treaties, from the use of the words "may be invoked" in relation to grounds of invalidity, termination and suspension of the operation of treaties, in part V of that Convention. Those difficulties provided one more argument in favour of avoiding, in article 4, any formulation which spoke of "invoking" a particular defence. The use of the verb "to invoke" and the negative formulation adopted for it were perhaps due to the fact that the wording of the article had been derived from judicial pronouncements.

49. He would suggest, for the consideration of the Drafting Committee that, in order to bring municipal law into the right relationship with international law, article 4 be redrafted to read: "An act of a State which is wrongful by international law cannot be rendered internationally lawful by virtue of the internal law of that State". The opening phrase made it clear that any question of municipal law being or not being an ingredient in the internationally wrongful act would already have been taken into account. The second part of the sentence laid down that, where an act was internationally wrongful, with due regard, if need be, to the municipal law ingredient, it could not be made lawful by virtue of the internal law of the State concerned. That wording would, he thought, avoid many of the difficulties which had arisen in connexion with article 4.

50. Lastly, he suggested that a passage be included in the commentary to make it clear that the reference to the "internal law" of a State was intended to embrace all its aspects, including constitutional law, municipal law proper, regulations issued pursuant to that law, and administrative and judicial acts in application of that law.

51. Mr. BARTOŠ said he had no criticism of the principle on which article 4 was based. There was no doubt that international law prevailed over internal law—jurisprudence was categorical on that point as witness, for example, the Nuremberg judgement. That did not mean that the existence of internal law was not taken into account, but that it could not be invoked to derogate from international law.

52. Two points should be stressed, however. The first was that certain rules of international law sometimes

referred to internal law, and it then became an integral part of international law, which it supplemented. That was a point which should be mentioned in the commentary. The second point was that the influence of internal law on international law must not be underestimated. International law had its source in rules that were generally accepted by States. In some cases it could be interpreted correctly only by a comparative interpretation of the internal law of States and had to be understood according to the dominant idea emerging from that interpretation. Whether one liked it or not, internal law and international law influenced each other. Thus judges who had to pronounce on a case of omission, for example, would necessarily be influenced by the concepts of the legal system to which they belonged, even if they disregarded its rules.

53. Article 4 should therefore be understood as meaning that the influence of internal law should be resisted to the utmost when it came to characterizing an act as internationally wrongful or lawful.

54. Subject to those reservations, he could accept article 4.

Ninth session of the Seminar on International Law

55. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

56. Mr. RATON (Secretariat) said he wished first to thank those members of the Commission, particularly Mr. Kearney, Mr. Tabibi and Mr. Yasseen, who had stressed the value of the International Law Seminar before the Sixth Committee of the General Assembly.

57. He also wished to thank those members who had agreed to lecture to participants in the ninth session of the Seminar and hoped that other members would also agree to help, since the success of the Seminar depended on the active participation of members of the Commission. The Legal Adviser to the International Labour Office and a Director of the International Committee of the Red Cross would also be speaking at the ninth session, the latter on the subject of humanitarian rules applicable in armed conflicts, with special reference to General Assembly resolution 3032 (XXVII).

58. In 1973, the Seminar would bring together twenty-two participants—among them thirteen citizens of developing countries—thanks to the generosity of the States that were financing fellowship, namely, Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden. To offset the combined effects of the monetary crisis and the rise in the cost of living, the Federal Republic of Germany, Finland and Israel had increased their contributions, and Denmark had doubled the amount of its grant. Two participants had received UNITAR fellowships.

The meeting rose at 1 p.m.

1210th MEETING

Monday, 21 May 1973, at 3.5 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 4 (Irrelevance of municipal law to the characterization of an act as internationally wrongful)
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 4 in the Special Rapporteur's third report (A/CN.4/246).

2. Mr. USTOR said that he fully agreed with the Special Rapporteur's conclusions and with the principle embodied in article 4.

3. In his rich supporting commentary the Special Rapporteur had used the inductive method, but his thesis could also be proved by the method of deduction. Article 4 flowed from the very nature of international law—from the fact that international law was a legal system distinct from the legal systems of individual States. That distinctness—a term which he preferred to "primacy"—led to the conclusion that it was the rights and duties of States prescribed by international law whose breach constituted an internationally wrongful act; it was therefore international law which attached responsibility to the effect of the breach and prescribed its consequences.

4. The internal law of a State could have a certain bearing on the question of responsibility. That law, however, could be referred to only if, and to the extent that, such reference was permitted or prescribed by international law. As the Special Rapporteur had pointed out, "international law may take into account certain situations existing in municipal law as a factual premise for the attribution which takes place within the sphere of international law" (A/CN.4/246, para. 87).

5. An illustration could be provided by a claim made by a State that one of its nationals had suffered injury in another State and had exhausted local remedies without avail. If the defendant State could prove that according to its laws the injured person also possessed its own nationality at the time of the injury, the claim would fail. The defendant State could then rely on its own nationality laws only because of the generally recognized rule of international law that a State could not grant diplomatic protection to a person who, at the time of the injury, possessed both its nationality and the

nationality of the defendant State. Of course, if the nationality of the defendant State had been conferred upon the injured person only after the occurrence of the injury, that fact would be without effect on the responsibility of the defendant State.

6. Once the facts in the broadest sense were established, however—and that meant including any domestic legal situation that was relevant according to the rules of international law—the State whose responsibility was in question could not invoke provisions of its own internal law to avoid international responsibility. That point had been made clear in the statement by the Preparatory Committee for the 1930 Codification Conference quoted by the Special Rapporteur, that "a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law" (A/CN.4/246, para. 98).

7. He fully agreed with the rule contained in article 4, but suggested that the Special Rapporteur and the Drafting Committee should amplify the text by drawing on the comments made during the discussion.

8. The CHAIRMAN, speaking as a member of the Commission, said that he was in full agreement both with the reasons given by the Special Rapporteur in support of article 4 and, basically, with the text of the article itself.

9. He shared the views of those members who had stressed the importance and practical usefulness of stating the principle embodied in article 4. With the present recrudescence of nationalism, it was not uncommon for the constitution of a country to provide that only those rules of international law which were compatible with its provisions should be applied.

10. He had been impressed by the fact that nearly all the opinions and decisions quoted by the Special Rapporteur confirmed that a State could not invoke its internal law to escape its international obligations or to exonerate itself from international responsibility.

11. The Special Rapporteur's formulation, however, stated the proposition in rather different terms: it specified that the municipal law of a State "cannot be invoked to prevent an act of that State from being characterized as wrongful in international law". Turning back to article 1, however, which laid down that every internationally wrongful act of a State involved its international responsibility, it was clear that article 4 led to the same results; once it was possible to characterize an act of a State as wrongful in international law, the responsibility of that State would be involved.

12. With regard to the difficult problem of the relationship between international law and internal law, and Mr. Kearney's remarks on article 10 of the draft,¹ it was possible to go even further. In some cases, the international and internal legal aspects were inseparably linked, as was shown by the *Fisheries* case between Norway and the United Kingdom.² The internal act, or the performance of an act in accordance with internal

¹ See previous meeting, para. 26.

² *I.C.J. Reports* 1951, p. 116.

law, was sometimes an integral and inseparable part of a complex situation which was partly internal and partly international. In the *Fisheries* case, which had related to the delimitation of maritime areas, there had been a close link between the internal and the international factors.

13. In such cases, it was difficult to assess the real practical significance of the formula proposed by the Special Rapporteur. That formula would have to be applied in an international society which was extremely fluid in regard to the norms of international law. It was often difficult to determine, in a given situation, whether a rule of international law existed or not. In such situations of uncertainty, the impact and even the final legal effect of a unilateral declaration was inevitably greater.

14. Since the 1958 Geneva Conference on the Law of the Sea, there had been some fifty unilateral declarations on the delimitation of maritime areas. The States making those declarations had based them on the need to fill a gap in international law. They maintained that there was no rule of international law prohibiting the establishment of such sea areas as fisheries zones. Many of those unilateral declarations invoked provisions of internal law.

15. Other branches of international law had also developed in the recent past. The law governing injuries to aliens, for example, was very different from what it had been forty years previously. The principle of the permanent sovereignty of States over their natural resources had greatly influenced that law.

16. While he had no proposal for any change in the text of article 4, he urged that the commentary should take full account of the problems mentioned during the discussion.

17. Mr. TAMMES said he could accept article 4 as it stood, but would suggest that the Drafting Committee consider a rather wider and more positive wording, in view of the obvious importance of the principle involved.

18. A negative formulation had already been used, however, in article 13 of the Commission's 1949 draft Declaration on Rights and Duties of States, which laid down that a State "may not invoke provisions in its constitution or its laws as an excuse for failure to perform" the duty to carry out its international obligations.³ That article had been widely quoted to prove that the primacy of international law over internal law had become a positive rule of international law.

19. Whatever the legal position, article 4 was irreproachable. It specified that internal law was irrelevant for purposes of establishing whether an act of a State was contrary to international law. It did not deal with the question whether an act constituted an act of the State; that question was covered by article 5 and the following articles and was one for which internal law would be highly relevant. For the characterization of conduct as internationally wrongful, however, international law alone was decisive. Hence he had no difficulty in subscribing to the statement in paragraph 103 of the Special

Rapporteur's third report that there was "no exception to the principle that municipal law has no effect on the characterization of an act of the State as internationally wrongful".

20. As he saw it, a provision of internal law only acquired its over-riding legal quality after it had been incorporated into the system of international law. The only possible exception was perhaps that of the body of moral rules which could render an act wrongful quite apart from considerations either of internal law or of international law.

21. He was in favour of referring article 4 to the Drafting Committee for consideration in the light of the discussion.

22. Mr. BILGE said he approved of the principle stated in article 4, which was supported by international jurisprudence, the practice of States and the preparatory work on codification.

23. The provision was linked with article 2, subparagraph (b); it developed the idea of failure to comply with an international obligation, by specifying that it was under international law that an act was characterized as wrongful. The Special Rapporteur had stressed that such characterization was independent of internal law. Although a breach of internal law did not constitute an internationally wrongful act when there was no violation of an international obligation, failure to comply with an international obligation could be characterized as an internationally wrongful act when there was no breach of internal law. That independence of international law could not be contested.

24. Nevertheless, the terms in which the principle was stated in international jurisprudence were very varied. Sometimes it had been said that internal law could not be invoked to escape international responsibility, while in other cases the courts had ruled that a State could not invoke its internal law to evade an international obligation. Most frequently, it was a formula of the latter type that had been used, and when the courts had referred to responsibility, they had regarded it rather as the result of failure to fulfil an obligation.

25. Personally, he would prefer article 4 to deal with failure to fulfil an international obligation, rather than with international responsibility. Moreover, in view of the general structure of the draft, there was no need to refer to international responsibility again in article 4. He was thus in full agreement with the principle stated in that article.

26. With regard to the text of the article, which was cast in negative form, it was in conformity with the formulations used in international jurisprudence. Some members of the Commission thought it important to stress the primacy of international law and to state the principle that internal law could not be invoked to escape international responsibility or to prevent an act from being characterized as wrongful. The Special Rapporteur considered it important to emphasize that it was under international law that an act was characterized as wrongful. That positive formula, which departed a little from those used in international jurisprudence, could be amplified by mentioning that internal law could not be invoked in that context.

³ See *Yearbook of the International Law Commission*, 1949, p. 288.

27. He would prefer the title of the article to reflect more effectively the independence of international law, which the Special Rapporteur was particularly anxious to emphasize.

28. With regard to the expression "municipal law", it would be desirable to specify in the commentary that it referred to pure internal law. Thanks to the machinery of *renvoi*, it was indeed possible for rules of internal law to become rules of international law. On the other hand, it could happen, as in Turkey, that rules of international law embodied in national law became rules of internal law.

29. Mr. REUTER said he found article 4 acceptable, both as to drafting and as to substance.

30. The possibility of a *renvoi* from international law to internal law did not cause him any difficulty. For a State could invoke internal law to establish that it had not committed a wrongful act, when international law referred to internal law. In fact, such cases were frequent; an example was to be found in the article 5 proposed by the Special Rapporteur. International law also referred to internal law for the choice of judicial authorities, questions of nationality, the exhaustion of local remedies and all substantive rules. It remained to be seen whether article 4 should be complicated by mentioning cases of *renvoi*. He would prefer them merely to be mentioned in the commentary.

31. As to the wording of article 4, it was clearly taken from judicial decisions and constituted, as it were, a reply to a plaintiff, whence the expression "cannot be invoked". The draft article did not provide that internal law could not prevent an act from being characterized as wrongful under international law; it stipulated that internal law could not be invoked to prevent such characterization, and that raised the question of justification. In his opinion, that wording implied that the responsibility of the State had already been established in international law and that it was to claim an exception that the State could not invoke its internal law.

32. When the question of justification had been raised in connexion with article 1, the Special Rapporteur had said, first, that it would be examined in due course and, secondly, that responsibility was not involved when there was some justifying circumstance. He was prepared to accept article 4 as it stood, if the Special Rapporteur still considered that the question of justifying circumstances should not be dealt with until later. Otherwise, the wording of the article should be appropriately amended.

33. Mr. AGO (Special Rapporteur), summing up the discussion on article 4, said that with regard to the primacy of international law, he had carefully avoided referring to the theses of the dualist and monist schools, because the Commission had no need to consider them. In any case, the advocates of the two theories were now agreed in recognizing that in practice the consequences were not very different.

34. The two legal orders were independent, but not entirely without contact; they made *renvois* to each other. It was quite certain, however, that international law

could not take account of a characterization under internal law which conflicted with its own.

35. It was true, as Mr. Elias had observed, that the opposite situation could be found: the constitution and jurisprudence of certain States proclaimed the primacy of internal law. Moreover, that primacy could exist in the national sphere even without being proclaimed; for instance, when a judge applied an internal law, even though in doing so he was committing an internationally wrongful act, it was internal law which prevailed, unless it had itself established the applicability and primacy of the rules of international law. The Commission, however, was concerned with defining the wrongfulness of an act, not at the national level, but only at the international level. At that level, it was by virtue of international law that an act was characterized as wrongful, even though the characterization would not be the same under internal law.

36. To allay the fears of certain members of the Commission, he pointed out that he was in agreement with them in recognizing that it was not unusual for the existence of a rule of international law to be challenged. In reality, international disputes often originated in a challenge of that kind. For instance, the *Lotus* case,⁴ referred to by Mr. Ramangasoavina,⁵ really turned on the existence of a rule of international law. The Permanent Court of International Justice had found that Turkey had been right in conforming to its internal law and ignoring an alleged international obligation which, in the opinion of the Court, did not exist.

37. It was important, however, to understand that the question of the existence or non-existence of a rule of international law was quite separate from the question of characterization referred to in article 4, and generally arose at an earlier stage. In that provision the question was assumed to have been answered. The purpose of article 4 was to lay down that if there was a rule of international law imposing an obligation on a State, that State could not invoke its internal law to show that the obligation did not exist.

38. It was always necessary to consider whether such an obligation existed and, if so, what were its content, its effect and its relevance to the case in point. Those questions would arise before the eventuality contemplated in article 4, and the answers they received would in no way be in conflict with that provision as drafted. Nevertheless, the commentary to the article would have to make that point clear. To take an example, the existence of a rule of international law on the breadth of the territorial sea was much contested. If a State extended the breadth of its territorial sea beyond the limit of twelve miles recognized by most States, the question of the existence of a rule of international law prohibiting such an extension would arise. If the rule was established, the State in question could not invoke its internal law to claim that its action was lawful. If, on the other hand, it was recognized that no such rule existed, the lawfulness

⁴ P.C.I.J., Series A, No. 10.

⁵ See previous meeting, para. 14.

of the action would derive from international law, not from internal law.

39. Some members had considered that the wording of article 4 was too absolute, whereas others desired a more rigorous text. Among the former, Mr. Kearney, speaking of the relationship between article 4 and article 10, had asked whether article 4 referred solely to the element of the wrongful act consisting in failure to comply with an international obligation, or also to the element of attribution of certain conduct to a State. There seemed to be no denying that article 4 referred to the objective element, as Mr. Tammes and Mr. Bilge had shown, in particular, by pointing out the link with article 2, sub-paragraph (b).

40. As to the cases of *renvoi* from international law to internal law, and acceptance of principles of internal law by international law, they were in no way at variance with article 10. A rule of internal law which found its way into international law became a rule of international law and imposed international obligations. For the purposes of the draft, it therefore mattered little what was the origin of the rule of international law; there was no need to consider that aspect of the relations between the two legal orders.

41. Article 10 (A/CN.4/264) referred to an entirely special case, but he did not think there was any justification for mentioning it as an exception to the principle stated in article 4. Article 4 was intended to prevent a State from invoking its internal law when that law would characterize an act of that State differently from international law. A State must not be able to transfer to the sphere of its internal law, where it was lawful, a situation which international law regarded as wrongful.

42. With regard to attribution of an act to the State, it took place under international law, although chapter II clearly indicated how internal law came into play. Mr. Sette Câmara had pointed out that, according to article 5, the internal legal order had to be taken into consideration;⁶ nevertheless, it was not by virtue of internal law that certain conduct was attributed to a State. The special situation dealt with in article 10 was not different; there, it was international law which accepted the reference to internal law, without there being any kind of conflict between the two legal orders. Article 4, on the other hand, referred to the case of conflict between the characterizations given by the two systems. Those explanations should be included in the commentary, but no exception should be introduced into article 4, since that might weaken that important provision.

43. Some members had criticised article 4 for being drafted in the form of a procedural rule. The wording he had proposed, however, was based on article 27 of the Vienna Convention on the Law of Treaties,⁷ and that had not been drafted by an international court. Mr. Tsu-ruoka and Sir Francis Vallat had suggested excellent formulations,⁸ but they would confer a theoretical

character on the principle stated in article 4, whereas the present wording, and in particular the verb "invoke", well reflected the contentious element contained in the situation covered by the article, even if it was not submitted to a court. It would be for the Drafting Committee to find an adequate formula, but it was important to express clearly the idea that a State could not find a loophole in its internal law.

44. It might be asked, as Mr. Ushakov and Mr. Bilge had asked, whether article 4 should deal with the situation from the point of view of responsibility or of wrongfulness. In fact, the two ideas were inseparable, as appeared from article 1. To reinforce the effect of article 4, it might be provided that a State could not invoke internal law to oppose the characterization of an act as wrongful in international law and thus to escape the resultant international responsibility. The same formula could also be adapted to article 3. Indeed, the four articles in chapter I stated general principles which were valid for the whole of the draft, and it should be clear that they referred to both wrongfulness and responsibility.

45. With regard to the terminology, the French word "*qualification*" did not involve any assessment on the part of a judge. He acknowledged that it might perhaps have no exact equivalent in English, but he would regret having to drop it.

46. The title of the article, although considered too long by some members, had been found excellent by others. He was therefore open to any suggestion, but there was a danger in adopting titles that were too short and lacked clarity.

47. He agreed with Sir Francis Vallat that the commentary should explain how the expression "municipal law"—or "internal law"—should be understood.

48. Mr. Yasseen had asked whether it was not necessary to consider the case in which a State invoked the internal law of another State which it could not accuse of having violated an international obligation. He thought that case might be mentioned in the commentary, but it was perhaps not essential to deal with it in the article under consideration.

49. If the Drafting Committee thought fit to recast article 4, it should be guided by the wording adopted for the previous article. To meet the main comments made during the discussion, he would propose the following text: "The internal law of a State cannot be invoked to prevent an act of that State from being wrongful in international law and to enable that State to escape the resultant responsibility".

50. The CHAIRMAN suggested that article 4 be referred to the Drafting Committee.

It was so agreed.⁹

CHAPTER II: THE "ACT OF THE STATE" ACCORDING TO INTERNATIONAL LAW

51. The CHAIRMAN invited the Special Rapporteur to introduce chapter II of his draft (A/CN.4/246/Add.1-3; A/CN.4/264).

⁶ See previous meeting, para. 30.

⁷ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293.

⁸ See previous meeting, paras. 18 and 49.

⁹ For resumption of the discussion see 1226th meeting, para. 1.

52. Mr. AGO (Special Rapporteur), introducing chapter II, said that in chapter I, on general principles, after affirming that every internationally wrongful act involved international responsibility, he had tried to establish that conduct constituting failure to fulfil an international obligation must be attributed to the State. That was what was called the subjective element of the wrongful act. It had been recognized that the State had to act through human beings or groups of human beings whose conduct, which had to be attributed to the State, might consist of an act or an omission; that such attribution was necessarily a legal link and not a link of natural causality; and that the wrongful act was attributed to the State in its capacity as a subject of law or, more precisely, of international law. What now had to be determined, in chapter II, was when, in what circumstances and under what conditions such an attribution could be made.

53. The problems to be solved had a common denominator: what forms of conduct could be regarded as acts of the State? In theory, there was no reason why every act committed on its territory should not be attributed to the State. But that was not the case in practice, and he suggested that the Commission should adopt an essentially inductive method and examine the practice to see what theoretical principles could be derived from it.

54. In practice, it was mainly acts by persons—organs or agents—who participated in the “organization” of the State, that were regarded as acts of the State; in other words, acts by those who were organs of the State according to the internal legal order. The Commission would have to decide whether that statement went too far or not far enough—too far, because the acts of certain organs of the State might not be considered as acts of the State as a subject of international law; not far enough, because acts committed by persons who were not, strictly speaking, organs of the State, such as organs of public institutions other than the State, might none the less be regarded as acts of the State in international law.

55. The Commission would then have to consider whether, in international law, the act of an individual who, although not an organ or agent of the State, was in fact acting in the exercise of certain public functions, should not also be attributed to the State. It would also have to see whether international law attributed to the State the acts of organs placed at its disposal by another State or by an international organization. Next, the Commission would have to consider whether the conduct of an organ exceeding its competence, or acting contrary to the rules of internal law concerning the exercise of its functions, should be attributed to the State. It would further have to consider whether the acts or omissions of private persons could sometimes be attributed to the State and, if not, whether it was not necessary none the less to take into consideration as a possible source of responsibility the conduct—act or omission—of State organs in relation to the acts of those private persons. Lastly, the Commission would have to examine a whole series of highly complex situations arising out of action by insurgent groups against the State, and decide whether they should be treated in the same way, depending on whether

or not the personality and structure of the State were affected by such action.

56. Before the Commission examined State practice and, by the proposed inductive method, established what was the existing position in international law, which could be modified if it thought fit, it should free itself from the influence of certain theories which might be a source of errors because they failed to differentiate between the attribution of an act to the State as a subject of international law and as a subject of internal law, and because they laid down as a principle that the fact of attributing conduct to a State automatically made the author of that conduct an organ of the State. The attribution to the State of an act which could be the source of international responsibility of the State was made under international law; but it was internal law alone which determined the organization of the State. It was wrong, starting from the principle that only the State could determine its organization according to its internal law, to say that when conduct was not an act of the State according to its internal law it could not be so in international law, just as it was absurd to say that it was international law which determined the organization of the State, or that international law delegated to the State the faculty of creating its own organization.

57. It must therefore be borne in mind that determination of the organization of the State and attribution of an act to the State were two entirely different things. Nor should it be forgotten that the doctrine of the act of the State applied not only to wrongful acts but also to lawful acts, even though the rules governing the attribution of a wrongful act to the State were much broader.

58. Two general conclusions followed from what he had said. The first was that the term “organization” of the State must be understood to mean the machinery of the State, in other words the complex of individual and collective entities through which it manifested its existence and performed its actions. The State set up its own machinery independently, on the basis of its internal law, and the existence of that machinery was presupposed in fact by international law. The second conclusion was that, so far as the international order was concerned, the internal organization of the State was merely a known fact to which international law referred in order to attribute an act to the State, while remaining free also to attribute to it acts not performed by members of that organization. In that connexion, one should not be misled by the use of the term “*renvoi*”, which was sometimes used to describe that phenomenon.

59. Finally, the Commission should not allow itself to be held up by the various theories on the subject. The inescapable conclusions were those dictated by practice, which reflected the realities of international life and the rules governing it.

Membership of the Drafting Committee

60. The CHAIRMAN said it had been agreed that the Drafting Committee should include one of the two newly elected Latin American members of the Com-

mission.¹⁰ He suggested that the member should be Mr. Martínez Moreno.

It was so agreed.

The meeting rose at 5.55 p.m.

¹⁰ See 1207th meeting, para. 3.

1211th MEETING

Tuesday, 22 May 1973, at 11.30 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 5

1. *Article 5*

Attribution to the State, subject of international law, of acts of its organs

For the purposes of these articles, the conduct of a person or group of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of the State from the standpoint of international law.

2. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in his third report (A/CN.4/246/Add.1).

3. Mr. AGO (Special Rapporteur) said that, in introducing chapter II at the previous meeting, he had pointed out that an examination of the facts of international life led to the initial conclusion that, normally, the acts of persons or groups of persons regarded as organs of the State under its internal law were considered as acts of the State generating international responsibility. Of course, that principle must be accepted as following from an examination of the realities of international relations and not as a corollary of other principles. In particular, it must not be regarded either as absolute or as exclusive.

4. It was also according to international realities that it would be possible to determine whether all the acts of persons or groups of persons constituting organs of the State were to be attributed to the State, and what other conduct capable of involving the responsibility of the State could be attributed to it. Thus the basic principle stated in article 5 did not by any means make it unneces-

sary to consider whether other conduct was also capable of taking the form of an act of the State.

5. First of all, therefore, the Commission should make sure that the general rule in article 5 followed from the facts of international life. Although that rule had not often been expressly proclaimed by international courts, it had nevertheless often been applied or implicitly acknowledged. Sometimes it had been explicitly stated, however, and he referred members to the cases cited in paragraph 124 of his third report.

6. With regard to the practice of States, he drew attention to the positive replies by Governments to the three points in the request for information sent to them by the Preparatory Committee for the Hague Codification Conference of 1930.¹ Those three points had related respectively to the acts of legislative, judicial and executive organs—a distinction regarding which he urged caution, since States must not be able to find a loophole in induly narrow wording by claiming that some of their organs did not fit into any of those three categories. The Commission might later consider drafting a separate article to deal with just that eventuality.

7. The various formulations given to the principle by the Codification Conference, by public institutions, by learned societies and by individual research workers were to be found in paragraphs 125 and 126 of his third report. As for the literature, writers were unanimous in accepting attribution to the State of the acts of its organs for the purpose of determining its international responsibility; but their unanimity disappeared when it came to finding a theoretical justification for the principle—though that was an aspect of the matter to which the Commission need not devote much attention.

8. There could be no doubt that the rule in article 5 was part of existing international law. The only question that arose was how it should be formulated. It must be quite clear that article 5 stated an initial rule which was to be supplemented by the subsequent articles. It must also be emphasized that the rule related only to attribution to the State of an act which could engage its international responsibility. The rule must express the idea that the acts or omissions of persons or groups of persons having the status of organs of the State under its legal system could be regarded as acts of the State capable of being characterized as internationally wrongful, with the consequences following from such characterization.

9. Some writers had gone so far as to assert that the persons or groups of persons forming the organization of the State were wholly integrated into its personality. That was not the case: every person retained a sphere of private activity, his acts or omissions in which could not be attributed to the State. That seemed obvious, but in some specific cases doubts might arise as to the capacity in which a person had acted. An examination of the jurisprudence, the practice of States and the literature showed that it was not possible to attribute to the State the acts or omissions of private persons acting in their

¹ League of Nations, *Conference for the Codification of International Law*, 1929, vol. III, pp. 16 *et seq.*

private capacity. On that point he referred members to paragraphs 130 and 131 of his third report.

10. There was another source of confusion which must be avoided. The case of an agent of the State acting in a private capacity must not be confused with that of an agent acting in the exercise of his official functions, but exceeding his competence or breaking internal law. For instance, if a police officer stole a suitcase, he was acting in a private capacity; but if, in the performance of his duties, he searched the suitcase of a diplomat, he was acting as an agent of the State who exceeded his competence and broke the regulations. Those cases would only be considered at a later stage of the work.

11. Mr. YASSEEN speaking first on the preliminary considerations in chapter II, section I of the report, congratulated the Special Rapporteur on having given a full but condensed account of all the doctrine relating to the attribution of conduct to a State. To a great extent, however, that doctrine was based on theories which could not solve all the problems that arose. Consequently, the Special Rapporteur had rightly advised members not to let themselves be confused by such theories, but rather to be guided by the practice of States in finding solutions to the problems of attribution.

12. He approved of that advice, but wished to remind the Commission that it was not called upon just to codify international law in the narrow sense of the term. Where State responsibility was concerned, its work of codification could include an element of progressive development. It must not only reflect, specify and formulate the practice, but if necessary supplement or even correct the solutions offered by practice, so as to guide them in what it believed to be the best direction. As international practice did not provide all the desired answers, others must be found on the basis of a philosophy on which the Commission should reach agreement.

13. In the case of article 5, it was particularly advisable not to be influenced by existing theories, but rather to consider the practice. The solutions offered by practice took account of the link which, in internal law, attached one or more individuals to the State. That did not mean that an internal law solution was imposed on international law; international law retained its independence and had the last word in regard to the attribution of an internationally wrongful act to a State. It could modify, restrict or extend the internal law solution, which it could take into account.

14. The rule should therefore be formulated in a neutral manner which was without prejudice to the provisions that would be adopted later to define it more precisely and possibly to extend or restrict its field of application. The fact remained that the general rule was correct and could be adapted to many situations. As the Special Rapporteur had explained, an agent remained a human being who could act as such, and it could not be claimed that his acts then involved the responsibility of the State to which he belonged. It might also happen that organs of the State exceeded their competence under internal law while acting in their official capacity. In such cases, the practice was to attribute their conduct to the State for which they were acting.

15. The wording proposed by the Special Rapporteur was therefore acceptable, since on the one hand it reflected a general rule derived from practice and on the other hand it allowed for the introduction of corrections and exceptions, so that a set of rules of law could be drawn up on the attribution of an internationally wrongful act to the State.

16. Mr. SETTE CÂMARA said that in the Commission's discussions on State responsibility at previous sessions, doubts had been expressed about the use of the expression "act of the State", which could give rise to ambiguity because of the internal law concept of an "act of State". It was clear, however, from the Special Rapporteur's lucid explanations, that it would be difficult to find a better expression.

17. The title of chapter II was too broad, since the chapter did not deal with all the acts of the State according to international law, but only with wrongful acts entailing State responsibility. Since there were other acts of the State under international law which did not entail international responsibility, the title of chapter II might perhaps be reworded to read: "The act of the State involving international responsibility according to international law".

18. Article 5 itself, as he had pointed out during the discussion on article 4, dealt with an exception to the rule in the latter article, namely, the case in which reference to internal law was not only necessary, but indispensable for the characterization of an act as internationally wrongful. The State was a juristic person and could only commit acts or omissions through individuals or groups of individuals acting as its organs in accordance with the internal legal order.

19. The attribution to the State of acts of individuals or groups of individuals involved problems which were dealt with in articles 5 to 13. Since the persons concerned did not cease to be individuals, it was necessary to draw a clear distinction between acts of individuals as such and acts of individuals as organs of the State. After a thorough analysis of the different schools of thought regarding the legal foundation for the definition of acts of individuals acting as organs of the State, the Special Rapporteur had arrived at his first conclusion, namely, that international law had nothing to do with the internal organization of the State. The Permanent Court of International Justice had held that, from the standpoint of international law, "municipal laws are merely facts".² The question whether a person or group of persons had or had not acted as an organ of the State according to internal law was a question of fact, not of law. As the Special Rapporteur had pointed out, "the conduct of persons or groups of persons to whom the legal status of organ of the State is attributed in the internal order, and solely in that order, is in principle considered as an act of the State". (A/CN.4/246/Add.1, para. 119.)

20. The Special Rapporteur's second conclusion was that international law was completely independent when it took into consideration a situation existing in internal law. An act which was not considered as an act of the

² *P.C.I.J.* (1926), Series A, No. 7, p. 19.

State in the internal legal order might well be defined as such by international law. Limitations which existed in the internal legal order were not always valid in the international legal order.

21. The Special Rapporteur's third conclusion was the need to disregard theoretical considerations and concentrate on determining "what conduct international law really attributes to the State" (A/CN.4/246/Add.1, para. 121), not the conduct which international law should attribute to the State according to abstract approaches to the problem.

22. The Special Rapporteur had cited an impressive body of judicial opinion and legal writings in support of the principle that the acts of persons who formed part of the internal machinery of the State were, as a general rule, considered as acts of the State. At the same time, he had recognized that the rule was neither absolute nor exclusive, and the articles which followed dealt with a number of special situations in which other principles prevailed.

23. As to the drafting, the introductory phrase "For the purposes of these articles" seemed unnecessary, since it was obvious that the rule in article 5 could not be intended for any other purpose. The words "in the case in question" could also be dropped without changing the meaning of the text, since it could be safely assumed that every case would be considered separately.

24. On the whole, he was in agreement with the proposed text, subject to further examination by the Drafting Committee.

25. Mr. TAMMES said that the draft had to be considered as an organic whole; an article of the importance of article 5 had its links with other articles, particularly articles 10 and 11 (A/CN.4/264).

26. Article 5 described what constituted an act of the State. Article 6 gave what seemed to him a complete picture of what constituted the organs of the State. Article 10 showed that there existed acts of the State other than those dealt with in article 5; he would call them "fictitious acts of the State". On grounds of international equity, article 10 made the State responsible for injurious conduct which was somehow connected with the State, but which did not really constitute an act of the State since it did not in any way correspond to the will of the State; indeed, the conduct in question would probably be contrary to the law of the State concerned.

27. The admirable historical account given by the Special Rapporteur in his fourth report (A/CN.4/264) showed that during the past hundred years the fictitious act of the State had come to be increasingly recognized in judicial and arbitral decisions and in State practice as a source of international responsibility. At first, a defendant State would only admit responsibility if its government had given specific instructions leading to the injurious act. Gradually, however, international tribunals had come to reject all distinction between a superior and a subordinate; action *ultra vires* by an organ of a State was regarded as attributable to the State, provided only that there existed an outward appearance of a link with the State.

28. The Special Rapporteur had not subscribed to all the fictitious links which judicial opinion and State practice had admitted over that period of a century. He had made a careful selection among them and had set a limit in paragraph 2 of article 10: in order to be considered as an act of the State, the act of the individual organ must not be wholly and manifestly foreign to the specific functions of that organ. Acts which went beyond that limit came under the heading of conduct of private individuals and were covered by article 11.

29. Even the distinction between real acts of the State and real acts of individuals, however, was not absolute. The Special Rapporteur's fourth report mentioned cases in which the lack of vigilance of the territorial State's authorities regarding internationally wrongful conduct of private individuals came close to tolerance if not authorization. Such cases would involve a direct act of the State rather than its indirect responsibility for acts of individuals. There were, in addition, all the cases of absolute or strict responsibility of the State for certain categories of acts on the part of individuals under its jurisdiction or control.

30. In the circumstances, doubts might well be entertained about the usefulness of the intellectual efforts of generations of jurists who had tried to explain the precise differences between acts of the State and acts of the individual, between direct and indirect responsibility and between full responsibility and responsibility for lack of due diligence. Those distinctions were undoubtedly useful as an aid to understanding the historical background of the problem of State responsibility and might help the Commission to reach a decision. He was not at all certain, however, that in the final draft the distinction between acts of the State and acts of individuals should play such a prominent part.

31. Mr. USHAKOV said he largely shared the ideas set out by the Special Rapporteur in his preliminary considerations and commentary on article 5, but could hardly accept that article as it stood.

32. His reservations were bound up with the mental confusion which often existed, and which had even crept into some of the examples given by the Special Rapporteur, regarding the terms "attribution" and "imputation". He was among those who had urged that the Commission should use the term "attribution" in preference to "imputation"; it was not simply a question of drafting it was also a question of substance.

33. The difference between attribution and imputation was two-fold. The term "attribution" applied to acts in general, both lawful and wrongful, whereas the term "imputation" applied only to wrongful acts. In other words, attribution meant simply noting an act, whereas imputation meant both noting that an act had been committed and the legal operation of characterizing the act as a wrongful act producing consequences. That was why it was correct to speak, in the chapter on the attribution of acts to the State, not of the attribution of internationally wrongful acts, but simply of the attribution of acts.

34. Since attribution meant simply noting, it could not be said that the conduct of an organ of the State could be

characterized differently in international law and in internal law for the purposes of attribution to the State. For instance, to “attribute” to a State the decision of a court—that was to say the decision of one of its organs—which was lawful under internal law but wrongful in international law, was to confuse attribution with imputation, since the State was charged with responsibility for a wrongful act. The difference between the attribution of an uncharacterized act and the imputation of a wrongful, and hence characterized act, should be clearly understood.

35. Then again, attribution—the objective rather than legal noting that an act had been committed—indicated the identity of the author of the act. The act was attributed to one particular State rather than another. There, too, there was no need to invoke either internal or international law. For example, if soldiers from one State wearing the uniform of the army of another State raided a third State, the attribution of the act would consist of noting that the soldiers belonged to such or such a State. There again, it was simply a question of noting without any legal characterization. That showed how important it was to agree on the meaning of the words “attribution” and “imputation”.

36. He would speak again on the text of article 5.

The meeting rose at 1.5 p.m.

1212th MEETING

Wednesday, 23 May 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 5 (Attributions to the State, subject of international law, of acts of its organs) (continued)

1. The CHAIRMAN invited Mr. Ushakov to conclude the statement he had begun at the previous meeting.

2. Mr. USHAKOV said he agreed with the Special Rapporteur that the conduct of organs of the State must be attributed to the State, though in his opinion there was no need to specify that the attribution was made by virtue of international law, since it consisted merely in establishing, independently of any legal order, that an act had been committed and by whom it had been committed. The question which then arose was under what conditions the State could be assimilated to its organs,

and on that point he did not share the Special Rapporteur's opinion.

3. In article 5 and the subsequent articles, the Special Rapporteur referred sometimes to the conduct of organs of the State and sometimes to the conduct of a person or group of persons who possessed the status of organs of the State. In his opinion, no such distinction could be made. To accept such a distinction would be to support the theory of certain writers, including the eminent French jurist Georges Scelle, who in that context did not recognize even the existence of the State or of legal persons in general, but regarded them as fictions and maintained that it was always individuals who acted.

4. In the exercise of public authority, which took place through the machinery of the State, it was certainly organs and not individuals that acted. For instance, the will of a parliament was not the sum of the wills of its members; its decisions were those of a unitary organ. The same applied to a court of law. Even when the organ consisted of a single person, it was as an organ and not as an individual that he acted, except, of course, when he was acting outside the exercise of his functions. Thus it was through the agency of its organs and not through that of the individuals composing them that the State acted. Consequently, he could not accept the distinction made by the Special Rapporteur between the conduct of persons acting as organs and the conduct of persons acting in a private capacity.

5. With regard to the drafting of article 5, there was a lack of concordance between the title, which referred to attribution to the State of acts of its organs, and the text, which referred to the conduct of a person or group of persons.

6. Moreover, the idea covered by the expression “State, subject of international law”, which appeared in the title of article 5 and of some of the subsequent articles, but not in the text of those articles, was not clear. If the purpose was to preclude the attribution of an act to States which had no international personality, such as the Swiss cantons or the member states of a federation, he saw no objection; otherwise he did not think the phrase served any useful purpose.

7. Mr. AGO (Special Rapporteur) said that Mr. Ushakov's comments called for explanations on three points: the meaning of the word “attribution”; the distinction between an organ and a person or group of persons possessing the status of an organ; and the use of the expression “State, subject of international law”.

8. With regard to the question of attribution, which Mr. Ushakov had already raised at a previous session, it should not be forgotten that words had only the meaning given to them. Even when he had used the word “imputation” in his first reports, he had never given it the sense of imputation in criminal procedure; that was why he had willingly accepted the proposal made by Mr. Ushakov at the twenty-second session, that he use the more neutral term “attribution”.¹ But no matter whether the term adopted was “attribution” or “imputa-

¹ See *Yearbook of the International Law Commission*, 1970, vol. I, p. 189, para. 20 *et seq.* and p. 221, paras. 72 and 73.

tion", or even "attachment", the idea it was intended to express was still the same.

9. Moreover, in order to avoid any misunderstanding, he had even endeavoured, in his third and fourth reports, to use as far as possible the phrase "consideration of an act as an act of the State" rather than the word "attribution". The sole purpose of chapter II was to establish the conditions in which there was an act of the State, in other words, in what conditions it must be considered that it was the State which had committed an act or omission. In that chapter he had not once departed from that idea.

10. However, the word "attribution" also covered several ideas. First, it could simply mean that an act was considered as having been committed by the State. Secondly, if it were said that the act was objectively an act of the State, it could just as objectively be considered that that act of the State constituted failure to fulfil an obligation incumbent on it and, since the necessary conditions for the existence of a wrongful act were then satisfied, the word "attribution" was used to say that an "internationally wrongful act" was attributed to the State.

11. He acknowledged that it was necessary to avoid, as far as possible, using the same term to denote two different situations, but the essential point was to say what had to be said clearly. It must be clearly understood that the expression "attribution of an act to the State" included no characterization of that act, whereas the idea that an internationally wrongful act had been committed by the State introduced the legal characterization of "wrongfulness".

12. The nature of the operation which led to saying that it was the State which had acted, required clarification. If an aircraft of a given State flew over the territory of another State without permission, the decision whether to attribute the act to the former State or not, was based on certain external marks on the aircraft, but mainly on the fact that it had been piloted, for example, by a member of the armed forces of the State in question, and thus, according to the internal legal order, by an organ of that State. In that case it was the State, and not merely a private person, which had violated foreign sovereignty. The operation by which that conclusion was reached was a legal operation, which might be based on the internal legal order or on the international legal order. It was, indeed, possible for those two legal orders to be in conflict regarding the attribution of the act. If the aircraft did not belong to the armed forces of the State, but to the police force of a certain town, international law would nevertheless attribute the act to the State, whereas internal law would attribute it to the municipality of the town concerned. Thus it could be seen that the fact of considering an act as an act of the State always included a legal link, though there was no characterization of the act as wrongful.

13. With regard to the difference between such expressions as "organs" and "person or group of persons possessing the status of organs", it was true that the State was a real organism, but it had no physical existence, and it was wrong to consider the relationship between the State and its organs in the same way as the relationship

between a natural person and his organs. In the last analysis, the organs of the State were always reduced to persons, taken individually or collectively. It was true that the will of a collective entity was not the sum of the wills of its members, but what was concerned was always the collective will of a group of persons.

14. As Special Rapporteur, he had always maintained that an act or omission of a private person was attributed to the State only in so far as that person was an organ of the State according to its internal legal order and had acted in that capacity. That amounted to saying that the acts of the same persons were not attributed to the State when they acted in a purely personal capacity and not as organs. He had even drawn attention to cases in which organs had acted contrary to rules of internal law and their conduct had nevertheless been considered as an act of the State for purposes of international law. The reason why he had used the synonymous expressions "person or group of persons who possess the status of organs of the State and are acting in that capacity" and "organs of the State" was, precisely, in order to bring out the difference which existed according to whether those persons were acting in a private capacity or as organs.

15. Finally, the use of the expression "State, subject of international law" was justified to mark the distinction between the internal legal order and the international legal order when certain acts were to be considered as acts of the State. For in all contemporary systems there were entities or public institutions other than the State whose conduct would not be considered as an act of the State in internal law, whereas it might be so considered in international law, which did not refer to the concept of the "State, subject of internal law". That was why it was important to specify that an act was attributed to the State as a subject of international law.

16. Mr. ELIAS said that article 5 was the logical development of the ideas which had been considered in the preceding four articles concerning internationally wrongful acts of a State. Article 5 dealt with the question whether a State could be held responsible for conduct, not of the State itself, but of the organs or agents through which it had to act.

17. He was prepared to accept the principles laid down in article 5. Those principles were, first, that the act in question must be carried out by organs or agents of the State who were considered to be acting in that capacity under internal law of which international law took judicial notice; and secondly, that the organs or agents must be acting in an official capacity within the scope of their authority.

18. To ensure a proper understanding of all the aspects of article 5, the Special Rapporteur had rightly warned members against certain pitfalls and against approaches which might confuse the issue the Commission wished to formulate as a rule of law. The Special Rapporteur had referred to three main theories advanced by legal writers, but he himself thought those theories could be reduced to two, namely, the dualist theory and the monist theory.

19. The dualist school could be divided into two sections. First, there were those who argued that the internal

organization of the State, as well as the conduct of those who acted as its organs or agents, should be regulated entirely by municipal law and that international law had to accept whatever attributions had been conferred on the State by its municipal law. In other words, the governing principle was that of the particular arrangement which the State had made in its own internal order.

20. Secondly, there was the opposite section of the dualist school, which maintained that international law was really the only law that could regulate the State's internal organization, decide which were its organs and agents, and determine what kind of conduct could be attributed to them. The obvious objection to that theory was that it was not the business of international law to regulate the internal structure of States. There were also writers, such as Verdross and Kelsen, who spoke of the "vicarious responsibility" of the State, and maintained that the State was not only responsible for the acts of its organs or agents, but could also be liable, in some cases, for the acts of its individual nationals.

21. The monist school, on the other hand, affirmed the primacy of international law over municipal law and maintained that in normal circumstances all acts carried out by organs or agents of the State possessing legal capacity must be considered as being carried out by the State. Only in exceptional cases could international law intervene to determine what organs or agents were capable of conduct attributable to the State under international law.

22. What should be the Commission's task in dealing with all those theories? As the Special Rapporteur had said, its main task was to determine what acts of individuals formed part of the State machinery and, as a general rule, had to be considered acts of the State from the point of view of international law. In chapter II of his third report (A/CN.4/246/Add.1) the Special Rapporteur had cited a number of examples drawn from State practice and judicial decisions, all of which pointed to the principle that would enable the Commission to express that complex of ideas and lay down a basic rule. That rule should not, of course, be considered absolute or exclusive, since there were obviously qualifications and limitations to the essential idea contained in article 5.

23. Two basic principles were involved in that article. First, for the conduct of an organ or agent to be attributable to the State as a subject of international law, the act must come within the apparent or ostensible authority of the organ or agent concerned; if it was outside that authority, it would not entail State responsibility. It should be noted, however, that there could be situations in which excessive exercise of the authority granted to an organ or agent might involve State responsibility.

24. Secondly, if the organs or agents were conceived of as physical persons, as distinct from the State as a living reality, it should be possible to state that principle in international law, whereas municipal law could not characterize a State's conduct as involving its responsibility.

25. In his opinion, although the primacy of international law must be acknowledged, it should be emphasized that international law could not operate in a vacuum and

was bound to take account of what a State's municipal law laid down about the extent of the competence of its organs and agents.

26. Article 5, as proposed by the Special Rapporteur, contained all the elements he had mentioned, but he was not sure that it was correctly formulated. To begin with, he did not think that the opening phrase "For the purposes of these articles" was necessary, since all the draft articles dealt with the question of State responsibility. He would suggest that the text of the article be amended to read: "A State is responsible under international law for the acts of a person or group of persons who are agents of that State under its internal law". Alternatively, if the Commission preferred to stress the "act of the State", he would suggest the following text: "The act of a person or group of persons who are the agents of a State under its internal law is attributable to that State under international law".

27. Mr. HAMBRO said that the many profound theoretical arguments put forward during the discussion had confirmed him in the view that the Special Rapporteur had been right in suggesting that theoretical considerations should be disregarded. The Special Rapporteur's excellent analysis of the various schools of thought on the subject had only been intended to clear the way for specific consideration of the questions dealt with in the various articles in chapter II.

28. It would be extremely regrettable if the Commission were to terminate its treatment of the subject of State responsibility with article 5. To submit such a draft to the General Assembly would give a completely wrong impression of the guiding principles the Commission was adopting.

29. The provisions of article 5 could only be understood in connexion with those of the subsequent articles in chapter II. Unless the Commission could deal with those articles as well, it should refrain from sending the draft to the General Assembly. It should also be remembered that later discussion on article 6 and the following articles might well lead the Commission to revise the wording of the earlier articles.

30. He welcomed the Special Rapporteur's conclusion that the acts of the State were not confined to those of its executive, legislature and judiciary. Thus article 8 (A/CN.4/246/Add.3) dealt with the case of acts of persons who did not formally possess the status of State organs, but in fact performed public functions; such acts might even be at variance with the internal law of the State concerned.

31. By contrast with article 8, article 5 dealt with acts which would always be attributed to the State, because the person or group of persons performing them was categorized as a State organ by the internal law of the State concerned.

32. It was often a matter of pure domestic convenience whether an entity was regarded by internal law as an organ of the State or not. An obvious example was that of State banks, which had been mentioned in the *Case of Certain Norwegian Loans*.² In that dispute between

² *I.C.J. Reports 1957*, p. 9.

France and Norway, relating to the gold clause, it had been argued that the Norwegian banks contracting the loans had a legal personality distinct from that of the State, so that an act or omission on their part did not involve the international responsibility of the Norwegian State.

33. The acts of State monopolies had given rise to similar difficulties in international disputes. In order to settle difficulties of that kind, it had been customary to rely on the distinction between acts performed *de jure imperii* and acts performed *de jure gestionis*. That distinction, however, would not be of assistance when dealing with the problem of a State which, for example, considered all cultural affairs as coming within the public sector. His own view on that point was that, from the standpoint of international law, there could well be some activities which did not deserve to be regarded as activities of State organs.

34. From the point of view of legal theory, he would object to the inclusion in the commentary to article 5 of the passage quoted in the third report (A/CN.4/246/Add.1, para. 117) from the judgement by the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*, which read: "From the standpoint of International Law... municipal laws are merely facts."³ Taken out of context, that passage was meaningless. In any case, it came from a decision which was nearly fifty years old and was based on an unfortunate analogy with the judicial system of certain countries. For purposes of appeals to the supreme court, a distinction was drawn in those countries between questions of law, which could be reviewed on such appeals, and questions of fact, which could not. In that context, it had been held that questions of foreign law could not be the subject of such review and could not lead to the quashing of a decision by a lower court as to the interpretation of the provisions of a foreign law.

35. It was significant that in the judgement in question, the Permanent Court had proceeded to state that it was not its duty to interpret Polish law as such. That statement might well have applied to that particular case, but no general rule could be derived from it. It was clear that an international tribunal was often under the necessity of interpreting the municipal law of a State in order to reach a decision. One had only to think of cases involving the problem of the exhaustion of local remedies: without interpreting the municipal law of the country concerned, it would not be possible for an international tribunal to decide whether local remedies had in fact been exhausted. Indeed, several of the articles of the present draft indicated that municipal law would have to be interpreted in order to apply their provisions.

36. He therefore urged the Commission not to lend its authority to a statement which, taken as it stood, could only confuse the issue.

37. Mr. BARTOŠ congratulated the Special Rapporteur on his brilliant introduction to chapter II. He had no comments on article 5, except with regard to the phrase "according to the internal legal order of a State". If the sovereignty of States was to be respected,

it was perhaps necessary to refer to the internal legal order of the State in order to determine the status of an organ, but such reference was hardly satisfactory from the standpoint of the international legal order.

38. As the Special Rapporteur had pointed out, there were various conceptions of an organ. In addition, modern jurisprudence and State practice recognized the existence of quasi-independent organs. One instance was the religious communities to which certain States, which accepted the principle of separation of Church and State, had delegated a large part of their powers. Disputes arising out of non-observance or violation of rules of private international law by such religious communities had come before international courts on several occasions. The States which had thus delegated their powers had generally claimed that they could not intervene with those communities and, in view of the principle of separation of Church and State, were not responsible for their acts. Such cases had arisen mainly in connexion with divorce and remarriage. They constituted cases of violation of human rights committed under the auspices of the State, since the delegation of powers had taken place in accordance with its internal law.

39. Under a Yugoslav law of 1934, the Orthodox Church had been granted absolute independence and that had enabled it to change the provisions applicable to its members in family law, on the basis of the rule providing for the equality of all religious communities. Under the Treaty of Versailles, the Moslem communities in Yugoslavia enjoyed certain privileges, including the right to apply their religious law to their members in the sphere of family law and the law of succession. Since the principle of equality of religious communities had been proclaimed, both the Orthodox Church and the Catholic Church had then claimed to apply their own canon law. A number of international disputes had arisen as a consequence, and some countries had held Yugoslavia responsible for the acts of its religious communities. Personally, he thought that if misconduct could be attributed to a State which delegated its powers in that way, it was because that State had neglected to ensure respect for the international order.

40. There was also a delegation of powers in countries where it was impossible to obtain a driving licence without applying to a national automobile club affiliated to the International Touring Alliance. Several States had held that drivers could not be compelled to go through a club of that kind and pay it quite a heavy fee. It had sometimes been claimed that such clubs were no more than private associations, but as a comparative study showed, it was a fact that they were endowed with powers which normally belonged to the State. In deviating from the generally accepted rules, a State was committing a violation.

41. He had cited only those two cases, but there were many others, and it was therefore inadvisable to rely on the internal legal order of States to determine the status of an organ. No doubt there were criteria for determining when a State was responsible for the acts of its organs. For instance, a State which failed to protect the interests of aliens or of other States in its territory and, either through tolerance or as a result of a delega-

³ *P.C.I.J.* (1926), Series A, No. 7, p. 19.

tion of powers, allowed organizations, private individuals or groups of individuals to commit acts prejudicial to those interests, would at least be guilty of an omission if it was true that there was an international legal order and that States had a duty to respect it.

42. The Commission might perhaps wish to leave that question aside, despite its practical importance, but it should consider recasting article 5.

43. Mr. REUTER said that the Special Rapporteur had presented all the theoretical aspects of the problem in his written reports and had perfectly reflected the state of present international practice in his draft articles; his oral introductions had been clear and precise. All that now remained was to agree on the best way of expressing his ideas.

44. The various articles in chapter II called for one general remark. Article 5 stated a rule which corresponded to the most frequent case. It contained two elements relating, respectively, to the status of an organ and the fact of acting in the capacity of an organ. Article 6 defined the first of those elements and article 10 the second. Between those two provisions there were three articles which supplemented the general hypothesis stated in article 5; the use of the word "also" confirmed their residuary character. The particulars given in articles 11 and 12 were presented in negative form.

45. Without questioning the order of those articles, he observed that it was impossible to grasp the scope of article 5 without knowing the content of articles 6 and 10. He would therefore suggest that articles 6 and 10 be considered after article 5, so that the latter would not be submitted to the Sixth Committee of the General Assembly without the other two which made it easier to understand.

46. Article 5 was also linked with article 8, since one of the conditions for the application of article 5 was that a person or group of persons should possess the status of an organ. But the status of an organ was not defined in article 5. Article 8, on the other hand, suggested that that notion could be interpreted in two ways: there could be an organ established formally, by statute, since article 8 provided that a person or group of persons who did not formally possess the status of organs could have that status "functionally".

47. To take a purely theoretical example, suppose that a State's diplomatic representative abroad, who would possess the status of organ, engaged in drug trafficking. Normally, he would not be acting in his capacity as organ, unless his purpose was to help to finance a secret service of the State of which he was the representative. Where the trafficking offence itself was in question, the diplomat would not be acting as a person formally possessing the status of an organ of the State in accordance with article 5, but as a representative of the State within the meaning of article 8.

48. He therefore suggested that the word "formally" be inserted before the word "possess" in article 5. For that provision covered only the simplest case, that of persons who not only were agents of the State, but who visibly possessed the status of organs of the State. The other cases were dealt with in the subsequent articles.

49. As to what was meant by the words "are acting in that capacity", as used in article 5, that would have to be discussed in connexion with article 10, which showed that article 5 did depend on article 10.

50. Lastly, the English expression "possess the status of organs" was better than French "*ont la qualité d'organes*"; perhaps it would be better to replace the word "*qualité*" by "*statut*" in the French version.

51. Mr. AGO (Special Rapporteur) said that, to enable the Sixth Committee to consider the draft under more favourable conditions it might be advisable to inform it of the articles examined, but to draw its attention to the need to wait until next year for the full picture of all the articles in chapter II.

52. With regard to the links between the different provisions in Chapter II, article 10 was complementary not only to article 5, but also to articles 7, 8 and 9, since the situation dealt with in article 10 could arise in each of the cases contemplated in the three preceding articles. That explained the position of article 10. Perhaps it should somehow be indicated expressly that the rule stated in article 5 was neither absolute nor exclusive.

53. Sir Francis VALLAT said he agreed with the practical and inductive approach adopted by the Special Rapporteur and with his step-by-step method. It was essential to proceed in that way in order to avoid getting involved in a complicated mass of principles and details which would only lead to confusion.

54. That approach did not, of course, necessarily preclude some element of progressive development if the Commission's work showed the need for it. In its productive period, the Commission had never allowed itself to be inhibited from introducing elements of progressive development into its work.

55. At the same time, the Commission should not be discouraged if, at the end of its work on State responsibility, there still remained certain small gaps to be filled by posterity. Experience had shown that the attempt to reach perfection could defeat the basic purpose one was trying to achieve.

56. He shared the view that article 5 and the following articles dealing with attribution needed to be examined as a whole. In the nature of things, however, the Commission could only focus attention on one article at a time even if, at the end, it might have to review each provisionally approved article in the light of later articles.

57. He would accordingly concentrate at that stage on article 5. Acceptance of the article was facilitated by the fact that it was in itself of a very limited character. It dealt only with the fact of conduct and not with the imputation of legal wrong or of legal responsibility for an internationally wrongful act. It could be said to be related to sub-paragraph (a) of article 2 rather than to sub-paragraph (b) of that article.

58. He found article 5 broadly acceptable as it stood. He was, however, rather concerned at the tendency, during the discussion, to use the terms "organ" and "agent" as though they were more or less interchangeable. To use the term "agent" in the present context could only lead to unnecessary difficulties. That term could be used to refer to a person having the status of an agent of the

State, but it could also be used in its more ordinary sense of a person acting as an agent in a specific case.

59. Article 5, more or less as drafted, was a satisfactory expression of one of the basic rules to be applied. It dealt with the attribution to the State of the conduct of a person or group of persons regarded as an organ of the State. It avoided the problem of persons who did not have the status of organs of the State, although they might be deemed to be its agents—a problem which was dealt with in article 8.

60. The distinction between an organ and an agent could be illustrated by a recent United Kingdom court decision relating to the New Brunswick Development Corporation.⁴ The Corporation was in no sense an organ of the Government of the Province of New Brunswick, but it had been involved in the negotiation of certain contracts on behalf of that Government. Upon being sued as a result of acts performed in connexion with those contracts, it had pleaded sovereign immunity. Although the court had not regarded the Corporation as a Government organ, it had held that it had acted as an agent of the Government with regard to certain specific matters and that to the extent that it had so acted as an agent, the Corporation was entitled to the protection of sovereign immunity. That judgement was, of course, a decision under domestic law and related to sovereign immunity rather than to State responsibility, but the case could serve to illustrate the difficulties that could arise if the term “agent” were introduced into the present draft as though it were equivalent to “organ”.

61. He would refrain from discussing other drafting points, which would be considered by the Drafting Committee, but he wished to deal with the problem of titles. The title of chapter II, with the words “act of the State” between quotation marks, was somewhat inelegant. He suggested that it should be redrafted so as to refer to the attribution of acts to the State. It should also reflect the thought that the chapter dealt with the attribution of acts to the State by international law.

62. In the title of article 5, he suggested the deletion of the words “subject of international law”, which did not reflect any part of the contents of the article itself and contained an element of definition of the term “State”—a definition which the Commission was not attempting in the present draft.

63. He himself was not in favour of titles in an international convention and had been glad to see them dropped by the 1961 Vienna Conference from the Convention on Diplomatic Relations. The 1963 Vienna Convention on Consular Relations, however, did include titles for each of its articles and had set a pattern for a number of other conventions. He believed that a title should be no more than an indication of the contents of the article and should not be used in any way for purposes of legislation.

64. Mr. RAMANGASOAVINA said he hoped the Commission would be able to examine all the draft articles at the present session, not only because of the

importance of the subject, but also because it had been on the agenda for a long time.

65. Generally speaking, article 5 was satisfactory. It was the logical sequel to chapter I. Perhaps the expression “For the purposes of these articles” was not essential, but it had the merit of showing that article 5 was a key provision which conditioned those that followed. And that was why those provisions should be examined as a whole.

66. Article 5 laid down the principle that acts committed by organs of a State involved its responsibility. Articles 6 to 10 dealt with a number of possible cases arising out of article 5.

The meeting rose at 1 p.m.

1213th MEETING

Thursday, 24 May 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

later: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Welcome to Mr. Pinto

1. The CHAIRMAN welcomed Mr. Pinto, who had been elected a member of the Commission to fill one of the casual vacancies which had occurred since the last session.

2. Mr. PINTO expressed his gratitude to the members of the Commission for electing him.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 5 (Attribution to the State, subject of international law, of acts of its organs) (*continued*)

3. The CHAIRMAN invited the Commission to continue consideration of article 5 in the Special Rapporteur's third report (A/CN.4/246/Add.1).

4. Mr. KEARNEY said he had been glad to find that Sir Francis Vallat supported his suggestion that the titles of the articles should be made shorter. A simpler title should certainly be drafted for article 5.

5. With regard to the substance of the article, it appeared to him to deal with a comparatively simple problem. The State was an abstract entity which could only act through

⁴ [1971] 2 All ER 593.

a person or persons. The purpose of article 5 was to state, in the clearest possible terms, that where persons acted for a State an act of that State was performed.

6. That thesis had been very well expressed by the Special Rapporteur in his commentary, which contained a thorough discussion of the background to the subject and gave a large number of adequate illustrations.

7. There was one point, however—already mentioned by Mr. Ushakov and some other members—which deserved attention: the wording of article 5 left open the possibility of confusion between the conduct of an organ of the State and the conduct of the individuals constituting that organ. There was a very real difference between a court of law as such and the judge who sat in that court, or between a legislature and the members of parliament. In order to bring out that difference more clearly, he suggested that article 5 should be reworded to read: “The conduct of a person or persons who, according to the internal legal order of a State, possess authority to act for or on behalf of the organs of that State and are acting in that capacity in the case in question, is considered as conduct of the State from the standpoint of international law.”

8. Mr. USTOR said he fully supported the Special Rapporteur’s thesis in article 5. He would, however, make some drafting suggestions, which were very close to the substance. As Mr. Reuter had pointed out, the two were intimately connected.

9. His suggestions were prompted to some extent by the close links between article 5 and article 10 (A/CN.4/264), which was itself linked with other articles of the draft. Since the ideas embodied in those two articles were complementary, the language used in them should be brought into line.

10. For example, article 5 referred to the conduct of “a person or group of persons”, whereas article 10 referred to the conduct of “an organ of the State”. In the redraft suggested by Mr. Kearney, the words “a person or persons” were used instead of “a person or group of persons”. The Special Rapporteur had used the expression “group of persons” to refer to an organized group having some kind of independent existence. It might or might not have the status of a legal entity in a particular legal system, but it would still be a “group of persons”. In Hungary, a Ministry was regarded as having a legal capacity independent of the State, though the position had been different in the past.

11. In the case of article 5 the difficulty might be overcome by omitting any reference to persons or groups of persons; only the acts or conduct of the organ of the State would be mentioned, as in the present text of article 10. He would therefore suggest that article 5 be reworded to read: “Acts of State organs shall be considered as acts of the State in international law”.

12. Paragraph 1 of article 10 would then be redrafted to state that the rule in article 5 applied whether the organ had acted within its competence according to internal law or had exceeded that competence or contravened the provisions of that law. That provision would be followed by the exception now set out in paragraph 2 of article 10, relating to conduct that was “wholly foreign

to the specific functions of the organ”. There, it would be appropriate to refer to the conduct of “a person or persons”, since the conduct in question would be totally unrelated to the proper functions of the organ.

13. Mr. TSURUOKA joined in congratulating the Special Rapporteur and said he approved of the text proposed for article 5. He supported the principle stated in the article, but stressed that it referred only to normal cases, that was to say those which arose most frequently. It was, moreover, that character of normality which justified the position of the provision at the beginning of chapter II.

14. For the sake of clarity and to emphasize the normal character of the case contemplated, it might be advisable to introduce the idea of omission into article 5. It was true that the term “conduct” could be interpreted as covering both acts and omissions, but it might be useful to be more specific on that point.

15. Similarly, the text of the article would be easier to understand if it were simplified a little and the words “and within their competence” were added after the words “acting in that capacity”. It might then read: “The conduct of an organ of the State under the internal law of the State, acting in that capacity and within its competence, is considered under international law as an act of the State”.

16. He very much hoped that the Commission would be able to continue its examination of the draft articles on State responsibility during the present session.

17. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with the reasoning behind the principle embodied in article 5, and basically also with the formulation of the article. The debate had shown that there was virtual unanimity in support of the principle; the proposals made had been mainly of a drafting character.

18. He strongly supported the view that article 5 should be confined to the legal attribution of acts of State organs. It covered a much more limited field than the wider rules contained in article 1 and in sub-paragraph (b) of article 2.

19. Like Mr. Reuter, he thought that the English wording “possess the status of organs” more adequately reflected the real situation than the corresponding language used in the French and Spanish versions. The organ was an abstract entity; the acts of a person were attributed to the State, that person possessed the status of an organ of the State and acted in that capacity. For example, a Minister, as the titular head of his Ministry, acted on its behalf; the titular head could change, but the organ would remain. On that point, the language suggested by Mr. Kearney: “...possess authority to act for or on behalf of...” seemed to provide a satisfactory solution to a difficult problem of drafting.

20. Mr. AGO (Special Rapporteur) replying to the comments made on draft article 5, said that the full debate had had the merit of drawing the attention of members to the interdependence of articles 5 to 13. Although article 5 could not be examined without looking at the subsequent provisions, it would nevertheless be premature to analyse those provisions, as Mr. Ustor had

suggested, before they had been duly put up for discussion and introduced by their author. In the case of article 10, in particular, he would give reasons for the wording he had given it and show how it entailed some degree of progressive development of international law.

21. Several members had well understood one of the main points of his preliminary considerations, namely, that it was necessary to rely on reality rather than on theory. The theories had great merits, but they were dangerous when it was claimed, out of fondness for a particular theory, that the reality should be adapted to it. Some writers had gone so far as to maintain that a certain practice was contrary to logic.

22. All the theories nevertheless contained some truth and it was only after studying them that he had been able to propose the pragmatic method he recommended. For instance, the traditional theory was no longer acceptable when it claimed that any act which was not attributed to the State by internal law could not be attributed to it by international law; it had the merit, however, of emphasizing that the organization of the State came under internal law. The same applied to the theory which claimed for international law a monopoly of the attribution of acts to a State at the international level; that theory could no longer be supported when it reached the conclusion that it was international law which determined and governed the organization of the State. Similarly, the monist theory rightly invoked the primacy of attribution under international law, but it went astray when it claimed that the State organized itself by virtue of a delegation of international law. Consequently, the theories should be taken as a guide only in so far as they gave a correct interpretation of the facts, and it must never be forgotten that practice was the decisive factor.

23. As Mr. Bartoš and, especially, Mr. Elias had pointed out, it was by virtue of its sovereignty that the State determined its organization. Normally, international law was not concerned with that. It nevertheless presupposed the organization of the State and sometimes made use of it, in particular for the purpose of attributing an act to a State as a subject of international law. The attribution was often the same in internal law as in international law, but not always.

24. With regard to the comments of Mr. Hambro, he explained that when he affirmed that international law presupposed the organization of the State determined according to its internal law, he was not claiming that international law was not called on to interpret or to apply internal law. On the contrary, it was clear from article 5 that international law relied mainly on the internal legal order of the State for determining what acts could be attributed to it, and it was obvious that that principle made it necessary to examine internal law, and to interpret and apply it. But that did not mean that international law adopted the rules of internal law.

25. The criterion adopted by international law in considering the internal organization of the State was, above all, the need for clarity and security in international relations. Every State should be in a position to know when the acts of another State could be attributed to that State; and it was also necessary to guard against means of evasion.

26. To express all those ideas, it was necessary to proceed step by step and draft a series of articles which complemented each other. For that purpose the pragmatic method must be adopted, but it was possible that on some points the Commission might consider it advisable to propose that States should modify certain practices, relying on one trend rather than another. It was therefore important to ascertain the main trend of international practice and, if possible, to clarify it.

27. With regard to article 5 itself, Mr. Sette Câmara had expressed doubts about the need to retain the words "For the purposes of these articles". Personally, he would like to retain those words, not only because they had already been used by the Commission in other legal instruments, but also in order to show that article 5 referred to the determination of acts of the State from the standpoint of international responsibility. From that point of view the acts considered as acts of the State were much more numerous than in other spheres, in particular, the conclusion of treaties.

28. To follow up a comment by Mr. Reuter, who had pointed out that the link between article 5 and the provisions which followed and completed it was shown by the use of the word "also", he thought the words "above all" or "in the first place" could be inserted in article 5, if desired, to show that that provision was neither absolute nor exclusive and that it was supplemented by the provisions which followed.

29. It was clearly understood, as Mr. Ushakov had pointed out, that chapter II related only to the attribution of an act to a State, without, for the moment, qualification of the act as either lawful or wrongful. That operation came later. It should be noted, however, that the attribution in question was normative and did not consist in establishing a mere link of causality, since it always consisted in attributing to a State the acts of natural persons. That normative character followed from the use of the words "international law" in the text of article 5, but further explanations should be given in the commentary.

30. As to the notion of an organ, that involved the whole theory of the organization of the State. In his view an organ was always an instrument capable of acting, whereas the State was not; an organ was necessarily composed of persons. Mr. Ushakov feared that to follow George Scelle, for whom the State did not exist, would lead to the conclusion that there could be no State responsibility, but only responsibility of natural persons. It was obvious that such a theory was entirely foreign to the present draft. Mr. Kearney and the Chairman had expressed doubts about the use of the word "organ", because they regarded an organ as an abstraction. His own view was, on the contrary, that in the last analysis an organ was nothing but a human being or collection of human beings. The person who acted for the State was an organ; when he acted it was the State that acted.

31. Those different views reflected the various ways in which members of the Commission understood the most familiar notions. As a compromise, he would suggest—though regretfully—that, by its choice of terms, the Commission should avoid defining an "organ of the

State". He accordingly accepted the idea put forward by Mr. Ustor. It would be advisable, however, to make it clear in the wording Mr. Ustor had proposed, that the organs referred to were only those considered to be organs under the internal legal order.

32. In the light of Sir Francis Vallat's warning against the use of certain terms,¹ he observed, with regard to the use of the word "organ", that natural persons, without being organs of the State, could in certain cases be characterized exceptionally as organs or *de facto* organs. But the Commission need not enter into those details at present.

33. He thought it would be better not to adopt the wording proposed by Mr. Kearney, in order not to widen the theoretical divergences in the Commission. It would be preferable to refer to organs of the State rather than to persons.

34. With regard to the titles of chapter II and article 5, he was anxious to retain the phrase "*fait de l'Etat*", which clearly showed that the State had acted, that it had committed an act of omission. It remained to find an equivalent formula for the English version.

35. In reply to a comment by Mr. Tsuruoka, he pointed out that the notion of conduct had been defined in article 2, sub-paragraph (a), as "an action or omission". That definition was valid for the whole draft and there was no reason to introduce the word "omission" into article 5.

36. Many members had expressed the hope that the discussion on the draft articles could be continued at the present session. Personally, he would be delighted, but it should be remembered that the Commission had decided to devote most of the session to three topics. Moreover, even three weeks would not be sufficient for a thorough examination of chapter II. It should perhaps be explained to the General Assembly that the Commission thought it inadvisable to submit its draft articles for discussion piecemeal. If the General Assembly considered a few articles which could only be fully understood in relation to other provisions, that could only lead to fruitless discussions. It would be better to inform the General Assembly of the progress of the Commission's work on the topic and submit the complete text of the articles in chapter II the following year. In order to do that, the Commission would have to devote six weeks to the topic of State responsibility in 1974.

37. Mr. USHAKOV thanked the Special Rapporteur for his efforts to reconcile the different views expressed. Personally, he considered the attribution of an act to a State to be a legal operation, since it did not only involve the attribution of conduct, but was always linked with characterization. Taken separately, however, the attribution was not exclusively legal, if considered from the point of view of conduct alone.

38. The CHAIRMAN suggested that article 5 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*²

Mr. Yasseen, First Vice-Chairman, took the chair.

ARTICLE 6

39.

Article 6

Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy

For the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the hierarchy of the State, are irrelevant.

40. The CHAIRMAN invited the Special Rapporteur to introduce article 6 of his draft (A/CN.4/246/Add.2).

41. Mr. AGO (Special Rapporteur) said that the Commission had recognized, when examining article 5, that the principle stated in that article was neither absolute nor exclusive. It was now called upon to see whether there were any exceptions to that principle or, in other words, to establish whether there were any organs whose conduct might not be considered as an act of the State.

42. In the past, the tendency of practice, jurisprudence and, above all, doctrine had been to consider that only organs responsible for external relations could commit acts which could be regarded as acts of the State giving rise to international responsibility. More recently, however, it had been found that that view was untenable and that the conduct of organs responsible for internal activities could also give rise to international responsibility. According to another school of thought, now also generally abandoned, only the acts of organs other than legislative and judicial organs should be taken into consideration for purposes of attribution to the State from the international standpoint. The impunity of legislative organs was claimed to be justified by State sovereignty and the primacy of internal law, and that of judicial organs by the independence of the judiciary. Lastly, certain writers and some arbitrators had made a distinction between the conduct of superior organs and that of subordinate organs.

43. The first question to be settled, therefore, was whether it was only the conduct of organs of certain sectors of the State that could constitute an act entailing international responsibility. Practice and doctrine showed that such was not the case and that the conduct of all organs of the State—constituent, legislative, executive, judicial and others—could involve the State's international responsibility.

44. For example, if a State failed to enact certain legislation which it had committed itself by treaty to enact, that omission would obviously be an internationally wrongful act which might involve its international responsibility. Moreover, acts by legislative organs could give rise to responsibility for another reason; for the rules of international law often imposed an obligation without expressly stating that legislative measures had to be taken to fulfil it, but the absence of such measures made it impossible to fulfil the obligation and thus caused the State to commit an internationally wrongful act. With regard to the judicial power, it had been amply demonstrated by writers that the acts of its organs could engage the international responsibility of the State. The principle of the unity of the State, in other words, the principle

¹ See previous meeting, para. 58 *et seq.*

² For resumption of the discussion see 1226th meeting, para. 7.

that there was no distinction to be made between the different branches of power when it came to considering the conduct of an organ as an act of the State from the standpoint of international law, was firmly established by doctrine, jurisprudence and State practice, as members could see from paragraphs 145-149 of his third report.

45. It remained to be seen whether, for the purpose of attributing to a State conduct capable of generating international responsibility, a distinction should be made between "superior" and "subordinate" organs in accordance with a theory of which Borchard had been the principal upholder, but which had now been abandoned. That theory had been largely based on confusion with the application of the rule of the exhaustion of local remedies, according to which there was no violation of an international obligation so long as there remained, at the internal level, an organ capable of securing its fulfilment. Admittedly, an act was not finally characterized as internationally wrongful so long as local remedies had not been exhausted, but it was considered as an act of the State from the beginning. For supposing that the act or omission of a subordinate organ was confirmed at every successive stage and it had to be finally declared that the State had committed an internationally wrongful act, it would not be the final decision at the highest level which conferred its wrongful character on the act, but the combined conduct of the different organs starting with that of the subordinate organ.

46. The confusion arose from the fact that the problem was stated not, as it should be, in terms of attribution to the State of the conduct of the organ, but directly in terms of responsibility. In terms of attribution, the act or omission of a subordinate organ was an act of the State. Moreover, as members could see from paragraphs 153-160 of his third report, State practice, jurisprudence and doctrine no longer made any distinction based on the rank of organs of the State for purposes of attributing conduct to the State. Were it otherwise, the Commission would have to engage in progressive development of international law by taking a stand against such a criterion.

47. Lastly, it went without saying that no distinction should be made between State officials according to where they worked or whether their duties were permanent or temporary, remunerated or honorary.

48. Mr. KEARNEY said there could be no doubt about the substance of article 6, as formulated by the Special Rapporteur, unless one invoked the theory of the late Professor Borchard, which seemed to have been generally abandoned some time ago.

49. The article did raise certain drafting problems, however, particularly for common-law countries, because it was drafted in the form of a rule of evidence rather than a direct or positive rule. Apart from that, the only real problem was whether the three "questions" in the article concerning the organ of the State were sufficiently inclusive. In his opinion, the relative totality of governmental power was satisfactorily covered by the categories listed by the Special Rapporteur.

50. He proposed that article 6 be revised to read:

The act or omission of any organ of the State is conduct of the State under international law

(a) Whether that organ is exercising constituent, legislative, executive, judicial or any other governmental power;

(b) Whether its activities are internal or international in character;

(c) Without regard to the position of the organ in the structure of the State.

51. Mr. USHAKOV, reverting to article 5, said that organs, like the persons who formed them, could change or disappear, but their acts remained. Perhaps the Drafting Committee should try to express that idea by referring to persons "who are, or were, organs".

52. With regard to article 6, he approved of the use of the words "or other", but wondered whether it might not be desirable to express the idea—which might not be evident in the other possibilities covered by those words—that what was meant was the exercise of the public power.

53. In the French version, it would be better to speak of the "*caractère*" of the functions rather than their "*nature*". Furthermore, there was no point in making a distinction, sometimes difficult to establish, between international and internal functions; it would be better just to say something like "regardless of the character of its functions".

54. Mr. RAMANGASOAVINA said he approved of the substance of article 6. As to the drafting, it would be more logical to reverse the order of the various parts of the sentence in the French version and say: *Aux fins de la considération du comportement d'un organe comme un fait de l'Etat sur le plan du droit international, ledit organe peut appartenir indifféremment au pouvoir constituant, législatif, exécutif, judiciaire ou autre, ses fonctions être de caractère international ou interne, et sa position supérieure ou subordonnée dans la hiérarchie de l'organisation de l'Etat*. That formulation was more direct than the present wording. The Drafting Committee would have to see that the other language versions were harmonized.

55. Mr. HAMBRO said he agreed with nearly all the points made by the Special Rapporteur in his introduction of article 6. He also agreed with much of what Mr. Kearney had said, though he was inclined to wonder whether his proposed redraft did not sin by oversimplification.

56. He hoped the commentary to the article would mention, for the benefit of the general reader, what the Special Rapporteur had said about local remedies with reference to the question whether the organ held a superior or a subordinate position in the hierarchy of the State.

57. Mr. SETTE CÂMARA said he agreed with the substance of article 6 as submitted by the Special Rapporteur, because his formulation embodied the principle of the unity on the State with respect to its international responsibility.

58. As to the drafting, however, in the phrase "the constituent, legislative, executive, judicial or other power", he questioned the use of the word "power". Since most State constitutions still adhered to Montesquieu's conception of the tripartite structure of the State, was it possible to speak of such a thing as the "constituent power"? The constituent authority was, of course, at

one time the very basis of a State, but once the constitution had come into force, that authority became the legislative power.

59. There could be no doubt that the legislative, executive and judicial branches of a State could commit internationally wrongful acts, but sometimes such acts were committed by one branch against the will of another. The executive power of his own country, for example, had on one occasion wished to abide by a certain international obligation, but had been over-ruled by its own Supreme Court.

60. In his opinion, it was clearly not important whether the functions of the organ were of an international or an internal character. It was likewise irrelevant whether the organ held a superior or a subordinate position in the hierarchy of the State, since sometimes a minor employee, such as a Customs official, could commit an internationally wrongful act of a serious nature.

61. He suggested that the Commission approve article 6 provisionally and refer it to the Drafting Committee.

62. The CHAIRMAN,* speaking as a member of the Commission, said that were it not for differences of opinion on points of detail, it might be considered that article 6 was superfluous and that a fuller commentary to article 5 would suffice. But in view of the differences of opinion to which the application of the rule set out in article 5 had given rise at certain times, it was preferable to retain article 6.

63. Everything stated in article 6 was correct. It was essential to provide, by using the words "or other", for the possible existence of powers other than the constituent, legislative, executive and judicial powers, which might be established by the constitutions of some countries. It was useful to mention the constituent power, since positive law now recognized that the constitution formed an integral part of the internal law of a State, whose responsibility might be engaged if a provision of its constitution was contrary to an international obligation. It was also useful to mention the judicial power, for although people talked about the independence of the courts, there were nevertheless abundant cases on record in which denial of justice appeared as a cause of State responsibility. Lastly, it had to be stated clearly, as was done in article 6, that the international or internal character of the functions of the organ and its position in the hierarchy played no part in the attribution of an act to the State. Borchard's theory was unacceptable and, besides, it was incompatible with the rule in article 5.

64. He therefore approved the substance of article 6 and would leave it to the Drafting Committee to review the wording.

65. Mr. ELIAS said he agreed with other speakers in finding the substance of article 6 acceptable. Like Mr. Kearney, however, he thought that it should be reworded in such a way as to avoid enumerating three characteristics of the organ of the State and then concluding that they were all irrelevant. He himself could not

recall any provision in a draft convention which stated a rule of law in quite that way.

66. He proposed that article 6 be revised to read:

The attribution to a State of the internationally wrongful act of its organ is not affected by the fact that

(a) The organ belongs to the constituent, legislative, executive, judicial or other power;

(b) Its functions are of an international or internal character; or

(c) It holds a superior or a subordinate position within the State.

67. That formulation would avoid the use of the expression "act of the State", which countries with common-law systems might find it difficult to accept. It would also omit the reference to "hierarchy", and perhaps some other word could be found to replace the word "power".

68. The CHAIRMAN suggested that article 6 be referred to the Drafting Committee, on the understanding that the Special Rapporteur would reply at a later meeting to the various points that had been raised and that his remarks would be communicated to the Drafting Committee.

*It was so agreed.*³

The meeting rose at 1.10 p.m.

³ For resumption of the discussion see 1215th meeting, para. 3.

1214th MEETING

Friday, 25 May 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his third and fourth reports on the most-favoured-nation clause (A/CN.4/257 and Add.1; A/CN.4/266).

2. Mr. USTOR (Special Rapporteur) said that the idea that the Commission should study the most-favoured-nation clause had originated in 1964, during the discussion on the law of treaties at the sixteenth session. Mr. Jiménez de Aréchaga had then proposed that a provision on the most-favoured-nation clause should be included in the draft on the law of treaties to ensure that the clause was formally reserved from the operation of the articles dealing with the problem of the effect of

* Mr. Yasseen.

treaties on third States.¹ While recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, the Commission had not considered that those clauses were in any way touched by the articles on the law of treaties and for that reason had decided that there was no need to include a saving clause of the kind proposed.²

3. At its nineteenth session, in 1967, after the completion of the articles on the law of treaties, the Commission had noted that several representatives in the Sixth Committee, at the twenty-first session of the General Assembly, had urged that the Commission should deal with the clause as an aspect of the general law of treaties. The Commission had accordingly decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and had appointed him Special Rapporteur.³

4. In 1968, at the Commission's twentieth session, he had submitted a working paper,⁴ in which he had taken stock of the problems involved and had pointed out the importance of the most-favoured-nation clause in commercial treaties and its use in other treaties.

5. The Commission had then held a general debate on the topic and had given the Special Rapporteur certain instructions, which were summarized in the report on the work of its twentieth session in the following terms: "While recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, the Commission instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considers that it should focus on the legal character of the clause and the legal conditions governing its application. It intends to clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. To this end the Commission wishes to base its studies on the broadest possible foundations without, however, entering into fields outside its functions." In the light of those considerations the Commission had instructed the Special Rapporteur "to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause".⁵

6. The Commission had also decided to shorten the title of the topic to "The most-favoured-nation clause".⁶

7. At the Commission's twenty-first session, in 1969, he had presented his first report (A/CN.4/213),⁷ which contained a short history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken by the League of Nations or under its aegis. After

briefly considering the report, the Commission had accepted his suggestion that he should prepare another report containing an analysis of three cases heard by the International Court of Justice, which had been called by some writers the *sedes materiae* for the problems of the most-favoured-nation clause. Those cases were the *Anglo-Iranian Oil Company case (jurisdiction)*, the *Case concerning rights of nationals of the United States of America in Morocco* and the *Ambatielos case*. The Commission had also asked him to summarize, in his next report, the answers received from interested international organizations.

8. On the basis of those instructions, he had prepared a second report, (A/CN.4/228 and Add.1),⁸ which unfortunately made rather difficult reading because the answers of the interested agencies, especially GATT and UNCTAD, were of such a highly technical character that it was not easy for an ordinary lawyer to digest them. That report had not been considered by the Commission.

9. In 1972 and 1973 he had completed his third and fourth reports, which were now before the Commission (A/CN.4/257 and Add.1; A/CN.4/266) and which contained eight draft articles. Meanwhile, work on the topic was being done by the Secretariat, which was preparing a digest of decisions of national courts concerning the most-favoured-nations clause and a survey of treaties containing the clause published in the United Nations Treaty Series.

10. In his third report (A/CN.4/257), article 1, on the use of terms, was, in accordance with the Commission's usual practice, only provisional; the final decision on it could not be taken until the other substantive articles had been considered. He proposed, however, that wherever the draft articles contained a notion which appeared in the Vienna Convention on the Law of Treaties, it should be given the same definition as in that Convention.⁹

11. There were two or three expressions in article 1 which were of a certain importance because they appeared in almost all the articles: in particular, the "granting State" and the "beneficiary State". Other terms had been used in the literature on the subject, but he considered it necessary to accept a uniform definition of those notions.

12. He proposed to introduce articles 2 and 3 together, because they constituted the cornerstone of the whole draft. Paragraph 1 of article 2 was intended to cover both bilateral and multilateral treaties in which a most-favoured-nation clause appeared, while paragraph 2 implied that a most-favoured-nation clause was usually reciprocal, in the sense that both contracting parties to a bilateral treaty and all contracting parties to a multilateral treaty promised to accord each other most-favoured-nation treatment.

13. In exceptional cases, however, it sometimes happened that only one of the parties was a granting State, while the other was a beneficiary State. That occurred

¹ See *Yearbook of the International Law Commission*, 1964, vol. I, pp. 184-188.

² *Ibid.*, 1964, vol. II, p. 176, para. 21.

³ *Ibid.*, 1967, vol. II, p. 369, para. 48.

⁴ *Ibid.*, 1968, vol. II, p. 165.

⁵ *Ibid.*, p. 223, paras. 93 and 94.

⁶ *Ibid.*, 1968, vol. I, p. 250, paras. 7-12.

⁷ *Ibid.*, 1969, vol. II, p. 157.

⁸ *Ibid.*, 1970, vol. II, p. 199.

⁹ 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, article 2.

mostly when the situation was such that only one of the contracting parties was able to give certain advantages to the other, which was unable to reciprocate. For example, when a treaty was concluded between a landlocked and a maritime country, the maritime country would be in a position to grant most-favoured-nation treatment to ships of the landlocked country, but the landlocked country would naturally be unable to reciprocate in kind.

14. The essence of article 2 was that the constituent element of a most-favoured-nation clause was the granting of most-favoured-nation treatment, which meant that when a treaty provision promised most-favoured-nation treatment, that provision was a most-favoured-nation clause. Most-favoured-nation clauses were not uniform and might vary considerably, but their essential element was that they included a stipulation on behalf of the granting State in favour of the beneficiary State to claim most-favoured-nation treatment. It had been rightly said, therefore, that there was no such thing as the most-favoured-nation clause and that every treaty required independent examination. In other words, there were innumerable most-favoured-nation clauses, but there was only one most-favoured-nation treatment or standard.

15. The purpose of article 3 was to define what most-favoured-nation treatment was. The article provided that treatment promised under the most-favoured-nation clause should be on terms not less favourable than the terms of the treatment accorded by the granting State to any third State. In the simplest and most usual construction of the situation, there were two treaties involved: one was a treaty which included a stipulation to grant most-favoured-nation treatment and the other was a collateral treaty concluded by the granting State with a third State. In the latter, the granting State conferred certain advantages on a third State which, on the basis of the stipulation, would have to be accorded to the beneficiary State as well.

16. In drafting that provision, the question arose whether the treatment accorded to the beneficiary State should be the same as that accorded to the third State—whether it should be equal treatment, identical treatment or similar treatment. He had chosen the term “treatment on terms not less favourable” for the following reasons. If the granting State granted a certain advantage to the third State, the same advantage would have to be granted to the beneficiary State. That meant that the beneficiary State could not be in a less advantageous position than the third State; in other words, most-favoured-nation treatment did not exclude the possibility of the granting State according the beneficiary State certain additional advantages which went beyond those conceded to the most-favoured third State. Consequently, while most-favoured-nation treatment excluded the preferential treatment of third States by the granting State, it was fully compatible with preferential treatment of the beneficiary State.

17. It was with some hesitation that he had abandoned the expression “equal treatment”. Equal treatment was really an extremely important aspect of the most-favoured-nation clause, but in theory a situation might arise in

which greater advantages were accorded to the beneficiary State than to a third State. In practice, however, the result of the most-favoured-nation clause was equality of treatment of the beneficiary State and any third States. In fact, it had often been stated that the most-favoured-nation clause was the instrument of the principle of equality of treatment, not only in the field of foreign trade, but also in all other fields where the clause was applied. One of the problems of contemporary trade, however, was the fact that equality of treatment was not necessarily a just practice in cases where the partners were unequal.

18. In article 3, he had said that most-favoured-nation treatment meant “treatment upon terms not less favourable than the terms of the treatment accorded by the granting State to any third State.” The word “accorded” was intended to mean two things: either that the treatment had been accorded previously or that it had been accorded subsequently.

19. Paragraph 1 of article 3 also referred to a “defined sphere of international relations”, since it was necessary to define the sphere of application of the most-favoured-nation clause. The need for such a definition was quite obvious at the present time, but in the past there had been most-favoured-nation clauses which had been couched in very general terms and in which the granting State had promised most-favoured-nation treatment in all matters. Today, however, it was almost inconceivable that a clause should be granted in such broad terms, although he had quoted the exception of the treaty concerning the establishment of the Republic of Cyprus, which had provided that that Republic should accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements, whatever their nature (A/CN.4/257, para. (7) of commentary to articles 2 and 3).

20. It was also an essential element of the most-favoured-nation clause that it should describe the persons or things in whose respect most-favoured-nation treatment was granted, as was also provided in paragraph 1.

21. Paragraph 2 of article 3 provided that, unless otherwise agreed, paragraph 1 should apply irrespective of whether the treatment accorded by the granting State to any third State was based upon treaty, other agreement, autonomous legislative act or practice. That meant that, if the treaty did not provide otherwise, the advantages accorded by the granting State to any third State could be claimed by the beneficiary State regardless of whether those advantages were granted to the third State on the basis of a treaty, an oral agreement, independently of any treaty on a unilateral basis, or merely on the basis of practice.

22. Mr. TSURUOKA said he fully supported the first three articles of the Special Rapporteur's draft. The draft had come at an appropriate time, since the world was passing through an economic crisis. The most-favoured-nation clause was based on the two principles of equality and liberty, which should govern States not only in matters of foreign trade, but in the financial and economic spheres in general. The draft was both progressive and imbued with the idea of justice. By its simplicity and the

effect of the two principles on which it was based, it should contribute to the establishment of peace and prosperity in the world.

23. His own experience, after examining the claims made against Japan by certain African States on the basis of the General Agreement on Tariffs and Trade,¹⁰ showed that the study of the most-favoured-nation clause by the Commission would make it possible not only to clarify the legal aspect of that specific problem, but also to facilitate the application of the rules in force in international economic relations in general.

24. Mr. ELIAS said he had been interested by Mr. Tsu-ruoka's remarks because the African countries had had some difficulties with the more industrialized countries in encouraging a two-way traffic so that the whole trade should not be entirely in favour of one side.

25. The ideas underlying the draft were very acceptable, but the Commission would have to exercise great care in formulating them. He had some misgivings about article 3, paragraph 2; perhaps he had not sufficiently understood the commentary. He had hoped that the Special Rapporteur would give further explanations when he introduced article 3, but he had apparently assumed that the meaning was clear. Unless more explanations were given, he feared that there might be some confusion between article 3, paragraph 2 and article 4.

26. Another problem concerned the Special Rapporteur's logical attempt to emphasize that the most-favoured-nation clause should not be identified with non-discrimination. As the Special Rapporteur had pointed out, the most-favoured-nation clause embodied a broader concept, which covered not only economic and legal, but also political, cultural and other fields.

27. Article 2 contained four main elements which were quite sound in conception, although considerable revision would be called for, especially in paragraph 2. The article attempted to define the most-favoured-nation clause and the Special Rapporteur had stressed, first, that the clause must contain a pledge by a granting State to accord most-favoured-nation treatment to a beneficiary State, not merely a promise of non-discrimination. Secondly, the clause was not normally unilateral, except perhaps in the case of landlocked countries. Thirdly, there was a question of interpretation, namely, whether the pledge was intended to be binding on the granting State. Fourthly, paragraph 1 made it clear that the most-favoured-nation clause was not confined to bilateral treaties, but could also be applied in multilateral treaties.

28. Article 3 contained three major points. First, the granting State could not give preferential treatment to a third State, although it could to a beneficiary State. In practice, however, such cases were rare. The Special Rapporteur had explained that the whole concept was one of equality of treatment, and that was the keynote of the most-favoured-nation clause.

29. The second point was that the clause was not confined to foreign trade, but could be applied to various

other fields, such as Customs, transport—especially shipping—and the treatment of aliens. Later, however, the Special Rapporteur seemed to go a little too far when he talked about literary and artistic rights, refugees, consuls and immunities.

30. Article 3 needed considerable pruning, for although he agreed with the Special Rapporteur's explanation of the expression "not less favourable", he thought that in his effort to be clear and concise, he had possibly become slightly obscure. For example, he agreed with the basic idea behind the expression "defined sphere of international relations", but he was not sure that that was the correct formulation. Also, the words "determined persons or things" should perhaps be replaced by the words "specific persons or things".

31. Finally, he would welcome a detailed explanation by the Special Rapporteur of precisely what he meant by the phrase in paragraph 2 of article 3 beginning with the words "irrespective of the fact...".

32. Mr. KEARNEY said he was glad that the draft articles on the most-favoured-nation clause were finally before the Commission. It was interesting to note that legal historians had traced the most-favoured-nation clause back to November 1226, when the Emperor Frederick II had conceded certain privileges to the City of Marseilles which had already been granted to Pisa and Genoa.

33. He agreed with the Special Rapporteur that it was the practice of the Commission not to discuss the article on the use of terms until the substantive articles had been worked out. However, he would already point out that the definition of the term "third State" might require further refinement, since it could be either a State which received most-favoured-nation treatment or one which did not.

34. At the very outset of the discussion, the reference to multilateral treaties in article 2, paragraph 1, raised one of the most difficult questions which would confront the Commission. That problem was discussed by the Special Rapporteur in paragraph (8) of the commentary in connexion with the General Agreement on Tariffs and Trade and the Treaty establishing a Free-Trade Area and instituting the Latin American Free-Trade Association. The same problem would also arise in connexion with article 8 (A/CN.4/266), which was particularly affected by the question of regional organizations.

35. With regard to article 2, he wondered whether paragraph 2 was not expository material which it would be better to put in the commentary. Indeed, it seemed so self-evident that it was hardly necessary.

36. Article 3 was the key article in the series of basic articles at the present stage. He had listened to Mr. Elias's comments on it with some interest and it seemed to him that it was a question of the approach which should be adopted in drafting the article. It would be necessary to decide whether the article should be couched in general language, as was the Commission's normal practice, or whether, owing to the technical nature of the subject, it would be desirable to use more specific language. To illustrate the difference between those approaches, it might be sufficient to quote paragraph 1 of Article I

¹⁰ United Nations, *Treaty Series*, vol. 55, p. 194.

of the General Agreement on Tariffs and Trade which read: "With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

37. The expression "defined sphere of international relations" in article 3, paragraph 1, seemed to him somewhat vague in the present context. If it was intended to permit a most-favoured-nation clause to include, for example, all possible international relationships, he was not sure that it was necessary, but if it meant that the most-favoured-nation clause would have to define with a substantial degree of specificity the parameters of the clause, it could be helpful, although the question arose whether that requirement would be subject to a different agreement by the parties.

38. The expression "determined persons or things" might not be sufficiently broad. Article I of the General Agreement on Tariffs and Trade, for example, referred to conduct rather than persons and things. It would be necessary to clarify, also, precisely how those persons or things would be determined. Must it be in the treaty?

39. Lastly, the purpose of article 3, paragraph 2 was to make it clear that the method by which, or the reason why, the third State was accorded preferential treatment was immaterial for the operation of the most-favoured-nation clause. It would be better, therefore, to express that idea more simply, without referring to "treaty, other agreement, autonomous legislative act or practice".

40. Mr. SETTE CÂMARA said that the Special Rapporteur had produced four admirable reports, the first of which contained a valuable historical account and the second an excellent analysis of the relevant judicial precedents and practice of international organizations. The concrete proposals for draft articles with commentaries contained in the Special Rapporteur's third and fourth reports logically followed from the analysis of the subject in the earlier reports.

41. He agreed that, in accordance with the Commission's established practice, consideration of article 1, on the use of terms, should be deferred until a later stage in the work.

42. Article 2 gave a definition of the most-favoured-nation clause in comprehensive terms, which took into account the fact that the Commission was called upon to deal with the general problem of the clause, not only with its operation in connexion with tariffs and trade. That definition thus contrasted with the complex and hermetic formulation embodied in Article I of the General Agreement on Tariffs and Trade, the effect of

which was confined to commercial agreements dealing with tariffs and trade.

43. The distinction between the most-favoured-nation clause and most-favoured-nation treatment was an important one and had been clearly expressed in the draft. There were many ways of formulating the clause, but there was only one most-favoured-nation treatment. Subject, therefore, to the examination of drafting aspects, he supported paragraph 1 of article 2.

44. Paragraph 2 of article 2 referred to the usual practice of reciprocity of treatment. The Special Rapporteur had done well to cover that point. The language which he had used rightly did not preclude the possibility of unilateral concession of most-favoured-nation treatment.

45. The suggested removal of paragraph 2 from the text of article 2 to the commentary would simplify the article; he himself had no strong views on the point.

46. He welcomed the use of the formula "not less favourable than" in paragraph 1 of article 3, which made it clear that nothing prevented the granting State from extending to the beneficiary State even better treatment than to the third State. A reference to "equal treatment" or "identical treatment" would not have reflected accurately the present everyday practice.

47. As to the words "in a defined sphere of international relations", in the same paragraph, he thought that a formula of that kind was necessary. It was not the practice for the most-favoured-nation clause to cover all relations between the States concerned; some limitation was normally included. Similarly, it was necessary to refer to the specified persons or things to which most-favoured-nation treatment would be applied.

48. The Special Rapporteur's intention in paragraph 2 of article 3, as he understood it, was to specify that the provisions of paragraph 1 would operate in favour of the beneficiary State regardless of whether the treatment in question was accorded by the granting State to the third State by a treaty, under another type of agreement, by virtue of internal legislation or even by mere practice. He had no difficulty in accepting that principle, which was consistent with State practice, but he agreed with Mr. Elias that some further enlightenment from the Special Rapporteur would be useful.

49. The Commission could hope to achieve concrete results on the basis of the draft articles submitted by the Special Rapporteur. The most-favoured-nation clause was an important instrument of international trade, and its wider use should be encouraged. That use was spreading through the machinery of the General Agreement on Tariffs and Trade, but the clause should not be regarded as a panacea. In particular, the developing nations had to pay close attention to the idea of generalized preferences, which was a cornerstone of the work of UNCTAD on international trade. That fact, however, should not make the Commission hesitate in any way to contribute to the efforts to promote a wider and better use of the most-favoured-nation clause.

50. Sir Francis VALLAT said he associated himself with the previous speaker's tribute to the Special Rapporteur's work. He would make a few general remarks before considering articles 2 and 3.

51. He fully shared the view that the present topic was an important one. It was also one which it was difficult to grasp, because it was not possible to have in mind at the same time all the different kinds of clauses which had a most-favoured-nation aspect. There was a wide variety of most-favoured-nation clauses, which differed very materially from one another. Some of them clearly expressed the idea of treatment no less favourable than that accorded by the granting State to a third State. Others were not so clear, and sometimes it was even difficult to tell whether a particular clause should be classified as a most-favoured-nation clause. The whole subject was full of subtlety and delicacy. As a result, even small changes of wording could have important effects in practice.

52. He had noted the reference, in paragraph (3) of the Special Rapporteur's commentary to article 5 (A/CN.4/257/Add.1), to the two opposing views put to the International Court of Justice in the *Anglo-Iranian Oil Company case (jurisdiction)*¹¹ in 1952, and to the distinction between the content of the clause and its legal effect. It was not, however, at all easy to relate to those arguments the short extract from the Court's decision given in paragraph (4) of the commentary. The fact was that, in that case, the International Court of Justice had had to deal essentially with a question of the interpretation of a particular treaty rather than with the character of the most-favoured-nation clause in general.

53. It was therefore clear that the Commission should exercise even more than its usual care when drafting articles on the topics; that was particularly necessary in a specialist's field like the present one. He hoped that the Commission would be able to adopt satisfactory articles on the most-favoured-nation clause, but would urge it to proceed with great caution.

54. With regard to the principles underlying the work of the Commission and of the Special Rapporteur, he fully supported the idea of extending the consideration of the clause into fields other than international trade. In 1969, he had noted with concern the different approach adopted by the Institute of International Law, which had largely centred its attention on clauses in the commercial field and on the relationship between the General Agreement on Tariffs and Trade and Customs unions. He sincerely hoped that the Commission would keep its work on a more general level.

55. The topic had been rightly placed within the framework of treaty law. The application of the most-favoured-nation clause in a treaty was *par excellence* a question of the interpretation of the particular clause in the particular treaty. Undoubtedly, general principles could be developed, but in any particular case an adjudicating body would have to deal basically with a question of treaty interpretation. That fact was bound to have an influence on the Commission's treatment of the topic.

56. The standard of treatment to be accorded under the most-favoured-nation clause was an essential point. The Special Rapporteur proposed the appropriate

formula that the treatment should be not less favourable than that accorded to any other State.

57. His last general remark concerned the very real problem arising from the relationship of the topic with the principle of non-discrimination. He supported the view that the most-favoured-nation clause should be studied separately from the principle of non-discrimination. No exhaustive study of that principle should be attempted, but it was necessary to recognize that the two subjects overlapped to some extent.

58. With regard to the text of the articles, he agreed that articles 2 and 3 tended to some extent to state the obvious. The topic, however, was one in which it was often necessary to state the obvious in order to be able to formulate any rules at all.

59. He had some misgivings about the words "as in the usual case", in paragraph 2 of article 2; it was difficult to see what obligation was implied by that type of provision. The paragraph was perhaps more suitable for inclusion in the commentary.

60. With regard to article 3, he agreed with many of the remarks of previous speakers. In addition, he wished to draw attention to the difficulty that could be created by the use of the word "term". There was a difference between the granting of a standard treatment and the granting of certain terms, such as an undertaking to extend a certain treatment.

61. Mr. HAMBRO said he associated himself with the tributes to the Special Rapporteur and was in agreement with most of the previous speaker's comments.

62. He had no quarrel with the contents of the articles under discussion, but thought they appeared to look too much to the past. They were largely based on the experience of the League of Nations period, when the most-favoured-nation clause had been particularly prominent.

63. Looking into the future, two important points would have to be borne in mind. The first was the relationship between the most-favoured-nation clause and the treatment to be given to developing countries in the general framework of the promotion of development. The Commission would be out of touch with reality if it made no reference in its work to that important question.

64. The second was the relationship between the most-favoured-nation clause and the new forms of customs and economic unions. The question of that relationship had preoccupied GATT to some extent and could be expected to do so increasingly. As far as the Commission was concerned, it should bear the question in mind in its work, but should at the same time be careful not to include in the draft anything that might create difficulties in the future.

65. Mr. PINTO said that in the performance of his duties in his country, which was a developing country, he had often encountered the problem of most-favoured-nation treatment. He had therefore been particularly impressed by the masterly treatment of the subject by the Special Rapporteur in his four reports.

66. With regard to articles 2 and 3, he largely agreed with the comments of Sir Francis Vallat. There were many difficulties inherent in the subject itself, mainly

¹¹ *I.C.J. Reports 1952*, p. 93.

because of the political overtones that accompanied the inclusion of most-favoured-nation clauses in treaties. In his own country, most-favoured-nation clauses were included in treaties as a mark of cordial relations between the signatories. For example, in a number of shipping agreements signed by Sri Lanka, a clause had been included granting reciprocal most-favoured-nation treatment to the ships of the States parties. That clause was essentially a political one, since Sri Lanka had little or no shipping. The great variety of most-favoured-nation clauses was also explained by the fact that political relations varied.

67. With regard to the text of article 3, paragraph 1, the meaning of the words "the treatment accorded" needed to be clarified. They could mean the actual treatment given in a particular case, but they could also be taken to refer to the treatment which a State was under an obligation to accord under a treaty. The question was essentially one of interpretation of the particular agreement in each case. It would therefore be difficult to formulate a general principle in the matter.

68. He had doubts about the words "as in the usual case", in article 2, paragraph 2, which could be construed to mean that reciprocity was almost compulsory. In fact, reciprocity was not feasible between countries which, although equal in sovereignty, were grossly unequal in all other respects.

69. If the words "the treatment accorded" in article 3, paragraph 1 were taken to mean the actual treatment extended by the granting State to any third State, the provisions of article 2, paragraph 2 would impose reciprocity of actual treatment.

70. With regard to the drafting, an attempt should be made to find a clearer formulation for the idea expressed in the words "in a defined sphere of international relations", in article 3, paragraph 1. In paragraph 2 of the same article, the words "autonomous legislative act" might perhaps be replaced by the words "unilateral act", which would cover acts that did not constitute legislation.

The meeting rose at 12.50 p.m.

1215th MEETING

Monday, 28 May 1973, at 3.5 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Welcome to Mr. Martínez Moreno

1. The CHAIRMAN welcomed Mr. Martínez Moreno, who had been elected a member of the Commission to

fill one of the casual vacancies which had occurred since the last session.

2. Mr. MARTÍNEZ MORENO thanked the members for electing him to the Commission and pledged his best efforts to contribute to the accomplishment of its important tasks.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the 1213th meeting)

ARTICLE 6 (Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy) (*continued*)

3. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 6 in his third report (A/CN.4/246 and Add.1-3).

4. Mr. AGO (Special Rapporteur) said he noted from the discussion that none of the members of the Commission had challenged the principle stated in article 6 and that the criticisms made related only to the drafting. He saw no objection to stating the principle more directly, as several members had suggested, provided that article 6 did not merely repeat what was said in article 5, which, on the contrary, it should supplement.

5. Mr. Kearney had asked whether the categories listed were sufficiently inclusive.¹ It could be said that they were, except that the expression "or other" covered the possibility that certain particular elements of the structure of a State might not fall within any of them.

6. Since it was made clear, both in the commentary and in the text of the article, that it referred to organs of the State, the organization of the State and the power of the State, he did not think it was necessary to express, in the article, the idea of "public" power, as Mr. Ushakov had suggested.² Nor did he think that the word "power" should be replaced by "branch", as suggested by Mr. Sette Câmara,³ one could not speak of a "constituent branch", and it was essential to mention the constituent power.

7. On the other hand he was quite willing to replace the word "*nature*" by "*caractère*" in the French version, as Mr. Ushakov⁴ and Mr. Ramangasoavina⁵ had proposed. Some members had been in favour of deleting the reference to the international or internal character of the functions of the organ. He did not think that advisable, since it had a purpose, which was to eliminate the false idea, long dominant in the literature of the subject, that only organs responsible for external affairs were capable of committing wrongful acts.

¹ See 1213th meeting, para. 49.

² *Ibid.*, para. 52.

³ *Ibid.*, paras. 58 and 59.

⁴ *Ibid.*, para. 53.

⁵ *Ibid.*, para. 54.

8. Lastly, the words "in the hierarchy of", to which Mr. Elias had objected,⁶ could perhaps be replaced simply by "in".

9. In the light of those considerations he proposed to the Drafting Committee that article 6 be redrafted to read: "The consideration of the conduct of an organ of the State as an act of the State in international law is independent of the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State".

10. The CHAIRMAN said that, as already agreed at a previous meeting, article 6 would be referred to the Drafting Committee.⁷

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

(*resumed from the previous meeting*)

ARTICLES 2 and 3

11.

Article 2

Most-favoured-nation clause

1. Most-favoured-nation clause means a treaty provision whereby an obligation is undertaken by one or more granting States to accord most-favoured-nation treatment to one or more beneficiary States.

2. When, as in the usual case, the contracting States undertake to accord most-favoured-nation treatment to each other, each of them becomes thereby a granting and a beneficiary State simultaneously.

Article 3

Most-favoured-nation treatment

1. Most-favoured-nation treatment means treatment upon terms not less favourable than the terms of the treatment accorded by the granting State to any third State in a defined sphere of international relations with respect to determined persons or things.

2. Unless otherwise agreed, paragraph 1 applies irrespective of the fact whether the treatment accorded by the granting State to any third State is based upon treaty, other agreement, autonomous legislative act or practice.

12. The CHAIRMAN invited the Commission to resume consideration of item 6 of the agenda, beginning with articles 2 and 3 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).

13. Mr. USHAKOV said that although the subject dealt with came under public international law, it was nevertheless closely linked with private international law. The Special Rapporteur had duly taken that into account in the excellent report he had submitted to the Commission. He (Mr. Ushakov) had no criticism of the substance of articles 2 and 3 and the comments he was about to make related solely to the drafting.

14. In article 2, paragraph 1, it would be preferable to replace the words "one or more granting States" by the words "a State" and the words "one or more beneficiary States" by the words "another State". At that stage, there was not yet either a granting State or a beneficiary State.

15. In paragraph 2, the expression "as in the usual case", which had no legal effect, should be deleted; the words "becomes thereby" should be replaced by the words "may be"; and the word "simultaneously" should be deleted.

16. With regard to article 3, in Russian terminology two synonymous expressions could equally well be used: "most-favoured-nation treatment" and "most favourable treatment"; he himself preferred the latter.

17. The expression "international relations", in article 3, paragraph 1, did not perhaps correspond exactly to the idea it was desired to express, for in the strict sense it applied to relations between States. In the context of the article, however, it had a wider sense, for although it was States which concluded agreements, the most-favoured-nation clause which those agreements might contain governed relations between persons and things coming under private law. He would not propose replacing the expression "international relations", which was clear, but he wished to draw attention to the two meanings it could have: the restricted meaning of relations between States and the wider meaning of relations between subjects of international law.

18. Articles 2 and 3 could be referred to the Drafting Committee, with a request to take particular care to see that the French and Russian translations accorded with the original.

19. Mr. YASSEEN said that the most-favoured-nation clause represented the complete application of the general principles of the law of treaties. The Commission was not required to take a position on the political or economic aspects of the clause, but to draft the clearest possible text on its legal régime.

20. He did not agree with the Special Rapporteur that reciprocity was the essence of the most-favoured-nation clause; for the reciprocity provided for by the clause might be only formal and even the equality it was sought to obtain by the effects of the clause could be merely apparent.

21. It would be a mistake to leave aside the question of the most-favoured-nation clause in multilateral treaties. The development of international relations might make it necessary to apply the clause for the benefit of certain classes of State or of an indeterminate number of States having a common characteristic: for example, the developing countries. On the other hand, it was sometimes difficult to grant general and absolute equality of treatment, as intended in article 3, paragraph 1. Certain exceptions based on the realities of international life might be justified if they were dictated by political, geographical or cultural similarities between States. That applied, for example, to the solidarity between the Arab and the Scandinavian countries.

22. He approved of the definitions given in article 1 and commended the Special Rapporteur particularly

⁶ *Ibid.*, paras. 66 and 67.

⁷ For resumption of the discussion see 1226th meeting, para. 20.

for having referred to the Vienna Convention on the Law of Treaties, thus ensuring the continuity of the Commission's work.

23. With regard to article 2, like other members he was in favour of deleting from paragraph 2 the words "as in the usual case", which might not always correspond to the facts.

24. In article 3, paragraph 1, there was no need to refer to the "terms of the treatment accorded", since the terms were an integral part of the treatment. It would be enough to say "treatment not less favourable than that accorded...".

25. Mr. BARTOŠ said that in general he approved of articles 1, 2 and 3 as proposed by the Special Rapporteur, but wished to draw attention to certain points which should be dealt with in the commentary.

26. First, it was no longer possible to speak of the most-favoured-"nation" clause, since the field of application of the clause had recently been extended to other subjects of international law, in particular, international organizations.

27. Secondly, the most-favoured-nation clause had two aspects: the positive aspect defined by the Special Rapporteur, and the negative aspect of not less favourable treatment. What it was desired to achieve through the effect of the clause was, basically, equality of treatment, which was sometimes obtained by other means. It was the League of Nations which had first sought to establish a general régime of equality, the scope of which the United Nations had then undertaken to enlarge. Equality of treatment would be ensured by prohibiting the application of less favourable treatment. The General Agreement on Tariffs and Trade and the Treaty of Rome were examples of that.

28. In the present state of the law, the clause did not yet represent a general régime of equality, but it came close to a non-discrimination clause. It was already ripe for codification, although some points called for very great caution.

29. Articles 2 and 3 should be referred to the Drafting Committee.

30. Mr. TAMMES said that the Special Rapporteur had produced a number of excellent reports and draft articles. The articles had the merit of simplicity, which could only be attained by a long and difficult process of sifting the various confusing elements involved. As a result, the Commission had now before it a draft containing the essentials of the topic.

31. The guidelines laid down by the Commission in its report on the work of its twentieth session⁸ were adequately reflected in the Special Rapporteur's set of draft articles. Its instruction to the Special Rapporteur not to confine his studies to the area of international trade, but to explore the major fields of application of the clause, was duly recognized in paragraph 1 of article 3, which spoke of treatment accorded "in a defined sphere of international relations with respect to determined persons or things".

32. It had been the Commission's understanding that the final results of its work on the present topic would be closely connected with, and not go beyond, the law of treaties; the Special Rapporteur's articles remained scrupulously within the spirit of the 1969 Vienna Convention on the Law of Treaties. In fact, the Special Rapporteur, particularly in his exposition of article 8 (A/CN.4/266), had shown himself a staunch defender of the acquired rights of the beneficiary States of most-favoured-nation treaty provisions against restrictive tendencies.

33. He entirely agreed with Sir Francis Vallat, in emphasizing the importance of interpreting each particular clause in each particular context. The draft itself did not lay down any general directives for interpretation of the most-favoured-nation clause, except perhaps the presumption set out in article 6. Indeed, a set of rules of that type could only afford limited opportunities for laying down guidelines.

34. To begin with, it could not have any retrospective effect. And since the clause was not expected to have the same wide application in the future as it had had in the past, the draft would not be relevant to the bulk of the clauses—a fact which constituted a very real limitation. Moreover, the autonomous will of the contracting parties, and its interpretation, would always prevail over any general rules relating to the clause. There were no *jus cogens* rules on the topic.

35. Finally, cases could occur in which the extent of any specific most-favoured-nation treatment would not be established on the basis of the interpretation of the clause alone. If the collateral treaty had been concluded prior to the undertaking to grant most-favoured-nation treatment, the intention of the parties to the first commitment would often have become indirectly and implicitly part of the consent of the parties to the second commitment. That intention would have to be taken into account in a complex process of cumulative interpretation.

36. As to the drafting of articles 2 and 3, he associated himself with much that had been said by previous speakers and had nothing to add at the present stage.

37. Mr. AGO said the Special Rapporteur was to be commended for having expressed himself strictly in terms of legal technique. The Commission was not required to pronounce on the desirability of most-favoured-nation treatment or on its development, since the justification of that treatment depended on historical, geographical and other circumstances.

38. Most-favoured-nation treatment was not necessarily a consequence of the principle of non-discrimination and equality of States. That equality was not affected by the existence or non-existence of the most-favoured-nation clause. If a country treated aliens differently from its own nationals within its jurisdiction, that was discrimination; but if a State maintained closer relations with one particular State than with others and granted that State more favourable treatment than it accorded to others, it could not be said to be discriminating. In that sphere, the autonomy of States was sovereign.

⁸ See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 223, para. 93.

39. With regard to the drafting, he wondered whether the word "clause" also covered the case of a treaty concluded solely in order to accord more favourable treatment. Was there not a more appropriate term for that case?

40. Like other members of the Commission, he was in favour of deleting the words "as in the usual case" from article 2, paragraph 2.

41. With regard to article 3, it would seem more logical for paragraph 1, which defined what was meant by most-favoured-nation treatment, to follow immediately after paragraph 1 of article 2, which spoke of according that treatment. In order to remove from paragraph 1 of article 3 the reference to the terms of the treatment accorded, perhaps the paragraph could be re-drafted to read: "Most-favoured-nation treatment means treatment granted by one State to another, in a defined sphere of international relations with respect to determined persons or things, not less favourable than the treatment accorded by the granting State to a third State".

42. It would appear that paragraph 2 of article 3 could also be attached to article 2, since it dealt with the effect of the obligation created by the most-favoured-nation clause. What it was intended to express was that the obligation provided for by the clause subsisted only if the treatment accorded by the granting State to any third State was based upon a treaty, other agreement, etc. It was thus a limitation on the operation of the clause rather than on the treatment accorded to the beneficiary State. Perhaps articles 2 and 3 could be merged in a single article.

43. Mr. BILGE said it was thanks to the work of the Special Rapporteur that the Commission was in a position to undertake the codification of a very old topic, which would satisfactorily complete the codification of the law of treaties.

44. In considering the most-favoured-nation clause as a legal institution, the Special Rapporteur had complied in every way with the instructions given him by the Commission. He was particularly grateful to the Special Rapporteur for having taken the needs of developing countries into consideration.

45. The Commission should consider whether it was not advisable to include in the draft, before articles 2 and 3, a general article defining the scope of the legal instrument it was drawing up.

46. It should also consider whether it would not be better to define the most-favoured-nation clause in two separate provisions, one dealing with bilateral treaties and the other with multilateral treaties, instead of dealing with both cases in a single provision, as the Special Rapporteur had done in article 2, paragraph 1. The Special Rapporteur had, indeed, pointed out in his second report that the operation of the GATT clause, for example, differed from that of a usual bilateral most-favoured-nation clause.⁹

47. In addition, a more general definition should be found to cover the case referred to by Mr. Ago, in which a treaty was concluded solely for the purpose of granting favourable treatment.

48. He endorsed the Special Rapporteur's comments, in paragraph (7) of his commentary, on the unilateral granting of most-favoured-nation treatment. The granting was not unilateral, in that compensation of another kind was generally provided for.

49. He agreed with other members of the Commission that paragraph 2 of article 2 would be better placed in the commentary.

50. In article 3, the Special Rapporteur had been right to use the phrase "not less favourable", which better reflected the essential object of the most-favoured-nation clause, namely, basic equality. He had also been right to use the word "accorded" rather than "granted". It should, however, be made clear that what was meant was treatment already accorded or to be accorded in the future.

51. Lastly, he asked whether article 3, paragraph 1 also applied to multilateral treaties.

52. Mr. BARTOŠ said that according to article 3, most-favoured-nation treatment was based "upon treaty, other agreement, autonomous legislative act or practice". According to the theory of the nature of unilateral legislative acts, it was difficult to take such acts into consideration unless they were converted into agreements. That occurred when unilateral declarations were accepted by the other party and became genuine treaty rules.

53. It was also important to mention cases in which the most-favoured-nation clause was applied by certain régimes recognized by international practice. One example was the Allied High Command in Germany, after the Second World War, whose decisions had not reflected the will of Germany and had not subsequently been accepted by it either. A basis for that régime might perhaps be found in the German treaty of surrender. In fact, the most-favoured-nation régime had been established in favour of the former allied States. It might therefore be asked whether the term "practice" meant practice pure and simple or whether it also covered the practice of an imposed régime.

54. In order to avoid disputes in a given sphere, particularly shipping, States had sometimes accepted the most-favoured-nation clause without being sure that it was the result of an autonomous legislative act or of practice. That was why, in his opinion, the expression "autonomous legislative act" should not be understood to mean only a unilateral act which had been accepted by the other party so that it became a genuine agreement.

55. Mr. RAMANGASOAVINA said that the Special Rapporteur had made good use of all the information at his disposal on a topic which was particularly arid from the legal standpoint. He had been duly guided in his work by the spirit of the Vienna Convention on the Law of Treaties—even in the working of the articles he proposed.

⁹ *Ibid.*, 1970, vol. II, p. 223, document A/CN.4/228 and Add.1, para. 157.

56. Articles 2 and 3 constituted an attempt to define the concepts of the most-favoured-nation clause and most-favoured-nation treatment. Those concepts covered a wide variety of situations. The articles proposed gave some idea of that variety and he fully supported their substance.

57. With regard to the drafting, it might be asked whether the expression “as in the usual case”, used in article 2, paragraph 2, was not an invitation to States to grant each other most-favoured-nation treatment on a reciprocal basis. In the absence of such reciprocity, most-favoured-nation clauses could lead to a certain lack of balance and take on the appearance of *leonine* clauses. The Special Rapporteur’s intention had certainly been to include in the definition of the clause any supplementary clauses that might be conceived.

58. Similarly, in article 3, the expression “not less favourable” was felicitous, even if rather indirect. The Special Rapporteur had used it in order to avoid saying “more favourable” or “equal”. It covered, in particular, the case in which, when a treaty was concluded, the beneficiary State specified that any subsequent treaties should not be concluded on terms as favourable as those on which the parties to the treaty in question had agreed.

59. Lastly, the word “practice”, though it had the advantage of being elastic, should nevertheless be defined, since it was somewhat vague.

60. Mr. MARTÍNEZ MORENO congratulated the Special Rapporteur on his skilful treatment of the topic dealt with in his report.

61. The point raised by Mr. Ushakov, that most-favoured-nation treatment could be accorded not only to States, but also to other subjects of international law, should be taken into account; but it was necessary to specify what kind of subjects of international law were referred to, since it would obviously be difficult to accord such treatment to individuals, and it was well known that in the opinion of Georges Scelle the human being was the subject of international law *par excellence*. Although such treatment had usually been the subject of a particular clause in a treaty of broader scope, it was conceivable that a treaty might relate solely to the question of most-favoured-nation treatment, and the expression “most-favoured-nation clause” might perhaps be replaced by some other term, as suggested by Mr. Ago.

62. The definition of most-favoured-nation treatment should take account of the exceptions for special situations between countries with special economic or other links. For example, the treaty establishing the Central American Common Market contained an “exception clause” laying down that the treatment accorded to the Central American countries which were uniting for historical, geographical and economic reasons could not be accorded to other countries.¹⁰ Economic integration measures, such as the establishment of customs unions, common markets and other economic associations intended to raise the standard of living of the countries concerned, entailed exceptions to the most-favoured-nation clause,

in particular, to assist less developed countries. It was an exception of that kind that the Mexican delegation to the Latin American Free Trade Association (LAFTA) had recently requested when it had sought permission to grant even more favourable treatment to Central American countries, which were in a worse state of under-development than the members of LAFTA. A treaty granting most-favoured-nation treatment which did not provide for such exceptions in special situations was unlikely to be ratified by the members of organizations or groups established for purposes of economic integration.

63. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on his general conception of the topic and the manner in which he had reflected it in the draft articles, of which he himself fully approved.

64. The definitions given were in exclusively legal terms, and all economic and political considerations had been left aside, although the Special Rapporteur had stated in paragraph (8) of his commentary to articles 2 and 3 that it was “obviously desirable that any definition of most-favoured-nation clauses should embrace also those inserted in multilateral treaties”. The question of exceptions, however, especially in the case of developing countries, should be mentioned, if not in the articles themselves, at least in the commentary.

65. In article 2, paragraph 2, the words “as in the usual case” appeared to be superfluous.

66. The definition of most-favoured-nation treatment, given in article 3, paragraph 1, should be supplemented. The words “the terms of” before “the treatment” could be deleted.

67. Since paragraph 1 of article 3 contained a definition, not a rule of international law, the words “paragraph 1 applies”, in paragraph 2, seemed inappropriate.

68. Mr. AGO said he wondered whether the expression “not less favourable” was appropriate, since it would permit treatment on more favourable terms, which would obviously constitute a different situation. It might perhaps be preferable to say “equally favourable” or “as favourable as”.

The meeting rose at 6 p.m.

1216th MEETING

Tuesday, 29 May 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramagosaovina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

¹⁰ See United Nations, *Treaty Series*, vol. 455, p. 90, article XXV.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]
(continued)

ARTICLE 2 (Most-favoured-nation clause) and

ARTICLE 3 (Most-favoured-nation treatment) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of item 6 of the agenda and articles 2 and 3 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).

2. Mr. BEDJAOUI said that with the Special Rapporteur's first two reports,¹ the Commission was sufficiently well equipped to take up the examination of the draft articles he had proposed in his third report.

3. He approved of the Special Rapporteur's general method of work. He had been right in stating that the most-favoured-nation clause could be included either in bilateral or in multilateral treaties—that was why he had taken the precaution of using the phrase of "one or more... States" in article 2; he had also been right not to limit the field of application to trade or to commercial policy, but to extend it to all possible spheres of international relations, as indicated in article 3, and to consider, through the general philosophy of the texts he had submitted to the Commission, both the past and the future advantages received by the beneficiary State under the clause.

4. He was grateful to the Special Rapporteur for having dwelt, particularly in his second report, on the questions of multilateralization and institutionalization of the clause—of which GATT was an example—which enlarged the scope of the clause and changed its character. He had also been particularly interested in what the Special Rapporteur had said about trade agreements with developing countries, though that was beyond the scope of the subject under study.

5. With regard to terminology, the expression "most-favoured-nation clause" was incorrect in many ways. First, it was not always just a clause, since there could be treaties whose sole object was to establish privileged treatment. Secondly, apart from the fact that the State was increasingly replacing the "nation" in certain economic systems, there were also organizations that now wished to benefit from the clause. Lastly, even the expression "most favoured" was incorrect, since in fact it was not the third State which was the most favoured, whatever might be said, but the beneficiary State, since the clause itself stipulated that no State might receive more favourable treatment than the beneficiary under it. As the Commission must refer to recognized concepts, however, it was bound to take account of the terminology inherited from the past, and he was therefore prepared to accept it.

6. The most-favoured-nation clause was a procedure that enabled a State to obtain advantages granted to a third State even though there was no legal relationship between the third State and the beneficiary State. A lot had been said about equality and reciprocity being inherent in the clause, but in his opinion, reciprocity was not, and should not be, an element in it; indeed the notion of reciprocity was foreign to the clause. If the treaty containing the clause did not provide for reciprocity, there was no reason to presume it; there would rather be a general presumption of unconditionality.

7. Reciprocity could be ensured in two ways. The first would be for the beneficiary State to offer to the granting State the same advantages as the granting State received from a favoured third State and, if the beneficiary State did not grant the advantages obtained from the third State by the granting State, it could not enjoy them itself. That, however, could not be presumed, since historically reciprocity was tending to disappear. The second way would be to oblige the beneficiary State to conclude a treaty with a third State also to be favoured in the same way as the granting State had been able to favour another third State. But it was obvious that the beneficiary State and the granting State, which were the initial signatories to the clause, were not obliged to behave in the same way with regard to various third States for both of them to benefit from the advantages they both granted to various third States. Reciprocity should therefore be excluded.

8. Article 4 rightly established that the legal obligation created between the beneficiary State and the granting State was justified not by the principle of reciprocity, but by the existence of the clause as expressed by voluntary agreement in the treaty containing it. In reality, equality of treatment was perceptible mainly in the phenomenon of multilateralization and institutionalization of the clause.

9. Although the expression "most-favoured-nation clause" was incorrect, he could accept articles 1, 2 and 3 as definition articles. He wondered, however, whether it would not be preferable to replace the term "*Etat concédant*" ("granting State"), by "*Etat promettant*" ("promising State"), since it was not really a matter of concession.

10. In article 2, the Special Rapporteur defined the clause in terms of the treatment. But the treatment was only defined in article 3 and it would therefore be better to refer, not to something still unknown, but to the treaty provisions by which the granting State undertook to accord present or future advantages to a third State.

11. In article 2, paragraph 2, the words "as in the usual case" should be deleted. The Special Rapporteur had obviously had reciprocity in mind at that point, but as reciprocity was not an essential condition for the application of the clause, it would be better to adopt a definition from which reciprocity was excluded.

12. In article 3, it might be better to say that most-favoured-nation treatment extended to the régime constituted by the advantages accorded by the granting State to any third State.

13. Mr. USTOR (Special Rapporteur), summing up the discussion, said he would like to deal first with

¹ Yearbook of the International Law Commission, 1969, vol. II, p. 157, document A/CN.4/213 and 1970, vol. II, p. 199, document A/CN.4/228 and Add.1.

members' general remarks. Members had implicitly or explicitly confirmed the Commission's 1968 decision that attention should be focused on the legal character of the most-favoured-nation clause and the legal conditions governing its application.² Most of them had also endorsed the view that the study of the clause should not be confined to international trade, and that all the major fields of its application should be explored. The feeling that that was perhaps too ambitious an aim had been expressed by Mr. Elias,³ but he wished to assure him that, as the work proceeded, all those fields would be covered by the draft.

14. It had also been agreed that it was not the Commission's task to pass judgement on the usefulness of the clause. The clause was a neutral institution, like treaties themselves; it could be used by any State, whatever its economic or social system; it could also be used for any purpose.

15. He would certainly proceed with caution, bearing in mind the complexity of the subject—an aspect to which Sir Francis Vallat had drawn attention.⁴ The present articles would require particularly careful drafting, but the Commission had a strong Drafting Committee to deal with that problem.

16. It was true that the articles contained essentially dispositive rules that would only come into play if States did not agree otherwise. Sir Francis Vallat had pointed out that most of the articles were of an interpretative character; many were in the nature of presumptions and embodied rules of interpretation. That did not, however, detract from the usefulness of the Commission's work.

17. At that point he would like to draw attention to the passage in his first report in which he had described the work done on the subject of the most-favoured-nation clause by the League of Nations Committee of Experts for the Progressive Codification of International Law.⁵ The Committee had entrusted a Sub-Committee of two experts with the study of the subject, one acting as Rapporteur. The Rapporteur had concluded that it was not necessary to frame rules of interpretation in regard to the clause, since the ordinary rules of judicial interpretation "would seem adequate and more desirable". The other member of the Sub-Committee, however, had expressed the opinion that the ordinary rules of judicial interpretation did not suffice to prevent disputes between contracting States; that it was desirable to frame supplementary provisions in a general international convention; and that it would be better to lay down certain general rules for the guidance of States in determining the interpretation of the clause when it was not clearly expressed.

18. The Committee of Experts itself had decided not to place the topic of the most-favoured-nation clause on the agenda of the 1930 Hague Conference. That decision was of course in line with the attitude of States at the

time, which was not very positive towards the codification of international law.

19. The important question of the relationship between the most-favoured-nation clause and the principle of non-discrimination had been raised by Sir Francis Vallat. Although there was undoubtedly some overlapping between the clause and that principle, the two were essentially different, and the difference was well illustrated by the provisions of article 47, paragraph 2 (b) of the Vienna Convention on Diplomatic Relations, which stated that "discrimination shall not be regarded as taking place" where States extended to each other "more favourable treatment" than was required by the Convention.⁶ Thus a State could not invoke the principle of non-discrimination in order to object to a particularly favourable treatment extended to another State if it had itself received the ordinary non-discriminatory treatment on a par with other States. On the other hand, a State invoking a most-favoured-nation clause would be entitled to claim the same favourable treatment as had been extended on a special basis to another State.

20. Another important difference was that the principle of non-discrimination was a general rule which could always be invoked by a State. The position was quite different with regard to most-favoured-nation treatment which, as provided in article 4 of the draft, could only be claimed by one State from another on the strength of a specific clause in force between those two States.

21. Several members had raised the question of preferences in favour of developing countries, which constituted an important exception to the rules on most-favoured-nation treatment. He would deal with that question in detail when preparing articles on the exceptions to the operation of the clause, and he wished to indicate that in the commentary already at the present stage.

22. He also proposed to deal elsewhere in the draft with the question of non-retroactivity, which had been raised by Mr. Tammes.⁷

23. Mr. Pinto had drawn attention to the political overtones of most-favoured-nation clauses, which sometimes led to one-sided results.⁸ It was, of course, a feature of all treaty-making that advantages which appeared to be reciprocal could have an unbalanced effect in practice. The problem was not peculiar to the most-favoured-nation clause.

24. Mr. Bedjaoui had suggested that the question of reciprocity should be set aside. No doubt that could be done for the time being, but it was bound to come up again when the Commission came to consider the question of conditional and unconditional clauses. In practice, it was very unusual for a treaty to provide for the unilateral granting of most-favoured-nation treatment. Regardless of the material content of the most-favoured-nation clause, it generally operated reciprocally.

25. A large number of drafting suggestions had been made during the discussion and they would be duly

² *Ibid.*, 1968, vol. II, p. 223, document A/7209/Rev.1, para. 93.

³ See 1214th meeting, para. 29.

⁴ *Ibid.*, para. 51 *et seq.*

⁵ *Yearbook of the International Law Commission*, 1969, vol. II, pp. 170-172.

⁶ See United Nations, *Treaty Series*, vol. 500, pp. 122-124.

⁷ See previous meeting, para. 34.

⁸ See 1214th meeting, para. 66.

taken into consideration by the Drafting Committee. Meanwhile, he would like to comment on some of them.

26. With regard to article 1, there had been general agreement concerning the provisions on the use of terms taken from the Vienna Convention on the Law of Treaties.

27. He understood that the terms "granting State" and "beneficiary State" were in conformity with generally accepted usage. The Drafting Committee would, however, examine Mr. Bedjaoui's suggestion that the term "*Etat promettant*" should be adopted.

28. The objection raised by Mr. Kearney to the use of the term "third State"⁹ in the present context was a valid one. In the light of that objection, he suggested deleting sub-paragraph (f) of article 1, and replacing it by a provision on the "favoured State"; that term would be defined to mean a State which had received favoured treatment from the granting State.

29. With regard to article 2, it had been pointed out that both the term "clause" and the term "most-favoured-nation" were not entirely accurate. For example, a whole treaty could contain nothing more than provision for most-favoured-nation treatment. In some cases, the text of the treaty would be quite long and set out in great detail the application of the treatment to various matters. Nevertheless, it was convenient to use the expression "most-favoured-nation clause", which was sanctioned by long usage. There was some analogy with the term "international law", which continued to be used although what was now meant was really inter-State law.

30. He would consider the drafting proposal made by Mr. Ushakov in regard to paragraph 1 of article 2,¹⁰ but should point out that the draft was intended to cover both bilateral and multilateral treaties. The complications which arose when an attempt was made to deal with both types of treaties together had been stressed by Mr. Kearney, but he thought it was necessary to cover both in the article.

31. The general language used in paragraph 1 had been contrasted by Mr. Kearney with the more specific language used in the General Agreement on Tariffs and Trade. The Commission's task, however, was to find general language which would cover all specific cases of application of the clause, without going into detail.

32. Attention had been drawn to the case in which the "third State" was one of the parties to the multilateral treaty in which the most-favoured-nation clause had been included. The clause should operate in the same manner in all cases, whether the favoured State was a party to the multilateral treaty or a complete outsider.

33. With regard to paragraph 2 of article 2, he could accept the suggestion that the words "as in the usual case" should be deleted.

34. He would like to retain the remainder of the provision in the article, instead of moving it to the commentary as some members had suggested, because it served to indicate that each of the two States concerned became

at the same time a granting State and a beneficiary State.

35. The problem of clauses providing for most-favoured-nation treatment for organizations would be mentioned in the commentary, unless a special provision was included in the draft on the lines of article 3 of the Vienna Convention on the Law of Treaties.¹¹

36. In article 3, he was in favour of retaining the expression "most-favoured-nation treatment" as it was the commonly accepted one in English, although it was true that in Russian and Hungarian, the expression "most-favoured treatment" was in current use.

37. In paragraph 1 of article 3, he could accept the suggestion by several members that the word "terms" should not be used. He could also agree to include in the commentary, as proposed by Mr. Bilge,¹² a passage to explain that the word "accorded" covered both treatment already accorded and treatment subsequently accorded.

38. Mr. Pinto had raised the question of the distinction between treatment legally accorded and benefits actually extended.¹³ On that point he would draw attention to the passage quoted in his second report from the judgement of the International Court of Justice in the *Case concerning the rights of nationals of the United States in Morocco*.¹⁴ The material question was whether the third State, or favoured State, was entitled to some advantage. The fact that, for some reason or other, it might not be in a position to avail itself of that advantage was irrelevant. Thus, the beneficiary State could invoke the most-favoured-nation clause in respect of an import duty exemption granted to the favoured State and the granting State could not object that, in fact, no goods at all of the category concerned had been imported from the favoured State, so that no actual benefit had been received by it.

39. The words "international relations" in article 3, paragraph 1, had been criticized by Mr. Ushakov.¹⁵ A better expression would certainly have to be found, since it was true that most-favoured-nation treatment applied to matters, such as the treatment of aliens, which went beyond the scope of "international relations".

40. In the same passage, the word "determined", which appeared before the words "persons or things", meant "defined by the treaty". The expression "persons or things" was not sufficiently broad and should be supplemented by a reference to actions or acts.

41. With regard to paragraph 2 of article 3, Mr. Elias had pointed out that no supporting comment had been appended. That omission would be remedied by drawing on the material in paragraph 27 of his 1968 working paper,¹⁶ which stated that "The right of the beneficiary

¹¹ 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.

¹² See previous meeting, para. 50.

¹³ See 1214th meeting, para. 67.

¹⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 207, document A/CN.4/228 and Add.1, para. 45.

¹⁵ See previous meeting, para. 17.

¹⁶ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 169.

⁹ *Ibid.*, para. 33.

¹⁰ See previous meeting, para. 14.

to a most-favoured-nation treatment extends to all favours granted by the conceding State to a third State independently of the fact whether the favour granted originated in a treaty, in a mere practice of reciprocity or in the operation of the internal law of the promiser.” The views of a number of writers were cited in support of that statement, together with an extract from a 1936 study by the Economic Committee of the League of Nations.

42. In the same paragraph of article 3, the wording “paragraph 1 applies” and “autonomous legislative act” would have to be improved to take into account the valid points made during the discussion.

43. He did not favour Mr. Kearney’s suggestion that the enumeration at the end of the paragraph should be replaced by a more general formulation.¹⁷ He would prefer to retain the enumeration and supplement it with a general formula making it clear that the enumeration was not exhaustive.

44. Mr. USHAKOV said he wished to clarify two points. First, there was no denying that the most-favoured-nation clause could be included in multilateral treaties as well as in bilateral treaties, but the idea of multilateralism was not expressed by the words “one or more States”. The text of article 2, paragraph 1, would be more correct and clearer if the words “a treaty provision” were replaced by the words “a bilateral or multilateral treaty provision”.

45. Secondly, the legal relationship created by the clause was always bilateral. It was always between two States only that it was established, not in a general way between several States at the same time. For the two States in question, all other States were third States, even if they were also beneficiaries under the clause.

46. Mr. KEARNEY said that the Special Rapporteur had explained that the word “accorded” in paragraph 1 of article 3 was intended to cover both treatment accorded at the time of the entry into force of the most-favoured-nation clause and treatment accorded subsequently. Since temporality had been a major problem in the *Anglo-Iranian Oil Company case (jurisdiction)*,¹⁸ which was discussed in connexion with article 5 (A/CN.4/257/Add.1), it would seem reasonable to include in the draft a new provision, which could take the form of a second paragraph in article 5 or of an additional article 5 *bis*, to deal with the temporal nature of the operation of the clause. It would cover the questions of commencement and termination of the clause and of developments during its operation.

47. Sir Francis VALLAT said that, according to article 1, sub-paragraph (f), “third State” meant a State “not a party to the treaty in question”. The result of reading that definition into paragraphs 1 and 2 of article 3 was that the operation of article 3 was limited to States not a party to the treaty in question. He wondered whether that was really the result intended.

48. Mr. BARTOŠ said that one of the main difficulties to which the most-favoured-nation clause could give rise was that of its territorial scope. It might happen that the

clause was restricted to only a part of the territory of the beneficiary State. The question then arose whether third States could claim the benefits of the clause for part of their territory or for the whole of it. It was also necessary to take account of the case in which part of the territory of a State became part of another State, as the Commission had already done in its work on the law of treaties and succession in respect of treaties. Nothing was said about those questions in the draft articles and that was a gap which should be filled by adding a reference to them, either in the commentary or in the Commission’s report, so that the General Assembly would know that the Commission had not neglected that aspect of the matter.

49. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with the remarks of Mr. Ushakov and Sir Francis Vallat.

50. With regard to article 2, paragraph 1, while it was true that most-favoured-nation treatment could have a multilateral origin, the legal ties to which it gave rise were bilateral.

51. It was also clear that the provisions of article 1, sub-paragraph (f), were valid only for bilateral treaties. In the case of multilateral treaties, there was clearly a contradiction between the provisions of that sub-paragraph and those of article 3, paragraph 1.

52. Mr. USTOR (Special Rapporteur), replying to Mr. Ushakov’s remarks, said it would be made clear in the commentary that the provisions of article 1, sub-paragraph (a), on the meaning of the word “treaty” were intended to cover both multilateral and bilateral treaties. It was true that the working of the clause was always bilateral, but there were multilateral treaties such as the General Agreement on Tariffs and Trade in which all the parties agreed to grant most-favoured-nation treatment to each other.

53. It was his intention in due course to propose a new article to deal with the point just raised by Mr. Kearney.

54. The comment by Sir Francis Vallat was perfectly valid; it was precisely for that reason that he had himself suggested deleting sub-paragraph (f) from article 1 and replacing it by a provision on the use of the term “favoured State”, which would replace the term “third State” in the draft articles.

55. He thanked Mr. Bartoš for drawing attention to the problem of territorial scope, which arose sometimes as a result of State succession. It had at one time been suggested that the matter should be dealt with in the draft on succession of States in respect of treaties, but no provision on it had appeared in the draft adopted by the Commission at the previous session. He would therefore consider the possibility of drafting a suitable provision at a later stage.

56. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 2 and 3 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁹

¹⁷ See 1214th meeting, para. 39.

¹⁸ *I.C.J. Reports 1952*, p. 93.

¹⁹ For resumption of the discussion see 1238th meeting, paras. 16 and 21.

ARTICLE 4

57.

*Article 4**Legal basis of most-favoured-nation treatment*

A State may claim most-favoured-nation treatment from another State solely on the ground of a most-favoured-nation clause in force between them.

58. The CHAIRMAN invited the Special Rapporteur to introduce article 4 of his draft (A/CN.4/257 and Add.1).

59. Mr. USTOR (Special Rapporteur) said that article 4 embodied a valid rule of international law and qualified the right defined in article 2. The word "solely" meant that the right to such treatment depended on a pledge by the granting State, normally contained in a written agreement between the two parties, but it did not exclude most-favoured-nation treatment promised in other forms of agreement. The article would therefore have to be supplemented by a provision on the lines of article 3 of the Vienna Convention on the Law of Treaties, to the effect that it did not affect the right to most-favoured-nation treatment conferred by promises given orally.

60. The effect of the words "in force", which were not used in article 2 or 3, could perhaps be conveyed by more felicitous drafting.

61. Although no State should be entitled to claim most-favoured-nation treatment unless such treatment had been explicitly promised, all States had an equal right to non-discriminatory treatment. That raised the question whether most-favoured-nation treatment could be claimed, on the basis of the principle of non-discrimination between States, from a State which already accorded such treatment to other States. According to one writer, the denial of most-favoured-nation treatment by a country which accorded such treatment to other countries constituted an unfriendly act. However, that was not strictly speaking a legal issue.

62. Mr. YASSEEN said he supported the idea expressed in article 4, but had some doubts about the need for a provision of that kind. The idea was already expressed in article 2, containing the definition of the most-favoured-nation clause, which was considered to be a treaty provision under which a State was entitled to claim certain treatment.

63. In its present form, article 4 might hinder the formation of a customary rule. At present, there was no customary rule under which a State could claim most-favoured-nation treatment from another State, but it was possible that such a rule might one day be recognized in the name of inter-State solidarity, at the regional or even at the universal level.

64. The Commission should therefore be careful not to freeze international law as it stood at present by affirming that a State could claim most-favoured-nation treatment "solely on the ground of a most-favoured-nation clause", as provided in article 4. Article 2 was drafted in more neutral terms, which did not encroach on the domain of the formation of custom.

65. Mr. HAMBRO said that Mr. Yasseen had raised a valid point, but it was one which would apply to almost

any rule of law the Commission might formulate. Such rules were intended for application in the existing legal situation. Article 4 ought not, of course, to preclude the possibility of future development of customary rules on non-discrimination between States, but since subsequent redrafting of the other articles might obviate the need for the present article 4, he preferred to reserve his position on that point.

66. Mr. BARTOŠ said that the most-favoured-nation clause had its origin in the law of treaties, but its development had been such that it was sometimes erected into a veritable institution.

67. He had already raised the question of imposed régimes²⁰ in connexion with article 3, paragraph 2 and had acknowledged that, as indicated in that provision, most-favoured-nation treatment could either be stipulated in an agreement, promised by an independent legislative act, or instituted by practice, the latter term being used in its widest sense, so as to cover imposed régimes.

68. Article 4 could not hinder the development of international law. The most-favoured-nation clause might indeed have an institutional character resulting from practice, whether that practice was based on custom or resulted from an institutional measure linking certain States at the regional or the world level. The latter tendency was particularly apparent in the Organization of African Unity, the General Agreement on Tariffs and Trade, and specialized agencies such as the World Health Organization and the Universal Postal Union. If it was established that the practice referred to in article 3, paragraph 2, included the practice of institutional régimes, article 4 could not hinder the development of international law.

69. Formerly, the most-favoured-nation clause had not taken the form of an institution or a régime, but had pertained to private international law, the treatment of aliens and Customs questions. With the development of international law, and in order to fight against discrimination, it had been made into a rule of much more general application. It had thus become an institutional clause for the States parties to the General Agreement on Tariffs and Trade and for those which claimed assistance under that Agreement.

70. It could be noted that international law was tending to substitute the idea of equal treatment of States for that of sovereign equality of States. That idea was still only in a crystallization stage, but article 4 could not impair the process in any way. Article 4 certainly had its place in the draft. Whereas article 3 defined most-favoured-nation treatment, article 4 specified that a State was entitled to claim such treatment.

71. Mr. KEARNEY said he supported the thesis of article 4. The manner in which it was expressed was acceptable, although it would be better if either the word "basis" or the word "ground" were used in both the title and the text.

²⁰ See previous meeting, paras. 52-54.

72. He was inclined to share Mr. Hambro's reaction to the concern expressed by Mr. Yasseen about the possible inhibiting effect of article 4 on the future development of customary rules on non-discrimination between States. Apprehensions expressed about possible similar adverse effects of the Commission's attempts to draft international instruments had proved unfounded.

73. Mr. YASSEEN said he was well aware that the Commission's task was to codify existing rules of international law. It could in no case hinder the development of the international legal order or, in particular, the formation of a custom. But he thought the wording proposed for article 4 was too absolute and would have the effect of arresting the development of international law. It was clearly provided in article 2, paragraph 1, that most-favoured-nation treatment could be claimed on the basis of a treaty provision. But article 4 went further; it stipulated that a State might claim that treatment solely on the ground of a most-favoured-nation clause, and that gave the existing rule an absolute character which might hinder the development of a custom. Consequently, article 2 appeared to be sufficient and article 4 unnecessary.

74. Mr. USHAKOV said that article 4 stated a very simple rule. The legal consequences of a most-favoured-nation clause could not be invoked without any legal basis; consequently, the clause must be in force.

75. Mr. Yasseen's comments should be applied to article 2 rather than to article 4. Article 2 contained the expression "treaty provision", which implied the existence of a treaty, whereas the rule in article 4 was applicable whether the most-favoured-nation treatment resulted from a treaty or from a custom.

76. The purpose of article 4 was not only to draw attention to the legal foundation of most-favoured-nation treatment, but also to stress that it was always definitely based on relations between two States.

77. He therefore fully approved of the wording of article 4.

78. Mr. ELIAS said that article 4 would be acceptable if its relationship with article 3, paragraph 2, were clarified. The text should indicate that it was not intended to restrict the idea implicit in article 3, paragraph 2; he hoped the Special Rapporteur would explain its implications in his commentary. If article 4 were retained as it stood, the inclusion of the word "practice" in article 3, paragraph 2, might only be justified in the sense of article 31, paragraph 3 (b) of the Vienna Convention on the Law of Treaties concerning interpretation.²¹ If it were understood in that way, it might be possible to accept article 4 as a basic provision laying down the rule that most-favoured-nation treatment could only be claimed on the basis of a treaty.

The meeting rose at 1 p.m.

1217th MEETING

Wednesday, 30 May 1973, at 10.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

(continued)

ARTICLE 4 (Legal basis of most-favoured-nation treatment) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 4 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).

2. Mr. PINTO said that article 4 seemed to him to be closely related to article 2, paragraph 1; he suggested that the Special Rapporteur might consider the possibility of revising article 2 in the light of article 4 and of article 3, paragraph 2.

3. He would propose, for example, that in article 2, paragraph 1, the words "a treaty provision whereby an obligation is undertaken" be replaced by the words "a specific undertaking". He thought the addition of the word "specific", in particular, would be helpful.

4. With regard to the statement in article 3, paragraph 2, that paragraph 1 of that article should apply "irrespective of the fact whether the treatment accorded by the granting State to any third State is based upon treaty, other agreement, autonomous legislative act or practice", he wondered whether there could be such things as unwritten clauses, except possibly a *clausula rebus sic stantibus*.

5. In article 4, some difficulty might be caused by the words "in force between them", though he saw no harm in retaining those words.

6. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the principle underlying article 4, and with the Special Rapporteur's formulation of it; from a technical point of view he considered the article absolutely necessary.

7. Of course, it might be possible to incorporate the substance of article 4 in article 2, but he himself considered it desirable to retain it as a separate article, since that made the basic principle clearer and more emphatic.

8. The question had been raised whether article 4 was really necessary at all, and fears had been expressed that it might in the future prove an obstacle to the progressive development of customary law. He thought that difficulty could be overcome with the help of the explanations

²¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293.

given by the Special Rapporteur, and possibly by including a saving clause, as in the Vienna Convention on the Law of Treaties.¹

9. There was an increasing tendency to admit exceptions in the application of the most-favoured-nation clause, as had been done with respect to generalized preferences in article I of the General Agreement on Tariffs and Trade.² He believed that most-favoured-nation treatment was an exception to the general principle of the sovereign equality of States and that it could only be claimed on the basis of a written text.

10. Sir Francis VALLAT said that the few comments he wished to make on article 4 related to its presentation rather than to its substance. In the strict context of the article, he agreed with its principle and wording; but he found in it, and in the presentation generally, a tendency to lay down what looked like absolute rules of international law, though the situation was saved, from the technical point of view, by the very careful drafting of the articles.

11. Article 4 spoke of "a most-favoured-nation clause", and that went back to the definition in article 2, paragraph 1: "most-favoured-nation clause means a treaty provision, etc.". There, the word "treaty" was absolutely vital and went back to the definition in article 1 (a), which referred to "an international agreement concluded between States", so that the system was limited to States parties to certain particular treaties. The self-contained character of the early articles of the Special Rapporteur's draft was not, however, as clear as that of the introductory articles of the Vienna Convention on the Law of Treaties.

12. As a matter of general presentation, he would like to see something included in the early part of the articles, perhaps as an introduction, which would clarify the position and soften the apparently absolute way in which the articles were stated.

13. Mr. MARTÍNEZ MORENO said he was in complete agreement with article 4 as drafted by the Special Rapporteur. However, the article might give rise to some opposition on the part of third States which had not signed a most-favoured-nation clause with the granting State, but to which that State had traditionally granted certain "historic" preferential rights, such as fishing rights.

14. Mr. SETTE CÂMARA said he did not think there could be any quarrel in the Commission about the content of article 4, although it might be questioned whether it was altogether necessary. Some speakers had pointed out that the wording of article 2 sufficed to make it clear that no State could claim most-favoured-nation treatment unless there was a pledge to grant it contained in a treaty provision, namely, the most-favoured-nation clause.

15. He himself submitted that the point of article 4 was also covered by article 5 (A/CN.4/257/Add.1). In fact, the titles of the two articles already showed some degree

of overlapping, since the "legal basis of most-favoured-nation treatment" and the "source of the right of the beneficiary State" were two bases of the same kind. Indeed, who, in any event, could claim most-favoured-treatment but the beneficiary State? Certainly not the granting State or the so-called "third State".

16. While agreeing fully with Sir Francis Vallat's acute observations that the use of the expression "third State", as defined in article 1, sub-paragraph (f), was incompatible with the inclusion of the most-favoured-nation clause in multilateral conventions, he had some misgivings about the Special Rapporteur's suggestion that it be replaced by the term "favoured State".

17. In practice, the State which would normally claim most-favoured-nation treatment could be no other than the beneficiary State. Consequently, he thought that article 4 could be deleted without changing the spirit of the Special Rapporteur's draft. If it were considered necessary to emphasize the thesis underlying the article, the word "solely" could be added in article 5 after the word "arises".

18. It did not escape him that article 5 was intended to deal with problems of time and was based on the judgement of the International Court of Justice in the *Anglo-Iranian Oil Company case (jurisdiction)*.³ In practical terms, however, the field of the two articles was the same; the Special Rapporteur himself recognized in his commentary to article 4 that there was no evidence of any customary international law whereby most-favoured-nation treatment might have some foundation other than the treaty clause. And in the treaty context, which implied a relationship between two States, as Mr. Ushakov had rightly emphasized, the only State which could claim most-favoured-nation treatment was the beneficiary State.

19. He agreed with Mr. Yasseen that there was no advantage whatsoever in freezing the possible progressive development of international law by including in the draft a rigid statement, which, as the Special Rapporteur recognized, was a point of principle—the defence of a thesis. As Mr. Kearney had said, the Commission's major task was codification, but he thought Mr. Yasseen had made it very clear that he was not pleading against codification. If he had understood him correctly, Mr. Yasseen's misgivings concerned only the desirability of an article which would close the door to the development of customary international law in an area in which there had already been some dispute in the Economic Committee of the League of Nations.

20. Mr. BEDJAOUI said he thought article 4 should be read in conjunction with articles 2 and 3. Those provisions had the merit of stating two conditions failing which a State could not claim most-favoured-nation treatment. The first condition was stated in article 3, paragraph 2: a favoured third State must have obtained certain treatment from the granting State. The second condition was in article 4: a State claiming most-favoured-nation treatment must have concluded with the granting

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, article 3.

² United Nations, *Treaty Series*, vol. 55, p. 196.

³ *I.C.J. Reports 1952*, p. 93.

State an agreement containing the most-favoured-nation clause.

21. At the previous meeting Mr. Yasseen had said that article 4 would have the effect of freezing international law and hindering the formation of a customary rule establishing the equality of States. He himself hesitated to support that argument, since, if a general customary rule of non-discrimination came into existence, it would affect not only the beneficiary State, but all third States concerned. It might therefore be asked whether the draft as a whole might not be liable to freeze international law.

22. Unlike Mr. Yasseen, who feared that article 4 might prevent the formation of a customary rule guaranteeing equal treatment to all States, which would be a maximum safeguard, he thought that article 4 was not drafted in sufficiently explicit terms to provide a minimum safeguard for a State which claimed most-favoured-nation treatment. Article 4 should include the idea of an obligation to accord most-favoured-nation treatment, as it appeared in article 2, paragraph 1. Drafting on those lines could dispel the doubts expressed by Mr. Yasseen.

23. Mr. TSURUOKA said he was in favour of retaining article 4, the purpose of which was to facilitate the application of the most-favoured-nation régime.

24. Generally speaking, Mr. Yasseen's fears were pertinent, because, although it was the Commission's duty to codify international law, it must take care not to hinder the development of customary law, which should operate naturally and in the interests of justice.

25. Nevertheless, as far as the specific question of the most-favoured-nation régime was concerned, it should be adapted to precise application, because the economic relations of States were passing through a crisis at the present time and it was essential to clarify a confused situation.

26. If the clause were to evolve in such a way that all countries were one day obliged to grant most-favoured-nation treatment, it would no longer come within the sphere of independent will, but within that of a mandatory régime. For that reason the inclusion of article 4 in the draft was justified.

27. Mr. USHAKOV said the Commission had to concern itself with general international law, and under article 38 of the Statute of the International Court of Justice, international custom was to be considered as "evidence of a general practice accepted as law". In the case of the most-favoured-nation clause, a general custom would be the negation of the very idea of that clause. In practice, however, commercial relations between States were passing through a crisis, and it could not be expected that a general custom would be formed which would have the effect of obliging States to grant most-favoured-nation treatment to all other States. Hence there was no need to consider the effects which article 4 might have on the formation of a general custom.

28. Mr. RAMANGASOAVINA said he thought the idea expressed in article 4 should be included in the draft, because it was essential to state the legal basis of the right of a State which claimed most-favoured-nation treatment. That idea was already expressed in article 2,

which stated that the most-favoured-nation clause was a "treaty provision" binding the granting State and the beneficiary State.

29. In article 3, paragraph 2, the Special Rapporteur had enumerated the different ways in which a granting State could bind itself to a third State, namely, by treaty, other agreement, autonomous legislative act or practice. In his opinion, the mention of practice among the means of becoming bound by the most-favoured-nation clause did not open the way for customs which might be established in inter-State relations. The Special Rapporteur had merely wished not to limit the possibilities.

30. The purpose of article 4 was to stress the need to invoke a most-favoured-nation clause and thus to restrict the rather wide scope of article 3. As had already been pointed out, articles 4 and 5 contained restrictions on the preceding provisions. He therefore believed that article 4 was justified.

31. Mr. YASSEEN, referring to his remarks of the previous day, said that Mr. Sette Câmara had confirmed his doubts about the need for article 4, by showing that the idea expressed in it already appeared not only in article 2, but also in article 5.

32. Moreover, the terms in which article 4 was drafted were too categorical. To assert that a State could claim most-favoured-nation treatment solely on the ground of a most-favoured-nation clause was to require the presence of such a clause in a "treaty", as defined in article 1. Stated in that form, the rule could be harmful to the formation of a custom and exclude the possibility of an oral clause. Although the possibility of a general custom on the subject must be excluded, it was quite possible to envisage a local custom.

33. As to oral clauses, it could be imagined that States belonging to a group might be bound by a clause of that kind. In such a case, article 4 would be invoked against every State which could not rely on a clause in writing.

34. He hoped that the draft would be made sufficiently flexible not to mortgage the future, in case justifiable situations arose. The deletion of article 4 would not harm the draft in any way; on the contrary, it would make it more flexible.

35. If article 4 was to be retained, it should perhaps be drafted in positive form to read: "A State may claim most-favoured-nation treatment from another State on the ground of a most-favoured-nation clause". That formula would at least make it possible to overcome the difficulties to which practice might give rise.

36. Mr. AGO said he thought it was necessary to state the rule contained in article 4. If it was repeated in article 5, that article might possibly be deleted. Article 2 dealt with a different situation. A State might approach another State with a request for most-favoured-nation treatment, which might lead the two States to conclude a treaty containing a most-favoured-nation clause. The purpose of article 4 was to specify when a State could claim the right to most-favoured-nation treatment. Under the terms of that article there must be a clause in force between the granting State and the beneficiary State.

37. It remained to be seen whether the Commission wished to be more liberal and to include the existence of a regional custom or an oral agreement, but States must be protected against unjustified claims by States demanding most-favoured-nation treatment for purely political reasons and without any legal basis.

38. In the complex field of trade relations, it was impossible to imagine a single régime applicable to all States. Such a régime would impede progress without in any way guaranteeing the equality of States. Only special rules could be suitable for differential trade relations. Moreover, if a general custom establishing a uniform régime were one day to be accepted, it would not entail "most-favoured-nation" treatment, since there would no longer be any favoured nation. There was therefore no need to be concerned about the formation of a general custom in the matter. So long as States entertained differential trade relations, most-favoured-nation treatment would continue.

39. Article 4 was therefore necessary, but its drafting might be made more flexible to allay the fears of certain members of the Commission.

40. Mr. KEARNEY said it was impossible for the Commission to divorce itself from the general economic framework that was developing in the contemporary world. If it adopted the thesis that a general customary rule concerning the most-favoured-nation was in process of formation, that would make it extremely complicated to carry on the development of a system of preferences for developing countries, which was one of the aims of UNCTAD and was in effect in a number of regional arrangements. Such a system of preferences would obviously be an exception to the most-favoured-nation rule and would have to be worked out on the basis of treaty arrangements which balanced the demands between preferential treatment for selected States and most-favoured-nation treatment.

41. Mr. BILGE said he doubted whether it was necessary to retain article 4 as a separate provision. Members all seemed to accept the idea it expressed, but their opinions differed as to the nature of the provision. Did it supplement and explain the preceding provisions or did it state a condition for application of the clause? In the former case it could be attached to article 2, which defined the most-favoured-nation clause.

42. Furthermore the title did not reflect the substance of the article. The only new element the article contained was the statement that the clause must be "in force" between the granting State and the beneficiary State. That statement alone would not seem to justify an article, especially as the content of article 5 brought it very close to article 4. If the purpose of article 4 was simply to provide an explanation, that could be given in the commentary.

43. Mr. PINTO said he was in complete sympathy with the position taken by Mr. Yasseen; his own remarks had been without prejudice to the question of exceptions for developing countries, which would be considered at a later date. Some exceptions might, indeed, already have assumed the character of customary law, and he was

confident that the Commission would not be closing the door to that possibility by adopting article 4.

44. Mr. SETTE CÂMARA, referring to the comments of Mr. Ushakov and Mr. Tsuruoka, said he did not think there was much incompatibility between the idea of a general custom with respect to the application of most-favoured-nation treatment and the idea of a general custom of international law. The practice of the last decade had shown that a very important international instrument, such as the General Agreement on Tariffs and Trade, which was based on the application of the most-favoured-nation clause, as well as on the principle of reciprocity, could be expressed not only in terms of general custom, but also in terms of treaty law. That was certainly one proof that it was possible to aim at generalization of the most-favoured-nation clause.

45. The point made by Mr. Yasseen was that for certain matters, such as tariffs, Customs and trade, some custom might develop in the future and the Commission should not close the door to that possibility. He himself, however, thought that the problem could be fully covered by article 5—a very important article which dealt with concrete problems of immediate practical relevance.

46. The CHAIRMAN, speaking as a member of the Commission, said that the exception did not consist in granting most-favoured-nation treatment to all developing countries, but rather in the fact that developing countries themselves were not obliged to grant most-favoured-nation treatment to other countries. The question of exceptions, however, was one which the Commission would discuss at a later stage.

47. Mr. USHAKOV said it would be necessary to specify, later on, the exceptions made in favour of developing countries. There was no customary or treaty rule laying down that all developing countries were entitled to most-favoured-nation treatment. There were, however, exceptions, which the Special Rapporteur had mentioned. Nevertheless, if a developed State gave exceptional preferences to a developing country, other States must not believe that it was under an obligation to grant the same preferences to them.

48. Mr. RAMANGASOAVINA said that all the members of the Commission supported the idea expressed in article 4, but some of them thought the article merely limited the scope of article 3. He therefore proposed the addition of the words "contained in a treaty, other agreement, autonomous legislative act or practice", taken from article 3, paragraph 2.

49. Mr. MARTÍNEZ MORENO said that the problem of the exceptions to the most-favoured-nation clause should have its proper place in the draft; he could think of at least two cases that should be mentioned. The first was that of certain exceptional preferences or advantages extended by a developed country to a developing country with which it had special ties; those ties often resulted from the developed country's former position as the metropolitan power. It was clear that another developed country could not invoke the most-favoured-nation clause to claim similar privileges. The second was that of the advantages granted to each other by the member

States of an economic union or common market such as the European Economic Community and the Central American Common Market. It was obvious that those member States would not extend the same advantages to an outside State, even if it were in a position to invoke a most-favoured-nation clause.

50. He hoped the Special Rapporteur would later submit an article dealing with such exceptions, so as to take into account the important contemporary problem of the developing countries. Without such an article, the draft was unlikely to prove generally acceptable.

51. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 4.

52. Mr. USTOR (Special Rapporteur) said that much of the discussion had centred on the question whether article 4 should be retained.

53. Some speakers had thought that its contents clearly followed from the provisions of articles 2 and 3. It was true that, from a purely legal point of view, article 4 was not essential. Nevertheless, the discussion had shown that it was by no means superfluous and that it was worth stating expressly that most-favoured-nation treatment could only be claimed on the basis of a most-favoured-nation clause contained in a treaty. He agreed, however, that the wording of the article should be carefully reviewed by the Drafting Committee in order to ensure that it stated the intended meaning clearly.

54. He accepted Sir Francis Vallat's suggestion that, bearing in mind the fact that the provisions of article 1, sub-paragraph (a) had been taken from the Vienna Convention on the Law of Treaties, a new article should be included on the lines of article 3 of that Convention. The new article would specify that the exclusion from the scope of the draft of international agreements other than those coming within the definition in article 1 sub-paragraph (a) did not affect the legal force of such agreements or the clauses in them. He would submit a draft of the article to the Drafting Committee.

55. Several speakers had dealt with the question of the future of most-favoured-nation treatment and Mr. Ushakov had pointed out that, if such treatment were ever to become general, it would no longer deserve its name, since it would apply in a uniform manner to all States.

56. In the field of international trade, there was the General Agreement on Tariffs and Trade (GATT) whereby the eighty States parties granted each other reciprocal most-favoured-nation treatment. There were at present in the international community some sixty States which were not parties to that Agreement, and they included the bulk of the developing countries, which were unable to enter into an undertaking to grant most-favoured-nation treatment to all the contracting parties.

57. Recently, however, a huge exception to most-favoured-nation treatment had been introduced into that system, when GATT had adopted the generalized system of preferences in favour of the developing countries. It was therefore possible that in the not too distant future the membership of GATT might become nearly universal. Nevertheless, the granting of most-favoured-nation treatment would still be based on the provisions of the General Agreement, not on any custom. It would certainly

be a very long time before a custom would emerge, so that the treatment could be said to apply independently of the operation of the Agreement. It was difficult to visualize a process similar to that which had led to the acceptance of the laws of war embodied in the Hague Conventions as the expression of customary rules of international law.

58. In any case, the developments which were taking place in GATT related only to international trade and the Commission was called upon to study the most-favoured-nation clause in all its applications. The clause was used in such matters as the treatment of aliens, the abolition of visas and co-operation in judicial matters, where nothing resembling a custom was ever likely to develop. Accordingly, the framing of the rule in article 4 would not hamper in any way the development of customary international law.

59. In reply to a point raised by Mr. Elias,⁴ he wished to make it clear that there was no connexion between the provisions of article 4 and those of article 3, paragraph 2. The latter concerned the manner in which the favourable treatment was accorded to the third or favoured State by the granting State: that treatment could be extended by a treaty or agreement, but it could also be extended unilaterally, through municipal legislation or by mere practice. Article 4 stated that the beneficiary State could not claim the same treatment unless it was in a position to invoke an express treaty provision containing the most-favoured-nation clause.

60. He suggested that article 4 be referred to the Drafting Committee, on the understanding that the Committee would consider the possibility of merging it with article 5, for the reasons given by Mr. Sette Câmara.

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 4 to the Drafting Committee for consideration in the light of the discussion and on the understanding mentioned by the Special Rapporteur.

*It was so agreed.*⁵

ARTICLE 5

62.

Article 5

The source of the right of the beneficiary State

The right of the beneficiary State to claim the treatment accorded by the granting State to a third State under a treaty, other agreement, autonomous legislative act or practice arises from the most-favoured-nation clause: the treaty containing the clause creates the legal bond between the granting State and the beneficiary State.

63. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in his third report (A/CN.4/257 and Add.1).

64. Mr. USTOR (Special Rapporteur) said he had made a few changes to the text given in his report. The word "advantages" had been replaced by the word "treatment" and the words "under a collateral treaty

⁴ See previous meeting, para. 78.

⁵ For resumption of the discussion see 1238th meeting, para. 30.

or by autonomous action" by the words "under a treaty, other agreement, autonomous legislative act or practice".

65. It had been suggested during the discussion on the previous article that the contents of articles 4 and 5 were virtually the same. In fact, the two articles served different purposes. Article 4 set out the rule that most-favoured-nation treatment could not be claimed unless it was possible to invoke a most-favoured-nation clause in a treaty. Article 5 stated that, where such a clause existed, the source of the right of the beneficiary State was the treaty which contained that clause and not the "collateral" treaty binding the granting State and the third, or favoured, State. The two articles were thus intended to express two distinct ideas and there was obvious merit in keeping those two ideas separate.

66. The idea embodied in article 5 had ample support both in judicial opinion and in legal writings. It had been argued during the *Anglo-Iranian Oil Company case (jurisdiction)*, in 1952, that when a beneficiary State invoked the most-favoured-nation clause to request the benefit of a treaty between the granting State and another—favoured—State, the right of the beneficiary State arose from that "collateral" treaty. That view had also been expressed in the dissenting opinion of Judge Hackworth,⁶ but not in the judgement of the Court.

67. The idea expressed in article 5 was borne out by the decision of the Vienna Conference on the Law of Treaties that the provisions of article 36 (Treaties providing for rights for third States)⁷ did not detract from the operation of the most-favoured-nation clause. Paragraph 1 of that article stated that "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right to the third State or to a group of States to which it belongs...".

68. The second session of the Vienna Conference had had before it a draft article submitted by the Drafting Committee in terms identical with those which now appeared in article 36 of the Vienna Convention on the Law of Treaties. The fear had then been expressed that the provisions of the article might be invoked to impair the operation of the most-favoured-nation clause since, when a beneficiary State invoked that clause, it could not be said that the parties to the collateral treaty had intended to accord a right to the beneficiary State.

69. An amendment had accordingly been proposed, to insert in the article an additional paragraph stating that "The provisions of paragraph 1 shall not affect the rights of States which enjoy most-favoured-nation treatment".⁸ The discussion on that amendment showed that representatives had been unanimous in recognizing that the provisions of the article did not affect the interests of States under the most-favoured-nation system and the amendment had been withdrawn.⁹ Article 36 of the

Vienna Convention on the Law of Treaties had then been adopted without change on the clear understanding that paragraph 1 did not affect the interests of States under the most-favoured-nation system. The Conference had thus recognized that a beneficiary State's claim to most-favoured-nation treatment was based, not on the collateral treaty, but on the treaty containing the most-favoured-nation clause.

70. That was the position where the treatment was accorded by the granting State under a treaty. The position would, of course, be even clearer where the treatment was accorded by the granting State to a third State by autonomous legislative action or mere practice; there could then be no question but that the right of the beneficiary State had its source in the treaty containing the most-favoured-nation clause.

71. Mr. TAMMES said that although, as the Special Rapporteur had pointed out, articles 4 and 5 were different in purpose, they both dealt with the source of the obligation to accord most-favoured-nation treatment.

72. The language used in the two articles was different, however. The title of article 5 referred to the "source" of the right of the beneficiary State and the text stated that the clause "creates the legal bond" between that State and the granting State. In article 4, the corresponding terms were "legal basis" in the title and "ground" in the text.

73. The commentaries to those articles and the earlier reports of the Special Rapporteur showed that article 4 dealt with the material nature of the source, whereas article 5 was intended to emphasize the temporal aspect—the time at which the rights and obligations relating to most-favoured-nation treatment came into existence.

74. That difference of function between the two articles was not entirely conveyed to a reader who had not studied the Special Rapporteur's commentaries and particularly the judgement in the *Anglo-Iranian Oil Company case (jurisdiction)*. Article 5 should say something more than that the clause created the legal bond between the granting State and the beneficiary State. The text should make it clear that it dealt with temporal matters, such as termination and succession.

75. There was a choice between two possibilities, both of them logically and legally admissible. The legal bond could be taken as coming into existence either at the time of entry into force of the clause or at the date of the conditioning event. He was not quite convinced that the judgement in the *Anglo-Iranian Oil Company case (jurisdiction)* was decisive on that point. In that very special case, it would have been unreasonable to confront Iran, which had explicitly wished to exclude past treaties from the compulsory jurisdiction of the Court, with precisely such treaties, concluded in the distant past. Nevertheless, it seemed to him that the choice made by the Special Rapporteur in order to prevent future uncertainties was a sound one, though the provision could be expressed in clearer language.

76. He suggested that the Special Rapporteur should submit a note to the Commission setting out the problems with which he proposed to deal in future articles. That would save discussion on what appeared to be gaps in

⁶ *I.C.J. Reports 1952*, pp. 137 *et seq.*

⁷ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations Publication, Sales No. E.70.V.5), p. 294.

⁸ *Ibid.*, document A/CONF.39/L.22, p. 268.

⁹ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (United Nations publication, Sales No. E.70.V.6), pp. 60-63.

the articles, but in fact were not. A document of that type had been submitted by Mr. Ago some years previously in connexion with State responsibility and had proved very useful to the Commission.

The meeting rose at 1 p.m.

1218th MEETING

Friday, 1 June 1973, at 10.20 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

(continued)

ARTICLE 5 (The source of the right of the beneficiary State) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 5 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).
2. Mr. YASSEEN said that article 5 stated a very important rule of the institution known as the most-favoured-nation clause. When the Commission had been studying the law of treaties and, more particularly, the rules relating to the principle of relativity treaties, he and some other members had opposed the idea of treating the most-favoured-nation clause as an exception to that principle.¹ He remained convinced that it was purely and simply the application of the provisions of the law of treaties.
3. There was no denying that the right of the beneficiary State had its source in the original treaty. The other event—agreement, law, practice, etc.—was merely an act fulfilling a condition, which created in favour of a third State, a certain potential status provided for in the original treaty.
4. Moreover, the principle remained the same whatever the nature of the act fulfilling the condition—internal practice, legislative or administrative rule of internal law, or treaty. The mechanics were the same. Of course, the most-favoured-nation clause did not specify the scope of the treatment to be granted; that would be determined by the future event, which might define the scope of the original obligation contained in the clause.

5. It was a potential obligation whose origin was not the act fulfilling the condition, but the clause containing it. That was a general question which was not confined to the most-favoured-nation clause alone. There were many cases of conditional obligations. It was not the fulfilment of the conditions which was the source of the obligation, but the provision establishing the condition. He therefore supported the rule stated in article 5 which, legally, was the only possible rule.

6. With regard to the drafting, the enumeration of acts fulfilling the condition was not exhaustive and should either be amplified to include administrative acts and regulations, or be replaced by a formula of wider scope, such as "by virtue of internal law". That comment also applied to article 3.

7. In view of those considerations he was in favour of retaining article 5 and proposed that it be referred to the Drafting Committee.

8. Mr. SETTE CÂMARA said that, despite the explanations given during the discussion by Mr. Ago and Mr. Tammes,² he still had doubts about the practical difference between the fields covered by articles 4 and 5 respectively.

9. Article 4 laid down that a State could claim most-favoured-nation treatment only on the ground of a most-favoured-nation clause. *A contrario sensu*, a beneficiary State could not invoke such treatment on the basis of some other agreement, a legislative act or a practice.

10. Article 5 provided that the beneficiary State's right to claim the treatment granted to the favoured State arose from the treaty containing the most-favoured-nation clause. There appeared to be no difference between that proposition and the one in article 4.

11. Mr. Tammes had referred to the temporal problem, which had arisen in the *Anglo-Iranian Oil Company case (jurisdiction)*,³ and had suggested that article 5 was intended to deal in part with that problem. Once the rule had been laid down, however, that no other basis could be invoked for most-favoured-nation treatment than the most-favoured-nation clause, the temporal problem was excluded. There was only one possible source, which could only operate at one moment.

12. For those reasons, he wished to repeat his suggestion that the Drafting Committee should consider the possibility of merging articles 4 and 5. If the Commission decided to retain article 5 as a separate article, however, he would propose the deletion of the last phrase: "the treaty containing the clause creates the legal bond between the granting State and the beneficiary State". That phrase did not state a legal norm; it was in the nature of a justification of the norm contained in the previous phrase and should therefore be transferred to the commentary.

13. Mr. AGO said that one of the difficulties pointed out by Mr. Sette Câmara arose from the fact that the titles of articles 4 and 5 were confusing, since they appeared to say the same thing in different ways, whereas they really dealt with two entirely different things.

¹ See *Yearbook of the International Law Commission*, 1964, vol. I, pp. 184-188.

² See previous meeting, paras. 36-39 and 71-76.

³ *I.C.J. Reports* 1952, p. 93.

14. In article 4, the Special Rapporteur had wished to emphasize that, in general, a State could only claim most-favoured-nation treatment if there was a treaty giving it the right to do so. The problem dealt with in article 5 was more delicate: it had to be stated whether the treatment in question derived from the treaty granting certain treatment to a third State, or from the treaty containing the most-favoured-nation clause concluded between the granting State and the beneficiary State. In other words, if a State A concluded with a State C an agreement granting it certain treatment, and concluded with a State B an agreement containing a most-favoured-nation clause, would the right of State B to claim from State A the treatment accorded to State C derive from the treaty concluded by State A with State B or from the treaty concluded by State A with State C?

15. The Special Rapporteur had rightly concluded that the right to claim most-favoured-nation treatment derived from the most-favoured-nation clause itself. For instance, if Italy concluded an agreement with Switzerland providing for the import of Swiss watches free of duty, and then concluded an agreement with Japan containing a most-favoured-nation clause, Italy's obligation to allow the import of Japanese watches free of duty would derive from its treaty with Japan and not from its treaty with Switzerland. But the existence of the latter treaty was the necessary condition for producing the effects of the clause between Italy and a third State, in that instance, Japan. It might be said that the most-favoured-nation clause was a clause with variable content and automatic effect. It was because of the agreement between Switzerland and Italy that the most-favoured-nation clause immediately created an obligation between Italy and Japan, but that obligation nevertheless derived from the clause contained in the treaty between Italy and Japan. That was the point which had to be made clear in article 5.

16. The situation remained the same whatever the chronological order in which the agreements were concluded. Thus, if the agreement between Italy and Switzerland was subsequent to the agreement between Italy and Japan, the clause contained in the latter agreement would produce no effects so long as the agreement between Italy and Switzerland had not been concluded. That was what was said in the first sentence of the article proposed by the Special Rapporteur.

17. With regard to the drafting, it was difficult to see how a legislative act could contain a most-favoured-nation clause; it would rather be an administrative act. Moreover, the true nature of the clause was that of a treaty provision; the other cases were exceptions. The last phrase of the paragraph should be in negative form. The Special Rapporteur had no doubt wished to emphasize that it was not the treaty concluded between States A and C which was the source of the obligation between States A and B.

18. Mr. KEARNEY said that it was not appropriate in English to speak of the beneficiary State's "right to claim"; anyone could make a claim. The real issue was the source of the beneficiary State's right to enjoy a certain treatment, and the wording should be adjusted accordingly.

19. He saw no reason to repeat in article 5 the enumeration in paragraph 2 of article 3: "treaty, other agreement, autonomous legislative act or practice".

20. With regard to a point just raised by Mr. Ago, he could visualize a situation in which advantages were extended to certain States by means of legislative acts of the granting State.

21. As it stood, article 5 did not appear to be very different from article 4. The commentary, however, which dealt at length with the *Anglo-Iranian Oil Company case (jurisdiction)*, showed that a major object of article 5 was to deal with the temporal aspects of the most-favoured-nation clause; but that intention was not clearly brought out by the text of the article. He therefore suggested that it be redrafted so as to refer to the right of the beneficiary State to enjoy the advantages accorded to a third State at the time of the entry into force of the most-favoured-nation clause or subsequently.

22. Mr. RAMANGASOAVINA said he approved of article 5 as orally amended by the Special Rapporteur when introducing it.⁴

23. He questioned the need for article 4, however, since the difference between the two articles was very slight. One article said that a State might claim most-favoured-nation treatment from another State solely on the ground of a most-favoured-nation clause, and the other said that the right to claim the treatment accorded to a third State arose from the most-favoured-nation clause. The only additional particular contained in article 5 was the enumeration of the instruments by means of which the treatment might have been accorded.

24. He approved of the inclusion of that enumeration, which he had himself requested, which expanded the notion of a "treaty" into an agreement in any form whatsoever. The words "other agreement" and "autonomous legislative act" adequately covered the various possible cases other than a treaty, such as an investment code, economic plan or agreement between countries having special links.

25. In the final version, commas should be inserted in the French text after the words "*Etat tiers*" and the word "*pratique*".

26. In the last phrase, the word "treaty" should be replaced by a more general term such as "document".

27. Mr. USHAKOV said he supported the principle stated in article 5. With regard to the drafting, it should be specified that the clause from which the right in question arose must relate to the same subject as the treatment accorded to the third State. It was not a most-generally-favoured-nation clause.

28. Similarly, it should be specified that the treaties, other agreements or practice by virtue of which privileged treatment had been accorded to a third State meant treaties, other agreements or practice between the granting State and the third State.

29. Lastly, the words "to claim" should be replaced by a less imperative expression such as "to be accorded";

⁴ See previous meeting, para. 64.

the words "the treatment accorded" should be replaced by "the same treatment as is accorded"; and the words "arises from the most-favoured-nation clause" should be replaced by "exists only by virtue of the most-favoured-nation clause", with the explanation that the clause related to the same subject as the treatment accorded.

30. Mr. ELIAS said that he would not dwell on the theoretical basis for article 5, but would suggest a slight reformulation in the light of what appeared to him to be the crux of the matter. The objection that there was very little difference between articles 4 and 5 had some justification with the present wording. It was not only the title, but also the actual text of article 5 that made for confusion with the contents of article 4.

31. He agreed with the Special Rapporteur that there was a very real difference between the intended meaning of article 4 and that of article 5. Article 4 dealt with the first stage of the problem and laid down the rule that most-favoured-nation treatment could only be claimed on the basis of the most-favoured-nation clause. Article 5 dealt with another stage of the problem, and the colon used to separate its two parts indicated that the second part was a sort of definition of what went before. It explained that the legal bond between the granting State and the beneficiary State, and the right of the beneficiary State, derived from the treaty containing the most-favoured-nation clause.

32. For those reasons, he suggested that article 4 should be left as it stood, but that article 5 should be reworded on the following lines: "The right of the beneficiary State... arises from the most-favoured-nation clause in the treaty between the granting State and the beneficiary State".

33. The Special Rapporteur had found it necessary to introduce into article 5 the enumeration given in paragraph 2 of article 3. It would be confusing if that enumeration were not repeated in some form in article 4 as well. At a later stage, it might also have to be introduced into other articles of the draft, thereby making the provisions somewhat unwieldy. He accordingly suggested that a new sub-paragraph be introduced into article 1 to explain that, wherever the draft referred to the treatment accorded by the granting State to a third, or favoured, State, the reference was to a treatment based upon treaty, other agreement, autonomous legislative act or practice. That would obviate the need to repeat the enumeration in the various articles.

34. Mr. MARTÍNEZ MORENO said that he had been glad to hear Mr. Yasseen refer to the possibility of most-favoured-nation treatment being granted by an administrative act. Clearly, such treatment could be granted by an act other than an "autonomous legislative act". From his own experience, he could cite a case in which most-favoured-nation treatment had been granted as the result of a judgment of a national court.

35. The case was one in which Costa Rican importers of eggs from El Salvador had successfully challenged, in the Costa Rican courts, the administrative action of the Costa Rican Executive in banning the import of eggs from El Salvador, but not from other Central American States, because their low price made them too com-

petitive with domestic production. The judgement had ordered that most-favoured-nation treatment, or even national treatment, should be given to imports from El Salvador. He accordingly suggested that the words "autonomous legislative act" be replaced by a broader formula which would cover any act or action under internal law.

36. He agreed with the proposition in the last part of article 5, that the legal bond between the granting State and the beneficiary State was created by the treaty containing the most-favoured-nation clause. At the same time, he wished to draw attention to the fact that, as a result of a dispute on a matter such as the determination of the goods covered by the clause, its application could be governed by a judicial or arbitral decision. The question might then arise whether the bond between the two States concerned had not been created by that decision.

37. Mr. TSURUOKA said he was in favour of retaining article 5, subject to a few drafting amendments. In particular, the last phrase was unnecessary. It was true that articles 4 and 5 were closely connected, but the object of the Commission's work was to draw up an instrument that would be easy to apply, and there was no reason not to emphasize a point, provided it would not hinder the attainment of that object.

38. As they stood at present, he thought article 5 contained a substantive rule and article 4 a procedural rule; if that were so, since substantive rules generally preceded procedural rules, the order of the articles should be reversed.

39. Mr. USTOR (Special Rapporteur) said that it might be helpful if, at that stage, he made a brief comment on the meaning of articles 4 and 5.

40. Article 4 was intended to say that, without prejudice to the duty of States not to discriminate between each other, the rule was that most-favoured-nation treatment could not be claimed unless a State held a valid title to it. The claim could not be based on any general rule of international law. The rule in article 4 was thus clearly a substantive rule and not a procedural rule.

41. As to article 5, in order to understand its purpose the case in which special treatment was accorded by the granting State to a third, or favoured, State on the basis of an autonomous legislative act or mere practice could be left aside. The purpose of article 5 was to make it clear that, where there were two treaties, one containing the most-favoured-nation clause and another granting special benefits to a third, or favoured, State, it was the former and not the latter treaty which constituted the basis for the claim to most-favoured-nation treatment.

42. The present text of the two articles was not, perhaps, sufficiently clear and the language used in the titles was somewhat confusing. The Drafting Committee would endeavour to improve the wording so as to bring out the intended meaning.

43. Sir Francis VALLAT said he was grateful to the Special Rapporteur for his explanation of the distinction between articles 4 and 5 and the scope of article 5 itself.

44. With regard to the principle in article 5, he found himself in the position of having to choose between the opposite views expressed, respectively, by Sir Eric

Beckett in his argument in the *Anglo-Iranian Oil Company case*⁵ and by Sir Gerald Fitzmaurice in his article in *The British Yearbook of International Law*.⁶ In the light of the reasons given by the Special Rapporteur and of those put forward by Mr. Ago and Mr. Yasseen, he had no difficulty in aligning himself, in principle, with the view expressed by Sir Gerald Fitzmaurice.

45. At the same time, he wished to point out that in the *Anglo-Iranian Oil Company case (jurisdiction)* the International Court of Justice had dealt with a declaration made by Iran under Article 36 (2) of the Statute of the Court, in which that country had expressly referred to a treaty. The issue was then whether that reference was to the treaty between the United Kingdom and Iran which contained the most-favoured-nation clause, or to a subsequent treaty.

46. That case should therefore be read as relating to the specific question just raised by the Special Rapporteur. If article 5 had dealt only with treaties, he would have found it easier to accept.

47. It was also possible to imagine a clause providing that the granting State would grant most-favoured-nation treatment to the beneficiary State upon that State's request. He had himself seen clauses of that kind, at least in draft, the purpose of which was to leave no doubt about the situation. In the present text, it would therefore be possible to insert at the end the additional proviso: "...and the right of the beneficiary State will only arise as from the time of the request".

48. From what he had said, it was clear that article 5 really dealt with two different juridical concepts: first, that of the legal source of the right or obligation; secondly, the temporal question, which could well be a quite different one.

49. While it was true that, as Sir Gerald Fitzmaurice had said, the most-favoured-nation clause was the main-spring of the clock, it was also true that, from the point of view of actual time, it could be argued that the right did not arise until the request was made.

50. It had been his intention to discuss other kinds of declaration referring to acts, or facts, or rights arising after the date of a declaration under Article 36 (2) of the Statute of the Court. In the light of the explanations given by the Special Rapporteur, however, it would not be necessary to elaborate on that point. He would only say that one could easily imagine a declaration regarding which the issue would be somewhat different from that which had arisen in the *Anglo-Iranian Oil Company case (jurisdiction)*.

51. Mr. SETTE CÂMARA said that, after hearing the Special Rapporteur's very clear explanation, he could agree to the retention of articles 4 and 5 as separate articles. Indeed, article 5 appeared to be a logical consequence of article 4, and he hoped that the Drafting Committee would understand it in that light.

⁵ *I.C.J. Pleadings, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, pp. 543-582 and 628-669.

⁶ See *The British Yearbook of International Law*, 1955/6, vol. XXXII, pp. 84 *et seq.*

52. Mr. REUTER said he fully approved of article 5, but wished to draw the attention of members to the various acceptations of the term "practice".

53. The present draft was an extension of the Vienna Convention on the Law of Treaties, and when the Commission came to examine the related question of treaties concluded by international organizations it would have to distinguish between the different forms of practice. Well-established practice, which was a source of rights, could be contrasted with practice consisting simply in a *de facto* attitude, which did not create any right. It might be advisable to explain in the commentary to article 5 that it was the latter form of practice that was meant.

54. The CHAIRMAN, speaking as a member of the Commission, said that while there was undoubtedly a close connexion between articles 4 and 5, there was also a conceptual difference; he was therefore basically in agreement with the Special Rapporteur's text and prepared to accept it.

55. As to the word "practice", however, he agreed with Mr. Reuter that it should be clarified in the commentary. The practice in question was something of a purely bilateral nature, which arose *de facto* from the relationship between the granting State and the third State and conferred certain advantages that did not have to be confirmed by a formal treaty. It had nothing to do with customary law or with a practice which was common to many States.

56. Mr. USTOR (Special Rapporteur), summing up the discussion, said that it appeared to be generally agreed that the thesis stated in article 5 was acceptable, although admittedly it was one that the Drafting Committee might find it difficult to formulate.

57. He was prepared to accept the suggestion made by Mr. Tammes at the previous meeting that he should submit a list of the articles he intended to draft in the future.⁷ One of those articles would deal with the contingent character of the most-favoured-nation clause and would, in particular, take account of the element of timing.

58. Mr. Yasseen had referred to the difference between a legislative act and an administrative act, but Mr. Kearney had observed that a legislative act might very well include an administrative act in the French sense of that term. In any case, the enumeration in article 5 merely repeated that in article 3, paragraph 2. The question was primarily one of terminology and the Drafting Committee should try to find some term which would cover all the legal systems of the world. In the light of the present discussion, he did not think article 5 should be restricted to the case in which two treaties existed.

59. Mr. Sette Câmara had advanced strong arguments for the amalgamation of articles 4 and 5, and he was pleased to note that he, too, was now prepared to keep them separate.

60. Mr. Kearney had said that article 5 should cover the two possibilities of advantages being granted upon

⁷ See previous meeting, para. 76.

the entry into force of the most-favoured-nation clause and after its entry into force. That point would be dealt with in a later article, on the contingent character of the clause. He agreed with Mr. Kearney that it would be better to replace the words "right to claim" by the words "right to enjoy".

61. He agreed with Mr. Ramangasoavina that the most-favoured-nation clause should be embodied in treaties between States and that it could not be inferred from a mere oral agreement or by other means. Some saving clause should therefore be included in the draft, on the lines of those contained in articles 1 and 3 of the Vienna Convention on the Law of Treaties.⁸

62. Mr. Ushakov had made the important observation that the most-favoured-nation clause could create rights only in a particular domain or specific field.

63. He was grateful to Mr. Elias for his proposal for an additional definition, which should certainly be considered by the Drafting Committee.

64. Mr. Martínez Moreno had rightly underlined the importance of a reference to administrative acts.

65. He noted that Mr. Reuter had reaffirmed the need for a saving clause along the lines of those in the Vienna Convention on the Law of Treaties.

66. He agreed in principle with the comments by Sir Francis Vallat.

67. Lastly, he agreed with the Chairman that the "practice" referred to in article 5 was always of a bilateral nature, and hoped that that point would be clearly reflected either in the article itself or in the commentary.

68. Mr. YASSEEN said that, like Mr. Martínez Moreno, he believed that not only the legislative and executive powers, but also the judicial power could establish legal rules on the treatment to be accorded to a third State, since judicial decisions were a source of law. Consequently, both in article 3 and in article 5, the enumeration of the different means of according certain treatment to a third State should either be exhaustive, or be drafted in general, unambiguous language. Of course, if the definition in article 3 was sufficiently clear and complete, it would not be necessary to include the enumeration in the following articles.

69. Mr. RAMANGASOAVINA said that he had not meant to suggest that the various possibilities to which he had referred should all be mentioned in article 5. On the contrary, he thought the provision was already drafted in sufficiently flexible terms to cover the different practices of States.

70. The CHAIRMAN suggested that article 5 be referred to the Drafting Committee.

It was so agreed.⁹

71. Sir Francis VALLAT observed that articles 2, 3, 4 and 5 had now been referred to the Drafting Committee.

However, since all those articles bore a certain relationship to article 1, he proposed that the Drafting Committee be asked to consider, at least provisionally, the latter article as well.

72. Mr. BARTOŠ said it was the Commission's practice not to consider the definitions article until after it had examined all the other articles in a draft. Examination of the whole draft might lead it to omit or amend provisional definitions.

73. Mr. USTOR (Special Rapporteur) said that Mr. Bartoš was certainly right in saying that it was the Commission's practice to consider the article on definitions only after it had completed its discussion of the other articles. But the Drafting Committee could, of course, consider article 1 provisionally, on the understanding that it could be subsequently revised.

74. He suggested that the Drafting Committee should be empowered to submit saving clauses to the Commission, of the kind mentioned during the discussion.

75. The CHAIRMAN said he took it that the Special Rapporteur's suggestions were acceptable to the Commission.

It was so agreed.

The meeting rose at 12.45 p.m.

1219th MEETING

Monday, 4 June 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

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

Welcome to Mr. Calle y Calle

1. The CHAIRMAN welcomed Mr. Calle y Calle, who had been elected a member of the Commission to fill one of the casual vacancies which had occurred since the last session.

2. Mr. CALLE y CALLE, thanking the Chairman, said it was an honour and a privilege for him to participate in the work of the Commission. His country had an old legal tradition and, like all developing countries, was deeply interested in the progressive development of international law. In Joining the Commission, he wished to pay a tribute to two of his Latin American predecessors, Mr. Ruda, who was now a judge of the International Court of Justice, and Mr. Alcívar, whose memory was particularly dear to him.

⁸ 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.

⁹ For resumption of the discussion see 1238th meeting, para. 33.

**Succession of States in respect of matters
other than treaties**

(A/CN.4/226 ; A/CN.4/247 and Add.1 ; A/CN.4/259 ; A/CN.4/267)

[Item 3 of the agenda]

3. The CHAIRMAN invited the Commission to take up the topic of succession of States in respect of matters other than treaties and asked the Special Rapporteur to introduce his sixth report (A/CN.4/267).

4. Mr. BEDJAOUI (Special Rapporteur), drawing attention to the difficulties presented by the study of succession of States in respect of matters other than treaties, said he greatly hoped that his sixth report, and the previous reports he had submitted, would help to make the work a little easier. His reports, however, covered only a small part of the topic: succession to public property.

5. The subject presented many difficulties. They were due, in the first place, to the fact that the conduct of States in regard to succession was contradictory and that it was difficult to deduce rules from the practice. In addition, the topic of succession of States was closely connected with certain concepts of international law, such as the State, sovereignty and territory. If, contrary to the view strongly upheld by certain jurists, such as Professor Charles Chaumont, an international community existed, that community consisted essentially of States, which came into being, changed and disappeared. The State was a living entity, changing and temporary. Many events could affect a State, its territory, its sovereignty or its population and lead to dismemberment, fusion, union, secession, a partial transfer of territory or independence. Such events in fact made up the web of history and the raw material for the theory of State succession.

6. It should also be noted that the topic of succession of States and, more particularly, succession in respect of matters other than treaties, had not been the subject of any attempt at codification on the part of official or private bodies. The literature on the subject was also very meagre; most treatises and manuals of international law barely touched on the problem, as though it presented no difficulties. Some writers did not mention it at all, because, like Ian Brownlie, they considered that there were no rules, and others like Guggenheim and Cavaré, rejected the expression "succession of States" as being incorrect. As to the Secretariat's studies on succession of States,¹ unfortunately they were far from constituting a rich source of documentation concerning public property. On the other hand, treaty precedents and diplomatic texts were abundant and varied, but they sometimes lacked rigour.

7. Another source of difficulties was the fact that the topic, although it belonged to international law, was not foreign to internal law. It might therefore be asked whether the public property of the State should be considered in the light of the traditional distinction made

by certain systems of internal law between property in the public domain and property in the private domain of the State. He had avoided using that distinction, because some contemporary systems of law did not recognize it. Doubt might also be cast on the advisability of tackling the subject from the point of view of international law rather than that of internal law.

8. Finally, succession to public property touched on economic, financial and monetary questions, which complicated the study of the subject. One example was the liquidation of the Austro-Hungarian Bank, which had been a particularly arduous operation.

9. In matters of succession of States, although it was considered that succession to public property was governed by international law, it was recognized that there was no transfer of sovereignty, but replacement of one sovereignty by another, which meant the automatic removal of the material support of the former sovereignty. The result was a replacement of the old State by the new State in the right to public ownership. The right to public property would therefore be the effect of the birth of a new subject of international law, not the result of a succession of States; it would be an attribute of the new sovereignty. Hence the theory of succession of States would not apply to the rights and obligations of the successor State, and international law would merely recognize the validity of the internal legal order of the successor State within the framework of the international legal order. There would thus be a gratuitous and immediate substitution of the successor State in rights to public property.

10. That theory was somewhat academic; it could not conceive of sovereignty without a set of attributes which made it possible to exercise. And apart from the fact that there had been governments in exile or without territory, certain questions remained unanswered. For instance, if the successor State automatically acquired public ownership solely by reason of its own sovereignty, how did it acquire property situated outside the territory which had undergone a change of sovereignty?

11. The theory had some justification when it came to defining or to determining public property, which involved practical application of the internal law of the successor State. For there was no definition of public property taken from international law, and the practice clearly showed that it was the internal legal order of the successor State which was decisive in that respect.

12. In his third and fourth reports² he had tried to present the subject without any theoretical systematization. He had drafted fifteen articles dealing with public property, without specifying the type of succession. That method had one disadvantage, which had appeared later and which he had tried to correct in his sixth report. In that report he had taken account, as far as possible, of the discussion in the Commission in 1972 on the related topic of succession of States in respect of treaties. He had drafted separate provisions for each type

¹ *Yearbook of the International Law Commission*, 1962, vol. II, p. 131, document A/CN.4/151 and 1970, vol. II, p. 170, document A/CN.4/232.

² *Yearbook of the International Law Commission*, 1970, vol. II, p. 131, document A/CN.4/226 and 1970, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

of succession of State. The following five cases could be considered: succession of a State without the creation or disappearance of a State—for example, partial transfer; creation of a State without the disappearance of the predecessor State—for example, a newly independent State; creation of a State with the disappearance of the predecessor State—for example, union or fusion, disappearance of the predecessor State without creation of a State—for example, absorption or partition; and secession, which was a particular case of the creation of a newly independent State.

13. In the draft articles adopted by the Commission on succession of States in respect of treaties, succession of States meant “the replacement of one State by another in the responsibility for the international relations of territory”.³ That definition deliberately left aside the transmission of rights and obligations as a legal consequence considered incidental to the replacement. At the twenty-seventh session of the General Assembly, the Sixth Committee, in its report to the General Assembly had stressed the difference between transfer of sovereignty and substitution of sovereignty, and had specified that succession of States, for the purposes of the draft articles, was not a transfer of sovereignty over territory, but the replacement of one sovereignty by another, thus excluding all questions of devolution of rights and obligations as a legal incident of that replacement.⁴

14. That definition, however, did not seem applicable to the present topic, because the rights and obligations were no longer an incident, but the principal. During the discussion of Sir Humphrey Waldock’s draft at the twenty-fourth session of the Commission, in 1972, Mr. Ushakov had suggested preparing a definition which would be valid for both topics.⁵ The Commission had not adopted his suggestion, believing that it would only lead to abstractions of doubtful utility. Consequently, he had proposed in his sixth report a definition of the term “succession of States” for the purposes of his draft. He had simply considered succession as the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of the predecessor State and the successor State for the territory affected by the change of sovereignty.

15. To understand what was meant by “succession of States in respect of matters other than treaties”, it must be remembered that the topic had first been entitled “Succession of States in respect of rights and duties resulting from sources other than treaties”. It had subsequently been found that the meaning of the term “treaty” differed according to whether it referred to a subject of succession, as in the topic assigned to Sir Humphrey Waldock, or to an instrument of succession, as in the topic assigned to himself. The Commission had therefore decided to distinguish between succession of

States in respect of treaties and succession of States in respect of matters other than treaties. In both cases the succession must be governed by rules, but both kinds of succession could have their origin in a treaty, since both succession to treaties and succession to public property or public debts could take place by treaty.

16. The definition of “public property”, which was very complex, was contained in article 5. For the time being it was enough to say that three kinds of public property could be considered: the property of the State, the property of the territory affected by the change of sovereignty and the property of public institutions or establishments or of territorial or local communities. Although the topic was succession of States, it could not be confined to the first category of public property. With regard to the régime governing such property, roughly speaking it could be noted that sometimes it passed to the successor States and sometimes it was not affected by the change of sovereignty so far as the law of property was concerned, although it was affected in regard to the territorial jurisdiction of the State.

17. Introducing the first three articles of his draft, he said that article 1, entitled “Scope of the present articles”, was modelled on article 1 of the draft on succession of States in respect of treaties⁶ adopted by the Commission.

18. Article 2 should not give rise to any difficulty either, because it reproduced the text of article 6 of the same draft. He had dropped the draft article 1 proposed in his fourth report (A/CN.4/247 and Add.1), in favour of the text already adopted by the Commission.

19. Article 3 was not yet complete. In it, he had proposed his own definition of the term “succession of States”, whereas the definitions of the terms “predecessor State” and “successor State” were those adopted by the Commission on the proposal of Sir Humphrey Waldock. Those three definitions would be supplemented by others, as the need would surely arise.

20. The first three articles he proposed were as follows:

Article 1

Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2

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.

Article 3

Use of terms

For the purposes of the present articles:

(a) “*Succession of States*” means the replacement of one sovereignty by another with regard to its practical effects on the rights

³ See *Yearbook of the International Law Commission*, 1972, vol. II, document A/8710/Rev.1, chapter II, section C, article 2, paragraph 1 (b).

⁴ See *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 35.

⁵ See *Yearbook of the International Law Commission*, 1972, vol. I, p. 33, 1156th meeting, para. 14.

⁶ *Ibid.*, 1972, vol. II, document A/8710/Rev.1, chapter II, section C.

and obligations of each for the territory affected by the change of sovereignty;

(b) "*Predecessor State*" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "*Successor State*" means the State which has replaced another State on the occurrence of a succession of States.

21. Mr. SETTE CÂMARA said he was sure that all members were grateful to the Special Rapporteur for his extremely interesting report. As the Special Rapporteur had pointed out, the topic was a particularly difficult one and no attempt had hitherto been made to codify it, even by academic bodies. He proposed that the Commission consider the draft in the Special Rapporteur's sixth report article by article.

22. Mr. USHAKOV said he thought it would be better to have a general discussion before examining the draft articles.

23. The CHAIRMAN suggested that the Commission should have a general discussion and then consider the Special Rapporteur's first three articles.

24. Mr. YASSEEN said that, since the topic of succession of States in respect of matters other than treaties was not governed by any general theory and had not yet been the subject of any attempt at codification even at the academic level, it would be better to follow the empirical method proposed by the Special Rapporteur and, as each article was considered, try to find solutions in international practice which could be adopted as rules applicable to questions of succession in respect of matters other than treaties. That would not exclude the possibility of making general comments.

25. Mr. AGO said he agreed with Mr. Ushakov that the Commission should first hold a general discussion on the topic as a whole and, in particular, on the criteria on which the Special Rapporteur had based his approach to it; the discussion should also cover the way in which the two parts of the topic of succession of States—succession in respect of treaties and succession in respect of matters other than treaties—fitted in with each other. There were two questions of a general nature to be considered: the subject-matter as a whole, and the first three articles on succession to public property, which was only one chapter of the general topic. That procedure would not cause any delay; on the contrary, it would enable the Commission to make faster progress by proceeding in more orderly fashion.

26. Mr. BARTOŠ said he was in favour of examining the draft article by article, but allowing members to express their views on the general principles evoked by the consideration of any particular article. It was obvious that with decolonization, national liberation movements and the proclamation of the right of peoples to self-determination, profound changes had been taking place in international law for some years and that new questions were arising, such as that of the continuity of relations between the former metropolitan State and its liberated or emancipated territories. Those major questions should be considered more closely, but in order to save time, it would be better to do so as each article came up for examination.

27. Mr. HAMBRO, after complimenting the Special Rapporteur on his extremely interesting and learned report, said that Mr. Bartoš's comments were most judicious. He was afraid that if the Commission embarked on a general discussion it would only repeat what had already been said in previous years. He hoped, therefore, that the Commission would consider the Special Rapporteur's draft, article by article.

28. Mr. USHAKOV said he had not proposed that the Commission should engage in a theoretical discussion, but simply that members should comment on the draft as a whole, since that might help the Special Rapporteur in his future work.

29. Mr. REUTER said it would no doubt be useful if each member made some general comments, though it was important that the specific problems should be tackled as soon as possible. The Special Rapporteur's report raised two main questions: first, the different cases of succession to be distinguished and, secondly, the definition of matters other than treaties.

30. With regard to the first question, he did not underestimate the historical, practical and theoretical importance of decolonization, but there were other cases of succession to be considered and the Commission should continually ask itself whether the provisions it adopted were also applicable to the other cases. It was possible that tomorrow the trend would be towards centralization and the formation of economic or political unions. The Commission would remember that it was cases of fusion which had caused it the greatest difficulties when considering succession in respect of treaties.

31. With regard to the second question, the Special Rapporteur had included property among matters other than treaties. He did not contest that decision, but he was not sure about all the elements which made up property. In his previous reports, the Special Rapporteur had spoken of succession to territory—the territory itself provided material for succession—whereas in his sixth report, it was the territory that defined the succession. He saw no objection to that, but he wondered whether the existing property might not include some items which, though closely linked with the territory, were not territorial property. For example, international law recognized certain rights linked with territory, which it did not characterize as territorial rights—the continental shelf, special fishing rights, etc. If those were to be included in succession to property, that would mean that property was defined in the first place by international law, whereas the most important problem to which the Special Rapporteur had devoted his study and which constituted the real difficulty of the subject, was that of property as defined in the first place by internal law.

32. The Special Rapporteur made a distinction between the kinds of property defined by internal law according to whether the property was situated in the territory of the State, in which case the solution was simple, or situated in the territory of a third State, in which case the solution was less simple. The Commission would have to consider some difficult concepts of attachment and formulate criteria for economic attachment. In some cases relating to debts or loans, it might have to go into

questions of economic participation or another aspect of attachment: maximum utility. That would be pioneer work. For that reason, he was prepared to follow the empirical method proposed by the Special Rapporteur.

33. Sir Francis VALLAT said that, as a new member, he would appreciate it if the Commission would first express its views on the substance of the draft articles as a whole.

34. The CHAIRMAN suggested that the Commission first hold a general discussion on the topic as a whole, on the understanding that members would be free to speak on the first three articles if they so desired.

It was so agreed.

The meeting rose at 4.50 p.m.

1220th MEETING

Tuesday 5 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramanga-soavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 1 (Scope of present articles)

ARTICLE 2 (Cases of succession of States covered by the present articles) *and*

ARTICLE 3 (Use of terms)

1. The CHAIRMAN invited the Commission to continue its general discussion on the Special Rapporteur's sixth report (A/CN.4/267) and consideration of draft articles 1, 2 and 3.

2. Mr. YASSEEN said he would refrain from general comments, because he found it difficult to take a general position on the practical problems raised by the topic. Like the Special Rapporteur, he believed that an empirical approach would be best. Solutions would have to be sought in the scanty and varied practice. The draft submitted by the Special Rapporteur would no doubt give rise to long discussions in the Commission, but that should not apply to the preliminary provisions, articles 1 to 3.

3. Article 1 appeared to be self-evident, but was nevertheless necessary in order to define the scope of the draft; it corresponded perfectly to the task entrusted to the

Special Rapporteur and could be referred to the Drafting Committee.

4. Article 2 was taken from the draft on succession of States in respect of treaties,¹ so its terms had already been considered by the Commission in 1972. At that time, he had been one of those who had considered the provision superfluous in Sir Humphrey Waldock's draft, not because they did not approve of its content, but because they considered it obvious that the draft could only apply to situations that were in conformity with international law. But the Commission had decided otherwise and its decision concerning the draft adopted in 1972 applied also to the present draft.

5. With regard to article 2, he congratulated the Special Rapporteur on the general broad-mindedness he had shown. A Special Rapporteur had to try to reflect the position of the Commission, and Mr. Bedjaoui had shown great understanding in dropping some of the formulas he had proposed and replacing them by those adopted by the Commission in the draft on succession of States in respect of treaties. That applied to article 2, which should therefore not give rise to any difficulty and could also be simply referred to the Drafting Committee.

6. Article 3, entitled "Use of terms", contained three sub-paragraphs. In sub-paragraph (a), the Special Rapporteur proposed a definition of the expression "succession of States" which did not correspond to the one adopted in the draft on succession of States in respect of treaties.² His reasons for doing so were given in paragraphs 1-5 of the commentary to the article. In point of fact, the two definitions differed mainly as to the angle from which they viewed the concept of succession of States. The definition adopted for succession of States in respect of treaties reflected more the Commission's concern to adopt a particular method of work than any desire to state a position of principle. As to the new definition proposed by the Special Rapporteur, he would rather defer a decision on its merits and its accuracy until all the draft articles had been examined. In any case, it was the Commission's usual practice to examine the definitions only at that stage, because they might need to be amended in the light of its examination of a draft.

7. Consideration of the other two sub-paragraphs of article 3, which defined the expressions "predecessor State" and "successor State" should also be left till later. Moreover, article 3 was not complete, since the Special Rapporteur had stated his intention of including other definitions in it.

8. Mr. PINTO said he associated himself with the tributes paid to the Special Rapporteur's series of erudite reports. The area they covered was almost uncharted and precedents were hard to find. The Special Rapporteur had provided the Commission with valuable guidance in dealing with an extremely difficult topic.

9. He supported Mr. Yasseen's suggestion that articles 1 and 2 should be referred to the Drafting Committee and

¹ See *Yearbook of the International Law Commission*, 1972, vol. II, document A/8710/Rev.1, chapter II, section C, article 6.

² *Ibid.*, article 2.

that the Commission's final position on article 3, on the use of terms, should be reserved.

10. The Special Rapporteur's sixth report, subsumed much of the material in his earlier reports. He supported the Special Rapporteur's empirical approach, which was the only one possible for dealing with the present topic.

11. He endorsed the five main ideas on which the draft was based: first, the idea that certain property followed the territory and was so closely linked to it that it should remain unaffected by succession; secondly, the idea that the successor State's sovereignty had an immediate impact, and immediate effects, on the territory in respect of which the succession took place; thirdly, the proposition that a successor State succeeded to certain duties as well as certain rights; fourthly, the idea that property of the successor State situated outside its territory should be the subject of separate treatment; and fifthly, the right of eminent domain in relation to "concessions".

12. He also endorsed four of the criteria which the Special Rapporteur had put forward for determining whether there would be succession to property, namely, the principle of equitable apportionment; the concept of the economic contribution of a territory; the geographical location of the territory; and the origin of the property.

13. He foresaw certain problems, however, with regard to the Special Rapporteur's proposed fifth criterion, relating to the viability of a State unit, or each of the State units, on a severance. It was difficult to see how that criterion would work in practice. If a State broke up into two units, it could well happen that the smaller or less populated one was more viable than the larger or more populated one. The question would then arise whether, under the proposed criterion, the public debt of the original State would have to be broken up in such a way as to place the greater burden upon the more viable State. Perhaps the Special Rapporteur would wish to clarify that point when introducing the appropriate article.

14. In any event, none of the proposed criteria had an absolute character; they would all have to be reviewed in the context of each particular succession and in the light of the circumstances—political, economic and geographical—of each case.

15. That being said, he wished to make some comments on certain points of terminology. First, the expression "newly independent" was not very apt in the present context. A blanket reference to "newly independent States" would obscure the difference between a State which had emerged for the first time and a State which had spent a century or more under colonial rule, but had been an independent State before colonization. A State of that kind had enjoyed international personality before becoming a colony, when its sovereignty had been submerged by a foreign power, by conquest or treaty or both. Its case was different from that of a State created on a territory which had never constituted an international entity.

16. In some of the articles it was not clear whether differences in terminology reflected actual differences in legal content. Problems of interpretation could arise in

such cases, so that more precise wording was desirable. For example, article 9 stated that certain property "shall devolve... to the successor State", but in article 8, sub-paragraph (a) the expression used was "shall pass within the patrimony of the successor State", and in article 13, paragraph 1, it was "shall pass into the patrimony". Article 14, paragraph 1, stated that certain items "follow the transferred territory". In article 8, sub-paragraphs (b) and (c), the expression used was "shall pass within the juridical order of the successor State", whereas version B of article 37 read: "shall be incorporated... in the juridical order of the successor State". Article 34 stated that the successor State "shall be automatically and fully subrogated to" certain property rights. Article 40, paragraph 1, provided that the legal status of certain property "shall not be affected by the change of sovereignty", but article 37 stated that "The change of sovereignty shall leave intact the ownership...".

17. Another case in which some greater degree of uniformity could perhaps be introduced in order to facilitate understanding, related to the formula used in articles 6, 26 and 40: "shall be transferred to the successor State". In article 38, paragraph 1, the wording used was "shall be transferred *ipso jure* to the successor State". The difference should, of course, be retained if there was a difference in the intended meaning, but not otherwise.

18. The question also arose of the difference between the transfer mentioned in those articles and the concepts underlying the words "shall... be allocated" in article 13, paragraph 2, "shall receive", in article 21, paragraph 1, and "shall take over" in article 24, paragraph 2. It was not certain whether there was any difference in intended meaning between those three expressions.

19. Similar differences arose with regard to certain descriptive terms relating to property. Article 11, paragraph 1, referred to "the patrimony" of a territory. In article 31, paragraph 1, there was a reference to "property belonging to" a territory. In article 34, the expression "patrimonial rights" was used, whereas version A of article 37 referred to "patrimonial property, rights and interests". Article 9, however, spoke of "property necessary for the exercise of sovereignty".

20. That last group of terms created a special difficulty, because it showed that in some of the articles, the distinction between ownership and sovereignty had become blurred. Ownership was mentioned in a number of places where the intention had been to refer to sovereignty. The two concepts should be kept separate. Ownership of property implied *jus utendi*, *jus fruendi* and *jus abutendi*; sovereignty implied legislative, executive and judicial powers. A clearer distinction should be made between sovereignty, the attribute of a State, and simple ownership.

21. Lastly, he would welcome some clarification of the difference between "public funds" dealt with in article 13, and the "currency, gold and foreign exchange reserves" referred to in article 12.

22. Mr. KEARNEY said that he too wished to congratulate the Special Rapporteur on his excellent reports,

the sixth of which constituted a substantial development and refinement of the theses expounded in the earlier reports.

23. By way of general comment, he wished to stress that the Commission's purpose in dealing with the present topic was essentially to draw up a set of residuary rules. The draft articles now under discussion would apply only to the cases of succession that would arise most often in the future as a result of a union of States, the dissolution of a State, or a transfer of territory from one State to another. In those cases, it was likely that the States concerned would make the necessary arrangements by agreement, and their agreement would be governed by the law of treaties.

24. Because of the enormous range of possible situations, it would be impossible to draft detailed rules to cover all eventualities. For example, in the case of the dissolution of a State which had a weather reporting satellite in orbit, it would be extremely difficult to apply the principle of equitable apportionment, except by a balancing of different categories of property.

25. The residuary rules to be embodied in the draft articles would serve to cover any gaps that might exist in the agreements concluded between the States concerned. In framing those rules, it would not be the Commission's objective to produce certain particular economic or social effects, or to ensure the maintenance or amendment of any form of political philosophy.

26. The Commission's principal objective should be to frame a set of rules which would allow a succession to take place with the minimum of dispute. Although the analogy was, of course, only partial, he might mention the work of the United Nations Commission on International Trade Law (UNCITRAL) on the revision of the international instruments governing bills of lading. For a long time there had been doctrinal and other disputes between shipping (maritime carrier) interests and shipper (cargo) interests and the major aim in revising the international instruments was to reduce friction between two sets of interests, as an effective way of reducing maritime transport costs.

27. By the same token, the Commission's aim should be to reduce the possibilities of friction between the predecessor State and the successor State and between either of those States and a third State. The only way to arrive at that result was to provide as precise a set of rules as possible.

28. There was one point, however, to which he wished to draw particular attention: the need to introduce some impartial method for the settlement of disputes, particularly if the concept of equitable apportionment was included in the draft. Clearly, it would be very hard for the parties themselves to decide what constituted equitable apportionment in the very complex situations which arose.

29. He had been very interested to hear Mr. Pinto's comments on terminology problems, because he himself had precisely the same difficulties. Part of the trouble was due to the use of code law concepts to express some of the rules. "Patrimony", for example, was more a code law than a common law concept. In any case, he

supported Mr. Pinto's plea for greater uniformity in terminology.

30. With regard to articles 1, 2 and 3, he had no objection to the first two being referred to the Drafting Committee, since they were similar to the corresponding articles 1 and 6 of the 1972 draft on succession of States in respect of treaties.

31. With regard to article 3, it was highly desirable that the same type of definition should be used in sub-paragraph (a) as had been adopted at the previous session in article 2, paragraph 1 (b) of the draft on succession of States in respect of treaties. One important difference between the two texts was that in the definition of "succession of States" relating to treaties, no reference was made to sovereignty, since the Commission had decided to exclude that concept.

32. The reference in article 3, sub-paragraph (a), to "practical effects" on the rights and obligations of each of the two States concerned raised another problem. That wording could lead to confusion, since the purpose of the draft was to deal with the legal effects of the replacement of one State by another in the responsibility for the international relations of territory.

33. Mr. USHAKOV congratulated the Special Rapporteur on the excellent work he had already accomplished, despite the difficulty of his task. His sixth report showed considerable progress. Although the Commission had not been able to examine his earlier reports, the Special Rapporteur had succeeded in improving and developing them, and the number of articles he proposed had increased from 4 to 15 and now to 40. Moreover, in his sixth report, the Special Rapporteur had distinguished between various cases of succession, whereas his previous report (A/CN.4/259) had attempted to deal with all the possible types of succession indiscriminately.

34. Before examining the draft article by article, the Commission should consider a number of general questions. It was regrettable that the Special Rapporteur had been unable to participate in the work of the Commission's twenty-fourth session, first because the Commission had been deprived of his valuable assistance when examining Sir Humphrey Waldock's draft, and secondly, because the Special Rapporteur had sometimes adopted, on certain general questions, a position contrary to that taken by the Commission. For instance, the definition proposed by Sir Humphrey Waldock for the expression "succession of States",³ which applied only to cases of succession in respect of treaties, had finally been replaced by a general definition applicable to both aspects of succession of States. Nevertheless, the Special Rapporteur now proposed a new definition, as he was, of course, entitled to do. The Commission, however, would find itself in a delicate position, because if it accepted the Special Rapporteur's definition, it would be obliged to review the position it had adopted last year. True, the Commission had the right to change its position, but it would have been better if the Special Rapporteur's view had been put forward the previous year.

³ *Ibid.*, 1969, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, II, art.1.

35. The definition of the expression "public property" should also be considered as a preliminary general question. The whole draft dealt with succession to public property and it was essential to be clear from the outset as to the meaning of that expression, which was defined in article 5. Later on, the Commission would have to decide whether the expression "public property" covered not only property, but also rights and interests; he himself thought it did not. For the time being, he merely noted that the definition was drafted in a negative form which he considered unsatisfactory: public property meant all property which was "not under private ownership". In his opinion, public property meant State property.

36. It was also essential to determine in advance what cases of succession were envisaged. He noticed that the Special Rapporteur had not followed exactly the classification adopted by the Commission in its draft on succession in respect of treaties, and that might oblige the Commission to review its position. The Commission had decided to distinguish between cases of transfer of territory and cases of the emergence of a new State, which covered the birth of a newly-independent State, and the unification, dissolution or severance of States. In his opinion, that arrangement was also valid for the present draft, but the Special Rapporteur had sometimes departed widely from it, as was clear from paragraphs (5) and (6) of his commentary to article 9 (sixth report). The difference was particularly marked in sub-paragraphs (c) and (d) of paragraph 110; the cases listed there had no equivalent in the draft on succession of States in respect of treaties. The sub-category in sub-paragraph (d), of succession without the creation of a State but entailing the disappearance of the predecessor, was unacceptable, particularly the case of partition among several States; in fact, under contemporary international law, it was illegal.

37. Before the draft was examined article by article, it should also be considered whether the future instrument should lay down strict peremptory rules or merely residuary rules. For instance, the question arose whether matters of succession, particularly succession to public property, could be settled by treaty between the two States concerned. In his opinion, that possibility, which had been mentioned by the Special Rapporteur, should be expressly provided for. Thus, in the event of a partial transfer of territory from State A to State B, if public property situated in a third State gave rise to a dispute, States A and B should be able to settle the question by agreement between themselves. Furthermore, the rules of international law should apply only if no agreement was concluded. But none of the forty articles proposed mentioned that procedure, though it was widely accepted in international law.

38. His last general comment concerned legal drafting technique. In order to understand the articles proposed by the Special Rapporteur, it was necessary, in nearly every case, to refer to the title of the article or section of the draft. For example, article 12, entitled "Currency and the privilege of issue", was comprehensible only in the light of the title of the section in which it was included, which was "Partial transfer of territory". In the draft on succession of States in respect of treaties, the corres-

ponding article, article 10, could be understood independently of the title. It should be noted that, in general, except in the case of the Vienna Convention on Consular Relations,⁴ titles disappeared when the text was adopted by a plenipotentiary conference. Their sole purpose was to facilitate the preparatory work.

39. Mr. AGO said it was essential for the Commission to know exactly what it was trying to do, so as to have a criterion to apply when it came to consider individual points in the draft.

40. In the Special Rapporteur's first two reports,⁵ following the Commission's decision, the plan had been to divide the topic of succession of States into two parts according to the source of the rights and obligations relating to succession—rights and obligations deriving from treaties and rights and obligations deriving from general international law. That distinction was clear, but unfortunately it was hardly practicable. The distinction which had replaced it was not so clear. In the sixth report several concepts remained vague. The Special Rapporteur said that, since the work on succession in respect of treaties had shown that the treaty was not considered as a source of rights and obligations, but as subject-matter of succession, the topic had had to be divided up according to the subject of succession—on the one hand the treaty and on the other hand other matters, which, according to the Special Rapporteur, were property, debts, legislation, nationality, acquired rights, etc. But when he gave a definition, such as that of succession of States in article 3, sub-paragraph (a), for example, the Special Rapporteur did not specify what rights and obligations were meant. In any case he had carefully avoided qualifying them as "international". Nor did he specify the source of those rights and obligations. He had certainly had treaty sources in mind in addition to customary international law, so the first thing the Commission had to decide was whether to codify only customary general rules on succession of States, or also to include all that was most frequently provided for in treaties.

41. The Special Rapporteur had probably opted for the latter course, but it was difficult to see how disparate rules appearing in different treaties could be converted into general rules of universal application, not to mention the fact that States generally preferred to settle certain questions specifically by special agreement. The Commission would be called upon as it were to codify residuary rules to be applied in the rare, but possible cases—which would have to be specified—in which there was no agreement. But that might create the impression that there was a whole body of rules governing the subject in general international law, which could be going too far.

42. It was important not to lose sight of the basic principle of the freedom of States. But some of the draft articles seemed to define the normal exercise of the State's sovereignty and the freedom inherent in it, rather than set out rules on succession of States. It must not be

⁴ United Nations, *Treaty Series*, vol. 596, p. 262.

⁵ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 94, document A/CN.4/204 and 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

supposed that every exercise of freedom by a State was the result of some concession of international law. For example, the privilege of issuing currency, referred to in article 12, paragraph 1, did not derive from a rule of international law, as might be supposed from reading that paragraph. It derived from the internal sovereignty of the State; it was a faculty enjoyed by the State, but not one granted to it by the international law governing succession of States.

43. Another very important question was the distinction between sovereignty and ownership. Sovereignty was a matter of international law, whereas ownership was a matter of internal law. That did not mean that international law could not intervene to establish how ownership could be transferred in certain cases, but the Commission, when examining the draft articles, should constantly ask itself whether it was dealing with a case of sovereignty or a case of ownership; in other words, whether the State should be considered, in each particular case, as a subject of international law or a subject of internal law.

44. General rules should not be laid down without conclusive evidence that there were generally accepted criteria to justify them.

45. Mr. TSURUOKA said that the Commission's task was to draft articles which would offer satisfactory solutions for the predecessor State, the successor State and third States. The articles should be simply and clearly worded so as to constitute a useful legal instrument that was easy to apply.

46. A closer parallelism with the draft articles on succession in respect of treaties was desirable, both in regard to terminology and in order to avoid any gaps or duplication. In addition, the meaning and scope of such expressions as "public property" and "rights and obligations" should be defined.

47. In his draft articles the Special Rapporteur had emphasized the relations between the predecessor State and the successor State, but it frequently happened that the interests of third States were also involved. To ensure that such States did not have to suffer through the refusal of a successor State or a predecessor State to honour obligations it did not consider to be incumbent on it, public property should also include obligations, debts and property in third States.

48. Articles 1 and 2 could be referred to the Drafting Committee. As to article 3, he preferred the definition of "succession of States" given in the draft on succession of States in respect of treaties.

The meeting rose at 1 p.m.

1221st MEETING

Wednesday, 6 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney,

Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 1 (Scope of the present articles),

ARTICLE 2 (Cases of succession of States covered by the present articles) and

ARTICLE 3 (Use of terms) (continued)

1. The CHAIRMAN invited the Commission to continue its general discussion on the Special Rapporteur's sixth report (A/CN.4/267) and consideration of articles 1, 2 and 3.

2. Mr. HAMBRO said that, while he had listened to the debate with interest and admiration, he could not help fearing that the Commission was attempting to do too much. Like Odysseus of old, it seemed to be embarking on a long and perilous voyage through uncharted seas strewn with rocks and shoals. As Mr. Yasseen had remarked at the previous meeting, there was a danger that it might never reach its goal unless it began to consider the individual articles immediately.

3. He was glad to note that the Special Rapporteur, in his sixth report, had abandoned some of the ideological and political considerations which had appeared in his first report¹ and had adopted a more simplified and pragmatic approach. Like Mr. Reuter, he was also glad that the Special Rapporteur had agreed not to concentrate too much on questions of decolonization, since there were other forms of State succession which were of equal importance.

4. Even if some of the problems connected with the topic should prove impossible to solve at present because the law concerning them was not yet settled, he was confident that useful work could still be done and that the final, collective report would stand as a monument to the Special Rapporteur's industry and imagination.

5. Mr. RAMANGASOAVINA said that the Special Rapporteur had done excellent work, which was all the more admirable because there was virtually no doctrine or jurisprudence on the topic, so that the credit for it belonged entirely to him. His sixth report showed a definite improvement in both quantity and quality over his previous reports. He had taken into account the views expressed in the International Law Commission and the Sixth Committee of the General Assembly and, in order not to impede the progress of the Commission's work, had avoided the controversial issues raised by the defini-

¹ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 94, document A/CN.4/204.

tions, by deferring them for later consideration. He (Mr. Ramangasoavina) fully approved of that procedure.

6. The Special Rapporteur also had the merit of having tried to group together in the draft all the elements relating to succession in respect of matters other than treaties—a vast undertaking, since there had been no previous attempt to codify the topic. Adopting a pragmatic approach, he had endeavoured to draft articles which could serve as a basis for discussion. The proposed classification was acceptable; it took account of what had been done on succession in respect of treaties, thereby ensuring the continuity and unity of the Commission's work on the law of treaties and succession of States. The work on the present topic pertained more to progressive development than to codification, and it was a matter for regret that the Commission had but little time to consider texts that were of undeniable importance.

7. Articles 1 and 2 could be referred to the Drafting Committee; so could article 3, although the definition it gave of succession of States was different from the one adopted in the draft on succession in respect of treaties.² That difference was justified for the reasons given by the Special Rapporteur, which he accepted.

8. Sir Francis VALLAT said he wished to congratulate the Special Rapporteur, not only on his sixth report, but also on his valuable oral introduction to it.

9. He, personally, would be glad to see articles 1 and 2 referred to the Drafting Committee, but at the previous meeting Mr. Ushakov had emphasized the need for clarity as to the meaning of the terms "succession of States" and "public property". It would, therefore, be advisable to begin by considering article 3, sub-paragraph (a) and article 5.

10. Much State practice already existed concerning treaties dealing with different kinds of transfer of territory and the emergence of new States. He suggested, therefore, that it would be helpful to the Commission if the Special Rapporteur would present a collection of such material, so that the Commission could examine it on a comparative basis.

11. Mr. MARTÍNEZ MORENO said that the codification of the topic dealt with by the Special Rapporteur in his impressive report was almost without precedent. Cases of succession of States in respect of matters other than treaties covered an immense field, because such succession could occur not only through accession to independence, but also through the union or dissolution of States, so that the Special Rapporteur had found it necessary to abandon some of his previous ideas.

12. The problem of public property in absorbed territories was particularly difficult. As Mr. Reuter had pointed out, the very definition of the term "territory" presented special difficulties at the present stage of the debate, since it might conceivably refer to the territorial sea, to the continental shelf or even to the air space above it. It would therefore be desirable to agree on a

general definition of "territory" before tackling the problem of public property.

13. Likewise, it was necessary to determine what exactly was the situation of the population of an absorbed territory, before dealing with the question of currency and the privilege of issue. The monetary aspects of such cases were very complex, for the Bretton Woods agreements and the rules of the International Monetary Fund might preclude the transfer to a successor State of special drawing rights, for example, which might well become the monetary unit of the future.

14. He could largely agree with Mr. Pinto's criticisms of the terminology used by the Special Rapporteur,³ but thought the latter had made a great effort to use the recognized terms of international law, many of which had been taken from the Commission's own texts.

15. He supported the proposal that articles 1 and 2 should be referred to the Drafting Committee. As to article 3, like Mr. Kearney, he was doubtful about the use of the word "sovereignty" in the definition of "succession of States" in sub-paragraph (a); but he was confident that the Drafting Committee would manage to find a satisfactory definition, so that the Commission could proceed with its work.

16. Lastly, while recognizing the desirability of a general discussion on the Special Rapporteur's sixth report, he thought that the Commission should concentrate its attention on the articles themselves.

17. Mr. SETTE CÂMARA said that, in dealing with the Special Rapporteur's very important and voluminous report, the Commission should, in his opinion, proceed in its traditional way and consider the draft, article by article.

18. He agreed with other members that articles 1 and 2 were quite satisfactory, following the Special Rapporteur's efforts to meet the Commission's wishes.

19. With regard to article 1, however, he noted that although the present articles applied to "the effects of succession of States in respect of matters other than treaties", they would actually serve as residual provisions to supplement treaties and to provide guidance in the absence of a treaty or if the treaty were silent on the subject, so that there would always be a treaty framework.

20. With regard to article 3, Mr. Ushakov had pointed out the difference between the definition of "succession of States" in sub-paragraph (a) of that article and the definition given in article 2, paragraph 1 (b) of the draft on succession of States in respect of treaties. The latter definition read: " 'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory". The commentary to that definition stated, *inter alia*: "Consequently, the term is used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". In paragraph 25 of his commentary to article 3 (sixth report), the Special

² *Ibid.*, 1972, vol. II, document A/8710/Rev.1, chapter II, section C, article 2.

³ See previous meeting, paras. 9-21.

Rapporteur had explained why he had adopted a different definition, but the point was certainly one on which the Commission would have to take a decision.

21. Lastly, he had been impressed by the doubts expressed by Mr. Pinto concerning the terminology used in the draft articles. In particular, the definition of "public property" would give rise to difficulties in the socialist States.

22. Mr. QUENTIN-BAXTER said that, like the other members, he found little difficulty in accepting the first three articles of the Special Rapporteur's impressive report, with the exception of sub-paragraph (a) of article 3. He would be content to dismiss that as a mere drafting problem did it not appear, from paragraphs (3) and (4) of the commentary to that article, that the Special Rapporteur attached importance of a substantive kind to the definition.

23. In paragraph (4), the Special Rapporteur had written: "In turning from succession in respect of treaties to succession in respect of matters other than treaties, one passes from the *fact* of the simple replacement of one State by another in the responsibility for the international relations of a territory to the problem of the concrete content of the rights and obligations transferred *as a result of that fact* to the successor State in the various fields relating to public property, public debts, the status of the inhabitants and so forth".

24. While he did not quarrel with that idea, he wondered whether it was necessary for it to be embodied in the definition of "succession of States", since the notion of "effects" was also contained in article 4. That was purely a drafting suggestion, but to his way of thinking there were certain advantages in keeping the primary definitions extremely simple.

25. He also questioned the use of the words "the replacement of one sovereignty by another" instead of the words "the replacement of one State by another", which had been used in article 2, paragraph 1(b) of the draft on succession of States in respect of treaties. The word "sovereignty" had many different connotations, some of which were clearly understood, while others were of a more shadowy and controversial nature. He would prefer the words "the replacement of one State by another".

26. He was very much in agreement with those speakers who has asked what the precise function of article 5 was. The Special Rapporteur had asked the same question in paragraph 2 of his fifth report (A/CN.4/259) when he had written: "It might well be argued that since State succession consists of the replacement of one sovereignty over a territory by another, this means that the previous sovereignty automatically loses its material support and that the right of the predecessor State to public property therefore passes *ipso jure* to the successor State". He himself agreed that the one clear primary sense in which the word "sovereignty" was used in international law related to the control of territory and to exclusive jurisdiction within that territory, in which the State was the law-maker.

27. In considering that problem, the Special Rapporteur had taken as a point of reference the case of property situated, not within the territory, but abroad and had

concluded that that was a situation in which the change of sovereignty, the replacement of one State by another, did not immediately lead to an automatic transfer of the property rights involved.

28. It seemed to him that the situation was basically the same in both cases. The State in which the property was situated was the lawgiver; at the level of domestic law it had exclusive jurisdiction and control, but always possessed those powers subject to the requirements of international law. To say what those requirements were, to say what limitations were placed on the State's exercise of its power was, of course, the purpose of the present draft articles.

29. He thought that the draft articles had nothing to do with the particular problem of State responsibility towards aliens. In the nature of things it was within the power of a sovereign State to change rights of ownership in domestic law, and the international consequence of such action ought to be considered under the broad heading of State responsibility and, in particular, in the context of the duties owed to foreign States and their citizens.

30. That would seem to be a matter clearly beyond the scope of the present draft article, and the Commission should concentrate on the question whether the replacement of one State by another extinguished, diminished or transformed the duty owed by the new State. A number of speakers had noted that in many cases those rights would be dealt with in treaty instruments and that the Commission was laying down residual rules subject to the right of States to order their affairs in treaties. Those residual rules, however, were of immense importance, because in some situations the possibility of regulation by treaty would not easily arise.

31. With regard to new States, it was a cardinal feature of international law that a decolonizing Power should not, for example, be allowed to settle certain questions which would affect its former territory. International law required that that territory should itself become an independent member of the international community before it attempted to dispose by treaty of its own rights and obligations. Moreover, as had already been pointed out, the age of decolonization was now coming to an end, and the Commission's attention had to be focused more and more on other areas. But even in those areas, the emergence of other new States by disruption or dismemberment of a former territory, would raise the same problems.

32. It seemed to him, therefore, that even if the scope of the present work was defined as modestly as possible, it would still present enormous difficulties. The rules laid down by the Commission would indeed have to be flexible rules, to be applied in the light of the circumstances of each case.

33. Lastly, referring more particularly to article 5, he said that although that article dealt with the question of defining public property, it immediately raised echoes of points he had already attempted to discuss. The article provided that what was public property would in the first instance be determined in accordance with the laws of the predecessor State, although clearly there could be

no attempt to elevate the law of that State to something unchangeable, which departed from the municipal level and settled permanently at the international level. The Special Rapporteur had, indeed, tried to qualify the definition by adding the words "or which are necessary for the exercise of sovereignty by the successor State in the said territory". However, that attempt at qualification raised the whole problem of the word "sovereignty" and how the necessity for exercising sovereignty was to be measured. The latter question would, in fact, seem to call for many of the tests which were properly applied to the question of State responsibility towards third States and their citizens.

34. Mr. USHAKOV said he realized that the almost total lack of jurisprudence and doctrine in a very difficult field made the task of the Special Rapporteur particularly arduous, but he had no doubt that his great ability would enable him to overcome the difficulties which were inherent in the preliminary phase of any study of a given topic.

35. The first three articles submitted to the Commission did not present any problems of substance and could be referred to the Drafting Committee. Sub-paragraph (a) of article 3, however, raised a drafting problem. While it was true that there was no difference of substance between the "replacement of one State by another" and "replacement of one sovereignty by another", it was preferable, in his opinion, to speak of the replacement of one State by another, so as not to lend support to the idea that colonial territories had previously been under the sovereignty of the former metropolitan Power. To say that one sovereignty was replaced by another was to acknowledge the sovereignty of the former metropolitan Power over its colonies. But the former colonies had been under the administration of the metropolitan Powers, not under their sovereignty. It was better not to say anything which might sow doubt in people's minds.

36. To gain time, the Commission might also refer article 4, which did not present any problem, to the Drafting Committee and pass on immediately to article 5, which was the key article of the draft. With regard to that article, he observed that a definition should follow from all the other draft articles, so that it could only be approved provisionally in order to facilitate further work by clarifying the meaning of certain terms.

Mr. Castañeda took the Chair.

37. Mr. USTOR said he congratulated the Special Rapporteur on his valuable reports and draft articles, which had the merit of following largely the pattern of the Commission's 1972 draft articles on succession of States in respect of treaties.

38. In two matters, however, the Special Rapporteur had departed from that pattern: the definition of succession of States and the typology of cases of succession. His own feeling was that although the Commission was not absolutely bound by its own precedents, any departure from then should only be for compelling reasons.

39. With regard to the definition, he still favoured the 1972 formula, which defined "succession of States" simply in terms of the replacement of one State by another in a certain territory. He would be prepared to

revise his views, however, if convincing reasons could be adduced by the Special Rapporteur.

40. Similarly, with regard to typology, the arguments put forward by Mr. Ushakov in favour of maintaining the 1972 pattern were very persuasive.

41. Except, therefore, for his remarks on article 3, sub-paragraph (a), he agreed with the suggestions made by Mr. Yasseen regarding the treatment of articles 1, 2 and 3.⁴

42. Speaking generally on the rest of the draft, he wished to suggest that two additional provisions should be introduced into "Part two: General provisions".

43. His first suggestion was for a saving clause to the effect that the provisions of the draft articles did not affect the right of the States concerned to settle matters of State succession by treaty. He believed that virtually all those matters could be settled by means of a treaty between the predecessor State and the successor State, sometimes with the participation of third States. Perhaps the Special Rapporteur would wish to examine how far the various rules were of a purely dispositive character and whether there was any rule that could not be varied by agreement between the parties.

44. His second proposal was for an article to the effect that all the rules set out in the draft articles were without prejudice to the sovereign right of the successor State to regulate rights of property within its own sphere. Clearly, the successor State was a sovereign State like any other and had a full right to regulate such matters.

45. The inclusion in the draft of an article stating that principle could simplify the position with regard to certain other matters, such as the right of the State to issue money, which was obviously not a right inherited from the predecessor State, but a right originating in the sovereignty of the successor State. It would also influence the definition of public property; article 5 referred to the law of the predecessor State, but the successor State undoubtedly had complete freedom to change both the economic and the legal system in its territory. What had previously been private property could thus become public property.

46. The CHAIRMAN, speaking as a member of the Commission, said he wished to associate himself with the tributes paid to the Special Rapporteur for his treatment of the topic and for the draft articles he had submitted. It should be borne in mind during the discussion that the articles in the Special Rapporteur's sixth report dealt only with public property and that other subjects would be considered in subsequent reports.

47. His first general comment would be to remind the Commission that when, in 1968, it had considered the criterion for demarcation between the topics of succession in respect of treaties and succession in respect of matters other than treaties,⁵ it had abandoned its earlier approach, which had been based on the source of succession: first, succession effected by means of a treaty and, secondly,

⁴ See previous meeting, paras. 2-7.

⁵ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 216, document A/7209/Rev.1, para. 46.

succession by virtue of customary rules of international law.⁶

48. The Commission had found that earlier approach unrealistic, since whether a succession took place by treaty or not was not the essential question. There was, on the other hand, a considerable difference between succession in respect of treaties and succession in respect of other matters, such as public debts and public property.

49. With regard to the definition of State succession given in article 3, sub-paragraph (a), he had been impressed by Mr. Ushakov's plea for uniformity with the text of article 2, paragraph 1(b) of the 1972 draft.⁷ Nevertheless, the Commission was free to adopt a different definition for the purposes of the present draft, and from a logical point of view it was perfectly possible to use the term "succession of States" in the present draft with a different meaning from that ascribed to it in the 1972 draft.

50. Moreover, it should be remembered that the definition in article 3, although different from that appearing in the 1972 draft, did not conflict with it. It was based on the concept of replacement; it did not state that succession of States meant the transfer of rights and obligations relating to the territory. The concept of replacement of sovereignty was not at variance with the concept of replacement of one State by another.

51. He agreed with Mr. Kearney, however, that the expression "practical effects" was not appropriate.⁸ The reference should clearly be to legal effects.

52. He was prepared to be convinced by the Special Rapporteur of the need to depart from the 1972 precedent in other respects, but he would need some grounds additional to those stated in paragraphs (3) and (4) of the commentary to article 3, which were insufficient.

53. His position was similar with regard to the classification of cases of succession. He would be prepared to accept a different classification from that adopted in 1972 if the Special Rapporteur put forward sufficient grounds for doing so. The fact that a certain classification had been adopted for the purposes of the draft on succession in respect of treaties should not be an obstacle to the adoption of a different classification in the present draft if that was justified.

54. He agreed with Mr. Ushakov on the need to specify clearly in the draft that questions of succession of States in respect of matters other than treaties were essentially questions to be settled by a treaty between the predecessor State and the successor State, sometimes with the participation of third States.⁹ That raised the problem of the dispositive character of the rules in the draft; personally, he thought it unlikely that there would prove to be any imperative rules.

55. Lastly, he endorsed Mr. Ushakov's remarks on the important question of titles. Some of the draft articles could be construed only by reference to their titles; in

a few cases, it was even necessary to refer to the titles of the chapter and the section in order to understand the meaning of an article. That method of drafting was dangerous.

56. Mr. BILGE said he associated himself with the tributes paid to the Special Rapporteur, who had ventured onto ground that was full of pitfalls, with hardly any precedents to guide him. After a thorough study of the subjects, he had reached certain conclusions which he defended in his draft, sometimes relying on a single decision or a particular opinion. It was not, strictly speaking, his own personal views that the Special Rapporteur was defending, but the results of his meticulous collation.

57. He himself was obliged to reserve his position, as he had not yet been able to make a study of that kind. Nevertheless, he approved of the pragmatic approach adopted by the Special Rapporteur, which seemed to him to be the only feasible method in the circumstances. Instead of developing a general theory, the Special Rapporteur had preferred to present the main cases of succession which could occur and propose solutions for them.

58. The first two articles did not present any difficulty. Article 1 was a classical provision which defined the scope of the draft, while article 2 was taken textually from the draft on succession of States in respect of treaties. He was one of those who had voted in favour of that provision the previous year, because he thought it was better to express the idea it contained, even though it might be self-evident.

59. The word "sovereignty" in article 3, sub-paragraph (a) was the key word of that provision. It should not present any insurmountable difficulties, although it had different meanings in internal law and international law and its scope was not always the same as in the Charter or in some United Nations declarations and resolutions. The Special Rapporteur had not used the term "sovereignty" in a broad sense. What he meant was the will of the inhabitants of a given territory to govern themselves and to participate in international relations. As it was used in the definition of the expression "succession of States", the word "sovereignty" served merely to delimit the subject to be codified and to indicate that the succession in question was in accordance with public international law.

60. As to whether it was better to use the definition adopted last year or draft a new one, he found that the present topic did seem to call for a fresh definition. Since it covered succession of States in general, it required a broader definition than succession of States in respect of treaties. Moreover, succession in respect of treaties gave rise to tripartite relationships between the predecessor State, the successor State and the third State, whereas succession of States in respect of matters other than treaties gave rise rather to bilateral relationships. Admittedly, there might be third States involved, but they were usually less directly interested.

61. Consequently, although he was in favour of uniformity in the definitions adopted by the Commission, he thought the expression "succession of States" could

⁶ *Ibid.*, 1967, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

⁷ See previous meeting, para. 34.

⁸ *Ibid.*, para. 32.

⁹ *Ibid.*, para. 37.

be defined in more general terms for the present topic than for the related topic. In any case, the Commission should, as was its practice, reconsider the definitions proposed by the Special Rapporteur after it had studied the different cases of succession.

62. Mr. CALLE y CALLE said he associated himself with the tributes paid to the Special Rapporteur for his remarkable analysis of a topic on which little guidance was provided by legal writings or precedents.

63. With regard to the definition of "succession of States", he favoured the reference to the replacement of sovereignty. Such questions as succession of public property were governed by rules which had their foundation in the sovereignty of the successor State.

64. The Special Rapporteur had intimated that the list of terms in article 3 was not yet complete and that additional terms would be added later. He himself would suggest including a definition of the date of succession, which was important in such matters as the effects of succession on public debts. He would also suggest including a definition of the term "newly independent States".

65. As to the classification of cases of succession, he found the Special Rapporteur's proposals acceptable.

66. Lastly, he endorsed the Special Rapporteur's pragmatic approach; the draft stated practical rules. The best way to deal with them was to examine the draft article by article.

The meeting rose at 1 p.m.

1222nd MEETING

Thursday, 7 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 1 (Scope of the present articles),

ARTICLE 2 (Cases of succession of States covered by the present articles) and

ARTICLE 3 (Use of terms) (continued)

1. The CHAIRMAN invited the Commission to continue its general discussion on the Special Rapporteur's sixth report (A/CN.4/267) and consideration of articles 1, 2 and 3.

2. Mr. BARTOŠ said that the topic under consideration, although new from the theoretical point of view, was not new in the practice of international law. The Commission had divided succession of States into two topics, according to whether it arose in regard to treaties or to matters other than treaties. For the first topic, succession of States in respect of treaties, which had been entrusted to Sir Humphrey Waldock, it was possible to formulate traditional rules of international law based on the presumption of free expression of the will of the parties concerned. It should be noted incidentally, however, that the parties were not always able to express their will freely; a case in point was the creation of the State of Yugoslavia. In the matter of succession of States, some agreements reflected not so much the will of one or other of the parties as the sole will of a State with imperialist designs, which was imposed on another State.

3. The question of succession of States in respect of matters other than treaties involved the whole of international law. There were two basic theories. One stressed the acquired rights of the former sovereign, while the other, which was revolutionary in outlook, emphasized liberation, so that the birth of a new independent State meant the transfer of sovereignty with all its attributes. According to the first theory, on the other hand, rights which had been more or less lawfully acquired remained attached to the predecessor State, so that the successor State was only partly liberated. But the United Nations had proclaimed the inalienable right of liberated nations to sovereignty over their natural resources and wealth; and that principle applied not only to natural wealth, but also to artificial wealth such as roads, railways, canals, etc. The two theories had opposite consequences with regard to compensation of the predecessor State.

4. It was therefore important to choose from the two theories the one which corresponded to the policy generally followed by the international community. The present trend seemed to be to grant newly independent States a natural right to their soil and their property and it was that trend which the Special Rapporteur had followed, while being careful to present it with moderation, so as not to arouse hostility.

5. The first three of his proposed articles stated basic provisions and ideas of international law which were recognized by most nations. It was essential to define the notion of public property. The public property of a State was not simply certain specific property; it included the whole of the public domain. That point should be introduced into the preliminary provisions.

6. As to the transfer rule, that raised the question of the date of transfer. Was it the date of acquisition of the territory by the new sovereign, or could it be considered that occupation or colonization entailed a provisional limitation or suspension of sovereignty? Even if it were considered that the change of sovereignty took place *de jure* at a given moment, it was nevertheless possible to apply the rule of retroactivity, which he would like to see included in the draft. In that way, States would not lose their right to sovereignty over their soil, and that sovereignty would reappear. Those ideas should be expressed in the draft articles or at least in the commentary.

7. The CHAIRMAN invited the Special Rapporteur to reply to the comments made during the discussion.

8. Mr. BEDJAOUI (Special Rapporteur) said that all the ideas expressed during the discussion would be helpful to him in the continuation of his work.

9. With regard to article 1, on the scope of the articles, he would remind the Commission that it had clearly defined the topic in 1967. It had distinguished between succession in respect of treaties, treaties being considered as a source of rights and obligations, and succession in respect of rights and duties resulting from sources other than treaties.¹ It had thus wished to contrast succession of the conventional type with succession of the non-conventional type. When the first topic had been examined, however, treaties had not been considered as constituting a source of rights and duties, but as the subject-matter of succession. The Commission had not considered the content of the treaties, but merely whether the successor State should receive them into its legal order. For the sake of symmetry, it had therefore been necessary to abandon the classification according to sources in dealing with the second topic. The matters to be dealt with as part of the second topic, particularly public property and public debts, should not be considered with reference to sources other than treaties, such as custom, but as the subject-matter of succession. The distinction according to sources had not proved very fruitful; moreover, custom would have provided little guidance and it would have been difficult to draw the line between treaty sources and other sources, as Mr. Bartoš had said in 1968.² And it was Mr. Ago who had first pointed out that the distinction made by the Commission was not satisfactory and that it was necessary to remove the ambiguity it caused.³

10. The matters other than treaties which were to be taken into consideration had been selected in 1963 by the Sub-Committee presided over by Mr. Lachs. They had then been approved by the Commission in 1968, when it had examined his first report (A/CN.4/204).⁴ Those matters constituted subjects of succession, whether there were any treaty rules or not. In that connexion, he wished to assure Mr. Ushakov that the draft had never been intended to exclude the faculty of States to proceed to succession by agreement.

11. He thought that article 1 should be referred to the Drafting Committee, as most members had suggested.

12. Article 2, which has its counterpart in the related draft, had not raised any difficulties. It could also be referred to the Drafting Committee.

13. Article 3, on the other hand, had given rise to discussion, which was not surprising since it contained definitions. Some members, like Mr. Yasseen, thought it preferable to defer consideration of the definitions; others, in particular Mr. Ushakov, thought that the definitions were of prime importance and could have

decisive consequences for the whole of the draft; others, again, had asked him for explanations or suggested drafting changes. Among the latter, Mr. Kearney had proposed that the words "practical effects" should be replaced by "legal effects".⁵ That was quite right, because it was mainly with the concrete legal effects that the Commission was concerned. He also welcomed Mr. Yasseen's suggestion that consideration of the definitions should be left till later. That had, indeed, been the practice followed by the Commission with all its draft articles, including Sir Humphrey Waldock's draft.

14. Although it would be preferable not to examine article 3 until later, he wished to reply to the comments made on it. In view of the many different meanings which could be ascribed to the word "sovereignty", as Mr. Quentin-Baxter had observed, it might perhaps be better to avoid using that term. Nevertheless, Mr. Bilge had quite rightly pointed out that the difficulties raised by the term were exaggerated, and that in any case they were not insurmountable, so that the Commission could reach agreement on its exact meaning. He had used the term "sovereignty" deliberately, so as not to speak only of the State, but also of its jurisdiction in the broad sense.

15. Mr. Ushakov had expressed the wish that the Commission should adopt a general definition of the term "State succession", applicable to both topics. But in its 1968 report to the General Assembly, the Commission had maintained that there was no need to attempt to draw up a general definition of State succession.⁶ Moreover, in the discussion in 1968, Mr. Ushakov himself had said that "there was no need for the Commission to attempt a general definition of State succession, which would hardly be of practical interest in connexion with a future convention".⁷

16. In any case, he shared Mr. Ushakov's present concern, being convinced like him that it was necessary to avoid having several different definitions for one and the same topic. Nevertheless, the mere fact that State succession had been divided into three topics showed that each had its own characteristics, and that might militate in favour of different definitions.

17. He himself had been the first to suggest a general definition, since question 2 of the questionnaire he had submitted in the Commission in 1968 had been entitled "General definition of State succession".⁸ He had considered three aspects of the question: terminology, form and substance. It was because the Commission had given up the idea of a general definition that he had proposed a second definition. In 1968 it had become clear that each Special Rapporteur was justified in formulating a separate definition for his own draft. The attachment of Sir Humphrey Waldock's topic to the general law of treaties showed the difference between the two topics. Another difference lay in the fact that Sir Humphrey Waldock's topic involved more aspects of public inter-

¹ See *Yearbook of the International Law Commission*, 1967, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

² *Ibid.*, 1968, vol. I, p. 103, 960th meeting, para. 50.

³ *Ibid.*, p. 102, paras. 37 and 38.

⁴ *Ibid.*, 1968, vol. II, p. 221, document A/7209/Rev.1, para. 79.

⁵ See 1220th meeting, para. 32.

⁶ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 217, document A/7209/Rev.1, para. 50.

⁷ *Ibid.*, 1968, vol. I, p. 122, 963rd meeting, para. 53.

⁸ *Ibid.*, p. 111, 962nd meeting, para. 1.

national law than his own. Moreover, the problem of public property introduced notions that were very different from that of a treaty, such as those of an administrative contract, a concession, and internal legislation. It should also be noted that the two definitions proposed did not conflict, but complemented one another. They reflected two aspects of the same question, and the definition he had himself proposed did not involve any reconsideration of the Commission's work on succession in respect of treaties. As Sir Humphrey Waldock himself had pointed out: "It should not be assumed that a word given a certain connotation in a convention must necessarily have precisely the same connotation in other contexts."⁹

18. There was a difference between the two topics which might justify two complementary definitions. Succession in respect of treaties involved the right of the State to be bound by a treaty only as an effect of its will. It was that right which had to be reconciled with the phenomenon of State succession. In that context, the rights and duties deriving from the succession were of little importance—so little, indeed, that Sir Humphrey Waldock had proposed, in his first definition, that succession of States should be considered as a change "in the possession of the competence to conclude treaties".¹⁰ In his own topic on the other hand, the question of competence did not arise, and it was the rights and duties deriving from the change of competence that had to be taken into consideration. The previous year, Mr. Ushakov had pointed out that State succession comprised two elements: the replacement of one State by another and the legal consequences of that replacement; and he had suggested introducing the second element into the definition of the term "succession".¹¹ That was precisely what he (Mr. Bedjaoui) had done.

19. Turning to general questions, he said that he had never intended to start from succession to territory and proceed to succession to public property, as Mr. Reuter supposed. On the contrary, he had tried to seriate the various questions raised by Mr. Reuter, in particular the rights attaching to territory, and in his first report¹² he had devoted a separate chapter to succession to territory. In that chapter he had dealt with succession to boundaries, servitudes, rights of way and enclaves. The problems, mentioned by Mr. Kearney, which might be raised by a weather satellite in orbit, could also be considered, as could fishing rights and the rights of the State over the continental shelf.

20. Many members of the Commission had raised the question whether the proposed articles were in the nature of residuary rules. Mr. Ushakov had expressed the fear that the draft might oblige States to give up their faculty of concluding succession agreements.¹³ But the reason why the draft did not expressly mention that faculty was that it was self-evident. The purpose of the draft could

be to provide States with rules by which they could be guided within the framework of an agreement or which they could decide to observe in the absence of an agreement. Contrary to what Mr. Ushakov thought, many provisions in the draft referred to the faculty of concluding an agreement. That applied to the expressions "by treaty or otherwise" in article 7; "devolution agreements" in article 10, paragraph 3; "treaty provisions" in article 21, paragraph 1; "stipulated by treaty" in article 23, paragraph 1; and "by treaty" in article 25, paragraph 2.

21. As to the fate of the draft itself, the text adopted might take the form of a convention. The large number of provisions, however, might rather suggest a code of conduct for States, though the articles would be systematically regrouped later.

22. Mr. Ustor had raised two questions.¹⁴ First, he had asked how far States could depart from the rules of the draft by agreement and had suggested that a provision be drafted on that point. He (Mr. Bedjaoui) found that proposal especially interesting because he had himself suggested, in his fourth report (A/CN.4/247 and Add.1), a provision stipulating, that any conventional limitation of the general principle of transfer of public property must be strictly interpreted (article 4). He had subsequently abandoned that provision, which seemed to him to be difficult to draft as well as to apply.

23. Secondly, Mr. Ustor had asked whether it should not be specified that the rules of the draft were without prejudice to the right of the successor State freely to regulate rights of property in its internal law. He shared that opinion, but had noted some doubts on the part of members of the Commission. In his second report,¹⁵ devoted to acquired rights, he had pointed out that the successor State must also be regarded first and foremost as a State. Again, in a previous version of article 10, on concessions (A/CN.4/247 and Add.1), he had referred to "the natural authority of the new sovereign to modify the pre-existing concessionary régime". He had subsequently had to abandon that clause, but was willing to reintroduce it. He felt some doubt, however, since in the case in point the successor State was acting not as a successor, but as a State, which took the problem outside the present topic.

24. Another general comment had related to legal technique and the role of the titles of the articles, which made them easier to understand. Although it was true that each article should itself contain all the elements needed to make it understandable, it must not be forgotten that what the Commission was examining was a first draft. As to the titles, he agreed with the Chairman that legally they were an integral part of the instrument. That had also been the opinion of the Vienna Convention on the Law of Treaties. Moreover, it would be found that it was made sufficiently clear in each article what kind of succession was referred to. But of course improvements could still be made by the Drafting Committee.

⁹ *Ibid.*, p. 119, 963rd meeting, para. 9.

¹⁰ *Ibid.*, 1968, vol. II, p. 90.

¹¹ *Ibid.*, 1972, vol. I, p. 33, 1156th meeting, para. 22.

¹² *Ibid.*, 1968, vol. II, p. 94, document A/CN.4/204.

¹³ See 1220th meeting, para. 37.

¹⁴ See previous meeting, paras. 42-45.

¹⁵ See *Yearbook of the International Law Commission*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

25. With regard to types of succession, he had at first intended to exclude all cases of irregular acquisition of territory. He would have liked the Commission to examine that question, but had finally had to abandon the idea, and it was perhaps in order to provoke such examination that he had included a section on those cases. Mr. Ushakov had reacted by emphasizing the unlawful character of cases of succession in which no State was created, but the predecessor disappeared. But some cases of disappearance of a State, or of partition, could be lawful within the framework of plebiscites or the right of self-determination. It seemed preferable only to take up questions of typology as they arose, in other words, to begin with the examination of article 12. The typology adopted for Sir Humphrey Waldock's topic had not been very rigorous. Certain cases of succession, moreover, could not be classified. For instance, the phenomenon of colonization, which should obviously not arise again in the future, was impossible to classify. That also applied to the cases of the French establishments in India, which had been joined to that country, and the disappearance of the Austro-Hungarian Empire. Consequently, the typology adopted for the other draft should not be considered as immutable, though he had followed it as far as possible. He would be prepared to abandon the provisions relating to the disappearance of a State by partition.

26. As to terminology, questions were bound to arise in view of the variety of systems of law and the diversity of languages used. For instance, a distinction was made between two kinds of public property. State property passed from the patrimony of the predecessor State into that of the successor State. Other public property belonging to territorial authorities or public establishments, did not change ownership merely by reason of a succession; such property, however, was no longer governed by the legal order of the predecessor State, but by that of the successor State. Those differences were difficult to express precisely and raised delicate translation problems. In addition, the terminology used in treaties was of infinite diversity.

27. At the end of the draft he intended to deal with several additional questions, such as relations between the successor State and third States. For the time being, so far as public property was concerned, it was mainly the predecessor State and the successor State which were involved, but it might be necessary to mention relations with third States in another context. It had been noticed, however, that he had considered that question whenever he had dealt with public property situated in the territory of a third State. Another provision might stipulate that the substitution, in principle, of the successor State in the patrimonial rights of the predecessor State implied that those rights were unchallenged. Similarly, that substitution must not impair the rights of third States. Where the draft spoke of an equitable distribution of public property, it referred only to relations between the predecessor State and the successor State or between several successor States, not to relations with third States, which were clearly not concerned in any way.

28. Mr. Bartoš had mentioned the case in which the status of railways was modified as a result of succession.

That case seemed to touch on another sphere. For example, in article 10, on concessions, he had referred to the rights of the conceding Power, but not to the content of the concession or the power to modify it. The latter aspect of the matter raised the question of acquired rights. For the time being the Commission must confine itself to affirming that the rights of the conceding State, as they existed in favour of the predecessor State, passed to the successor State.

29. With regard to archives, Mr. Ago had said that it was necessary to see whether there was a recognized right in that matter. Although he thought he had gone into that question in sufficient detail in his sixth report (A/CN.4/267), he was willing to pursue his research and draft a note on it.

30. In article 12 he had stated the rule that "The privilege of issue shall belong to the successor State throughout the transferred territory". That privilege was not conferred on States by international law; it derived from their sovereignty. The situation was not always as clear as that, however. In certain cases of decolonization, for instance, the colonial Power had retained the privilege of issue in the territory which had become independent. He would nevertheless be willing to abandon that provision, provided the matter was dealt with in the commentary.

31. He was not sure whether article 4 should be referred to the Drafting Committee, as Mr. Ushakov had suggested. It did not raise any difficulties; it simply specified that the draft referred to succession of States, not of governments and to succession to public property, not to other matters. It should be read in the light of the decisions taken by the Commission in 1968, when it had defined the scope of the topic.¹⁶

Mr. Yasseen took the Chair.

32. Mr. AGO said he wished to point out, for the benefit of the Special Rapporteur, that when he had referred, in a previous intervention, to the successive approaches adopted for the study of the topic of succession of States, it had not been in order to call in question the decision taken by the Commission, but to clarify it. Two reasons had led the Commission to go back on its initial decision to divide the topic according to the source of the succession. The first was that nearly all cases of succession were settled by treaty, so that very few cases would have been left for the Special Rapporteur for succession not having its source in a treaty; and the second was that the Special Rapporteur for succession in respect of treaties had soon found that from the viewpoint adopted in his report, the treaty was the subject-matter and not the source of the succession. The criterion adopted had thus been inappropriate, even though it had had the merit of being clear. The second criterion chosen—the subject-matter of the succession—could have been clear if it had been taken in the sense of succession of one State to another in international rights and obligations resulting on the one hand from treaties, and on the other hand from custom or other

¹⁶ *Ibid.*, 1968, vol. II, p. 216, A/7209/Rev.1, paras. 46 *et seq.*

sources. But, there again, the balance tilted strongly in favour of treaties.

33. In omitting—no doubt intentionally—to qualify as “international” the rights and obligations referred to in his definition of succession of States, in article 3, subparagraph (a), the Special Rapporteur had endeavoured to cover those cases in which one State succeeded another in rights and obligations which came under internal law, but in virtue of a rule of international law concerning succession. Thus on the one hand there was succession to rights and obligations of international law, and on the other hand there was succession to rights and obligations of internal law. The question which then arose was whether any particular case was a case of succession provided for by a rule of international law or simply the external manifestation of the fact that a State had been born, that it was sovereign, that its legal order had replaced the previous legal order, and that it was operating within that legal order independently of any rule of international law concerning succession of States.

34. There then arose an extremely important question of method. The Special Rapporteur had chosen to proceed according to the different categories of subject-matter of succession, beginning with public property, and had stated a rule relating to each of the various categories of such property. The drawback to that method was that there were very few rules of international law governing succession, so that the Special Rapporteur had been led sometimes to state an existing rule, and sometimes a rule which did not exist, but which he proposed that the Commission should adopt, and, even more frequently, to describe in his formulation what often happened, though not in fulfilment of any international obligation concerning succession of States.

35. That raised the question of what the Commission wished to do. If it intended to produce a code half way between codification and theory, the method was sound. But if its intention was to prepare a general convention on succession, there would be difficulties. The Commission's task would no longer be to make a general examination of what most often happened to the various kinds of public property in the event of a succession, but merely to ascertain in what cases rules of international law governing the subject need or need not be formulated. It was thus clear that the choice of method depended on the Commission's final aim and that it was important to reach agreement on that aim as quickly as possible.

36. Mr. USHAKOV thanked the Special Rapporteur for his explanations, which he had followed with great interest.

37. He repeated the proposal he had made at the previous meeting that article 4 be referred to the Drafting Committee without discussion.

Mr. Castañeda resumed the Chair.

38. Mr. BEDJAOUI (Special Rapporteur) said that Mr. Ago's comments should be carefully considered by the Commission. He himself did not yet know what would become of the draft articles. The approach he had adopted was not to overlook any of the problems concerning public property, but it had led him into several difficulties, which he was not sure he had managed to

overcome completely. Mr. Ago's comments showed that the method itself was open to criticism. It was true that it had led him to propose, in some cases, unchallenged rules of international law, and, in many others, descriptive rules showing what happened in most cases of succession of States. It was now for the Commission to decide whether the provisions he had proposed in his sixth report were rules of international law suitable for inclusion in a draft, or whether they were rules which, however correct, were not entirely rules of international law.

39. The CHAIRMAN speaking as a member of the Commission, said it was his impression that in dealing with the question of public property the Commission was entering a field in which there were no rules of international law, properly speaking, which governed the majority of cases, but rather a prevalence of municipal rules. However, when it came to deal with other subject-matter of the law of succession, such as the status of aliens, acquired rights and the like, it was probable that rules of international law would play a larger part.

40. For example, the first two paragraphs of article 12, on currency and the privilege of issue, did not involve international law at all, but in paragraph 3 there appeared to be the germ of a rule of international law, although it was difficult to distinguish between its external and its internal aspects.

41. He agreed with Mr. Ago, therefore, that the Commission should agree on its method of approach before deciding whether the instrument it was attempting to draw up should take the form of a code or a convention.

42. Mr. BEDJAOUI (Special Rapporteur) said it seemed that the majority of the Commission were in favour of referring articles 1, 2 and 4 to the Drafting Committee. Article 3 might perhaps be put aside temporarily, though the Drafting Committee might examine it, if it saw fit. In any event, it was only a first draft, which would certainly be added to later.

43. The CHAIRMAN asked if there were any objections to the procedure proposed by the Special Rapporteur.

44. Mr. AGO said he could agree to articles 1 and 2 being referred to the Drafting Committee, but not articles 3 and 4, on which several members had not yet expressed their opinion.

45. Mr. YASSEEN said he was in favour of leaving article 3 aside, as was the Commission's practice with definitions articles. Article 4 merely defined the sphere of application of the draft, so it would be better not to refer it to the Drafting Committee until the Commission had considered article 5, with which it was closely connected. The two articles could then be referred to the Drafting Committee together.

46. The CHAIRMAN speaking as a member of the Commission, said he entirely agreed with Mr. Yasseen that articles 4 and 5 should be considered together. For the time being, article 3 should be left aside.

47. Mr. BEDJAOUI (Special Rapporteur) said that article 4 might indeed be related to article 5, although he had not really intended to make it a definitions article. Article 4 was an article without pretensions. It simply stated that the following part of the draft related to

public property, without specifying what that property was. In drafting the article, he had followed the instructions of the Commission, which, at its twentieth session, had asked him to deal with succession in respect of economic and financial matters.¹⁷ One of the sub-divisions of his study was entitled "Public property": the article which covered that point was not necessarily related to article 5, which defined public property.

48. Mr. KEARNEY said he feared that it would cause some confusion in the Sixth Committee of the General Assembly if the Commission submitted to it a series of articles which did not include an article, such as article 3, on the use of terms. The Commission should at least indicate to the Sixth Committee, in some way, that it was working with a different definition of "succession of States" from the one it had adopted at its previous session.

49. The CHAIRMAN speaking as a member of the Commission, said he fully agreed with Mr. Kearney that it was very important that the Commission should avoid creating any confusion in the minds of the Sixth Committee. He suggested that it should state clearly in its report that, in accordance with its usual practice, the definitions article would be dealt with at a later stage.

50. Mr. USTOR said that at its 1968 session, when dealing with the topic of relations between States and inter-governmental organizations, the Commission had included a definitions article, but had stated that it was provisional and subject to later decision of the Commission. He therefore supported the suggestions of Mr. Kearney and the Chairman.

51. Mr. MARTÍNEZ MORENO said that he supported the suggestions put forward by Mr. Kearney, the Chairman and Mr. Ustor. He proposed that the Commission set up a small working group, consisting of the Special Rapporteur, Mr. Ago, Mr. Kearney, Mr. Ushakov, Mr. Ustor and Mr. Yasseen, to draft a satisfactory text of article 3 for submission to the General Assembly.

52. The CHAIRMAN proposed that articles 1, 2 and 4 be referred to the Drafting Committee, but not article 3.

53. Mr. AGO said that in his opinion, article 4, which defined the subject-matter to be considered, was a key article that must be examined thoroughly. Hence he could not agree to its being referred to the Drafting Committee.

54. Mr. REUTER said he agreed with Mr. Yasseen that article 4 was closely connected with article 5 and that it would be premature to refer it to the Drafting Committee.

55. The CHAIRMAN suggested that articles 1 and 2 be referred to the Drafting Committee,¹⁸ that article 4 be discussed together with article 5, and that article 3 be dealt with at a later stage.¹⁹

It was so agreed.

¹⁷ *Ibid.*, p. 221, para. 79.

¹⁸ For resumption of the discussion see 1230th meeting, paras. 8 and 35.

¹⁹ See 1230th meeting, para. 8.

Other business

[Item 10 of the agenda]

56. The CHAIRMAN said that, before adjourning the meeting, he wished to announce two decisions which had been taken by the officers of the Commission and former chairmen.

57. First, it had been decided that it would be impractical to attempt to celebrate the Commission's twenty-fifth anniversary at the present session, since most of the Judges of the International Court who were former members of the Commission had intimated that they would be unable to attend such a ceremony. It had therefore been agreed that the Commission's anniversary should be celebrated at its next session in 1974 and that Mr. Sette Câmara should be asked to maintain contact with the General Assembly with a view to making the necessary preparations.

58. Secondly, it had been decided that, owing to lack of funds, it would be impossible to send a delegation of members to the twenty-eighth session of the General Assembly and that the Commission should be represented there by its Chairman alone, in accordance with its usual practice.

The meeting rose at 1.5 p.m.

1223rd MEETING

Friday, 8 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(resumed from the previous meeting)

ARTICLES 4 AND 5

Article 4

Sphere of application of the present articles

The present articles relate to the effects of succession of States in respect of public property.

Article 5

Definition and determination of public property

For the purposes of the present articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State,

were not under private ownership in the territory affected by the change of sovereignty or which are necessary for the exercise of sovereignty by the successor State in the said territory.

1. The CHAIRMAN invited the Special Rapporteur to introduce article 5 of his draft (A/CN.4/267).

2. Mr. BEDJAOU (Special Rapporteur) said that the question of defining public property was fundamental and must be closely linked with the question of determining such property. Several approaches were possible. It was possible to give a definition *a contrario*, a definition according to ownership of the property, or a definition according to internal public law. In some situations one could note the existence of an internationalist definition, a unilateral definition, or a definition given by certain international organizations, in particular the United Nations. He proposed to examine the advantages and disadvantages of each of those formulas.

3. A definition *a contrario* was not incompatible with legal technique. Examples were to be found in treaty practice, in particular in a treaty signed in 1924 between Hungary and Romania concerning distribution of the property of the counties (*comitats*), towns and villages situated in the territory ceded under the Treaty of Trianon. Article 2 of that treaty did not include in the distribution any funds or endowments which were not the property of the counties, towns or villages, but had been, or were, merely administered by them, or any funds or endowments which were not assigned exclusively to the said counties, towns or villages.

4. In his third report he had proposed defining public property by the fact of its "belonging to the State, a territorial authority thereof or a public body".¹ That was the definition most frequently found in treaties, but it did raise some problems.

5. First of all, to whom was the ownership of public property to be confined? Mr. Ushakov believed that it could only be property of the State. That might indeed be sufficient. But the notion of public property, as deduced from internal practice, including the practice of the Soviet Union, was wider. Soviet law recognized other property which was genuinely public, for instance, the property of the *sovkhozes* and *kolkhozes*. And in some countries, such as Yugoslavia and Algeria, there was property placed under self-management which belonged neither to the State nor to public authorities; it was the property of the people. Thus there was a problem to be solved there.

6. Similarly, in treaty practice the devolution of public property was not confined to property of the State. For instance, the trade agreement concluded in 1921 between the Russian Socialist Federal Soviet Republic and the United Kingdom² referred, in article (10), to "the funds or other property of the late Imperial and Provisional Russian Governments in the United Kingdom" and provided that other provisions might be included in a general treaty to specify further what was meant by other

public property. Again, in default of an adequate definition, the peace treaty between the RSFSR, Poland and the Ukraine, signed at Riga in 1921,³ spoke of objects, collections, libraries, war trophies, etc. The peace treaty signed in 1920 between the RSFSR and Lithuania⁴ referred to national property of all kinds, securities and objects of virtue, while the peace treaty signed in 1920 between Finland and the RSFSR⁵ contained the formula "Property... belonging to the Russian State and to Russian National Institutions".

7. That showed the difficulties raised by the criterion of ownership, and those difficulties were all the more real because in some cases of succession, particularly cases of decolonization, it was impossible to say whether certain property belonged to the State or not. That applied, for example, to the property of the *British South Africa Company*, which had been established in 1883 to exploit the copper deposits in Rhodesia and what was now Zambia, had had the power to conclude treaties and promulgate laws, and had been the pre-eminent public power in those territories. That was a problem the Commission should study if it adopted the criterion of ownership for defining public property.

8. Public property could also be defined by its public character, which generally comprised three elements: a special legal régime under the public internal law of the State; public ownership; and use for all purposes which came within the objectives of the State. Although that was an internal law definition, it was used in various international agreements.

9. The fourth possible type of definition would be an "internationalist" definition, which would leave it to the States concerned to agree on what they meant by "public property" and would say that unless the predecessor State and the successor State agreed otherwise, public property meant all property belonging to a legal person who was a subject of public law, without specifying whether the property belonged to public authorities or to the State. States did in fact make such arrangements, as was shown by the numerous agreements concluded on the subject, either by themselves making an inventory of the property in question or by drawing up a list of it. The agreements concluded between France and its former African colonies provided examples. There were also cases in which States drew up neither a list nor an inventory, but stated in general what property they were referring to. For instance, the treaties which had terminated the Second World War referred to property belonging to the German Reich or to one of the German states.

10. Besides the term "property", certain treaties, such as the Treaty of 1960 concerning the Establishment of the Republic of Cyprus,⁶ used the expression "rights and interests". That expression was frequently used in the main treaties which had ended the First World War—the treaties of Versailles, St. Germain, Trianon, Sèvres, etc.

¹ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 133, document A/CN.4/226.

² League of Nations, *Treaty Series*, vol. IV, p. 128.

³ *Ibid.*, vol. VI, p. 123; see article 11.

⁴ *Ibid.*, vol. III, p. 122; see articles 9 and 10.

⁵ *Ibid.*, p. 65; see article 22.

⁶ United Nations, *Treaty Series*, vol. 382, p. 10.

Moreover, public property included things that were material or corporeal, and other things that were incorporeal. A credit was not, strictly speaking, property, so much as a right. That was why it had been necessary to adopt the enumeration "property, rights and interests", it being understood that the last word meant legal interests.

11. One difficulty to which an internationalist definition might give rise was that, in the case of decolonization, it was not always two States that were involved, but the former metropolitan Power and a potential State. He had discussed in his first report the problem of the legal character of "agreements" concluded between the former metropolitan Power and the new State about to be born.⁷ Sometimes it was a unilateral definition of public property that was found in the instrument by which the former colonial Power granted independence and defined its legal consequences for public property, debts, etc.

12. International organizations, in particular the United Nations, had also defined public property. General Assembly resolutions 530 (VI), on economic and financial provisions relating to Eritrea, and 388 (V), on economic and financial provisions relating to Libya, were examples. The question which arose in those cases was that of the legal character of those particular resolutions.

13. There could be yet other types of definition of public property. States sometimes took the precaution of providing for procedures, or even for the setting up of bodies such as commissions for conciliation, arbitration, distribution of property, partition and so on, to clarify the relationship between treaty law and internal law and settle any disputes which might arise.

14. He hoped the Commission would give him precise instructions on the point of view to be adopted in defining both public property and State succession, since all the rest of the draft depended on it. But whatever the point of view adopted in defining public property, another problem arose, namely, the actual determination of such property.

15. In determining public property it was necessary to refer to internal law, but should it be the law of the predecessor State or of the successor State? It would be logical to refer to the law of the predecessor State, but the need to do so was far from being completely confirmed by practice. To refer to the law of the successor State, however, would render all codification useless, since that State would be entirely free to decide what property should pass to it. In some cases, such as partial transfer of territory or decolonization, there was also the law of the territory itself, or local law. Should that law also be taken into account in determining public property? The only solution seemed to be to leave it to States to settle the matter by agreement.

16. Mr. SETTE CÂMARA said that, in his attempt to define and determine what constituted "public property" the Special Rapporteur had made a great effort to achieve a formulation which would be as simple as

possible and eliminate certain highly controversial elements in his former proposals, such as article 5, paragraph 2, in his fourth report (A/CN.4/247/Add.1) which read: "Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty".

17. The deletion of that clause was an improvement, since it would be very difficult to decide when such a serious conflict with the public policy of the successor State occurred. Likewise it would be doubtful whether both the predecessor and the successor States would agree on the application of the exception. In the case of controversy, for example, to which municipal law would reference be made? If it was for the successor State to decide whether such a conflict existed, it could always find a justification for the exception. And, *vice versa*, the predecessor State would normally contend that the general rule of reference to its municipal law should be followed.

18. The present article 5 followed the formulation of article 5*bis*, which appeared as a variant in the Special Rapporteur's fourth report, with some slight changes in arrangement. However, the new text still presented many problems on which the Commission would have to reach agreement before proceeding with the other articles.

19. The first problem was that of the basic criterion for defining public property by the method of exclusion. All property which was not private property in the territory affected by the change of sovereignty was considered to be public property. That provision was a useful and ingenious expedient, but it was still necessary to define what was meant by private property. Did it include the private domain of the State? And what would happen when the concepts of private property in the municipal law of the predecessor State and the successor State conflicted radically, as would be the case when the succession occurred between States with different political systems? In paragraph (11) of the commentary to article 5 in his fourth report, the Special Rapporteur had himself recognized those enormous difficulties.

20. The second problem was the reference to "rights and interests", as included in the concept of property. The Special Rapporteur had admitted that he had used that expression because it was included in some international treaties; but he did not seem to be entirely convinced of its accuracy and had even acknowledged, in paragraph (10) the commentary to article 5 (sixth report) (A/CN.4/267), that his reason for including it was "insufficient".

21. Another difficulty was that of the property, rights and interests "which are necessary for the exercise of sovereignty by the successor State in the said territory". That was a very vague and complex formula, which had replaced the concept of "property appertaining to sovereignty", appearing in former drafts. The latter formula had, indeed, been still more imprecise, since, in principle, sovereignty was an absolute concept and all that belonged to the State appertained to sovereignty. Nevertheless, the change had not eliminated the difficulties. The reference

⁷ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 104, para. 70.

to municipal law would not be of much help, since internal legislation did not include any specific determination of the property which was necessary for the exercise of sovereignty.

22. What, after all, was the exercise of sovereignty? To him it appeared to be a very broad concept which coincided with the very existence of the State as such. Any act of the State, *lato sensu*, whatever its nature, was a form of the exercise of sovereignty. Hence any property belonging to the State was, in one way or another, necessary for the exercise of its sovereignty.

23. Furthermore, what authority had the power to determine such property? In paragraph 40 of his fifth report (A/CN.4/259), the Special Rapporteur had recognized those difficulties and had confirmed that "There is no indication as to which State, the predecessor or the successor, would be used as a point of reference for the determination of the 'property necessary for the exercise of sovereignty' over the territory". And in paragraph 41 of the same report, the Special Rapporteur seemed to consider that the determination should be based on the concept of public property as being everything which was not private property. If that was so, the same difficulties arose concerning the definition of private property.

24. For example, property in parts of the territory which were not private property should be an outstanding example of property necessary for the exercise of sovereignty. In federal States, such as Brazil, however, property on land which was not private property belonged to the patrimony of the member state in which it was situated, or, to use the terminology of the Special Rapporteur, "to territorial authorities". In the case of a change of sovereignty, and if the federal structure disappeared, what would be the fate of such property, which according to article 37 was to remain intact? Was it to be considered necessary for the exercise of sovereignty? If so, how did the predecessor State transfer property that was not its own under its own internal legal order?

25. Mr REUTER said he would examine certain problems of method raised by article 5.

26. The Special Rapporteur had asked the Commission whether it was the law of the predecessor State, the law of the successor State or the law of the territory by which public property would be determined. But the Commission was awaiting the Special Rapporteur's answer to precisely that question. The solutions it adopted in the draft articles would, of course, necessarily be rules of international law, but that did not settle anything, because those rules could refer to national law and the Commission could not say in advance what the extent of the *renvoi* would be in each case. It was for the Special Rapporteur to say to what extent the rules of international law drawn up by the Commission should refer to national law and to which national law.

27. With regard to the definition of public property, the Commission could not, at that stage, take a final decision on article 5. To decide what it wished to include in the draft, it must first examine the concrete cases chosen by the Special Rapporteur. Then, and only then, would it know what the definition should contain. For

the time being the Commission could identify the problems that arose, but it could not solve them.

28. The first of those problems was whether the reference to public property in article 4 was useful for defining public property, or whether only article 5 should be referred to for that purpose. It followed from article 6 that the territory was public property; it could only be so within the meaning of article 4, not within the meaning of article 5, because that article defined public property as property not under private ownership "in the territory" affected by the change of sovereignty. The Commission was therefore obliged to settle the question whether the draft as a whole should or should not contain provisions concerning the territory as such and, if it decided in the affirmative, it would have to solve the problem of certain territorial annexes and certain real rights attaching to the territory. Consequently, it could not yet be said what the subject-matter of the draft articles would be. If the Commission did not wish to take up the question of the territory, it would have to amend article 6.

29. Another problem in article 5 was the reference to public property not under "private ownership". Did that mean private ownership by the State or ownership by a private person? Moreover, article 8 referred to "public or private" property of the predecessor State. Obviously the fate of the private property of the predecessor State must be settled, but then either the sphere of application of the draft would not be confined to public property, or there would be two definitions of such property, the international definition not being the same as the definition in the internal law of the predecessor State. It could thus be seen how dangerous it would be to try to give at the outset, in article 5, a general definition that would delimit the whole scope of the draft.

30. Article 5 raised yet another problem when it used the expression "in the territory". Although the territory was regarded as a subject of succession, it was also considered as a framework, the legal effects of which were fundamental for the succession. The Special Rapporteur had said that if it was accepted that the law of the successor State was applicable to the territory, there was no longer any problem of succession, since all property situated in the territory would be subject to the law of that State. But that did not solve the problem of property situated outside the territory, whether it was the property of the State or of a local authority. Under what legal régime was such property placed? As drafted at present, article 5 excluded property situated abroad from the definition of public property, and that again raised the problem of article 4, that was to say the problem of the scope of the draft articles.

31. The discussion on article 5 should enable members to appreciate the problems it raised and to explain them, but it was obviously not possible to solve them at the moment. After the discussion, article 5 should be left aside until the Commission had examined more closely the concrete proposals contained in the later articles. It could then decide what property the articles would apply to.

32. Mr. KEARNEY after congratulating the Special Rapporteur on his impressive attempt to explore all the

different ways of defining public property, said that, while not fully agreeing with the present text of article 5, he doubted whether it would be possible to produce anything much better.

33. His main difficulty was with the proposition in that article that, in effect, public property was everything which was not under private ownership. In that kind of syllogistic thinking, the minor premise would be that something which was not privately owned was public property, but one could immediately think of a number of cases to which that would not apply. Mr. Reuter had offered the best example in his discussion of the transfer of territory, which in internal law was often privately owned.

34. It seemed to him that to start with a negative rule such as that stated in article 5 would lead to a series of logical difficulties which that rule would not justify. Those difficulties had, in fact, been illustrated by the variety of alternatives suggested by the Special Rapporteur himself. He was inclined to agree with Mr. Reuter, therefore, that the wisest course would be to postpone the discussion of the definition of public property until agreement had been reached, in the subsequent articles, on the concrete problems it involved.

35. He shared the doubts expressed by Mr. Sette Câmara concerning the qualifying clause at the end of article 5: "... or which are necessary for the exercise of sovereignty by the successor State in the said territory". That clause would seem to grant a blanket authority to the successor State to make its own determination of what constituted public property. Such a provision did not really bear any relationship to the rules of succession, but dealt rather with other problems in other contexts, such as the right of permanent sovereignty over natural resources, problems of State responsibility and the like. Since, therefore, the incorporation of that clause in article 5 might prejudice those and other fields of law, it did not seem to him either necessary or desirable.

36. The Commission's basic objective should be to produce a set of rules which would permit a succession of States to come into effect as simply, easily and with as little controversy as possible. The final clause of article 5 was so vague that it ran counter to that objective and might lend itself to abuse. He was convinced that its adoption would open the way to much friction and quarrelling, not only between the predecessor State and the successor State, but also between the latter and third States.

37. Mr. BEDJAOUÏ (Special Rapporteur), replying to the objections raised by Mr. Reuter and Mr. Kearney on the question of territory, said that he had carefully distinguished in his first report⁸ between questions of public property and the transfer of territory. He had said that he would deal with several subjects in turn and he had started with public property, leaving territorial questions to the end. He had, however, referred in that report to the questions of succession to boundaries, real rights, fishing rights, rights over the continental shelf,

servitudes, rights of way, enclaves and incomplete territorial devolutions. He thought it preferable to leave those questions aside for the moment, so as not to complicate the task of defining public property. If the Commission wished to consider them immediately, it would have to allow him to draft a number of articles. He agreed that he ought not to have referred to the transfer of territory in article 6, but in his view, paragraph 1 of that article was merely the introduction to paragraph 2.

38. Mr. AGO said that all the draft articles were related and it would be bad policy to leave some aside. Article 4 was linked not only with article 5, but also, and especially, with article 3, and the Commission could not accept it without being perfectly clear about the meaning of article 3. For the moment, however, it would have to be taken as provisionally agreed that, within the meaning of article 3, succession was represented by a change of sovereignty over a given territory. The problem which then arose was what happened to public property when such a change occurred.

39. Articles on territory had no place in a text devoted to the fate of public property. It was essential to distinguish clearly between international law and internal law. Territory was a concept of international law; the replacement of one sovereignty over territory by another was the essence of succession as a phenomenon of international law; public property was property situated in the territory and determined as such by the internal legal order. Admittedly such property could be the subject of a provision of international law, which might lay down, for example, that a public or private ownership ceased and was replaced by another, but always within the framework of internal law. Territorial problems should therefore be set aside for the moment.

40. The next question was what should be the object of the rule of international law applicable to succession to public property. In his opinion, the only question governed by international law was that of the cessation of public ownership by the predecessor State of property described as public in its internal legal order. What happened subsequently was the effect not of the transfer of sovereignty, but of an independent determination by the successor State, which could either agree that all property which had been public property under the legal order of the predecessor State should remain so, or decide that part of it should become private property, or—as frequently happened—convert into public property certain property which had been private under the internal legal order of the predecessor State. Thus the basic rule to be borne in mind was that of the cessation of ownership under international law, by the predecessor State, of property which had been public property under its legal order. It was to that rule that the definition of public property in article 5 should correspond.

41. Should the Commission concern itself with the fate of all public property of the predecessor State? For in addition to property which had been the public property of the State, not to mention property which had been its private property, there was the property of various public institutions: that of institutions close to the State, such as a single party; that of institutions which intervened more and more directly in the economic life of the State;

⁸ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 94, document A/CN.4/204.

and, lastly, that of territorial authorities which usually survived a change of sovereignty. Should the Commission consider all those questions?

42. He thought the Commission should not be too ambitious: it should leave a good many of those questions to be settled by the treaties concluded in each particular case and confine itself to drafting a few residual principles. It should state clearly that the definite rule in matters of succession was that the predecessor State ceased to be the public owner of its former property and that the successor State was free to decide, in the exercise of its own sovereignty, what should happen to that property under its own internal legal order.

Mr. Castañeda took the Chair.

43. Mr. USHAKOV thanking the Special Rapporteur for his explanations, said they had made it quite clear that the rights and interests referred to in the expression "property, rights and interests" were solely those attaching to public property, not rights and interests in general.

44. As a member of the Commission representing the socialist legal system, he saw special difficulties in article 5, which defined public property by contrast with private property. That kind of definition was acceptable if it was agreed that property could be divided into public and private property, but it was not satisfactory in the context of the Soviet socialist legal system, because in the Soviet Union private property did not exist. Article 4 of the Constitution of the Soviet Union read:

Article 4

The economic foundation of the USSR is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the elimination of the exploitation of man by man.

45. Socialist property comprised State property and social property, which was the property of the co-operatives and collective farms, as stated in article 5 of the Constitution, which read:

Article 5

Socialist property in the USSR exists either in the form of State property (belonging to the whole people) or in the form of co-operative and collective-farm property (property of collective farms, property of co-operative societies).

46. The first paragraph of article 7 defined the concept of co-operative and collective-farm property in the following terms:

Article 7

The common enterprises of collective farms and co-operative organizations, with their livestock and implements, the products of the collective farms and co-operative organizations, as well as their common buildings, constitute the common, socialist property of the collective farms and co-operative organizations.*

47. In addition to those two forms of property, there was personal property, which was defined in the second paragraph of article 7 and certain subsequent provisions. According to that paragraph, "Every household in a collective farm, in addition to its basic income from the common, collective-farm enterprise, has for its personal use a small plot of household land and, as its personal property, a subsidiary husbandry on the plot, a dwelling-house, livestock, poultry and minor agricultural implements". Clothing, cars and savings were also part of personal property. Such personal property, however, could in no way be assimilated to private property, so that the definition proposed by the Special Rapporteur was not acceptable to Soviet socialist-law countries.

48. Nor was it satisfactory, from the point of view of socialist law, to mention the law of the predecessor State in article 5. For example, a large part of the private property which had existed under the Czarist régime had been nationalized shortly after the revolution and had become State property. That nationalization had been carried out in accordance with the internal law of the Soviet Union, not the law of the predecessor State.

49. In order to define property, rights and interests "which are necessary for the exercise of sovereignty by the successor State", the Special Rapporteur had referred to the privilege of issuing currency, which he regarded as a right necessary for the exercise of sovereignty. He himself considered that everything pertaining to sovereignty belonged to the State as such, whether there was a succession of States or not. He therefore approved of the idea in the last clause of article 5, but not the basis of the idea. The issue of currency was not necessary for the exercise of sovereignty. Legally, a State would be equally justified in introducing a domestic barter system instead of issuing currency. It was therefore quite clear that the definition of public property must refer to property belonging to the State as a subject of international law endowed with sovereignty.

50. The most delicate question was that of the property of third States situated in the territory which was the subject of the succession: for example, the premises of embassies, which belonged to the sending State as a State. Another source of difficulty lay in the fact that, conversely, State property could be situated in the territory of a third State, as Mr. Bedjaoui had pointed out.

51. The many treaties cited by the Special Rapporteur, in which the property transferred had been specified, all related to the same type of succession of States: the case of partial transfer of territory. In other types of succession, and particularly in cases of merger, no such treaty was concluded, since everything situated in the territory of the merging States passed under the sovereignty of the successor State, whether unitary or federal. In the case of partition, a distinction must be made between dissolution, or the division of one State into two or more States when that was the expression of the will of the predecessor State, and division of a State into two or more States independently of the will of the predecessor State. It was obviously the second case which the Special Rapporteur considered illegal and wished to remove from the draft.

* English translation published by the *Foreign Languages Publishing House*, Moscow, 1955.

52. The agreements on the partial transfer of territory, to which he had just referred, were not succession agreements. They provided for the transfer of everything situated in the transferred territory, not only public property, but also private property or, for socialist countries, State property, social property and personal property. The reason why those treaties referred only to State property was that other property usually raised no problems.

53. With regard to public property of a third State situated in territory which was the subject of a succession, certain land-locked States possessed ports in a maritime State and the question arose of what happened to those ports when the territory in which they were situated became the subject of a succession.

54. By "State property" should be understood not only property belonging to the State proper, in other words, to the central authorities, but also property belonging to local authorities. For example, what belonged to the Swiss cantons belonged to the Swiss Confederation. Under the Soviet legal system, only State property was affected by succession, not social or personal property.

55. Mr. MARTÍNEZ MORENO said that when he had first examined the definition of public property in article 5 he had experienced some difficulty, because it reminded him of the concept of public property embodied in the Civil Code of his own country, which was a copy of the Chilean Civil Code, itself based on the French Civil Code of 1804.

56. Actually, property vested in the State was known in El Salvador as "national property" (*bienes nacionales*) and was subdivided into two categories: public property (*bienes públicos*), which included such property as roads and bridges belonging to the public at large, and other national property which was known as State property (*bienes del Estado* or *bienes fiscales*).

57. As far as international law was concerned, the concept of public property expressed in article 5 seemed appropriate. With regard to the text of the article, most of the comments he had intended to make had already been made by other members of the Commission. There remained, however, the problem of property which a third State might own in the transferred territory. Such property should not be affected by the succession and should remain the property of the third State concerned.

58. With regard to the final clause, he suggested that the words "which are necessary for the exercise of sovereignty by the successor State" be replaced by the words "which are necessary to fulfil the social aims of the successor State". Specialists in public laws, constitutionalists and internationalists alike, had long emphasized the importance of the social aims which the State was intended to serve. International lawyers had pointed out that a community of pirates exercising control over an island did not constitute a State. Such a community had a territory, a population and even a government, but it lacked a social purpose and was therefore not a State.

The meeting rose at 1 p.m.

1224th MEETING

Monday, 11 June 1973, at 3.15 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 4 (Sphere of application of the present articles)
and

ARTICLE 5 (Definition and determination of public pro-
perty) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 4 and 5 in the Special Rapporteur's sixth report (A/CN.4/267).

2. Mr. BARTOŠ said that it was very dangerous to refer to internal law in defining public property, since the notion of public property varied from one system of law to another. For instance, at the previous meeting Mr. Ushakov had said that in Soviet law real property was State property. But in some socialist States there were several gradations of ownership. In Yugoslavia, for example, landed property could be either private property—in which case the area was limited, but it remained private property in the Roman law sense; or "social" property—in which case it came close to the Soviet conception; or public property. The capitalist countries even made a distinction between the public domain and the private property of the State and of public authorities.

3. The situation would be still more complicated if, as the Special Rapporteur had proposed in his fourth report (A/CN.4/247 and Add.1), the determination of public property was made, save in the event of serious conflict with the public policy of the successor State, by reference to the municipal law which governed the territory affected at the time of the change of sovereignty. There were, indeed, many succession treaties whose application had raised insoluble problems for arbitration commissions, precisely because the notions of public property, property belonging to public authorities and private property, had not been the same in the law of the predecessor State and that of the successor State. And recently, when certain African countries had acceded to independence, the question had arisen whether land belonging to nationals of the former colonial Power—the big plantations, for instance—should be treated as private property or as collective property which had been usurped.

4. The Commission should therefore try to ascertain whether there were any general principles governing the

notion of public property. The basic idea of article 5 was acceptable, but the Special Rapporteur and the Drafting Committee should try to find a clearer formulation, so that the rule to be drawn up might conform to the general principles of law and the true meaning of the notions used be more explicit.

5. Mr. HAMBRO said that, as the Commission's work advanced, its task was becoming more difficult. Article 5 raised many far-reaching problems which the Special Rapporteur, for all his efforts, had not been able fully to solve.

6. He very much appreciated the Special Rapporteur's endeavours to simplify the concept of public property. In his first report,¹ the Special Rapporteur had decided in favour of dropping the distinction between public (*domaine public*) and private property (*domaine privé*) of the State. That distinction was obsolete, and public property, as defined in article 5, was intended to cover all State property. The new approach might well be the most practical, but it created difficulties for a number of members of the Commission.

7. The Special Rapporteur had been right to take the position that the qualification of property was a matter for the law of the predecessor State, not that of the successor State. It was desirable, however, to take into account the case in which the territory itself, as a dependency of the predecessor State, had had a law of its own; in such a case, it would be reasonable to refer to that law rather than to the law of the predecessor State itself.

8. The socialist conception of property, which had been discussed by Mr. Ushakov, did not raise any insurmountable difficulties in the realm of succession. Clearly, no problem would arise in the case of a succession involving two socialist States. Nor would there be any major problem in the case of a predecessor State with a socialist system of property and a successor State with a different system, since the latter State could apply its own system after the succession.

9. In the case in which a territory formerly under a capitalist system was transferred to a successor State having a socialist system, the ordinary rules of jurisdiction would enable the new sovereign to use its internal law to nationalize private property. Any difficulties that might arise would not be problems of State succession, but problems of State responsibility in respect of claims based on alleged acquired rights.

10. The fact that under Soviet law there was no private property, as such, was not of decisive importance. For the purposes of the present discussion, the "personal property" of Soviet law could be taken as broadly equivalent to what was known elsewhere as private property.

11. The most important problem that arose in connexion with article 5 related to the concluding words "or which are necessary for the exercise of sovereignty by the successor State in the said territory". Apart from the difficulties arising from the many meanings of the word

"sovereignty", it was inconceivable that any property of that kind should not be already the public property of the predecessor State. He could not think of any example of private property which could be said to be necessary for the exercise of sovereignty. He therefore suggested that the concluding phrase be deleted.

12. Lastly, he wished to urge that references to sovereignty should be eliminated from the draft wherever they were not absolutely necessary. The concept of sovereignty was difficult to define, to understand and to apply; it was used with many different meanings; it was shrouded in ideology and full of emotional content. Whenever an attempt was made to advance international solidarity and the progressive development of international law, sovereignty was almost always invoked by those who wished to resist progress. He was disappointed to see jurists from newly independent States laying so much stress on sovereignty, when it was sovereignty that had been invoked by the colonial Powers in the recent past precisely in order to resist decolonization.

13. Sir Francis VALLAT said it was necessary to ascertain the function which the definition in article 5 was going to perform, because that function would govern its content. As he saw it, the definition was likely to have two quite different functions.

14. The first was to indicate the boundaries or limitations of the present topic in the sense of article 4. For that purpose, it was clearly necessary to determine what was meant by public property.

15. The second was quite a different function: it related to the effect and application of other articles of the draft. The expression "public property" was used as a term of art in many articles. A definition of that term was not essential for application of the provisions of article 6, since that article stated that property would be transferred to the successor State "as it exists and with its legal status". Article 7, on the date of transfer, was itself part of the definition.

16. A definition became essential, however, for understanding the important provisions of article 10. Those provisions needed careful consideration, but, as the article was drafted, "public property" was an essential part of its content.

17. A survey of the various draft articles confirmed that it was necessary to determine what was meant by "public property". It was evident that a precise definition would be very difficult to arrive at. As usual, that could only be done at a later stage, when the Commission had determined how the term would actually be used in other articles. Nevertheless, it was necessary at present to have some common understanding of the meaning of "public property".

18. He believed that the Commission's task would be facilitated by examining first what was meant by "property". He agreed with the Special Rapporteur that that term should be taken in its broadest sense. The concept of "property, rights and interests" was quite acceptable; it had been used in numerous modern treaties and had in itself led to remarkably few difficulties. It embraced all manner of property and all manner of legal rights and interests.

¹ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 94, document A/CN.4/204.

19. As to the relevant date, he agreed in principle that it ought to be the date of change, as stated in article 7. The determination of the date of change, however, might not be easy, because it was linked with the problem of article 3, sub-paragraph (a). Furthermore, he was not at all convinced that "sovereignty" was the right word to use in that connexion; perhaps the matter should be further considered under article 7. As in the case of succession in respect of treaties, "succession of States" should be taken as a fact and the date of succession should be the relevant date.

20. The question then arose of determining the location of the property. If article 5 had been intended to deal only with internal property—property within the territory affected by the change—no great problem would have arisen. Such property would be subject to the law of the successor State, which could make sovereign dispositions with regard to it. He believed, however, that article 5 should deal with all property affected by the change, even if it was not situated in the transferred territory. It was precisely when the property concerned was in the territory of the predecessor State, or of a third State, that the real difficulties appeared, even leaving aside questions of recognition, which unfortunately often arose in practice.

21. Where such external property was concerned, the reference to "the law of the predecessor State" would not always be appropriate. In the case in which the property was situated in a third State, the law of that State would in many cases have to be applied.

22. Another problem was that the predecessor State might not have a unified system of law; a reference to the "law of the predecessor State" would then be ambiguous. It would be necessary to make a precise reference to the law of the territory.

23. In order to avoid all those difficulties, he suggested that the words "in accordance with the law of the predecessor State", in article 5, be replaced by the words "in accordance with the applicable law", thus leaving the problem to be solved in accordance with rules of private international law.

24. Major difficulties also arose in regard to the link with the State and the difficult problem of the nature of public property.

25. The link with the State should be understood as a legal link. Since it was the legal consequences of the fact of succession which were being considered, the matter should, basically, be dealt with in legal terms. There might be grounds for extension or limitation, but the only clear and sound approach was to start from the concept of State property. Since property covered all "property, rights and interests", some form of ownership test would cover the main or central case, whether one spoke of "ownership", of "belonging to" or simply of "property of the State".

26. Property belonging to other entities gave rise to a different series of problems. He was thinking, for example, of municipalities and public corporations such as the BBC in the United Kingdom. In general, such problems could be adequately dealt with by applying the principle of continuity. If the property of those other entities was

to be covered by the draft, he believed that, in addition to the principle of continuity, the principle of equitable distribution should apply.

27. The question of the nature of the property, or rather the purpose for which it was held or used, gave rise to extremely difficult problems of definitions and application. He himself would not wish at that stage to attempt to define precisely what constituted a public purpose.

28. Although he understood the reasons which had led the Special Rapporteur to define public property by exclusion, he himself favoured a positive approach to the definition. It was not enough to say that public property meant property which was "not under private ownership", because that involved defining "private ownership", which was just as difficult as defining "public property". Both concepts were equally subject to variation.

29. With regard to the concluding phrase of article 5, he shared the misgivings expressed by many of the previous speakers. The articles should deal with the problem of succession at the date of change; they should not try to govern the exercise of sovereignty after that date.

30. Lastly, he shared the Special Rapporteur's view that the provisions of article 5, like those of other articles of the draft, should apply only "unless otherwise agreed". A valid agreement between the parties concerned ought to have priority over those provisions.

31. Mr. YASSEEN said it was bound to be difficult to define and determine public property in an international instrument. The term might have a clear and precise meaning in internal law, but the meaning ascribed to it varied from one country to another, according to the different economic and social systems. Hence it was difficult to find in international law a generally acceptable definition of public property. It was all the more difficult for the Commission to define public property, because it had agreed to follow the empirical method proposed by the Special Rapporteur, so that any definition should be the outcome, not the starting point, of the whole of the Commission's work on the topic.

32. When he had drafted the definitions, the Special Rapporteur had had the advantage of having studied the whole of the topic, whereas the Commission had hardly begun to examine it. It would be better for the Commission to go ahead, examine the various provisions proposed to it and deal with the problems as they arose, so that it could see its way more clearly and be in a position to draft a definition. For example, the Special Rapporteur had proposed articles on what he regarded as public property. After examining those articles the Commission would have a better idea of what it thought that notion should include.

33. It was true that the definition adopted by the Commission would have a dual objective: to provide a framework for its deliberations and to confer a status on certain property which was not directly mentioned. The latter objective, which was the more important, but which raised many problems, should certainly not be excluded. For even before a definition of public property had been adopted, there was no logical reason why the rules governing its transfer should not be drawn up.

A similar question had arisen with regard to the régime of the sea-bed, which some people had not wished to establish before knowing the limits, whereas others had considered that that was not essential provided the basic idea was clear. Perhaps the Commission had not, at the moment, a precise idea of what constituted public property, except for a certain number of items, the nature of which no one would question. But that was enough for a start. Without leaving article 5 entirely aside, the Commission should proceed to examine the various solutions proposed for the transfer of public property, which would enable it to reach a more precise definition of such property.

34. He agreed with those who had referred to the difficulty of the question of property situated outside the territory affected by the change of sovereignty. No doubt the transfer of such property could raise problems of private international law, but it belonged in principle to public international law and, as the fate of such property had to be settled in the draft, the definition should cover it.

35. Mr. USTOR said that, in dealing with the question of public property, it was necessary to distinguish clearly between what, in Roman law, were known as *dominium* and *proprietas*. *Dominium* was the sum-total of the rights of the State in the field of international law, whereas *proprietas* was property within the legal system of the State in question, some parts of which might be in the ownership of private persons and other parts in the ownership of the State itself.

36. Mr. REUTER said he wished to refer to a question which had already been raised by some members of the Commission: the compensation to which the transfer of public property could give rise. Logically, the Commission could leave that question aside, because it arose after the transfer and thus did not properly belong to succession of States. It could be reserved in a separate provision. It might also be necessary to reserve other questions, because the change in status of the property transferred could raise other delicate issues, particularly in the case of property situated abroad.

37. Such an attitude on the part of the Commission would be disappointing, however, for common sense required that State succession should bring about a transfer without compensation, at least in the case of property such as public property.

38. The Commission might envisage either a very simple draft consisting of a few provisions only, or a complete draft, in which case the question of compensation would have to be dealt with. That raised the question whether it might be advisable to confine the draft to property for which compensation was excluded.

39. Mr. BILGE said that, following the Iraqi revolution, Turkey had had some difficulty in determining what was the property of the ex-King which should be returned to Iraq. That, however, had not been a case of succession of States, but of succession of governments.

40. The question of the determination of public property, which the Special Rapporteur had dealt with in article 5, was very important for defining the subject-matter of the transfer. But that question was closely

bound up with the question of the transfer proper, which was not mentioned. Since he did not know the Special Rapporteur's intentions in that matter, he was not at the moment in a position to state an opinion on the question of the determination of public property.

41. With regard to the practice concerning Turkey, article 60 of the Treaty of Lausanne² mentioned the property of the Ottoman Empire, but without defining it, and simply referred to the municipal law of the Ottoman Empire. Again, when Turkey had entered into negotiations with France, the mandatory Power for Syria, over boundary questions, the items of public property affected had each been mentioned individually, without any definition being given.

42. It was therefore open to question whether a provision should be drafted to facilitate the determination of public property. Personally, he thought that an attempt should be made, not to define public property, but to determine it—a matter on which there seemed to be fewer differences of opinion. That was the only possible method, because public property could not be defined in international law, and it was in fact the method which the Special Rapporteur had adopted in drafting article 5. In view of the difficulties to which the article gave rise at the present stage, it would be better to consider that, for the time being, it reflected the opinion of the Commission as a whole.

43. There were two general comments he wished to make on article 5. Referring to Mr. Reuter's remarks at the previous meeting,³ he said that if the question of the transfer of territory was not dealt with in the draft, article 5 would have to be reworded. For that reason, he could not at present endorse article 5 or either of the two previous versions proposed by the Special Rapporteur (A/CN.4/267, para. (3) of the commentary to art. 5).

44. With regard to the difficulties raised by the last phrase of article 5, which referred to property, rights and interests "which are necessary for the exercise of sovereignty by the successor State", he was not opposed to the principle of viability or to the right of States to dispose of their natural resources. Nevertheless, he wondered whether the question Mr. Reuter had raised in that connexion was not alien to the subject under consideration. The phrase in question should perhaps be separated from the rest of the article.

45. As to drafting, article 5 in fact covered only the determination of public property and the words "Definition and" should therefore be deleted from the title.

46. In version A, it should be made clear that the property must be public in character, because there could also be semi-public property.

47. If the Commission decided in favour of article 5, it could insert a reference to the law of the territory concerned. He was not opposed to the use of the term "sovereignty", since it served to indicate the nature of the functions performed by the successor State in the territory. On the other hand, the concept of "private

² League of Nations, *Treaty Series*, vol. XXVIII, p. 53.

³ See para. 28.

ownership” needed to be clarified, because there was also private property of the State. Although Mr. Ushakov had maintained that all State property was public property,⁴ under Turkish administrative law there was also private property of the State, which was placed in that category by reason of the use made of it. It would therefore be preferable to contrast public property with property not under the “ownership of private persons”. That formula would also apply to the private property of the State, since when a State owned private property, it dealt with it in the same way as a private person.

48. The CHAIRMAN, speaking as a member of the Commission, said that the problem of defining public property was necessarily complicated by differences in systems of government. He would suggest that, for the purposes of the present draft articles, public property should be considered to be property which had been so considered by the predecessor State.

49. Mr. QUENTIN-BAXTER said he agreed with previous speakers that the successor State was a new lawgiver with powers that were subject only to the overriding requirements of international law. He agreed essentially with what had been said by Sir Francis Vallat, but wondered whether the latter had not gone too far in suggesting that the reference to the law of the predecessor State should be deleted from the definition of public property. As had been rightly pointed out, the fundamental principle of succession was respect for continuity, whether in public or private rights. Thus, the title to the New Zealand High Commission in London was not vested in Her Majesty the Queen, but in a corporation created by the New Zealand Parliament.

50. As to property which was “necessary for the exercise of sovereignty by the successor State,” he did not question the right of the State to legislate in that matter, but wondered what would happen to property in the territory of a third State.

51. Mr. KEARNEY said he had two comments to make. First, the problem the Commission was dealing with perhaps went beyond what property was in the title of the State at the time of succession. For example, certain lands which were in the title of the United States were covered by a series of agreements with the American Indians, under which rights to the territory had been retained by a particular tribe, and those rights remained in the members of the tribe as a collectivity. Those agreements were not considered international treaties, but they had a special status which placed them above the level of an ordinary contract between the State and individuals. It would be difficult to solve, simply by a definition, the problems involved when that kind of legal relationship was affected by a succession, and special provisions could well be necessary.

52. Secondly, it had been pointed out that the high seas had been defined by means of a negative formula.⁵ In view of recent developments, however, that did not seem to be the happiest precedent to follow.

The meeting rose at 6 p.m.

1225th MEETING

Tuesday, 12 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 4 (Sphere of application of the present articles)
and

ARTICLE 5 (Definition and determination of public
property) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 4 and 5 in the Special Rapporteur's sixth report (A/CN.4/267).

2. Mr. RAMANGASOAVINA said that the discussion on article 5 and the various alternatives proposed by the Special Rapporteur in his successive reports showed how difficult it was to define public property. The last formulation proposed, the present article 5, could be divided into two parts: the first part was an attempt to define the public property, rights and interests to be transferred, and the second part characterized as public all property necessary for the exercise of sovereignty by the successor State.

3. He could easily accept the first part of the article, which was wide enough to cover the differences between the internal laws of different countries and, although in negative form was preferable to an enumeration, which was never exhaustive. The second part, on the other hand, which was obviously intended to include everything not covered by the first, was too imprecise; and there was a danger that, instead of complementing the first part as it should, it might deprive that part of its content, since it practically left the field open for the successor State. Consequently, the Commission should either delete the last phrase or find a formula which was not open to misinterpretation.

4. The transfer of property in cases of succession was generally regulated by agreement, but successions were also very often the result of a conflict in which the balance of the forces was unequal; hence it was important to find, for article 5, a formulation which could serve as a residuary rule in cases where no agreement had been concluded.

5. The CHAIRMAN invited the Special Rapporteur to reply to the comments made during the discussion.

⁴ See 1220th meeting, para. 35.

⁵ United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

6. Mr. BEDJAOUI (Special Rapporteur) said he noted that the problems he had submitted to the Commission in the hope that it would find solutions had remained unsolved, and that other problems had been added to them. There were differences of opinion about what should be done with article 5. Some members considered that the problem of the definition should be discussed thoroughly, because the rest of the draft depended on it; others thought that article 5 should be referred to the Drafting Committee; he himself since he required the assistance of all members in the continuation of his work, saw only advantages in continuing the discussion in the Drafting Committee, to which he was prepared to submit new drafts of the article; yet other members—and they were the majority—thought the article could be retained unchanged as a working hypothesis, on a precarious and revocable basis. Mr. Reuter had expressed the opinion that the problems should be discussed and the solutions sought later;¹ Sir Francis Vallat had said that the definition had two functions: to limit the topic, and to make it possible to apply the subsequent articles where items of public property were not individually mentioned;² Mr. Yasseen thought it advisable to go ahead and examine the other articles.³ It was clear that the Commission was trying to find its way, but he now needed precise instructions.

7. Some members of the Commission thought that it should start from two premises—the replacement of one State by another and the actual date of the replacement—and try to deduce only rules of public international law governing the cession to the successor State of property considered to be public in the internal legal order of the predecessor State, the conduct of the successor State after the succession being of no further concern to the Commission. That was why Mr. Ustor had expressed doubts about the advisability of drafting articles on such problems as concession rights and the privilege of issue.⁴ If the Commission adopted that procedure, however, it would soon find that the rules of public international law in question were very few. The General Assembly expected the Commission to draft a text applicable to concrete situations, and if it drafted a small number of articles, which would probably not settle much, the Commission might give the impression that succession to public property was not part of succession of States in the strict sense, as understood in international law. On the other hand, the Commission should also be careful not to engage in drafting a sort of wide-ranging code of conduct which would take it many years to complete. For his part, he had chosen a middle way by drafting articles which would allow the Commission to go ahead and prune the draft as it went.

8. Mr. Reuter had asked what would be the future consequences of a succession to public property and if the real problem did not consist in deciding whether or not succession entailed compensation or indemnification.⁵

He had said that, logically, the question of compensation was posterior to the succession, that the Commission might not need to deal with it, and that it could be reserved in a separate provision. But the Commission's difficulty over the definition was partly due to the fact that State succession brought about an automatic and gratuitous transfer of a body of property which involved the highest functions of sovereignty. That was why he had referred to property "necessary for the exercise of sovereignty" and had drafted article 9, on the general principle of the transfer of all State property, automatically and without compensation. Thus the same problem constantly recurred.

9. The transfer of the infrastructure of a country to the successor State was one example. It was obvious that the successor State succeeded to it automatically. Roads, for instance, did not remain the property of the predecessor State merely because it had built them. The older treaties, of which he had given some examples in his third report (A/CN.4/226), expressly provided for the transfer of roads to the successor State; that was not done in contemporary treaties, which regarded such a transfer as being self-evident. But other means of communication, such as railways, were dealt with in contemporary treaties. That difference was explained historically by the fact that the transfer of railways, unlike that of roads, raised the problem of the acquired rights of private persons. However, there were now private, toll-paying motorways, which sometimes represented a larger investment than the building of a small railway line.

10. Another problem was whether the definition of public property should include only property of the State, to the exclusion of the property of all other authorities, independent administrations, etc., or whether it should be of wider scope. He himself had provisionally opted for the wider sense and had proposed two working hypotheses: the definition *a contrario* and the definition by ownership.

11. The definition *a contrario* had given rise to several objections. Some members regarded it as sterile in itself but it was not unusual to have recourse to definitions of that kind in various sciences, including jurisprudence; one had been used in the case of the high seas, which had been defined *a contrario* by reference to the territorial sea.⁶ Other members had been unable to accept the definition because very often the reference datum did not exist. For instance, Mr. Ushakov had pointed out that under the Soviet Constitution there was no private property in the USSR. But that simplified the problem, because it meant that all property was public and it only remained to define its nature, not its character. Other members, again, had objected that such a definition would make it necessary to define private property, which would be all the more difficult because there was such a thing as private property of the State. But the private property of the State was public property—property belonging to a national entity, not to a private person, even though it was subject to a special legal

¹ See 1223rd meeting, para. 27.

² See 1224th meeting, paras. 13-16.

³ *Ibid.*, para. 32.

⁴ See 1221st meeting, paras. 44 and 45.

⁵ See 1224th meeting, paras. 36-38.

⁶ United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

régime. It had been very well said that the expression "private property of the State" contained a contradiction *in objecto*. The same answer could be given to the objection raised by Mr. Reuter, who had set the term "public property", defined in article 5, against the expression "private property of the ... State", used in article 8. He (the Special Rapporteur) could equally well have referred simply to State property, public or private, and he admitted that he had followed the distinction made in French law between the public and the private domain of the State. Lastly, Mr. Bartoš had referred to the difficulties created by successor States deciding to declare as public, items of property which had been private in the legal order of the predecessor State.⁷ But those were problems posterior to the succession—acts performed by the successor State as a sovereign State, not as a successor.

12. With regard to the definition by ownership, that raised the question whether the Commission should concern itself only with property of the State, or with all public property. Some members, including Mr. Ago and Mr. Ushakov, considered that only property of the State should be taken into consideration. His task would be simplified if the Commission adopted that view, but in addition to the fact that the rules of international law which could be deduced would be very few, several difficulties would remain.

13. First, there was State property even in the patrimony of certain communes or certain public institutions in which the State had a share. The property of those entities would thus not be entirely excluded from the Commission's field of study. It would therefore be better to wait until a complete inventory had been made before deciding on that course.

14. Secondly, many conventions gave definitions of State property that included property which the Commission did not regard as such. That applied, for example, to the peace treaty between the RSFSR, Poland and the Ukraine, signed at Riga in 1921.⁸

15. Lastly, in the peoples' democracies there were State companies—commercial import-export organizations—which, being in contact with foreign countries, were also in contact with the legal systems of other countries. Soviet law made a distinction between State property and the property of State bodies, in particular for purposes of immunity from jurisdiction—State bodies could be prosecuted in foreign courts. But that distinction would certainly not apply if it was a case of succession, not of trade.

16. The question of sovereignty had given rise to several objections. Mr. Sette Câmara had been concerned about the fate of property of which, under article 37, the ownership would not be transferred, whereas article 6 provided for the transfer of public property as it existed.⁹ The example of Brazil, which he had chosen, was not relevant, for if Brazil adopted a unitary structure, it would not be a case of succession; for succession to occur, there must be at least two States and the federated states of Brazil

were not subjects of international law. A distinction must be made between property which the State could receive as a successor and property which it would receive by reason of its own jurisdiction. As a sovereign State, it could enlarge or reduce its patrimony by procedures of internal law which it was fully justified in applying.

17. With regard to sovereignty, Mr. Kearney had raised the problem of natural resources.¹⁰ But the situation had evolved considerably since the United Nations had first examined that problem in the 1950s, and UNCTAD was now trying to define the economic rights of States. The Commission must admit that he had been relatively discreet on that point in his sixth report. Moreover, Mr. Kearney had merely considered that it would be premature to deal with the matter.

18. It was mainly the determination of public property which had led him to take up the problem of the internal law of the State. But which State? Practice showed that in many cases it was the internal law of the successor State which applied. To accept that fact would make codification illusory, but it would not be wise entirely to reject it either. It would be better to compromise. There was always some conflict between internal legal systems and it was necessary to choose, or to find compromise formulas. He had tried to take account of the facts, first in his third report (A/CN.4/226), by affirming the principle of *renvoi* to the internal law of the predecessor State, but allowing an exception based on the public policy of the successor State,¹¹ and a second time in his sixth report (A/CN.4/267), by referring to the notion of property "necessary for the exercise of sovereignty", which evoked the general principle of the viability of the successor State. The successor State must have a viable country in which it could operate. It was necessary to find a definition which would lead to that functional determination.

19. He agreed with Mr. Reuter that the future articles would be rules of international law, that the *renvoi* to internal law should be made article by article, and that it was not possible to formulate a general rule on the subject at once.

20. With regard to the question of territory, he had himself asked that a distinction be made between the case of public property and that of territory. He intended to delete paragraph 1 of article 6, which had been an anticipation on his part. But there remained the major objection relating to property situated outside the territory. He had always considered the case of such property to be a separate question, so much so that he had given a definition which related only to property situated in the territory. But the reason why he had decided to deal separately, for each type of succession, with the case of property situated abroad, was that the transfer of such property raised the problem of recognition of the State, and that entailed the intervention of a third State in the relations between the predecessor and successor States. Perhaps another formula should be

⁷ See previous meeting, paras. 2 and 3.

⁸ League of Nations, *Treaty Series*, vol. VI, p. 123.

⁹ See 1223rd meeting, para. 24.

¹⁰ *Ibid.*, para. 35.

¹¹ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 133, article 1.

found for the attachment: for instance, economic attachment. But if the search for an appropriate basis for the replacement of sovereignty over property situated outside the territory should raise unduly difficult problems for the definition of public property, or if it should prove inelegant to have a second definition for property situated outside the territory, it would be necessary to amend article 5, either by referring to property "attached to the territory" instead of property situated "in the territory", or by deleting all reference to the territory.

21. Mr. SETTE CÂMARA said that the Special Rapporteur's very lucid explanation would greatly facilitate the Commission's understanding of article 5, and help it to reach a decision.

22. He wished to clear up a misunderstanding, however, about the hypothetical example he had given at a previous meeting relating to the application of article 6 (Transfer of public property as it exists) and article 37 (Public property proper to territorial authorities). He had not been referring to a federal State which became a unitary State; in such a case, there would be no room for application of the rules of State succession. What he had had in mind was the possibility of the predecessor State being a federal State, and the fate of property belonging to a component unit of that State and situated in the transferred territory. The problem then was the extent to which such property would be transferred to the successor State or retained as the property of the territorial authority.

23. The CHAIRMAN said that, as the Commission had heard the comments of its members and the replies of the Special Rapporteur, it might perhaps be wise to approve article 5 as a working hypothesis, so as to be able to proceed to the subsequent articles, leaving it open to the Commission or the Drafting Committee to revert to article 5 if necessary and if the programme of work permitted.

24. Mr. KEARNEY said that, during the discussion, several members had raised serious objections to the concluding phrase of article 5: "or which are necessary for the exercise of sovereignty by the successor State in the said territory". They had expressed concern at the vagueness of that phrase. It was therefore extremely doubtful whether that particular phrase could be accepted as part of the text to be used as a working hypothesis.

25. Mr. HAMBRO said he fully agreed.

26. Mr. AGO said he recognized that it was essential to have a working hypothesis in order to continue the examination of the draft articles, but he could not accept draft article 5 for that purpose. The discussion had shown that the Commission could accept a simpler hypothesis, namely, that public property was property which, at the time of the succession, that was to say at the time of transfer of sovereignty, had been property of the predecessor State under its internal legal order. That was the only hypothesis he found acceptable.

27. Mr. BARTOŠ said he agreed with Mr. Ago. As Mr. Reuter had pointed out at the previous meeting, the Commission need not concern itself with the conduct of the successor State after the succession. It should confine itself to saying what property was transferable.

That was a point to which the attention of the Drafting Committee should be drawn.

28. Mr. REUTER said he could accept article 5 as a working hypothesis, but without committing himself to any of its provisions. The discussion and the Special Rapporteur's excellent summing up had given an idea of the problems involved, but those problems remained unsolved. It was obvious that article 5 would come up again in connexion with each of the subsequent articles and that the Commission would be obliged to revert to it.

29. Mr. SETTE CÂMARA said he shared the view of previous speakers that article 5, as it stood, raised too many difficulties for the Commission to accept it even as a working hypothesis. Personally, he would be prepared to accept a simple formula such as that outlined by Mr. Ago, if a formal proposal were made to use it as a working basis which did not involve any commitment on controversial issues.

30. It would be a delusion to think that article 5 could be left aside. The problems it involved were bound to arise at every turn. Perhaps the Commission could agree to take no decision on article 5 at that stage, but to discuss its controversial elements as occasion arose during the examination of subsequent articles. Later on, the Commission could take a decision on the question whether a definition of public property was necessary in the draft and, if appropriate, on the contents of that definition.

31. Mr. BILGE said he agreed with Mr. Ago. After hearing the comments of the Special Rapporteur, he maintained his reservation concerning the last clause of article 5.

32. Mr. TSURUOKA said he thought article 5 should be referred to the Drafting Committee, with the request that it draft a provisional abstract formulation which would enable the Commission to examine the subsequent draft articles.

33. Mr. USTOR said that the formula outlined by Mr. Ago was simpler than that put forward by the Chairman (Mr. Castañeda) at the previous meeting.¹² He thought that, for practical purposes, it would perhaps be well first to restrict the topic to succession in property belonging directly to the State, and then proceed to examine the problem of other types of "public property".

34. Mr. RAMANGASOAVINA said that the Commission must have a basis to work on. The hypothesis suggested by Mr. Ago would be satisfactory, but so was the first part of article 5 as it stood. The last phrase, which several members could not accept because they considered the concept of sovereignty to be vague or dangerous, could be deleted without difficulty, since in any case it made the first part of the article meaningless. The working basis would then be the idea—very close to that of Mr. Ago—that public property meant all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, had not been under private ownership.

¹² See para. 48.

35. The CHAIRMAN,* speaking as a member of the Commission, said that the Commission should not let itself be held up by the obstacle of article 5. It was not essential to adopt, even provisionally, an article on the definition and determination of public property. Acceptance of the article as a working hypothesis did not mean adopting it as it stood. Of course, the wording used by the Commission at the present stage would influence its future work, but that work would also be subsequently reflected in the wording. Only when examination of the chapter had been completed would it be possible to work out the final formulation.

36. He therefore proposed that the Drafting Committee be asked to try to work out, with the help of the Special Rapporteur, an acceptable provisional formula taking account of all the comments of members, on the understanding that it could be amended as the Commission proceeded with the work. The Special Rapporteur had himself said that he was willing to submit further proposals to the Drafting Committee. Members could also submit specific comments in writing on the problems they had mentioned, in order to facilitate the work of the Drafting Committee and the Special Rapporteur. As Chairman of the Drafting Committee, he would ask them to do so, if the Commission decided to refer article 5 to the Committee on the terms he had outlined.

37. Mr. USHAKOV supported that proposal.

38. Mr. AGO said he could agree to the article being referred to the Drafting Committee, on the clear understanding that the Committee would function as a working group and not as a committee called upon to prepare a final draft of a provision which presented no further problems of substance. It would be merely a matter of seeing whether agreement could be reached on an idea.

39. The CHAIRMAN endorsed that interpretation. The Drafting Committee would have before it all the ideas put forward during the discussion and would re-examine them, with the assistance of the Special Rapporteur, in an attempt to work out a provisional formula which, in the words of the Special Rapporteur, would be "precarious and revocable".

40. Mr. REUTER said he would support the proposal if it was clearly understood that the Drafting Committee would, in fact, be resuming the present discussion in a smaller body. Before it did so, however, it would be better to wait until the Commission had examined articles 6, 7, 8 and 9, which were basic articles.

41. The CHAIRMAN said that that was indeed the only possible course. If there were no objections, he would take it that the Commission agreed to refer articles 4 and 5 to the Drafting Committee and to ask members to submit their written comments to that Committee, on the understanding that it would examine article 5 if such examination seemed useful and was warranted by the Commission's rate of progress.

*It was so agreed.*¹³

* Mr. Yasseen.

¹³ For resumption of the discussion see 1230th meeting, para. 41 and 1231st meeting, para. 1.

State responsibility

(A/CN.4/L.194)

[Item 2 of the agenda]

(resumed from the 1215th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

42. The CHAIRMAN** invited the Commission to consider the titles of the draft and of Chapters I and II and the titles and texts of articles 1 to 6 adopted by the Drafting Committee.

TITLE OF THE DRAFT

43. Speaking as Chairman of the Drafting Committee, he said the Committee had noted a large measure of agreement in the Commission to exclude from the draft anything that touched on responsibility for risk. The rules on responsibility for risk were different from those which governed responsibility for internationally wrongful acts, and to mix the two types of responsibility in a single draft would introduce an element of confusion which ought to be avoided.

44. The Drafting Committee had considered whether, as several members had suggested, the title should itself specify that the draft concerned only responsibility for internationally wrongful acts; but after due reflection, the Committee had preferred to retain the title proposed by the Special Rapporteur: "Draft articles on State responsibility". That was the traditional designation of the topic and any other designation might lead to misunderstanding. The Committee suggested, however, that the Commission's report, and more particularly the commentary to the draft articles, should make it clear that responsibility for risk was excluded from the draft, and give the reasons for its exclusion.

45. Speaking as Chairman of the Commission, he said that if there were no comments he would take it that the Commission provisionally approved the title of the draft as proposed by the Drafting Committee.

It was so agreed.

TITLE OF CHAPTER I

46. The CHAIRMAN speaking as Chairman of the Drafting Committee, said that several amendments to the title of chapter I had been suggested. The Committee nevertheless proposed that the Commission should retain the Special Rapporteur's title "General principles". Chapter I did in fact contain general principles, in other words, rules of law applicable to the draft as a whole. No other expression such as "fundamental rules" or "basic principles" would be as appropriate. Other chapters of the draft contained rules or principles of a fundamental character, but only the provisions of chapter I were general principles applicable to the draft as a whole.

47. The Drafting Committee had considered it unnecessary to add the qualification "of State responsibility"

** Mr. Yasseen.

to the words "General principles", since the title of the draft, immediately above that of chapter I, showed that only State responsibility was concerned.

48. Speaking as Chairman of the Commission, he said that if there were no comments he would take it that the Commission provisionally approved the title of chapter I as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 1¹⁴

49. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had retained the French text of article 1 without change. The key phrase in that text, "*engage sa responsabilité internationale*" was hallowed by abundant precedents, but the Committee had found the English and Spanish translations of the word "*engage*" unsatisfactory, and had replaced them by the words "entails" and "*da lugar*" respectively.

50. The Drafting Committee had given the article the title "Responsibility of a State for its internationally wrongful acts", as that seemed clearer and more precise than the one originally proposed, "Principle attaching responsibility to every internationally wrongful act of the State".

51. The Committee thought the commentary should explain that the principle stated in article 1 suffered no exception. It was true that justifying circumstances might be an obstacle to the attribution of international responsibility, and some provisions of the draft would be devoted to such circumstances. But justifying circumstances did not constitute exceptions; they divested the act of the State of its wrongful character. Thus, where there was justification, there was no internationally wrongful act and the conduct of the State did not fall within the scope of article 1.

52. The text proposed for article 1 read:

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

53. Mr. USTOR said that he could accept article 1, but would point out that the English version of the title spoke of "a State", whereas the French text read "*de l'Etat*".

54. Sir Francis VALLAT said that was purely a question of style; in the present context he preferred the expression "responsibility of a State".

55. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved article 1 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2¹⁵

56. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had reversed the order of articles 2 and 3. Article 2, as proposed by the Special Rapporteur, introduced a new concept in sub-paragraph (a): that of the attribution of conduct to the State. In the Committee's view, article 2 should therefore follow article 3, which merely developed the idea set out in article 1. Thus article 1 would proclaim the principle of responsibility and article 2 would provide that every State was subject to being considered as having committed an internationally wrongful act entailing its international responsibility.

57. The Commission's discussion on the former article 3 had dealt mainly with a question of drafting. There seemed to have been broad agreement on the principle stated by the article, namely, that every State had the capacity to commit an internationally wrongful act; but the use of the word "capacity" could give rise to misunderstanding. The Committee had therefore had to find a formulation which, on the one hand, did not contain the word "capacity" and, on the other, would not offend the susceptibility of States.

58. The title given by the Special Rapporteur to article 3 had been "Subjects which may commit internationally wrongful acts". As the draft was only concerned with State responsibility and not with the responsibility of other subjects of international law such as international organizations, the Committee proposed that the title should be changed.

59. The text proposed for the new draft article 2 read:

Article 2

Possibility that any State may be considered as having committed an internationally wrongful act

Every State is subject to being considered as having committed an internationally wrongful act entailing its international responsibility.

60. Sir Francis VALLAT said he was essentially in agreement with the substance of article 2, but suggested, as a matter of drafting, that it be amended to read: "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility".

61. Mr. AGO (Special Rapporteur), referring to Sir Francis Vallat's suggestion, said he thought the words "subject to the possibility of" rendered the idea contained in the French text better than the present English version.

62. Mr. USTOR pointed out that, in the English version, the title referred to "any State", whereas the text of the article said "Every State".

63. The CHAIRMAN said that, to avoid any misunderstanding, it would be better to use the same terms in the title and the text of the article.

64. Mr. CALLE y CALLE said that the Spanish version of article 2 was somewhat too mandatory; he pro-

¹⁴ For previous discussion see 1202nd meeting, para. 15.

¹⁵ For previous discussion see 1207th meeting, para. 27.

posed that the word “*sujeto*” be replaced by the word “*susceptible*”, which would be closer to the French.

65. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Secretariat had drawn his attention to an error in the Spanish translation. Consequently, he suggested that Mr. Calle y Calle should consult the Secretariat on the precise wording of the text.

66. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission provisionally approved article 2, as proposed by the Drafting Committee, on the understanding that the Spanish version would be slightly amended.

It was so agreed.

ARTICLE 3¹⁶

67. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had noted that each of the two sub-paragraphs of article 3 (former article 2) in a way introduced a separate chapter of the draft. It had therefore preferred to retain those two sub-paragraphs rather than merge them into a single paragraph, as some members had proposed. In the introductory phrase of the article, the Committee had added the words “of a State” after the words “internationally wrongful act” because the draft was concerned only with State responsibility, to the exclusion of the responsibility of other subjects of international law.

68. In sub-paragraph (a), the Committee had replaced the expression “in virtue of international law” by the expression “under international law”, in order to meet the wishes of some members.

69. In sub-paragraph (b) the Committee had replaced the words “failure to comply with” by the words “breach of”, which was the expression used in article 36 of the Statute of the International Court of Justice.

70. Lastly, the Committee had given the article a title which, it thought, better reflected its contents than the title originally proposed.

71. The text proposed for the new draft article 3 read:

Article 3

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) Conduct consisting of an action or omission is attributable to the State under international law; and

(b) That conduct constitutes a breach of an international obligation of the State.

72. Mr. USTOR, referring to the French text, pointed out that the expression “*fait internationalement illicite de l'Etat*” had been used both in the title and in the text of article 3, whereas the expression “*fait internationalement illicite d'un Etat*” appeared in the text of article 1. The formula used in article 1 should perhaps be repeated in article 3, especially since it corresponded with the wording used in the English version of both article 1 and article 3.

73. Mr. REUTER said he thought it would be better not to change the French title of article 3, because the provision applied to a State which had already been determined. Moreover, even though the words “of a State” appeared in the title and the introductory phrase of article 3 in the English version, the words “to the State” and “of the State” were used in sub-paragraphs (a) and (b).

74. Mr. AGO (Special Rapporteur) said he thought that the words “*de l'Etat*” should be retained in the French version.

75. Mr. KEARNEY said that the use of the indefinite article followed by the definite article was standard usage in English and perfectly satisfactory.

76. Mr. USTOR said he thought the English word “breach”, in sub-paragraph (b), was stronger than the French word “*violation*”.

77. Mr. AGO (Special Rapporteur) said that he had proposed the word “*manquement*”, but as the Committee had followed Mr. Kearney's suggestion and used the word “breach” in the English version, the word “*violation*”, which was the translation of “breach” in Article 36 of the Statute of the International Court of Justice, had been substituted for the word “*manquement*” in the French version.

78. The CHAIRMAN, speaking as a member of the Commission, said that he had formerly defended the use of the word “*manquement*”, which was less strong than “*violation*”, but the discussions in the Drafting Committee had convinced him that it was advisable to follow the Statute of the International Court.

79. Mr. BARTOŠ said that the basic idea of article 3, sub-paragraph (a), was to place actions and omissions on the same footing. The use of the word “*violation*” in the French version of sub-paragraph (b) was unsatisfactory, because it did not cover those two concepts: one could not commit a “*violation*” by omission. That was why he preferred the term “*manquement*”, which had a broader meaning.

80. Mr. KEARNEY said he was not competent to criticize the French terminology, but the word “breach” in English would also cover an omission. Failure to pay for a purchased article, for example, quite clearly constituted a breach of contract.

81. Mr. REUTER said that the words “*d'après le droit international*” in article 3, sub-paragraph (a), were essential, and they would be more emphatic if they were placed immediately before the words “*à l'Etat*”, instead of after them.

82. The CHAIRMAN, speaking as a member of the Commission, said he supported that suggestion. The words “*à l'Etat*” and “*d'après le droit international*” should not be joined together as if they formed a unit.

83. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission provisionally approved article 3, with the amendment proposed by Mr. Reuter.

It was so agreed.

The meeting rose at 12.50 p.m.

¹⁶ For previous discussion see 1205th meeting, para. 2.

1226th MEETING

Wednesday, 13 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/L.194)

[Item 2 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 4¹

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.194). He asked the Chairman of the Drafting Committee to introduce article 4.

2. Mr. YASSEEN (Chairman of the Drafting Committee) said that, as originally drafted, article 4 had read: "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law".

3. During the Commission's discussion, that text had been criticized mainly from two points of view. Some members had maintained that municipal law could be relevant, in certain circumstances, for determining whether some particular conduct of a State did or did not constitute an internationally wrongful act. They had therefore considered that the formulation of article 4 was too absolute. Other members had observed that article 4 did not emphasize the basic rule, namely, that in the last resort it was international law which characterized an act as internationally wrongful. As it then stood, the article had appeared to deal only with the particular case in which a State accused of committing an internationally wrongful act invoked its internal law to prove an exception. They therefore considered that a more general formula should be found.

4. The Drafting Committee had taken those two points of view into account in the text it was now proposing to the Commission. It had also amended the title of article 4 to bring it into line with the new text.

5. The new version of article 4 read:

Article 4

Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be

affected by the characterization of the same act as lawful by internal law.

6. The CHAIRMAN said that if there were no comments he would take it that the Commission decided provisionally to approve article 4 as proposed by the Drafting Committee.

It was so agreed.

TITLE OF CHAPTER II AND ARTICLE 5²

7. Mr. YASSEEN (Chairman of the Drafting Committee), introducing the title of chapter II, said that in the interest of uniform terminology, the Drafting Committee had replaced the words "according to international law" in the title of chapter II, by the words "under international law". Thus the new title proposed for chapter II read: "The 'act of the State' under international law".

8. The discussion on article 5 had related mainly to the question whether, from the Commission's point of view, it was possible to distinguish, in an organ of a State, between the organ proper and the natural person who must necessarily act on behalf of the organ. Some members had maintained that only an organ could act on behalf of the State. They had acknowledged that in most cases there was physical intervention by a natural person, but in their opinion he was acting solely in the capacity of an organ, so that natural persons must be disregarded whenever a certain conduct was attributed to a State.

9. In order to avoid any abstract discussion on that point and not to come out in favour of a particular theory, the Drafting Committee proposed the following title and text for article 5:

Article 5

Attribution to the State of acts of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State, will be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

10. Mr. USTOR said he fully approved of the text of article 5, but noted that the tenses of the verbs were not the same in the French and English versions.

11. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee had been very careful with the concordance of the different versions, but that in some cases, for purely linguistic reasons, it had been obliged to abandon strict parallelism.

12. Sir Francis VALLAT proposed that the words "will be considered" be replaced by the words "shall be considered", as the word "shall" was less permissive than the word "will".

13. Mr. REUTER said he thought the idea of anteriority should be expressed in the last phrase of article 5. He therefore suggested that the words "*il agisse en cette qualité*" be replaced by the words "*il ait agi en cette qualité*": the past tense was used in the English version.

¹ For previous discussion see 1209th meeting, para. 1.

² For previous discussion see 1211th meeting, para. 1.

14. Comparing the title and text of article 5, he questioned whether it was appropriate for the French version to speak sometimes of the “*faits*” and sometimes of the “*comportement*” of an organ.

15. Mr. AGO (Special Rapporteur) said he concurred with Mr. Reuter’s remarks. The term “*fait*” should be reserved for the expression “*fait de l’Etat*” and it would therefore be preferable to replace the words “*des faits*” by “*du comportement*” in the title of the article. It would also be preferable to use the past tense in the final phrase.

16. The CHAIRMAN said that in the English version the words “will be considered” would be replaced by the words “shall be considered”, and to take account of the amendments proposed by Mr. Reuter and Mr. Ago the title would be amended to read: “Attribution to the State of the conduct of its organs”.

17. Mr. KEARNEY said he had no objection to the revised text of article 5, but wished to make the reservation that at some stage in the discussion it would be necessary to define a “State organ”. A reference to that problem should be included in the commentary.

18. The CHAIRMAN, speaking as a member of the Commission, said he fully supported Mr. Kearney’s remarks.

Article 5, as amended, and subject to the reservation made by Mr. Kearney, was approved.

19. Mr. AGO said that if the Commission so desired he would endeavour to define the expression “State organ” in the commentary. He pointed out, however, that it would not be an easy task, since the views of members of the Commission on that subject differed widely.

ARTICLE 6³

20. Mr. YASSEEN (Chairman of the Drafting Committee) said that when the Commission had examined article 6 as originally drafted, some members had observed that it might raise difficulties in the common-law countries. For lawyers of those countries, the draft article seemed only to state a rule of evidence. The word “hierarchy”, which appeared in the phrase “a superior or a subordinate position in the hierarchy of the State”, had also been criticized. There had not, however, been any great difference of opinion on the substance of the article.

21. The new text proposed for article 6 read:

Article 6
Irrelevance of the position of the organ
in the organization of the State

The conduct of an organ of the State is considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

22. Mr. SETTE CÂMARA said he still felt the misgivings he had previously expressed about the enumera-

tion of the constituent, legislative, executive, judicial or other powers; it was a departure from the traditional tripartite structure of the State.⁴ The constituent power was not on the same level as the others; it was a short-lived phenomenon which was soon replaced by the legislative power. It was possible to refer to an organ of the executive or judicial power, but hardly to an organ of the constituent power, whose decisions were taken in plenary.

23. Mr. KEARNEY said that the legislative power could undoubtedly possess organs, since it was empowered to appoint committees for a variety of purposes. It was quite possible, though unlikely, that such a committee might commit an internationally wrongful act by requiring the presence of the ambassador of a foreign country at a committee meeting.

24. Mr. SETTE CÂMARA said that, in his view, an organ of the legislative power, such as a committee, was responsible only for reporting to the legislature in plenary; he doubted that it would be capable of committing an act engaging the responsibility of the State.

25. Mr. MARTÍNEZ MORENO said he could accept article 6 in its present form. He appreciated Mr. Sette Câmara’s comment on the traditional tripartite structure of the State, but in Latin America there were instances of organs belonging to other powers, such as the electoral power, which exercised certain specific functions on election days.

26. Mr. YASSEEN, speaking as a member of the Commission, said that the constituent power was not sporadic; although it manifested itself sporadically, it was always latent.

27. Mr. SETTE CÂMARA said that the term “constituent power” meant not so much a “power” as a “constitution”.

Article 6 was approved.

28. The CHAIRMAN said that the Commission had now completed its consideration of the draft articles on State responsibility proposed by the Drafting Committee.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(resumed from the previous meeting)

ARTICLE 6

29. The CHAIRMAN invited the Special Rapporteur to introduce article 6 of his draft (A/CN.4/267), which read:

Article 6
Transfer of public property as it exists

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

³ For previous discussion see 1213th meeting, para. 39.

⁴ *Ibid.*, para. 58.

2. In accordance with the provisions of the present articles, public property shall be transferred to the successor State as it exists and with its legal status.

30. Mr. BEDJAoui (Special Rapporteur) said that article 6 was the first of three articles containing the general provisions of his draft. He still felt the doubts he had expressed in his fourth report (A/CN.4/247 and Add.1, commentary to article 2) about the need for such a provision, which corresponded to his former article 2. The Commission would have to decide whether to retain article 6, but paragraph 1 should be regarded as having been deleted.

31. The question raised by article 6 was, basically, whether the rights of third parties—both third States and private persons—should be reserved. It might perhaps be advisable to wait until other questions arising out of succession in respect of matters other than treaties had been considered, particularly the question of acquired rights, before taking a decision on article 6.

32. By virtue of the succession, the successor State would have no more rights over the property transferred than the predecessor State. It might therefore be asked what happened to any defects in the title to the property, and what was the extent of the title of the successor State. It might perhaps be laid down as a principle that no person and no predecessor State could convey more rights than he or it possessed. He had tried to find out whether there was any rule of international law which obliged the predecessor State to clear the transferred property of any charges there might be on it; no such rule appeared to exist.

33. It might also be asked whether the successor State could receive more than it had been given, by freeing itself of obligations attached to the property transferred. It seemed, however, that that was perhaps not strictly a problem of succession of States, but a matter within the exclusive competence of the successor State in its capacity as a State.

34. Finally, must the legal status and condition of the property received be compatible with the rules of the internal law of the successor State? In other words, if there was a legal rule in the predecessor State which had no counterpart in the legal system of the successor State, was that rule binding on the successor State? That raised particularly difficult problems, some of which related to required rights.

35. Mr. REUTER said he fully endorsed the views of the Special Rapporteur, but was concerned about the serious problems raised by article 6. In his opinion, one question was more important than all the rest: was there or was there not a transfer?

36. One could imagine an article which was confined to stipulating the conditions under which the rights of the predecessor State were extinguished. If it was accepted that, following such extinction, there was a break and a new legal order was established, it must then be asked whether the rights of third parties survived the extinction.

37. On the other hand, if there was a transfer, as implied by the titles of articles 6, 7 and 9, the Commission must move away from the internal law of the predecessor State and the successor State into the sphere of inter-

national law. For the notion of transfer was not compatible with a simple *renvoi* to the internal law of the predecessor State for the past, and to the internal law of the successor State for the future. It must be affirmed that there was some link between those two legal orders, and all the consequences of that affirmation, which was based on considerations of international law, must be accepted.

38. In his view, it was clear that the rights of the predecessor State were extinguished, but that, by virtue of a general principle of legal security, the extinction did not affect the rights of third parties. If one opted for that narrow conception, one could not go so far as to affirm that public property was transferred "as it exists and with its legal status", as did article 6.

39. The notion of transfer would also arise in connexion with other articles of the draft. Personally, he was inclined to think that there was no transfer in the cases dealt with in the draft.

40. Mr. SETTE CÂMARA said he was glad the Special Rapporteur had decided to delete paragraph 1, since it tended to confuse the concepts of property (*proprietas*) and possession (*possessio*). The principle in article 6, of course, related to the old rule of Roman law *nemo plus juris ad alium transferre potest quam ipse habet*.

41. To the extent that the problem of transfer of territory fell within the sphere of succession of States in respect of treaties, he did not think the Commission would have any difficulties. Under the system adopted in the Commission's draft on succession of States in respect of treaties,⁵ the transfer had to be conducted in such a way that the successor State would be bound by its own will alone in regard to treaties of the predecessor State limiting or circumscribing sovereignty over the territory.

42. Paragraph 2 of article 6 was a revised version of the corresponding paragraph 3 of article 2 of the former draft (A/CN.4/247). The reservation "in so far as this is compatible with the municipal law of the successor State" had been deleted, and that, in his view, was an improvement, since at the time of the transfer it was the law of the predecessor State which prevailed, irrespective of any provisions of the law of the successor State.

43. Since the legal order of the predecessor State continued to apply until modified by a legislative act of the successor State, any limitations or restrictions on public property were unaffected by the change. But of course that was a transitory situation, for once the transfer had taken place nothing prevented the successor State from maintaining or modifying the legal status of public property or even the legal concept of what constituted it.

44. With regard to the drafting of paragraph 2, he thought the French text expressed the Special Rapporteur's ideas much better than the English, so his remarks would apply mainly to the latter. The introductory phrase "In accordance with the provisions of the present articles" seemed unnecessary, for, unless there was a stipulation to the contrary, it was obvious that the provision was bound to be in conformity with the general

⁵ See *Yearbook of the International Law Commission, 1972, vol. II, document A/8710/Rev.1, chapter II, section C.*

philosophy of the draft. He did not understand the meaning of the words "as it exists". If public property was to be defined and determined by the law of the predecessor State, in accordance with article 5, it was evident that such property could not be envisaged in a different way from that in which it had existed under the legal order of that State. He hoped the Special Rapporteur would explain the exact meaning of that piece of legal existentialism.

45. He also had some misgivings about the use of the expression "legal status", as applied to public property. As he understood it, the Special Rapporteur intended to convey the idea that public property was transferred with any limitations or restrictions with which it might be encumbered under the legal order of the predecessor State. If that was so, would it not be better to say so clearly in the text of the article, instead of speaking of the "legal status" of public property, which was a much broader expression involving a wide range of municipal law provisions that removed public property from the régime of private property?

46. Mr. USHAKOV said that the purpose of article 6 was to make it clear that the fate of public property was governed by the draft. Article 6 was thus a very general provision and it was perhaps premature to determine, at that stage, what was governed by the draft and what was not. As in many other cases, the Commission might subsequently have to draft a special provision on that point.

47. Moreover, to state that the fate of public property was governed by the draft articles ruled out at once the possibility of concluding agreements on the subject, although that possibility had been recognized by the Special Rapporteur. It therefore appeared that the drafting of article 6 was too strict.

48. With regard to Mr. Reuter's comments on the question whether there was a transfer, he could quote two examples of State succession where there was no transfer. The first was the case in which property belonging to two States which had merged into a single State was situated in the territory of a third State. The second was the case of a partial transfer of territory from one State to another, both States agreeing that the property of the predecessor State situated in the territory of a third State should remain its property. In neither of those cases was there a genuine transfer, and the Commission should beware of that term, which did not always correspond to reality.

49. The CHAIRMAN, speaking as a member of the Commission, said that the comments made by Mr. Ushakov and Mr. Reuter related mainly to the question whether a transfer took place or not; he wondered whether that question was not raised rather by article 8.

50. What article 8 meant was that when succession took place, or when there was replacement of one State or sovereignty by another, the public and private property of the predecessor State passed into the patrimony of the successor State; other property, which was not State property, passed within the legal order of the successor State, which was not the same as passing into its patrimony. In his view, therefore, the rule stated in

article 6 should properly follow that stated in article 8, which was the basic rule, and it might be better to examine the latter article first.

51. Mr. BARTOŠ said it was his understanding that article 6 concerned the devolution of all property falling under the sovereignty over the territory concerned. But the Special Rapporteur had surely not meant that all property, public or private, devolved gratuitously to the new sovereign State. A distinction must be made between two aspects of the matter: on the one hand, property attached to a territory was subject to the new sovereignty as it had been to the old; on the other hand, in so far as ownership and enjoyment were concerned, it was difficult to accept that all such property passed at the discretion of the new sovereign State, without compensation and without regard to either its former use or its existing condition.

52. Although it was true, as Mr. Reuter had pointed out, that property was subject to the legal order of the successor State once the rights of the predecessor State had been extinguished, that did not mean that there was legal devolution of the property. It was not in consequence of a devolution, but because the property was attached to the territory in question that the successor State was able to impose its public order on it. Moreover, that happened after the succession.

53. Lastly, he doubted whether the expression "property of the territory", in sub-paragraph (c) of article 8 was adequate. That expression implied that the territory possessed property of its own; it would be better to speak of property "situated in the territory".

54. Sir Francis VALLAT said that, although he shared to a large extent the misgivings expressed by other members about the concept of "transfer", he had no difficulty with the underlying principle of article 6, which was absolutely sound.

55. That principle was akin to the adage "What is sauce for the goose is sauce for the gander". Article 6 stated, in effect, that if the public property in question was subject to certain obligations, restrictions or limitations, it passed to the successor State subject to the obligations, restrictions or limitations attaching to it. For example, a government house in a territory which became independent would naturally become the property of the new State. Supposing, however, that it was surrounded by large grounds where the local people had the right to grow vegetables, that right would not be extinguished because the house and its grounds had passed to the new State. The principle was an elementary one which needed to be expressed in the draft articles. Otherwise there might be a tendency to consider exclusively the positive side of the operation, without taking the negative aspects duly into account.

56. He agreed with Mr. Sette Câmara about the discrepancy between the English and French texts. The French text was much nearer to his idea of the intended meaning of article 6. That, however, was a matter of drafting which could be settled at a later stage.

57. Mr. MARTÍNEZ MORENO said that the question raised by Mr. Reuter was a fundamental one. The Commission would have to decide the preliminary issue

whether, upon a succession, there was a transfer of public property from the predecessor State to the successor State, or an extinction of the rights of the predecessor State and novation in favour of the successor State. The issue was not purely academic; it had important legal effects, and he would be grateful if Mr. Reuter would go into greater detail on it.

58. He welcomed the Special Rapporteur's decision to drop paragraph 1, which could have caused many difficulties. In particular, the reference to possession was unfortunate, because of the essential distinction between *uti possidetis de facto* and *uti possidetis de jure*. This was a matter of great importance with regard to boundaries in Latin America and, more recently, in Africa and Asia, as a result of the emergence of many new States.

59. Paragraph 2, the only remaining paragraph, should be examined with due regard to the provisions of later articles. For example, there appeared to be some contradiction with sub-paragraph (c) of article 8. The purpose of article 6 was to state that if the property in question was, say, mortgaged, it would pass to the successor State subject to the mortgage. The terms of sub-paragraph (c) of article 8 would, however, make it possible for the mortgage to be disregarded if it were considered contrary to "the juridical order of the successor State".

60. To give some idea of the difficulties involved, he would quote an example which provided a useful illustration, though it was not, strictly speaking, a case of State succession. In the boundary dispute between Honduras and Nicaragua,⁶ the International Court of Justice had ordered the return to Honduras of part of the disputed territory, which had previously been in the possession of Nicaragua. It had been agreed that the property rights of private individuals would be respected. Under the constitution of Honduras, however, aliens were forbidden to own property within a certain distance of the international boundary. Nicaraguan nationals affected by the application of that provision of the Honduran juridical order were now involved in litigation which, when the judgement of the Supreme Court of Honduras was known, was likely to lead to further international litigation.

61. A similar problem could well arise in a case of State succession. It was therefore necessary carefully to co-ordinate the provisions of article 6 with those of article 8.

62. The problem became even more serious when the provisions of article 9 were taken into account, according to which property necessary for the exercise of sovereignty devolved "without compensation" to the successor State. A person placed by a State in a situation similar to that of the Nicaraguan property owners would, under the provisions of article 9, be dispossessed of his property without any compensation at all.

63. Mr. KEARNEY said that the concept of transfer raised serious problems, particularly when it was by no means clear what constituted public property. He agreed with Sir Francis Vallat that an article was needed to state the rule that the successor State took over State property

with its restrictions and limitations. For that purpose, the expression "with its legal status" was not broad enough.

64. The question was whether article 6 was sufficient to meet all the problems that arose regarding the taking over of public property by the successor State, and, if not, whether the subsequent articles filled all the gaps.

65. An example was provided by the fate of State-run railways in a predecessor State which split up into two successor States. It would not be enough to say that the track and other permanent installations would go with the territory on which they were situated. The formula "as it exists and with its legal status" would be of no assistance when it came to dividing the rolling stock, which was just as much public property as the track.

66. Similar problems would arise in connexion with State-owned shipping lines. One could imagine a case in which all the coast-line of the predecessor State went to one of the two successor States, the other being left land-locked. Difficulties of that kind could, of course, be settled by recourse to the principle of equitable distribution, but the net result would be to trade off one kind of property against another.

67. He was not in a position at the present stage to offer a solution to those problems; he merely wished to draw attention to their complexity.

68. Mr. HAMBRO said that article 6 embodied a simple rule which had been very clearly explained by the Special Rapporteur in a brief but important passage of his fourth report: "The successor State does not acquire more rights than the predecessor State itself had over the property transferred. This is a statement of the obvious, since no one, including a predecessor State, can 'give more than he has'".⁷

69. The Commission would have to adopt that rule in one form or another. The rule would have to be stated in simple terms and so worded as to apply generally to all the particular cases that could arise. It was not necessary, for the moment, to consider those particular cases in detail; but the Commission should have a general formula in mind for article 6 when it came to discuss the subsequent articles of the draft.

70. Mr. CALLE y CALLE said it would be impossible for a single article to solve all the problems that arose regarding the transfer of public property. Assuming that an agreed concept of public property existed, an article was needed to specify that the public property of the predecessor State passed to the successor State with the same physical features and the same legal status as had obtained prior to the succession.

71. A statement of that rule in simple terms would be acceptable to him. He suggested deleting the opening words "In accordance with the conditions of the present articles", which were unnecessary, since all the articles had to be read in the context of the whole draft. Moreover, like other provisions of the draft, article 6 contained a residuary rule which applied only unless otherwise agreed by the parties, so that the transfer might well

⁶ *I.C.J. Reports* 1960, p. 192.

⁷ See *Yearbook of the International Law Commission*, 1971, vol. II (Part One), p. 169, document A/CN.4/247 and Add.1, para. (13) of the Commentary to article 2.

take place in accordance with the terms of an agreement rather than with those of the articles.

72. Mr. BILGE said he approved of the idea expressed in paragraph 2 of article 6, which had become the sole paragraph. It must be expressly stated in the draft that public property was transferred to the successor State as it stood. That was perhaps an obvious truth, but since difficulties had arisen over the point in practice, it was not useless to repeat it.

73. However, the idea of transfer in good faith should also be introduced into the text; the words "by the predecessor State" should therefore be inserted after the words "public property shall be transferred", since that wording would call for a certain conduct showing goodwill on the part of the predecessor State. It should also be indicated in the commentary that the provision was intended to ensure the physical conservation of public property.

74. Mr. REUTER clarifying his position, said he agreed with Sir Francis Vallat and other members of the Commission that the rights of third parties—which could be not only States, but also, for example, international organizations—must be respected. The problems now facing the International Bank for Reconstruction and Development, as a result of certain open successions, showed that that reservation was an entirely practical one. The question of the rights of private persons should also be reserved.

75. He believed, above all, that it was natural for articles 6 to 10 to be considered in conjunction with each other. The comment he had made on the word "transfer" was a comment of substance in the sense that the true problem, which the Commission would have to discuss later, was whether the two terms of the change, namely, the property as it existed in the patrimony of the predecessor State and then its attribution to the patrimony of the successor State, should be determined—as was done very explicitly in article 8—or whether it was enough to determine that the rights of the predecessor State were extinguished and that its property, subject to the rights of third parties, passed under the sovereignty of the successor State. The Commission would have to decide whether it was really possible to say that public property passed into the patrimony of the successor State. That was open to question, for it was not certain that the concept of the patrimony of the State existed in international law, or even in all national systems of law.

76. Mr. QUENTIN-BAXTER said that, like Mr. Bilge, he assumed that the Commission was not concerned at the present stage with the problem of equitable distribution.

77. He had no objection to the idea expressed in paragraph 2 of article 6, the sole remaining paragraph; but he had some doubt whether the provision was necessary. Clearly, the successor State received only what the predecessor State had to give. He shared, however, Mr. Reuter's objections to the concept of "transfer" of property.

78. The question of continuity was of fundamental importance. The territory affected by the succession was

acquired by the successor State with its physical features and the law that it carried. It was the lawgiver that changed; the power to make the law was put in other hands.

79. In the draft on succession in respect of treaties, which it had adopted in 1972, the Commission had placed the emphasis on the replacement of one State by another. He thought that, in article 6, the concept of replacement in the ownership of public property should be introduced. The concept of replacement was different from that of transfer, and more suitable for present purposes.

The meeting rose at 12.35 p.m.

1227th MEETING

Thursday, 14 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 6 (Transfer of public property as it exists)
(continued)

1. The CHAIRMAN invited the Special Rapporteur to reply to the comments of members on article 6.

2. Mr. BEDJAOU (Special Rapporteur) said the debate had clearly shown that opinions were too definite to allow of any hope of reaching unanimity on the present text of article 6. Before discussing what should be done with the provision, he would reply to the comments that had been made.

3. Mr. Ushakov had criticized the text for being too rigid, in that it excluded the possibility of agreement to a different effect between the parties.¹ He admitted that and would try to find a remedy with the help of the Drafting Committee. Agreement between the parties was obviously important, because the rules the Commission was drawing up were residuary rules.

4. Mr. Ushakov had also considered that the Commission should not, for the moment, dwell on article 6, which dealt with the general régime of property—a subject also regulated by the following articles. Bearing in mind the Draft prepared by Sir Humphrey Waldock, he (Mr. Bedjaoui) wondered whether it had always been

¹ See previous meeting, para. 47.

the Commission's practice to hold over general articles such as article 6. He himself had no views on that point and would leave it to the Commission to decide what procedure should be followed.

5. Mr. Kearney had raised the problem of equitable distribution of property.² That was outside the scope of article 6, however, and would be considered by the Commission when it took up other articles.

6. He agreed with Mr. Bilge that it would be useful to introduce the notion of transfer in good faith by inserting the words "by the predecessor State".³ He, too, valued that notion, and he had spoken in previous reports of the "*période suspecte*" immediately preceding succession.⁴

7. Mr. Martínez Moreno had raised the question of possible contradictions between articles 6 and 9 and between article 6 and article 8, sub-paragraph (c).⁵ He himself could not see any contradiction between articles 6 and 9. Article 9 did not refer to the rights of third parties, whether States or private persons; it simply stated that, as between the predecessor and successor States, there occurred, automatically and without compensation, a devolution of the property belonging to the predecessor State, which then passed into the "patrimony" of the successor State. Whereas article 6 introduced the question what became of the rights of third parties, whether States or private persons, article 9 raised the question whether or not the successor State should indemnify or compensate the predecessor State for the property transferred.

8. He could not see any contradiction between article 6 and sub-paragraph (c) of article 8 either. Article 8 was not a substantive article. Its sole purpose was to clarify the problem. He had intended to convey that there were three categories of property: on the one hand, the property of the predecessor State, of which the successor State must be able to acquire full ownership; on the other hand, the property of public authorities and property belonging to the territory, which did not pass to the successor State in full ownership. The latter property remained within the patrimony of the authority or territory, though obviously it was no longer governed by the legal order of the predecessor State, but came under the general and exclusive jurisdiction of the successor State, which might see fit, for instance, to protect it internationally.

9. With regard to Mr. Reuter's comments on the word "transfer"⁶ the relevant terminology, as derived from treaties, varied considerably. Property was "transferred", "transmitted" or "delivered"; the terms "cession" and "retrocession" were used; and property was said to "pass" or "be received". But it was not only the terminology that was in question, and he agreed with

Mr. Reuter on the substance of the matter, subject to two reservations. He did so because what he had proposed in article 6 did not reflect his inner convictions, which he had had to hide; it was the result of the course he had adopted in his successive reports in order to meet the wishes of the Commission. He was therefore grateful to Mr. Reuter for having raised the question again.

10. In his second report, concerning acquired rights, he had pointed out that there was not a transfer of sovereignty, but a substitution of one sovereignty for another,⁷ with the many legal consequences that produced, one of which was embodied in article 6. He therefore agreed that there was replacement of sovereignty. In article 6, however, it was no longer a question of replacement of States, which was by then an accomplished fact, but of what happened to property, that was to say the transfer of property. There was a material transfer which, for most property, was effected through inventories and records. It was not rights in the property, but the property itself that was transferred. True, the expression "legal status" might perhaps suggest that the rights in the property were transferred along with the property itself. That was the second point of difference between Mr. Reuter's position and the position which he himself had had to abandon when drafting article 6.

11. If the matter was indeed to be put in terms of replacement, as he would prefer, it would be necessary to go the whole way and recognize that the rights of ownership of the predecessor State were extinguished. The old terminology was very clear on that point and some modern treaties—for example, the domanial agreement of 1965 between France and Cameroon—were equally explicit. Yet there was not simply a change of owner. Parallel with the extinction of the rights of the predecessor State, new rights were created for the successor State. Since the rights of the predecessor State were extinguished, they could not, by definition, be exercised by another. The successor State did not exercise the rights of the predecessor State in its stead; it exercised new rights of its own, derived from its sovereignty, as it had replaced that of the predecessor State; so there could be no foundation for respect by the successor State of acquired rights in themselves.

12. The argument had very far-reaching implications. He had advanced it in his second report, but the Commission's reactions had forced him to retreat it. Even the less specific formula he had subsequently proposed in his fourth report,⁸ under which the successor State would not have been obliged to regard itself as bound by the rights of third parties, had not met with the Commission's approval and he had therefore suggested the expurgated version of the present article 6. But of course he would be only too happy to move forward again, if such was the Commission's general wish.

13. For instance, he might propose to the Drafting Committee a formula such as: "The fact of the replacement of the predecessor State by the successor State

² *Ibid.*, para. 66.

³ *Ibid.*, para. 73.

⁴ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 104, document A/CN.4/204, paras. 68 and 69; 1970, vol. II, p. 141, document A/CN.4/226, paras. (35)-(37); 1971, vol. II (Part One), p. 173, document A/CN.4/247 and Add.1, paras. (23)-(27).

⁵ See previous meeting, paras. 59 and 62.

⁶ *Ibid.*, paras. 35-39 and 75.

⁷ See *Yearbook of the International Law Commission* 1969, vol. II, p. 77, para. 29.

⁸ *Ibid.*, 1971, vol. II (Part One), p. 167, document A/CN.4/247 and Add.1, art. 2, para. 2.

entails the extinction of the rights of the former in public property and, simultaneously, the creation of rights of the successor State in the same property". But it would not be possible to say that the rights of the predecessor State in the property and those of the successor State, or the contents of their respective rights, were the same. He was reluctant even to express a general reservation stating that the extinction of the rights of the predecessor State was without prejudice to the rights of third States or private persons; if he had done so in the present article 6, it was only to meet the wishes of the majority of the Commission.

14. It remained for the Commission to decide whether it wished to refer article 6 to the Drafting Committee, which would take that difficulty into account and seek the most neutral formula reserving certain situations contemplated in later articles, or to reopen the discussion on the substance.

15. Mr. AGO said that the Commission had made progress in clarifying the subject under study by eliminating from the article any question of replacement of sovereignty, which was entirely a matter of international law, whereas the situations contemplated in article 6 came under internal law. The consequences they might have in international law derived solely from the existence of certain rights in internal law. The Special Rapporteur had proposed a formula which was correct, but which needed to be made clearer.

16. The Special Rapporteur spoke of the transfer of property and of rights. In his own view, it was only rights that were transferred. Property passed only with the right attaching to it, which could be a right of ownership or some other real right. Since it was generally rights of ownership that were concerned, property was referred to, but in fact it was always rights that were transferred.

17. Moreover, he was not sure that there was no connexion between the extinction of the rights of the predecessor State and the creation of the rights of the successor State. If that were so, there would be a legal hiatus between the extinction of the rights of the predecessor State and the creation of the rights of the successor State in the property in question. What took place was definitely a "transfer" or "passage", and the phenomena of extinction and creation of rights of States were not entirely independent of each other.

18. Nor did he wholly agree with the Special Rapporteur when he said that the content of the rights of the predecessor State and the successor State were not necessarily the same. Once the successor State had replaced the predecessor State in its rights, it was, of course, free to act as it wished, but at the actual moment of the transfer the successor State received only what the predecessor State had possessed. In that respect, there was complete equivalence.

19. The Drafting Committee should be asked to try to find a formula which would provide an acceptable working basis.

20. Mr. USHAKOV drew attention to the fact that it was the Commission's custom not to consider general articles until it had examined the substantive articles of a draft. That procedure had been followed in 1971, in the

work on relations between States and international organizations, and in 1972, in examining the draft articles on succession of States in respect of treaties. In 1971, it had been after considering all the draft articles proposed that the Commission had decided to set apart a number of general provisions.

21. On occasions when the Commission discussed general provisions before completing consideration of the substantive articles and referred those provisions to the Drafting Committee, the latter could not put them into final form until the whole draft had been examined. He would not object to article 6 being referred to the Drafting Committee, but must point out that the Committee would be unable to deal with it until much later.

22. The general articles proposed in the draft under discussion, which applied solely to succession to public property, might perhaps later be drafted in such a way as to cover the whole subject of succession of States in respect of matters other than treaties.

23. Mr. YASSEEN said that he thought Mr. Ushakov's concern would be justified if the Commission were examining a draft on second reading with a view to drawing up a final text; but it was examining Mr. Bedjaoui's draft only on first reading, so that the work was purely provisional. That being so, there was no reason why the general articles should not be discussed before the substantive articles; in any case, the general articles also contained substantive rules, though of a more general nature than those in the other articles.

24. If the Commission was to make any progress, it was essential to begin by discussing the general articles. Of course, if a general provision was referred to the Drafting Committee, it would consider it in the light of the discussion on the other articles. It should not be forgotten, either, that the draft would be reconsidered in the light of the comments of Governments, which might give rise to major changes in its arrangement.

25. The CHAIRMAN, speaking as a member of the Commission, said that the problem was to find a criterion to distinguish from the others those rules which were of a general character and which should therefore be considered before the others.

26. Personally, he thought the most general of all the rules in the draft articles, and the one which should have been considered first, was not that contained in article 6, but the rule in article 8. It was the rule which stated that, in the event of a succession, the public property of the predecessor State passed into the patrimony of the successor State. The question of the date, dealt with in article 7, and that of the legal status of the property, dealt with in article 6, should be examined after article 8. Nevertheless, he would not object to the procedure suggested by the Special Rapporteur of dealing first with article 6, especially as the articles were being examined on first reading. At a later stage, the various provisions would have to be rearranged.

27. The Special Rapporteur had suggested that the Commission should take a decision on the question whether, in the event of a succession, there was a transfer of property or only extinction of the right of the predecessor State and creation of the right of the successor

State. He was not at all certain that the Commission needed to decide precisely that question, but it was difficult not to see a process of transmission in that situation. Although analogies with private law were often misleading, he would venture to mention the example of a sale. It could perhaps be said that the seller's title to the object sold was extinguished and that the buyer's right was created on the sale being effected. Nevertheless, it was rare for anyone to regard a sale transaction in that manner; what was apparent was the transmission of the right to the object sold.

28. Possibly the best course would be to refer article 6 to the Drafting Committee so that an effort could be made to find language more acceptable to all members, possibly avoiding the term "transfer".

29. Mr. REUTER said he had no objection to article 6 being referred to the Drafting Committee. The article raised two main questions, one of them practical and the other theoretical, which were interrelated.

30. The practical question, which had been raised chiefly by members who represented the common-law system, was the protection of the interests of third States, international organizations and even private persons. He believed that it was essential to protect the rights of third parties, no matter what conception of the phenomenon of succession to public property was adopted. The Commission should therefore take a clear decision on that point.

31. The theoretical question was not purely one of terminology, as it might seem. It was true, as the Special Rapporteur had pointed out, that the terminology was not settled; that uncertainty was reflected in the draft articles themselves. Thus, in the title of article 6, the Special Rapporteur had used the word "transfer", which implied the presence of two entities, one giving and the other receiving. In the body of article 8, however, it was said that property "passed within" the patrimony or the juridical order of the successor State. The verb "to pass" (in the French text "*tomber*") suggested a unilateral operation. The Drafting Committee should see to the unification of the terminology.

32. The theoretical question related to the change of sovereignty and of internal legal order. It appeared to be generally recognized that a State succession involved the extinction of one sovereignty and the birth of another, the two operations being separate. Perhaps it would be better to speak, in that case, of "replacement" of sovereignty, a phenomenon which occurred at the date of succession. Article 8 also envisaged the replacement of one juridical order by another. Should the extinction of one juridical order and the birth of another be regarded as so dependent on sovereignty that they took place automatically and simultaneously with the replacement of one sovereignty by another? Logically, that should be so, since the juridical order was the expression of sovereignty. Practice indicated, however, that the successor State recognized for a certain time the material content of the previous juridical order, which subsisted as such. Thus the régime of ownership did not change at the very moment of replacement of sovereignty; it was only after a certain lapse of time that the successor State took the necessary adaptation measures.

33. Article 8 provided that "Public or private property of the predecessor State shall pass within the patrimony of the successor State". It should be noted, however, that the notion of patrimony did not necessarily exist in every internal juridical order. If the term "patrimony" was intended to signify an international law concept, the provision meant that the property in question was placed at the disposal of the successor State. That was tantamount to saying that the property passed within its "juridical order", the expression used in the same article with regard to the other two categories of public property. Hence there did not seem to be any need to provide for a special régime for State property by using the term "patrimony" instead of the expression "juridical order".

34. Of course, if one juridical order did not replace the other completely at the time of the replacement of sovereignty, the régime of State property of the predecessor State would continue to be applied for some time by the successor State and there would thus be no *vacuum juris*. But it was difficult to accept that the juridical order of the predecessor State subsisted after the succession only for State property. However, the words "as it exists and with its legal status", in article 6, implied that the juridical order of a predecessor State continued only for State property.

35. To sum up, he was not at all certain that the replacement of sovereignty was automatically accompanied by replacement of one legal order by the other on the date of succession, since the successor State could decide to maintain the rules of the juridical order of the predecessor State for a certain time and then replace them by its own legal rules. If that idea was accepted by the Commission, it would be desirable to reserve the rights of international organizations and third States, and to amend the wording of article 6 to stipulate simply that, upon a State succession, the rights of the predecessor State were extinguished and its juridical order applied until the successor State had made its own juridical order applicable.

36. Mr. USHAKOV, reverting to the question of the procedure to be followed and referring to Mr. Yasseen's remarks, said it was true that the Commission was only just beginning to examine the Special Rapporteur's draft, but the general articles were not all of the same order. Article 4, which determined the sphere of application of the draft, had to be formulated at once because it defined the scope of the study, but its formulation could not be quite final. It might prove necessary to add a saving clause specifying that certain questions were outside the scope of the draft, as had been done in the corresponding provision of the draft on the most-favoured-nation clause.⁹ Article 5, which dealt with the definition and determination of public property, was absolutely necessary at the present stage, although it was of a general character.

37. With regard to article 6, he doubted whether it was advisable to retain the words "In accordance with the provisions of the present articles", because State succession was also governed by general rules of international law. It might even be necessary to supplement article 6

⁹ See 1238th meeting, para. 7.

by a saving clause. If article 6 was sent to the Drafting Committee at once for redrafting, however, it would be difficult to foresee, at the present stage, what saving clause would be required.

38. Mr. AGO urged that if the Commission was to formulate articles it must know exactly what basis it was working on. It had to decide whether it would consider that the cessation of sovereignty brought about the termination of the pre-existing legal order, even if that meant admitting that the legal order of the successor State inherited the rules of the predecessor State, or that the pre-existing legal order continued after the succession.

39. Moreover, the Commission must bear in mind the possible consequences of the provisions it was preparing and, in particular, consider, when drafting an article such as article 6, whether it constituted a rule of international law or merely a scientific statement of what often happened in reality. For if article 6 contained a rule, failure to comply with it could be a wrongful act entailing the responsibility of its author.

40. Mr. USTOR said that the question raised by Mr. Reuter and Mr. Ago was closely connected with the idea put forward by Mr. Ushakov. Clearly, when State property was affected by a succession it passed from the legal order of the predecessor State to that of the successor State. Where the successor was a newly independent State, it often took time for its new legal order to become fully developed.

41. There were, however, cases of succession other than those which Mr. Reuter appeared to have had in mind. There were many examples in history of territorial changes in which both the predecessor State and the successor State were old established countries. The legal order of the successor State would in those cases apply immediately to the territory which had changed hands. As suggested by Mr. Ushakov, all the different cases would have to be examined with an inductive approach before a general rule valid for all cases could be framed.

42. Subject to those comments, he would be prepared to see article 6 referred to the Drafting Committee on the understanding that the text that emerged would be a very provisional one.

Co-operation with other bodies

[Item 8 of the agenda]

(resumed from the 1205th meeting)

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

43. The CHAIRMAN invited Mr. Vargas Carreño, observer for the Inter-American Juridical Committee, to address the Commission.

44. Mr. VARGAS CARREÑO (Observer for the Inter-American Juridical Committee) said he first wished to congratulate the Commission on the important contribution it was making to the codification and progressive development of international law. On behalf of his Committee, he wished to emphasize the importance it attached to collaboration with the Commission, which

had hitherto found expression mainly in exchanges of visits by observers.

45. At its last session, held in January and February 1973 at its headquarters in Rio de Janeiro, the Committee had had the pleasure of receiving Mr. Kearney, who had then been Chairman of the Commission, as observer. Mr. Kearney's statements had been very helpful to the members of the Committee, as they had enabled them to learn at first hand about the work being done by the Commission. The Committee hoped that the Commission would arrange to be represented at its next session, either by the Chairman, or, if that was not possible, by another observer. Contacts of that kind could be highly beneficial to both bodies, whose purposes, though at different levels, were the same.

46. One of the Committee's tasks was the codification and progressive development of international law at the regional level. But it was impossible to formulate regional principles and rules of law without taking into account the rules and principles which were of universal application. The interdependence of States brought about by the present multiplication of international relations had facilitated the universalization of international law, which, with the Vienna Convention on the Law of Treaties, had come to regard as void or terminated, as the case might be, treaties concluded between groups of States which violated *jus cogens*, being in conflict with peremptory norms of a general character.

47. However, although there should not be any conflict on the same subject-matter between general international law and regional legal systems, the latter might nevertheless have their own legal institutions, such as the right of diplomatic asylum in Latin America and other questions which were not settled by general international law.

48. On the other hand, in its work of codifying and progressively developing international law, the Commission should take account of the practices and doctrinal formulations of the various regions and legal systems of the world, especially when those practices and formulations came from inter-State juridical bodies.

49. Following the revision of the Charter of the Organization of American States (OAS), the Committee had become one of the central organs of that organization. It was now carrying out its work mainly by means of resolutions and draft conventions, which it either prepared on its own initiative or at the request of the main organs of the OAS, namely, the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs.

50. At its 1970 session, the Committee had decided to place on its agenda the topic of the law of the sea, with a view to facilitating the adoption of common positions by the Latin American countries. After considering the topic at several sessions, the Committee had unanimously adopted a resolution which attempted to reconcile contradictory positions and bring out the points of agreement of the Latin American countries.

51. Starting from the fact that the 200-mile maritime jurisdiction was a reality accepted or endorsed by the great majority of Latin American States, the debates

had centred on the legal character to be ascribed to the zone. While some members of the Committee had argued in favour of the concept of territorial sea, or full sovereignty of the coastal State, over a distance of 200 nautical miles, others had proposed that the area should be divided into two zones, the first being territorial sea of a breadth of not more than twelve miles, and the second extending up to 200 miles.

52. The second zone might be called the "patrimonial sea" or "economic zone"; within it the coastal State would exercise its jurisdiction only in matters relating to the protection and exploitation of natural resources, and would have to respect the freedoms of navigation and overflight and freedom to lay submarine cables and pipelines.

53. The attempt to reconcile those two opposing views had resulted in a document which, in some respects, was contradictory. For example, the Committee's resolution began by stating that the sovereignty or jurisdiction of the coastal State extended beyond its territory and its internal waters over the adjacent sea for not more than 200 nautical miles, as also over its air space and the sea-bed and ocean floor. Thus, by acknowledging State sovereignty over all the area included in those 200 miles, including air space, the resolution recognized the concept of the territorial sea. Later on, however, the validity of the claim to 200 nautical miles was recognized only for those States which respected the freedom of navigation and overflight beyond the twelve-mile limit, which was obviously inconsistent with the concept of a territorial sea of 200 miles.

54. In the same document the Committee then proceeded to distinguish between two zones within the 200-mile limit, though it did not denominate or qualify them. In the first of those zones, which extended for twelve nautical miles, vessels of any State would have the right of innocent passage, while in the second zone, which extended from the outer limit of the first zone for a total distance of 188 miles, the vessels and aircraft of any State would enjoy the rights of free navigation and overflight, although that right would be subject to the regulations of the coastal State.

55. In another passage, the Committee's resolution stated that vessels and aircraft which passed through or over international straits which were customarily used for international navigation and which connected two free seas, should enjoy freedom of navigation and overflight similar to that recognized for the second zone of 188 miles. In other words, although the right of free passage was assured, the coastal State had the power, within the jurisdiction it exercised over those straits, to impose its own regulations with respect to the safety of navigation and maritime transport. However, the rule supported by the Committee did not affect the legal situation of certain straits, passage through which was regulated by specific international agreements.

56. Another aspect of the document which was worth mentioning because of its *lex ferenda* elements, was that of the various submarine areas. The Committee's resolution indicated that there were three areas of the sea-bed and ocean floor, which entailed a modification of the international law of the sea in force.

57. In the first area, up to a distance of 200 miles, the coastal State exercised sovereignty and jurisdiction over the sea-bed and subsoil of the sea. The second area, beyond the 200-mile limit and up to the edge of the continental slope, was legally termed the "continental shelf"; in it, the coastal State exercised sovereignty for purposes of exploration and exploitation of natural resources. Lastly, beyond those two areas, which were subject to State jurisdiction, the sea-bed and ocean floor and their resources constituted the "common heritage of mankind", as acknowledged by General Assembly resolution 2749 (XXV).

58. The Committee's resolution of February 1973 also contained a number of proposals relating to other questions of the law of the sea which, in the interests of brevity, he would not discuss, though he was prepared to reply to any questions from members of the Commission.

59. At its 1973 session, the Inter-American Juridical Committee had also approved a draft inter-American convention on extradition. At present, the majority of American States were bound by bilateral extradition treaties and by a multilateral convention on the subject which had been adopted by the Seventh International Conference of American States, held at Montevideo in 1933.¹⁰ The fact that a number of American States had not ratified the 1933 Montevideo Convention and, above all, the need to amend that Convention in the light of forty years' experience of its application, had led the OAS Assembly to request the Inter-American Juridical Committee to prepare a new draft convention on extradition.¹¹

60. In summarizing the main clauses of the draft approved by the Committee in February 1973, he would leave aside the procedural provisions, which made up the majority of the 28 articles. The first article specified the obligation of each contracting State to extradite to another Contracting State which made the request, any person charged, prosecuted or sentenced by the judicial authorities of the requesting State. It was necessary that the alleged offence should have been committed in the territory of the requesting State; if it had been committed elsewhere, the requesting State must have had, at the time, jurisdiction under its own laws to try a person for such an offence committed abroad.

61. For the purpose of determining what offences were extraditable, the Committee's draft provided two criteria. The first was the penalty legally applicable for the alleged offence, irrespective of the denomination of the offence and of the existence of extenuating or aggravating circumstances. Only offences punishable at the time of their commission by imprisonment for a minimum of one year, under the law of both the requesting and the requested State, would constitute extraditable offences. The second criterion consisted of lists of offences which each contracting State might attach as an annex to the future convention at the time of signature or ratification. A State could amend its list, but without retroactive effect

¹⁰ League of Nations, *Treaty Series*, vol. CLXV, p. 47.

¹¹ *International Legal Materials*, vol. XII, number 3 (May 1973), p. 537.

unless the amendment benefited the alleged offender. Where that system applied, an offence would be extraditable only if it had appeared on the lists of both the requesting State and the requested State before the commission of the alleged offence.

62. The draft went on to deal with the case in which one of the two States concerned had opted for the penalty criterion and the other for lists. For an offence to be extraditable, it would then be necessary for it to appear on the list of the State which had opted for lists and, in addition, to be punishable by at least one year's imprisonment under the laws of both States.

63. The draft provided that there would be no extradition in certain circumstances. First, where the person concerned had already served a sentence equivalent to the prescribed penalty, or had been pardoned, amnestied, acquitted, or discharged in respect of the alleged offence; secondly, where the statutory time-limit for prosecution or for the execution of the penalty under the laws of either the requesting State or the requested State had expired before extradition; thirdly, where the person concerned was due to be tried by a special or *ad hoc* court in the requesting State; and fourthly, where, under the laws of the requested State, the alleged offence was classed as a political offence or was connected with such an offence.

64. The last exception was particularly important, because it followed a well-established Latin American practice according to which the State called upon to decide whether to extradite or grant asylum was competent to rule unilaterally on whether the alleged offence was a political or an ordinary offence.

65. However, the draft did not preclude extradition for the crime of genocide or for any other offence which was extraditable under a treaty in force between the requesting and the requested State.

66. Another very important limitation embodied in the draft was that neither the death penalty nor a life sentence could be imposed on any person surrendered to a State under its provisions.

67. The final clauses specified that the future Convention should be open for signature not only by States members of the Organization of American States, but also by any other State which so requested.

68. It was possible that at its next session, the OAS General Assembly might convene a specialized conference of plenipotentiaries to examine the draft convention on extradition.

69. Finally, he wished to draw attention to the fact that the Inter-American Juridical Committee had on its agenda a number of items that were closely connected with topics under consideration by the Commission. In the near future the Committee would be considering the questions of the immunity of the State from jurisdiction and of the nationalization of foreign property from the standpoint of international law—questions clearly connected with the international responsibility of the State, which the Commission was now examining. That was an additional reason for the keen interest with which he and the other members of the Committee followed the Commission's work.

70. The CHAIRMAN, after thanking the observer for the Inter-American Juridical Committee for his lucid and detailed statement, said that the Committee, with thirty-five years' experience in the work of legal codification, was perhaps the oldest body of its kind in the world.

71. Co-operation between the Committee and the Commission, which was already long established and fruitful, mainly took the form of exchange visits of observers. The reasons for that co-operation could be easily explained: on the one hand it was not possible to establish rules of regional law without reference to universal rules, while on the other hand the Commission could benefit by learning how regional rules were applied to concrete circumstances. The rules concerning the continental shelf, for example, had had their origin on the Latin-American continent.

72. As the observer had pointed out, attempts to find common solutions at the regional level were attended by many difficulties. For example, the efforts of the Latin American countries to reach agreement on the law of the sea had called for many compromises and had not always been successful, as was shown by the resolution adopted by the Committee on 9 February 1973, at its last session in Rio de Janeiro. It was interesting to note that the observer for the Committee had made a great study of the problem of the "economic zone", or, to use the term which he himself had invented, the "patrimonial sea".

73. The Committee's draft convention on extradition contained one very novel feature, namely, provision for lists of extraditable offences to be agreed upon by the parties. With regard to that draft convention, it should, of course, be borne in mind that it was a long-standing Latin American tradition that extradition did not apply to political offences. The only possible exceptions would be the crimes of genocide or crimes which were the subject of specific treaties.

74. He hoped that the present co-operation between the Commission and the Committee would be maintained and strengthened in the future.

75. Mr. YASSEEN said that the importance of co-operation between universal and regional bodies entrusted with the codification and development of international law was beyond question. International law was always one and the same, but that was not incompatible with the existence of regional systems, for the unity of the international legal order asserted itself through certain universally accepted rules which all regions had to respect. It was that unity of the international legal order which determined the freedom enjoyed by each region to formulate rules concerning certain situations peculiar to itself. The scope of regionalism could thus be considered as being determined by the results of the co-operation between regional and universal bodies.

76. Latin America had always made most valuable contributions to the progressive development of international law and had been the source of a number of ideas which had been adopted by the International Law Commission in formulating its own rules. For example, the system of reservations to treaties formulated by the

Commission, which had found its way into the Vienna Convention, had been largely inspired by Latin American practice.

77. He thought that co-operation between the Inter-American Juridical Committee and the International Law Commission could be made even more fruitful. The Committee could give it its opinion on the work accomplished by the Commission. Any comments the Committee might make on that subject would be very useful, since they would combine the attitudes of the different countries of Latin America. He was glad to see that the Inter-American Juridical Committee was studying questions that were very close to the topics being examined by the International Law Commission, in particular, the very important topic of State responsibility. He appreciated that co-operation and hoped it would increase.

78. Lastly, he wished to say how happy he had been to work with Mr. Vargas Carreño, the present observer for the Inter-American Juridical Committee, both in the Sixth Committee of the General Assembly and in various other international bodies, and how much he appreciated his devotion to the cause of the codification and progressive development of international law.

79. Mr. KEARNEY said he was delighted to meet an old friend in the person of the observer for the Inter-American Juridical Committee, whose hospitality he had enjoyed at the Committee's last session in the charming city of Rio de Janeiro. He, too, was well aware that Mr. Vargas Carreño could be called the father of the "patrimonial sea", though he suspected that certain evil tongues might insinuate that it was an illegitimate child. He strongly supported the idea that the Chairman of the Commission should attend the next session of the Committee as an observer.

The meeting rose at 1 p.m.

1228th MEETING

Friday, 15 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Co-operation with other bodies

[Item 8 of the agenda]

(continued)

INTER-AMERICAN JURIDICAL COMMITTEE (continued)

1. The CHAIRMAN invited members who had not already done so to comment on the statement by the observer for the Inter-American Juridical Committee.

2. Mr. MARTÍNEZ MORENO said that as a Latin American member of the Commission, he was pleased to greet the distinguished Chilean jurist, Mr. Vargas Carreño, as observer for the Inter-American Juridical Committee.

3. There could be no doubt that close co-operation between the Commission, which worked at the world level of international law, and the Committee, which worked at the regional level, would be highly beneficial to both bodies. As to doctrine, the dispute about whether there was such a thing as American international law was obsolete. The great majority of writers, even Americans, were inclined to believe that there was only one universal international law; but that was no obstacle to the recognition of American institutions of international law, both practical and theoretical.

4. As examples, he could cite the development of the Latin American rules of *uti possidetis* for the demarcation of international frontiers; the principle of freedom of navigation of rivers, even before the Congress of Vienna; the principle of political asylum; and the doctrine of recognition of *de facto* governments. It should also be remembered that Latin America had come out in favour of the self-determination of peoples and the legal equality of States at a time when other continents still put their trust in political balance.

5. He was pleased to note that the observer for the Committee, while recognizing that there were certain legal practices peculiar to Latin America, had agreed that there was general agreement among the jurists of that continent that international law was unique and universal.

6. At its last session, the Committee had made an outstanding effort to reach agreement on such a highly complex matter as the regime of the territorial sea. The result had been a generous compromise in which the members, while supporting the idea of an "economic zone" extending 200 miles beyond the coastal State, had also accepted the right of free or innocent passage through international straits. Those efforts of the Committee, it was encouraging to note, offered some assurance that the next conference on the law of the sea, to be held at Santiago de Chile in 1974, would have some flexible material before it, designed to harmonize the rights and interests of the world community with the higher rights of coastal States to the conservation and use of the natural resources of the sea adjacent to their shores.

7. The Committee's draft convention on extradition also contained new elements, such as the requirement that an extraditable offence must be punishable by at least one year's imprisonment, and provision for lists of extraditable offences to be supplied by both parties. It was interesting to note that the majority of Latin American States, despite their traditional support of the right of asylum, were now agreed that the nationality of the person whose extradition was requested could not be invoked as a reason for denying extradition, unless the law of the requested State expressly provided otherwise.

8. Lastly, he congratulated the observer for the Committee on his excellent statement and expressed the hope

that co-operation between the Committee and the Commission would continue to their mutual benefit.

9. Mr. REUTER, speaking on behalf of those members who were nationals of States members of the Council of Europe, congratulated the observer for the Latin-American Juridical Committee on his enlightening statement on the present state of codification of international law in Latin America. His statement showed that regional work on the codification of international law was directed towards both concrete formulation and exploration.

10. As to the former, the different geographical, economic and political regions required particular formulations of international law. Europe had already benefited from the codification work undertaken in the New World. A particular aim of that work was to give practical expression to the general principles laid down in the United Nations Charter. In the sphere of human rights, where rules of differing applicability were needed for different regions, Europe had profited from the work done in Latin America, just as Latin America had sometimes drawn inspiration from the work of the Council of Europe. In the sphere of economic co-operation, which should certainly be established on a world-wide basis, but which had nevertheless taken different forms in different regions, the formulas developed in the New World could serve as models for the African and even the European countries.

11. With regard to exploration, which the observer had illustrated by references to the law of the sea and extradition, the tendency to work out solutions to world problems at the regional level was not a new one, and even in the matter of codification, the American countries had preceded those of Europe. A few troubled spirits might find the trend towards regional codification disturbing and wonder what would become of the world if every region set about formulating universally applicable rules of international law. But the observer for the Inter-American Committee had shown such fears to be vain. For States within the same region were in different situations and had different interests, so that the results of their regional codification work could provide a valid scheme at the world level. With regard to the law of the sea, for example, the observer had shown that the Latin American States experienced the same difficulties as the countries of other continents; for instance, their respective geographical positions in relation to the sea were not so very different from those of the European countries.

12. Mr. CALLE y CALLE said that previous speakers had already mentioned the interest with which the Commission had listened to the statement by the observer for the Inter-American Juridical Committee. Co-operation between the two bodies had hitherto mainly taken the form of exchanges of observers, but he wondered whether the Commission could not engage in even more fruitful co-operation by consulting with the Committee from time to time, as provided for in article 26, paragraph 1, of the Commission's Statute.

13. There were several Latin-American members of the Commission and he was sure they had no doubt that the Committee represented the legal conscience of Latin America. It had been asked whether there was a system

of international law peculiar to Latin America. What was certain was that Latin-American regional international law possessed certain special features, such as a greater development than elsewhere of the principle of the right of asylum.

14. Moreover, as the observer had so clearly brought out in his statement, the Latin American States had made a great contribution to the development of the law of the sea, in particular by recognizing the sovereign right of coastal States to control, protect and exploit the natural resources of their territorial sea. The observer had also described the Committee's work on the draft convention on extradition, a subject which had been on the fringe of the Commission's own work for some time and which it might well consider tackling, in the form of a draft international convention, at some time in the future.

15. Mr. SETTE CÂMARA said that the observer had given the Commission a brilliant and succinct description of the work accomplished by the Committee during the past year. The fact that Mr. Kearney, the Commission's Chairman at that time, had been present at the Committee's last session had established an interesting precedent, and he himself, as a member from the host country, Brazil, hoped that the Commission would follow that precedent and send its present Chairman to the Committee's next session as an observer.

16. The legal world today was much concerned with the law of the sea, a subject to which the Committee had devoted much time in an effort to reach a compromise solution. Different views had been expressed on the extent of the territorial sea, but he hoped that the representatives of the Latin-American legal system would be able to attend the 1974 conference on the law of the sea with a certain unity of outlook. That question was related to the right of the coastal State to protect and exploit those natural resources of the sea which were essential for the survival of its population. The Chairman had pointed out that the new concept of the "patrimonial sea" had been developed precisely for that purpose.

17. The Committee's work on the draft convention on extradition was another example of its efforts to reconcile conflicting points of view. Latin American jurists had always attached great importance to the right of asylum, but some of them were now impressed by the need to combat the frequent outbursts of terrorism which were afflicting the continent, and were therefore inclined to treat certain crimes differently from the traditional ones. The ingenious device of providing lists of extraditable offences would enable States to solve that problem on a bilateral basis within a multilateral system.

18. Mr. Martínez Moreno had raised the old question whether there was such a thing as Latin American international law. He himself believed that all the States in the Latin American legal system, while possessing their own special characteristics, were anxious to find a common place within the world system of international law.

19. The Chairman had said that the Committee, with thirty-five years' experience, was perhaps the oldest body in the world engaged in the codification of international law. He himself would say that attempts at

codification on the Latin American continent went back much further than that—as far back as the Congress of Panama of 1826, not to mention later conferences such as the Third International Conference of American States in 1906, which had, in fact, set up a special Commission of Jurists to work on the codification of international law.

20. While members of the Inter-American Juridical Committee, like members of the Commission, were elected in their private capacity as jurists, he was proud to state that his Government extended to them all the facilities, privileges and immunities granted to ambassadors. That was, he thought, an example which should be followed by host countries everywhere.

21. Mr. USTOR, speaking also on behalf of Mr. Ushakov, said he wished to extend the warmest greetings to the observer for the Inter-American Juridical Committee, as well as to express his appreciation of his very lucid account of the Committee's activities during the past year. He was pleased to note that the Commission had, in the past, relied on the work of the Committee in such fields as diplomatic relations; the Committee's work, in fact, was a real gold mine for all students of international law, as he himself could testify from his own work on the most-favoured-nation clause.

22. He had listened with interest to the observer's account of the Committee's work on the law of the sea and considered it highly important that bodies such as the Committee should tackle that problem at the regional level and thus facilitate the task of reaching general agreement at the forthcoming conference at Santiago. The Committee's work on other topics, such as the draft convention on extradition, could also serve as a pattern for broader agreement at the world level.

23. Mr. RAMANGASOAVINA said that the part of the observer's excellent statement which had dealt with the law of the sea was particularly topical in view of the conference on that subject which was to meet in Chile in 1974. It was in the nature of law to evolve, so it was not surprising that the 1958 Geneva Conventions on the Law of the Sea had to be reviewed.

24. Certain requirements made themselves felt in young countries and it was to be feared that, if the 1958 Conventions continued in force, the conservation of the biological and mineral resources which new States found essential for their development might be jeopardized. Moreover, in view of the technological progress made by the advanced countries, the conservation of those resources must not be confined to the territorial sea and the continental shelf. In its resolutions, the Inter-American Juridical Committee had stressed the need for a review of the law of the sea and had indicated the present position of the Latin American countries. The Committee had tried to find a middle course, while preserving the right of freedom of movement. As a national of an African country, he thought he was justified in saying that most African, and even the great majority of Asian countries felt the need for revision of the law of the sea.

25. With regard to extradition, the second question dealt with by the observer for the Inter-American Juridical Committee, he merely wished to stress that the adoption

of a common, or at least a harmonized set of rules, would be very useful. Several countries had already concluded bilateral or multilateral conventions on the subject, but the Committee was pursuing more general aims.

26. Mr. BEDJAOUÏ said he wished to thank Mr. Vargas Carreño for his authoritative remarks on the state of the codification work of the Inter-American Juridical Committee relating to extradition and the law of the sea. African states followed the work of Latin American jurists with great interest. The Committee's activities were a rich and valuable source of inspiration to countries in other continents and the path it had traced might be followed by the African countries, which were making their first attempts to develop an African regional international law.

27. Mr. VARGAS CARREÑO (Observer for the Inter-American Juridical Committee) said he wished to thank all the members of the Commission who had expressed their appreciation of the Committee's work. On behalf of the Committee, he invited the Chairman of the International Law Commission to attend the next session of the Committee as an observer.

28. Commenting briefly on the observations made by various members of the Commission, he said that Mr. Martínez Moreno had made the important point that article 8 of the inter-American draft convention on extradition provided that the nationality of the person whose extradition was requested could not be invoked for the purpose of denying extradition, unless the law of the requested State established the contrary.

29. He agreed with Mr. Reuter that the role of regional international law was to give positive form to and explore the possibilities of international law. A good example was the work done by the Council of Europe on the immunity of a foreign State from jurisdiction, and the work soon to be done on that subject by the Inter-American Juridical Committee. That work might be useful to the Commission if it decided to deal with the topic of the immunity of the State from jurisdiction.

30. In connexion with Mr. Sette Câmara's remarks, it was interesting to note that the Havana Conference of 1928 had been a success, whereas the Hague Conference, held shortly afterwards, had failed on subjects which had been successfully regulated at Havana.¹ Latin American law owed its existence partly to the fact that no other international law had existed at the time of its inception. In the interdependent world of today, however, common norms were needed, the formulation of which could be helped by the positions adopted by regional international law.

31. With regard to the law of the sea, the States of Latin America had developed certain legal concepts, intended mainly to safeguard the rights and interests of developing countries, which might come to have a universal influence.

32. The CHAIRMAN said he wished to thank the observer for the Inter-American Juridical Committee

¹ See Convention regarding the Status of Aliens, League of Nations, *Treaty Series*, vol. CXXXII, p. 303.

for his statement and to express once more the hope that the present fruitful co-operation between the Committee and the International Law Commission would be maintained and strengthened in the future. He would be very pleased to attend the Committee's next session as an observer, if it was possible for him to do so.

Organization of work

(*resumed from 1201st meeting*)

RECOMMENDATION OF THE COMMISSION ON HUMAN RIGHTS

33. The CHAIRMAN said he understood that the Secretary to the Commission wished to inform members of the contents of a memorandum from the Director of the Division of Human Rights.

34. Mr. RYBAKOV (Secretary to the Commission) said he wished to refer to a matter which had been mentioned at the beginning of the session,² namely, the decision of the Economic and Social Council at its 1818th meeting, on 2 June 1972, to transmit to the International Law Commission for its comments, at the request of the Commission on Human Rights, the report of the *Ad Hoc* Working Group of Experts concerning the question of *apartheid* from the point of view of international penal law.³ In a note circulated at the beginning of the session (A/CN.4/L.193), the Secretariat referred to a resolution by which the Commission on Human Rights, at its twenty-ninth session, had recommended, among other things, that the International Law Commission should expedite its comments on the report. By a memorandum dated 31 May 1973, the Director of the Division of Human Rights had now informed the Legal Counsel that the Economic and Social Council had approved that recommendation.

35. The memorandum of the Director of the Division of Human Rights read:

"I should like to draw your attention to the decision of the Economic and Social Council, adopted at its 1858th meeting on 18 May 1973 on recommendation of the Commission on Human Rights, reminding the International Law Commission to expedite its comments and suggestions on the study of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* from the point of view of international penal law (A/CN.4/1075 and Corr.1).

"You will recall that the Commission on Human Rights had issued a similar reminder in paragraph 12 of its resolution 19 (XXIX), adopted at its 1237th meeting on 3 April 1973. I understand that the Commission's reminder was to have been drawn to the attention of the International Law Commission at the beginning of its current session.

"I would be most grateful to be kept informed of any action taken in implementation of the above-

mentioned decision of the Economic and Social Council."

36. Members would be aware that the matter was in hand.

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(*resumed from the previous meeting*)

ARTICLE 6 (Transfer of public property as it exists)
(*continued*)

37. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment briefly on the remarks made by Mr. Reuter, who had expressed concern that the text of article 6 did not take into account the need to safeguard the acquired rights of third parties, which could be States, international organizations or private persons.⁴

38. Actually, the very terms of article 6 made it, in a sense, a safeguarding clause for such acquired rights. That, he believed, was the real meaning of the concluding words of the article, "as it exists and with its legal status". Those words could only mean that the public property in question was transferred to the successor State with such limitations as attached to it.

39. In discussing article 6, it should be remembered that its provisions could only be construed in conjunction with those of article 8, with which they were closely connected.

40. He wished to draw attention to a number of examples given by the Special Rapporteur in the commentary to article 2 in his fourth report. (Paragraph 3 of that article corresponded to the provision now under discussion.) In the commentary, the Special Rapporteur had mentioned the case of the transfer of Alsace-Lorraine from France to the German Empire in 1871.⁵ The latter, as the successor State, had been obliged to respect the obligations undertaken by France, the predecessor State, under the Treaty of Paris of 1815, prohibiting the construction of fortifications within an area of three leagues around Basel. That solution was in accordance with the rule stated in article 6.

41. There were, however, some further aspects of the problem of acquired rights which were connected more with article 8 than with article 6. Article 6 provided that, upon a succession, public property passed from the predecessor State to the successor State subject to existing limitations. Article 8 then went on to lay down, in separate sub-paragraphs, rules for three kinds of property: public or private property of the predecessor State; public property of authorities or bodies other than States; and property of the territory. A separate rule was given in article 9 for property necessary for the exercise of sovereignty over the territory affected by the succession.

² See 1201st meeting, paras. 1 and 4-6.

³ See *Official Records of the Economic and Social Council, Fifty-second Session, Supplement No. 1* (E/5183), p. 23.

⁴ See 1226th meeting, para. 74, and 1227th meeting, para. 30.

⁵ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 168, document A/CN.4/247 and Add.1 (part two), article 2, para. 5 of the commentary.

42. In order fully to safeguard acquired rights, it would be appropriate to introduce an additional sub-paragraph into article 8, which would specify that property of private persons situated in the territory passed within the juridical order of the successor State.

43. That being so, article 6 could be referred to the Drafting Committee with the same broad instructions as for article 5.

44. He would suggest to the Special Rapporteur that he should consider rearranging articles 6 to 9 so that the basic rules contained in article 8, with the additional paragraph he had suggested, and article 9 would be placed first; the provisions on the date of transfer, in article 7, and the conditions of transfer, in article 6, which logically followed, would come next, in that order.

45. Mr. BEDJAOUI (Special Rapporteur) summing up the further discussion which had taken place on article 6, said that the general feeling had been very well expressed by the Chairman.

46. As to the advisability of considering article 6 at the present stage, he was grateful to Mr. Ushakov for agreeing to its consideration even though he regarded it as premature. It should be noted that, as pointed out by Mr. Yasseen, the Commission had not yet even begun consideration of the draft articles on first reading. Besides, as Mr. Ushakov had very aptly observed, a general rule of the kind contained in article 6 might well prove to be applicable not only to succession to public property, but to other aspects of State succession, such as succession to public debts, and it would be unreasonable to defer its formulation until not only the subject of public property, but also that of public debts had been fully examined.

47. A question of theory had been raised by Mr. Ago and Mr. Reuter: upon the replacement of one State by another, was there an interruption or continuity of the juridical order? That was one of the most delicate questions in legal science. He had not expressed his own views on that question in article 6 any more than he had in article 10, as members would see. It was, of course, true that there was no instantaneous replacement of the old juridical order by a new juridical order; it generally took some time. Mr. Reuter believed that the successor State recognized the juridical order of the predecessor State and that that order could therefore be considered applicable.⁶ He thus acknowledged that there was an expression of the will of the successor State. For example, after it became independent, Algeria had enacted a law providing for the provisional continuance, within limits compatible with its sovereignty, of the former laws to which it had been subject. The successor State could be regarded as tacitly and provisionally accepting the juridical order of the predecessor State.

48. When studying the topic of succession of States in respect of treaties, the Commission had, in certain cases been obliged to accept a presumption of continuance of treaties. Generally speaking it could be said, by way of simplification, that sovereignty was expressed essentially through treaties and legislation.

49. In the event of tacit continuance, and even more so in the case of express continuance of the juridical order of the predecessor State, that order did not survive as such. It was no longer the same. It was another juridical order than that of the predecessor State. It was received by the successor State as a result of an act expressing the will of that State. Thus from the outset the manifestation of will, tacit or express, changed the juridical order qualitatively. The continuity between the two juridical orders was thus only apparent. The juridical order of the predecessor State was not extended and it was a new juridical order that the successor State endorsed.

50. Another question which had been raised was whether, parallel to the extinction of the rights of the predecessor State, rights proper to the successor State came into existence. He had not allowed his own views to prevail in article 6 any more than in article 10, where it was said, in paragraph 2, that the successor State replaced the predecessor State in its rights to grant concessions. In his view, it was not the rights of the predecessor State which were exercised by the successor State, but the successor State's own rights.

51. The idea of an interruption in the right of ownership was not acceptable to Mr. Ago.⁷ But in the last resort, what was the right of ownership of the State and, more particularly, the right of ownership of the successor State? Could it be assimilated to the right of private ownership? He himself did not think so. If it was a stereotyped right, having the same content for the successor State as for the predecessor State, there would be no problem. If, on the contrary, the change of owner showed that the right of ownership was different, it would be necessary to enquire into its character. The right of ownership of the State over a property had a content which was not the same for all States, but was determined by the juridical order, which reflected the political philosophy inspiring the activities of the State concerned. Above all, the right of the predecessor State was limited by the acquired rights of third parties, and it was against that limitation that the successor State, by exercising its own rights, set a new and different right.

52. That theory was confirmed by the new practice, but also by the old, in particular as it appeared from the formation of all the colonial empires without exception; those empires had applied the most absolute *tabula rasa* principle, on the assumption that they were exercising, not the rights of their predecessors, but their own. No one would now think of claiming that the colonial States had been unable to refer to a right of the predecessor State because they had found only savage tribes in the territory; the work of eminent scholars—in particular, that of the research team led by Professor Charles Alexandrovicz—had amply demonstrated that there had been States before colonization. But apart from colonization, certain cases of restoration of States, such as that of Poland after 1918, showed that the successor had considered that its rights derived only from its own sovereignty and that it was not taking over the rights of the predecessor State. He did not claim to have exhausted

⁶ See previous meeting, para. 32.

⁷ *Ibid.*, para. 17.

the subject with those few comments; he had only expressed his deep conviction on the problem of broken continuity, which was at the very root of legal science and could not be easily solved.

53. In reply to Mr. Reuter's objections to article 8,⁸ he wished to repeat that it was not a substantive article, but a declaratory article which took note of a certain situation. The terminology was no doubt defective, but the idea was clear. The purpose was to draw a distinction between State property properly so called and the property of authorities or of the territory. It was quite clear, as Mr. Reuter had pointed out, that everything situated within the limits of the territory, and not only public property, came under the exclusive jurisdiction of the successor State. But what he himself had meant to convey in article 8 was that the public and private property of the State not only passed within the new juridical order of the successor State, but passed into its "patrimony", whereas the property of authorities or public bodies and the property of the territory remained the property of those authorities or bodies, or the property of the territory, but were henceforth governed by a different juridical order, namely, that of the successor State. Thus, when France had recovered its sovereignty over Alsace-Lorraine in 1918, the State property of the former German Empire had passed both within the juridical order and into the patrimony of the French State, whereas the property of the port of Strasbourg, for example, had remained the property of that port, but passed within the French juridical order. He had wished to make that clear in an article in order to distinguish, among public property, between what was State property and what was not.

54. With reference to the remarks made by Mr. Castañeda, he recognized that the general arrangement of the draft articles could be more rational, and he would try to recast it at a later stage. On the other hand, he feared that if an additional sub-paragraph (d), on private property, were introduced into article 8, it would also be necessary to add a sub-paragraph (e) on the fate of the inhabitants and so on. In order to avoid complications, he therefore thought it better not to go beyond the present three sub-paragraphs, though if the Commission wished it he would draft a fourth.

55. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 6 to the Drafting Committee, requesting it to examine all the questions raised during the discussion and to try to frame a generally acceptable text.

*It was so agreed.*⁹

ARTICLE 7

56.

Article 7

Date of transfer of public property

Save where sovereignty has been restored and is deemed to be retroactive to the date of its termination or where the date of

transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty

- (a) occurs *de jure* through the ratification of devolution agreements, or
- (b) is effectively carried out in cases where no agreement exists or reference is made in an agreement to the said effective date.

57. The CHAIRMAN invited the Special Rapporteur to introduce draft article 7 in his sixth report (A/CN.4/267).

58. Mr. BEDJAoui (Special Rapporteur) said that article 7 dealt with the date of transfer of public property. The commentary to it would be found in his fourth report below the former article 3¹⁰ which, with a few drafting amendments, had become the present article 7.

59. The date of transfer of public property did not always coincide with that of the transfer of the territory. It was sometimes later. Very often it was fixed by treaty between the parties, as he had tried to show in article 7. The transfer could take place upon the entry into force of a treaty or on the expiry of a fixed period. It could also be effected in stages or be made subject to a suspensive condition, even in the absence of a treaty; for example, the former metropolitan Powers had sometimes decided to make the date of independence subject to consultation of the people by referendum. Lastly, the parties could stipulate in a treaty that the date of transfer would be fixed by agreement. It had often happened that the parties had been obliged to refer to the date of the effective transfer, which had raised rather complicated problems examined in international jurisprudence.

60. He had thought it advisable to take the case of restoration of sovereignty into account, since there had been in practice, in particular after the first and second World Wars, examples of restored sovereignty operating retroactively to the date of its termination. That had been the case of Poland in 1918, and Ethiopia and Albania in 1947. He was not sure that sovereignty could be restored retroactively in all its practical effects after one or more decades, but the case had arisen.

61. He had also referred to the problem of "critical dates" and the "suspect period" immediately preceding the transfer of property, during which the predecessor State might be tempted to reduce the value or change the composition of the property to be ceded. That had raised very complicated problems in the past, which had come before the Permanent Court of International Justice and which the Commission might examine.

The meeting rose at 1 p.m.

⁸ *Ibid.*, para. 33.

⁹ For resumption of the discussion see 1239th meeting, para. 3.

¹⁰ See *Yearbook of the International Law Commission*, 1971, vol. II (Part One), p. 170, document A/CN.4/247 and Add.1, part two.

1229th MEETING

Monday, 18 June 1973, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

**Succession of States in respect of matters
other than treaties**

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 7 (Date of transfer of public property)
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 7 in the Special Rapporteur's sixth report (A/CN.4/267).

2. Mr. TAMMES said that if the main purpose of rules on succession to public property was to contribute to the certainty of international law and provide a basis for making a choice in the interests of a predecessor State, a successor State, or some other entity, in order to prevent disputes, article 7 in its present form would serve that purpose well. It provided a residuary rule for application in the absence of devolution agreements. Where no date had been stipulated, it would be natural to assume that the date of the change of sovereignty would be the date of entry into force of the relevant agreement, rather than the date of its ratification as specified in the present draft. He preferred the principle stated in the Special Rapporteur's fourth report, that "Where no time is expressly laid down in an agreement, the transfer is legally effected as soon as the agreement enters into force by virtue of the law of treaties, i.e. generally from the date on which the instrument is ratified".¹

3. He agreed with the underlying idea of sub-paragraph (ii). If there was no agreement on the effective date, the only device available to international law was that of effectiveness—in the present case, the effective replacement of one sovereignty by another. There was a generally recognized exception to the principle of effectiveness: the effective situation must not be contrary to modern international law. However, retroactivity of sovereignty could only apply to future cases, which would be illegal under the United Nations Charter and to which, consequently, the draft articles would not apply, as provided in article 2. The phrase "and is deemed to be

retroactive to the date of its termination", apart from lacking precision, had no place in the present articles.

4. Mr. KEARNEY said he agreed that the reference to retroactivity of sovereignty raised problems, though they were more practical than legal. It would be difficult to determine on what basis sovereignty deemed to be retroactive would have been restored. He assumed that the restoration would relate to a situation in which a pre-existing State had been over-run and placed under the sovereignty of another State, but there could also be an amicable union of States which subsequently agreed to separate. It was also unclear whether the return of public property was to be retroactive to the time of the loss of the original sovereignty. If so, what were the consequences of such retroactivity? He assumed that the return of public property which had not been in existence at the time of the loss of the original sovereignty would be retroactive, not to the date of the loss of sovereignty, but to the date when the property had been acquired by the intervening sovereignty. Or perhaps there would not be any retroactivity in such a case. It might be desirable not to deal with the matter in article 7. During its discussion of the draft articles on succession of States in respect of treaties, the Commission had decided not to include a reference to the problem of States which were regaining rather than acquiring independence, despite certain decisions of the International Court of Justice, for example, in the *Case concerning rights of nationals of the United States of America in Morocco*,² which would have warranted the inclusion of such a reference. The largely practical considerations which had prompted the exclusion of the reference were perhaps equally relevant in the present case.

5. If the word "otherwise" in the phrase "by treaty or otherwise" was intended to include any possible act, statement or other manifestation of intent, that should be made clear. If it was not so intended, the phrase was redundant and should be deleted, as it might add to the problems of interpretation. He also had doubts about the relationship between the whole phrase "where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time" and the phrase in sub-paragraph (b) "reference is made in an agreement to the said effective date". There seemed to be no real difference between a clause referring to a particular effective date and one which provided for the transfer of property upon the lapse of a fixed period of time. The use of change of sovereignty as a touchstone, implicit in the introductory clause, would depend on the definition given to succession. It might therefore be necessary to postpone judgement on that point until agreement had been reached on the meaning of succession.

6. The term "*de jure*" in sub-paragraph (a) appeared to be used as a limitation. Was it only through the ratification—or entry into force, which Mr. Tammes quite rightly preferred—of devolution agreements that change of sovereignty occurred *de jure*, or was it the transfer of property which occurred *de jure* on the basis of the entry

¹ See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 171, document A/CN.4/247 and Add.1, part two, para. (8) of the commentary to article 2.

² *I.C.J. Reports 1952*, p. 176.

into force of such agreements? Was *de jure* validity limited to the case of the entry into force of devolution agreements? If that was what was meant, it was too limited a concept. There could be *de jure* succession in other ways than through devolution agreements. It was therefore unnecessary to refer specifically to devolution agreements, unless the term was given a very broad definition. The meaning of the word "effectively" in subparagraph (b) was also unclear. Mr. Tammes had interpreted it as meaning the effective replacement of one sovereignty by another, but the term was susceptible of different interpretations. For example, it could be interpreted as meaning that what was required was some effective act of transfer of particular items of property between the predecessor State and the successor State. That point should be clarified.

7. Mr. SETTE CÂMARA said that article 7 was particularly important because, as pointed out by the Special Rapporteur, in the last paragraph of his commentary, "the obligations imposed on the predecessor State by international law and codified in the present articles are independent of the existence or validity of treaties." In that context, residuary rules on the date of succession to public property were most necessary.

8. Article 7 was closely related to the problem of the definition of succession. If the definition given in article 2, paragraph 1 (b), of the draft articles on succession of States in respect of treaties was chosen for the present draft, it would be logical also to adopt the definition of the date of succession given in article 2, paragraph 1 (e).³ That would avoid many problems.

9. He agreed, in general, with the comments made by Mr. Tammes and Mr. Kearney about the saving clause, which had clearly been drafted with cases of annexation and occupation by force in mind. In cases such as those of Ethiopia, Albania, and Poland, no one would dispute the principle of retroactivity of sovereignty when it was restored; the property was considered never to have ceased to be subject to the exercise of the restored sovereignty, though serious practical problems had arisen from that solution and had been treated differently by different tribunals. A recent example was the re-establishment of relations between the Federal Republic of Germany and Czechoslovakia, one of the conditions for which had been that the Munich Agreement be treated as non-existent. The situation was quite different where the restoration of sovereignty was the result of the dissolution of a union which States had entered into by mutual consent. The principle of retroactivity itself was legitimate, but had no place in the present draft. Article 7 should be so drafted as to dispel any doubts that might arise on that point.

10. He agreed with Mr. Kearney that change of sovereignty might occur *de jure* in other ways than by the ratification of devolution agreements, in cases of succession not resulting from decolonization. He also agreed with Mr. Tammes that it would be better to refer to the entry into force of such agreements, rather than to their ratification. For all those reasons, a general

formula similar to the one adopted in the draft articles on succession of States in respect of treaties would be more appropriate than the text now proposed by the Special Rapporteur.

11. Mr. YASSEEN said that the principle of the retroactivity of restored sovereignty was indisputable. Sovereignty was sometimes temporarily eclipsed for reasons which were incompatible with the international legal order. That was the case when a State was attacked in violation of the existing rules against the use of force. To recognize a situation resulting from such an attack would amount to denying the fundamental principles of the international legal order. The unduly rigid effects of the rule of retroactivity of sovereignty on the transfer of public property could nevertheless be mitigated by an agreement or by any other means.

12. The date of transfer of public property could only be that of the *de jure* or effective change of sovereignty. When the change of sovereignty occurred *de jure*, the date was that of the entry into force, not of the ratification, of the devolution agreement, as Mr. Tammes had pointed out. The expression "change of sovereignty" was correct, but its precise meaning would depend on how the Commission finally defined the expression "date of the succession of States".

13. In conclusion, he hoped that the word "simply" would be deleted from article 7.

14. Mr. HAMBRO said that a provision along the lines of article 7 was clearly necessary, but he had serious doubts about the reference to the retroactivity of sovereignty.

15. It was difficult to incorporate such a principle satisfactorily in a draft article. The historical importance of the principle was obvious, but it was of such a special and extraordinary character that it should not be necessary to include it in a draft convention, especially at the beginning of the article under consideration.

16. It was always difficult and dangerous to accept such a principle. Serious difficulties could arise if attempts were made to recreate, with retroactive effect, a sovereignty lost long ago, especially when the change of sovereignty had been recognized by third States. He was aware of the political importance and justice of the principle, but the principle of the effectiveness of international law must also be borne in mind. The re-opening of an issue of sovereignty might violate that principle of effectiveness. The disappearance of sovereignty could be legal, for example in the case of the voluntary fusion of States. If those States subsequently decided to dissolve their union, that was perfectly admissible, but it would be wrong to make such a dissolution retroactive. The disappearance of sovereignty resulting from an illegal act, however, should not be recognized, and it would be right to recognize the rebirth of such sovereignty retroactively.

17. The draft was based on the assumption that changes in sovereignty were effected legally and not in violation of the United Nations Charter or of fundamental principles of international law. The articles would be more readily acceptable if the principle of the retroactivity of restored sovereignty were not incorporated

³ See *Yearbook of the International Law Commission*, 1972, vol. II, document A/8710/Rev.1, chapter II, section C.

in them. It would be better for the Commission to state in its report that it had discussed the possibility of incorporating that principle and had reached certain conclusions.

18. Mr. AGO said that article 7 should not concern change of sovereignty, but only the transfer of public property in cases of change of sovereignty. The Special Rapporteur seemed to have allowed himself to be drawn into dealing also with change of sovereignty and the conditions under which it took place.

19. With regard to the saving clause relating to the restoration of sovereignty, he acknowledged that it was sometimes necessary in specific cases, for reasons of "international morality", to accept the fiction of a restoration of sovereignty. But if the situation were as simple as it appeared from the proposed article, the saving clause would be unnecessary. For if public property which had passed temporarily under the control of another sovereignty subsequently reverted unchanged to the original sovereignty, as if it had never changed hands, there was no transfer of public property, just as there was no change of sovereignty.

20. In practice, however, *de facto* sovereignty might be exercised for a long time, during which the *de facto* sovereign inevitably created new public property, for example, by building. In such a case it could not be considered that there was no transfer of public property, even though it was assumed that there had been only a *de facto* transfer of sovereignty. The fate of the property created by the *de facto* sovereign should be the same as that prescribed for public property in the event of a transfer of sovereignty, otherwise it would remain in the hands of the State which had wrongfully exercised sovereignty.

21. The two sub-paragraphs of article 7 dealt with the manner in which the change of sovereignty took place. There, he thought the Special Rapporteur had unnecessarily given too much prominence to the conditions under which the change occurred. There was no need to go into that aspect of the problem; but if it did so, the article should bring out the difference between the transfer of property in internal law and the transfer of sovereignty in international law. In internal civil law a contract gave title and transfers of property were based on contract; in international law a treaty only created the obligation to transfer, and the change of sovereignty took place only at the moment of effective transfer.

22. He therefore suggested that the principle should be stated more concisely, and be to the effect that unless provided for by treaty, the transfer of public property occurred at the time of the change of sovereignty, irrespective of the manner in which the change of sovereignty occurred. It was necessary to reserve the case in which the States concerned agreed on a date for the change of sovereignty and, possibly, the transfer of public property, in a special agreement. Moreover, different dates might be fixed for different kinds of property.

23. Mr. RAMANGASOAVINA said he supported the principle that when sovereignty was restored the transfer of public property was retroactive; that principle certainly reflected an idea of justice. However, the period during

which sovereignty disappeared or was suspended might be very long, as was shown by the examples given by the Special Rapporteur. Furthermore, after a State had seized a territory by force, it might try to obliterate all trace of the former sovereignty by destroying its property.

24. To take the case of his own country, in 1895, after an armed conflict, the Kingdom of Madagascar had fallen into the hands of the French. Previously, the Kingdom of Madagascar had concluded international treaties with other States and had maintained diplomatic missions abroad. After being a protectorate for a year, Madagascar had become a colonial territory. It was difficult to consider that when it had attained independence 65 years later its sovereignty had been restored. Even if the principle of restoration were accepted in such cases, it would obviously be very difficult to reconstitute the property which had existed at the time of the original sovereignty.

25. It was, perhaps, unnecessary to state expressly the principle that the transfer of public property was retroactive when sovereignty was restored, since that principle reflected an idea of justice. In stating it at the beginning of article 7 the Special Rapporteur seemed, indeed, to have regarded it as an accepted principle of which only a reminder was needed.

26. As to the change of sovereignty and the date of transfer of public property, he agreed that, where there was a devolution agreement, the change of sovereignty occurred *de jure* in accordance with the devolution agreement. In the absence of an agreement, the effective date should apply, as Mr. Tammes had pointed out. Nevertheless, that date was sometimes difficult to determine, for instance, when a State was born as the result of a proclamation by a government in exile or by a government which had appropriated a piece of territory. In the absence of an agreement, public property should be considered to be transferred on the date when the provisional government effectively established its authority or took over part of the territory. The Special Rapporteur had ignored such cases, because he thought it unnecessary to consider them.

27. In the second part of article 7, the Special Rapporteur had deliberately avoided contrasting the terms "*de jure*" and "*de facto*". In fact, the latter term covered the idea of effectiveness, which deserved to be given more prominence, since it should apply both when there was no special agreement between the parties and when the parties could not agree on a date for the transfer of public property.

28. To sum up, he approved of the principles stated in article 7, but would like to see them better formulated and, if possible, expressed in simpler terms. The rule was that the transfer of public property coincided with the change of sovereignty. It was important, however, not to ignore certain special cases.

29. Mr. USHAKOV said he agreed with Mr. Ago that the proposed article 7 dealt with change of sovereignty rather than with the transfer of public property.

30. When it had examined the draft articles on succession of States in respect of treaties, and especially the definition of the term "date of the succession of States",

the Commission had not specified the conditions under which one State replaced another, or the date of that replacement, because those matters were foreign to the subject of succession of States. In article 7, however, the Special Rapporteur had tried to define the concept of change of sovereignty, although it belonged to another branch of international law.

31. With regard to the restoration of sovereignty, he referred to the Special Rapporteur's article 2, entitled "Cases of succession of States covered by the present articles". The draft certainly applied only to contemporary situations, which had arisen since the entry into force of the United Nations Charter; situations which were wrongful and contrary to international law were not covered. He wondered whether sovereignty could be restored after it had terminated quite lawfully. However, such a situation, if it arose, would not come under succession of States. Restoration of the sovereignty of Arab States over those parts of their territory which were now occupied would not constitute a case of succession of States.

32. The Drafting Committee should consider all the hypothetical situations covered by article 7 and redraft it in simpler terms, perhaps on the basis of the definition which the Commission had adopted in 1972 for the expression "date of the succession of States".

33. He even doubted whether it was really opportune to draft a general article on the date of transfer of public property. In the case of fusion of two States the question did not arise, either for the merging States or for third States. It might be better to wait until the whole draft had been considered, to see whether a general article should be drafted on whether each case of succession of States, especially of newly independent States, required different provisions.

Mr. Castañeda took the Chair.

34. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 7 and reply to the comments of members.

35. Mr. BEDJAOUI (Special Rapporteur) said he must first explain that the passage from his report quoted by Mr. Sette Câmara had not been intended as part of the commentary to article 7. Owing to an error, the asterisks in his manuscript which had clearly divided off the last three paragraphs from the rest of the text had not been reproduced. Those three paragraphs merely mentioned some hypotheses which he had considered, but had not put forward in draft articles.

36. Mr. Ushakov doubted whether it was useful to discuss article 7 at present, because examination of the various cases of State succession might subsequently show that the date of transfer of certain public property did not bear out the rule—too general in his opinion—laid down in that article. He himself believed that a general provision was justified nevertheless. Mr. Ushakov had cited the case of fusion of States, in which, he held, there would be no transfer of public property. That was not his own view. A State formed as a result of the fusion or union of two or more other States was legally a separate State from those which composed it. As such, it possessed public property and could decide that some

or all of that property was the property which had previously belonged to the States which had united to form it. However, Mr. Ushakov had raised a question of principle which could not be settled immediately. Perhaps the Commission could refer article 7 to the Drafting Committee provisionally, on the understanding that it would work out a less general provision later if necessary.

37. With regard to the date of transfer itself, some members, including Mr. Ago, thought that it should simply be defined as the date of the change of sovereignty. He had feared that such a definition might be criticized as merely defining one thing in terms of another, so he had tried to define the date of change of sovereignty as well, and had accordingly drawn the distinctions contained in article 7. However, he would fall in with the Commission's view if it preferred the simpler formula of defining the date of transfer of public property by the date of the change of sovereignty.

38. As to the question of the restoration of sovereignty—an exceptional occurrence, it was true, but not unknown to history—he had wished to deal with it because, although the problem of retroactivity which it raised was so extremely complex, in both international and internal law, that it constituted an exception in most national legal systems, there had been occasions when the principle of retroactivity had been applied in international relations, mainly on grounds of international morality. He had considered only the case of wrongful termination of sovereignty, not the case of its lawful termination, for instance by a fusion of States; that was to avoid giving the impression that international law could implicitly recognize the effects of a situation whose wrongfulness, in his opinion, could not be obliterated by the passage of time. He had confined himself to an existing situation by using the words "deemed to be retroactive to the date of its termination".

39. Mr. Kearney had asked on what basis restored sovereignty would be considered retroactive. The basis might be a treaty; for example, the Treaty of Peace with Italy, of 10 February 1947,⁴ or an express manifestation of the will of the successor State, as in the case of Poland in 1918.

40. It was for the Commission to decide whether to disregard facts of that kind, or to seek a more flexible formula which took account of the passage of time, since sovereignty might not be restored until many years had elapsed and it was certainly difficult to return property in its original condition.

41. Several members had expressed the view that there was no need to reserve the case of restoration of sovereignty, because article 2 specified that the draft articles applied only to the effects of a succession occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations, and that it would therefore be sufficient to mention the case of wrongfully terminated sovereignty in the commentary. If that view was endorsed by the Commission and the Drafting Committee he would accept it.

⁴ United Nations, *Treaty Series*, vol. 49, p. 126.

42. In reply to Mr. Ushakov's question whether sovereignty could be restored if it had terminated lawfully, he cited the case of Poland, which, while taking the view in 1918 that there had been a succession of States, had applied the *tabula rasa* principle and held that it did not derive its rights from the predecessor State.

43. Mr. Kearney had suggested that it might be useful to include in article 7 the notion of a manifestation of intent or act of the predecessor State, to show that a change of sovereignty could be effected by other means than a devolution agreement. He agreed and would ask the Drafting Committee to take that point into account. In certain cases of decolonization, for instance, there might be some kind of charter granted by the former metropolitan Power.

44. He saw no objection to deleting the word "simply" and replacing the word "ratification" by the words "entry into force".

45. He suggested that article 7 might now be referred to the Drafting Committee.

46. Mr. RYBAKOV (Secretary to the Commission) said the Secretariat regretted the omission of the asterisks from the Special Rapporteur's report, which had been unintentional and without the approval of the Codification Division.

47. The CHAIRMAN said that, if there were no objections, article 7 would be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 8

48. *Article 8*

General treatment of public property according to ownership

All other conditions established by the present articles being fulfilled,

- (a) Public or private property of the predecessor State shall pass within the patrimony of the successor State;
- (b) Public property of authorities or bodies other than States shall pass within the juridical order of the successor State;
- (c) Property of the territory affected by the change of sovereignty shall pass within the juridical order of the successor State.

49. The CHAIRMAN invited the Special Rapporteur to introduce article 8.

50. Mr. BEDJAOUI (Special Rapporteur) said that the sole purpose of article 8 was to distinguish, in regard to their treatment, between State property and property which, although public, did not belong to the State.

51. In the case of State property, the situation was simple: it passed within the patrimony of the successor State. He acknowledged that the terminology would have to be changed, because not all legal systems regarded the State as owning a patrimony and in all probability the notion of patrimony was not recognized by international law. With regard to public property of authorities or bodies other than States and property of the territory, it remained the property of those entities, but passed

from the juridical order of the predecessor State into that of the successor State, for purposes of international protection, for example.

52. Article 8, which did not indicate the conditions of transfer, was not a substantive article. It was merely intended to show the difference between the right of ownership and the juridical order. If the Commission thought the article might raise more problems than it solved, he would not press for its retention.

53. In addition, in the light of the discussions held so far, he intended to suggest to the Drafting Committee that the definition of public property, in article 5, be confined to State property, and that public property belonging to authorities, public establishments and so forth should be provisionally left aside. If such a definition were adopted, it would be bound to affect article 8. In the interests of consistency, the Commission should likewise define public debts as being exclusively debts of the State; that would relieve it of the need to consider a whole range of problems to which the international community devoted much attention. In point of fact, public debts were mainly the debts of public establishments, public bodies, public corporations and so on, and rarely debts of the State as such. But perhaps the Commission could later extend its study to public property and public debts other than State property and debts.

54. The CHAIRMAN asked the Special Rapporteur to explain why he now proposed that the notion of "public property" should be replaced by that of "property of the State".

55. Mr. BEDJAOUI (Special Rapporteur) said that the discussions had shown him that it would be very difficult to deal with all public property at the same time and that it might be more useful and more reasonable to proceed by categories, beginning with State property. If the Commission succeeded in working out a certain number of rules of international law concerning such property, it would probably then be able to proceed to consider other public property. The same applied to public debts. For his part, he was prepared either to confine himself for the time being to a single category of public property—State property—or to proceed with the study of all public property as he had originally intended. He would do whatever the Commission wished.⁶

The meeting rose at 5.50 p.m.

⁶ For resumption of the discussion see 1231st meeting, para. 66.

1230th MEETING

Wednesday, 20 June 1973, at 11.50 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

⁵ For resumption of the discussion see 1239th meeting, para. 18.

Organization of future work

[Item 7 of the agenda]

1. The CHAIRMAN said that a number of decisions had been taken by the officers of the Commission and former chairmen at a meeting that morning. First, the small group which had been appointed to deal with the question of *apartheid* from the point of view of international penal law¹ had already met and would meet again in an attempt to produce a document representing a consensus on that question.

2. Secondly, with regard to the Gilberto Amado memorial lecture, since it had proved impossible, owing to pressure of work at the International Court of Justice, to secure a lecturer from among the member Judges, it had been decided to invite one of the Commission's former members, Mr. Eustathiades, to deliver the lecture. If Mr. Eustathiades were unable to accept that invitation, the memorial lecture would be postponed until the following session, when it could be delivered in connexion with the celebration of the Commission's twenty-fifth anniversary.

3. Thirdly, since it was necessary to appoint a Special Rapporteur to replace Sir Humphrey Waldock for the completion of the draft articles on succession of States in respect of treaties, it was proposed that Sir Francis Vallat be appointed to serve in that capacity.

It was so agreed.

4. Sir Francis VALLAT said he regarded his appointment as a very great honour; he would do his best to follow in the footsteps of Sir Humphrey Waldock and endeavour to bring the draft articles to a fruitful conclusion, with due regard to the comments received from governments.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196)

[Item 3 of the agenda]

(*resumed from the previous meeting*)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

5. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by the Committee (A/CN.4/L.196).

TITLE OF THE DRAFT

6. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed that the draft be entitled: "Draft articles on succession of States in respect of matters other than treaties". It was true that so far the Commission had considered only one aspect of that succession, namely, public property; but at its twentieth session it had expressed the intention to study all aspects of succession in turn, after completing consideration of the aspect to which it had given priority,

mainly for reasons of order and method.² Consequently the draft, when completed, would deal with the whole topic of succession of States in respect of matters other than treaties, and that was, indeed, the subject-matter of the initial provisions which the Committee had grouped together under the heading "Introduction" in document A/CN.4/L.196.

7. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved the title for the draft articles proposed by the Drafting Committee.

It was so agreed.

ARTICLES 1 AND 3³

8. Mr. YASSEEN (Chairman of the Drafting Committee) said he would introduce articles 1 and 3 together, since they were closely linked.

9. The texts proposed read:

Article 1

Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 3

Use of terms

1. For the purposes of the present articles:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "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.

10. Paragraph 1 of article 3, which for the time being had no paragraph 2, reproduced *verbatim* four subparagraphs of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties adopted provisionally by the Commission at its twenty-fourth session. Thus the definition of succession of States in article 3, paragraph 1 (a) of the present draft was identical with that adopted at the twenty-fourth session, and did not refer to the effects of succession. The Special Rapporteur had taken the view that those effects should be covered by the definition of succession of States in respect of matters other than treaties, since it was the effects, not the fact of the replacement of one State by another, that were the subject-matter of the study undertaken by the Commission. In his sixth report (A/CN.4/267), the Special Rapporteur had therefore submitted a new definition of succession. In the Drafting Committee, however, he had provisionally accepted the definition

¹ See 1228th meeting, paras. 33 and 34.

² See *Yearbook of the International Law Commission, 1968*, vol. II, p. 221, document A/7209/Rev.1, paras. 78 and 79.

³ For previous discussion see 1219th meeting, para. 20.

adopted at the twenty-fourth session, seeing that article 1 of the present draft articles supplemented that definition by stating that "the present articles apply to the effects of succession of States in respect of matters other than treaties".

11. The Drafting Committee considered that the commentary to article 3 should state that the text adopted at the present session was incomplete. It would be advisable to indicate that in the report, by points of suspension following the text. For it would be necessary to add further definitions as the Commission proceeded with the work and possibly a paragraph 2 based on the paragraph 2 adopted at the twenty-fourth session.⁴

12. The Drafting Committee also thought that the report should stress the provisional nature of article 3. Of course, any text adopted by the Commission on first reading was provisional, since the Commission did not produce a final draft until it had received the comments of governments. But in the present case there was more to it than that. With the topic of succession of States in respect of matters other than treaties, the Commission had undertaken the preparation of a set of draft articles which were far-reaching in scope and bristled with difficulties. For the guidance of the reader, and in particular the members of the Sixth Committee of the General Assembly, the Commission had to place general provisions such as article 3 at the beginning of the draft; but it was obvious that it might need to reconsider those provisions and possibly to amend them during the first reading, as it gradually built new material into the structure of the draft. The Commission should reserve that possibility in its report to the General Assembly.

13. With regard to article 1, the Drafting Committee thought the commentary should point out that the Commission could not at present state what matters would be covered by the draft articles other than the particular matter considered at the current session. As a rough guide the commentary might mention the various subjects which the Commission had envisaged at its twentieth session—public debts, legal régime of the predecessor State, territorial problems, status of the inhabitants, and so on.

14. Mr. CALLE y CALLE referring to article 3, paragraph 1(a), said he was sorry the Drafting Committee had decided to revert to the definition used in article 2 of the draft articles on succession of States in respect of treaties. He himself preferred the Special Rapporteur's formulation, since the phrase "replacement of one State by another is the responsibility for the international relations of territory", in the Drafting Committee's version, might seem to apply to the case of a protectorate whose foreign relations were administered by the protecting State.

15. Mr. SETTE CÂMARA said he wished to congratulate the Drafting Committee on having produced a text for article 3 which, while respecting the Special Rapporteur's basic ideas and doctrine, was in line with the text agreed upon by the Commission, at its previous

session, for article 2 of the draft on succession of States in respect of treaties.

16. That text might not be perfect, but the hypothetical case of protectorates, mentioned by Mr. Calle y Calle, was an exceptional one and unlikely to arise in practice.

17. He was pleased to note that the Drafting Committee had decided to include sub-paragraph (d) on the date of the succession of States, since the Special Rapporteur's article 7 had given rise to considerable controversy, whereas the present text was in conformity with that adopted by the Commission at its previous session.

18. Mr. BILGE said that he had no objection to article 1, but he had the most serious reservations about article 3, particularly the definition of "succession of States" given in paragraph 1(a). Succession of States in respect of matters other than treaties was a topic of far wider scope than succession of States in respect of treaties, so the two kinds of succession should not be defined in the same way. Succession in respect of matters other than treaties involved bilateral relations between the predecessor and successor States, which was not the case in succession in respect of treaties, and above all it related to territory and the property in it, more than to international relations.

19. The CHAIRMAN said he was in partial agreement with the new text of article 3 proposed by the Drafting Committee; in particular, he preferred the words "the replacement of one State by another" to the words "the replacement of one sovereignty by another".

20. Nevertheless, he wished to make a reservation with regard to the words "in the responsibility for the international relations of territory", because he believed that succession of States in respect of matters other than treaties should rest on a broader basis than merely responsibility for the international relations of territory. The new text of article 3 was provisional, however, and a more comprehensive definition could always be produced at a later stage.

21. Mr. KEARNEY said that the definition in article 3, paragraph 1(a), was a neutral one, so that it could be determined in the subsequent articles precisely what effects the succession would have on State-owned property in both the predecessor State and third States. The new text did not prejudice the rules concerning State property, and it might well be that after examining them, the Commission would wish to reconsider the definition, not only in terms of State property, but in the context of the draft as a whole.

22. Mr. QUENTIN-BAXTER said that the extensive reports of the Special Rapporteur had been vindicated, because it had been possible, against that rich background, for the Drafting Committee to frame remarkably simple texts which would be of great assistance to the Commission in its future work.

23. He welcomed the Drafting Committee's decision to propose the same definition of "succession of States" as had been adopted in the 1972 draft on succession in respect of treaties. It was true that the subject-matter was now different; it was larger and more amorphous than the subject-matter of succession in respect of treaties.

⁴ See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter II, section C, article 2.

Nevertheless, there was basic value in adopting a single definition for an expression like "succession of States", which was frequently used by international lawyers. It would be an impediment to legal argument if, whenever an international lawyer used the term "succession of States", he had to qualify it in order to show which of two meanings was to be attributed to it. The adoption of two different definitions for the two drafts would lead to confusion of thought and to the emergence of apparent disagreements which did not reflect real differences, but were merely induced by terminology.

24. The text proposed by the Drafting Committee did not affect the position of a small State which entrusted a part or the whole of its international relations to another State. Occasionally, a very small State did seek assistance from a larger State in that manner; the essential point was that a request of that kind was revocable, so that the authority remained with the donor. The text now proposed did not do any injustice to small States, which took such action in the fullness of their own competence and not with any limitation of that competence.

25. Mr. USTOR said he supported the definition in paragraph 1(a) of article 3, which had the merit of being in harmony with the definition in the 1972 draft on succession in respect of treaties.

26. The Drafting Committee's decision was a very important one, in that it not only dealt with the definition of succession of States, but also provided guidance for the Commission's whole work on the present topic. It served to show that, although succession of States could have many aspects and had important repercussions in internal law, the Commission's concern was with the effect of succession on international relations.

27. Mr. USHAKOV said that he had always been in favour of adopting a definition applicable to all aspects of succession of States. Although the definitions proposed in article 3 were preceded by the words "For the purposes of the present articles", their scope was not confined to the draft articles. What was defined was not each aspect of State succession taken separately—succession in respect of treaties, succession to public property, succession to public debts, and so on—but the whole phenomenon of the replacement of one State by another. He agreed that the phrase "replacement . . . in the responsibility for the international relations of territory" might not be perfect, but if the Commission later decided to amend it, it should do so having regard to the phenomenon of succession in general, not just to succession in respect of some particular matter.

28. In the case of protectorates, to which Mr. Calle y Calle had referred, there was no replacement of one State by another. The State which agreed to be protected entrusted certain administrative functions, such as responsibility for international relations, to another State. The reason why the Commission, at its twenty-fourth session, had accepted the idea of replacement in the responsibility for international relations, was that in the case of newly independent States there was no replacement of one sovereignty by another, since the former metropolitan Powers had not exercised sovereignty over their colonies, but had merely administered them. That

was confirmed by Articles 73 and 75 of the United Nations Charter.

29. The definition of succession of States in article 3, paragraph 1(a) was therefore acceptable as a working basis, subject to possible improvement later.

30. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had adopted the definition of succession of States proposed in paragraph 1(a) for the sake of congruity with the draft articles on succession of States in respect of treaties. At its twenty-fourth session, the Commission had thought fit to adopt a neutral definition in order to facilitate its work. He appreciated the concern of Mr. Calle y Calle, but he did not think the formula proposed could be interpreted as referring to the case of protectorates; in such situations, there was no replacement in the responsibility for international relations, only representation for the exercise of those relations. As the words "responsibility for the international relations", it was clearly international relations that were concerned, since succession of States was governed by international law.

31. The definitions adopted by the Commission would still be entirely provisional, like those adopted at the previous session. It went without saying that they could be amended in the light of government comments and of the Commission's subsequent work.

32. Mr. BILGE said he endorsed Mr. Yasseen's last remark. The Commission was still at the very first stage of its study of succession in respect of matters other than treaties. The definitions were bound to be very provisional, and their purpose was only to make it possible to go ahead. Perhaps the two Special Rapporteurs on succession of States could confer on the question of the definitions.

33. The CHAIRMAN said that the two Special Rapporteurs would no doubt consult each other and, at the appropriate stage, agree on the question whether there should be a single definition of succession of States or two definitions, one for each draft.

34. The reservations expressed by certain members having been placed on record, he suggested that articles 1 and 3, as proposed by the Drafting Committee, be provisionally approved.

It was so agreed.

ARTICLE 2⁵

35. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 2 reproduced *verbatim* article 6 of the draft articles on succession of States in respect of treaties. In 1972, some members had expressed doubts about the latter article,⁶ but since it appeared in the draft then adopted, it was essential to include an identical article in the present draft, if only to prevent deductions *a contrario*.

⁵ For previous discussion, see 1219th meeting, para. 20.

⁶ See *Yearbook of the International Law Commission*, 1972, vol. 1, p. 221, 1187th meeting, para. 1 *et seq.*

36. The text proposed for article 2 read:

Article 2

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.

37. Mr. USHAKOV said that he approved of the substance of article 2, but must renew the objections he had made the previous year to the drafting of the corresponding article of the draft on succession in respect of treaties.

38. The CHAIRMAN, speaking as a member of the Commission, said that he fully supported article 2, although he did not entirely agree with the reason given for its inclusion. The fact that the provision had appeared in the 1972 draft on succession in respect of treaties was not in itself a sufficient argument for its inclusion in the present draft. The two drafts dealt with comparatively different subjects and he was not convinced of the need for strict legal symmetry.

39. Mr. USTOR said that he fully agreed with the content of article 2, but thought it went without saying. To include in the present draft a provision to the effect that the articles dealt only with valid successions would create problems, because no such provision had been included in some other drafts.

40. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 2 provisionally, as proposed by the Drafting Committee.

It was so agreed.

TITLE OF PART I OF THE DRAFT, TITLE OF SECTION 1, AND ARTICLE 4

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed as the title of part I of the draft "Succession to State property", and as the title of section 1 "General provisions". So far, the Commission had discussed public property, to which the Special Rapporteur had devoted his last four reports. Public property comprised State property, the property of authorities or bodies other than States, and the property of the territory concerned. The discussion had shown, however, that the problem was extremely complex and that the difficulties must be taken one by one. The Drafting Committee and the Special Rapporteur accordingly suggested a new approach, as indicated by the title of part I. The Commission would first study State property and then the other kinds of public property.

42. Article 4 formed a corollary to the title of part I. It was very simple and intended solely to indicate that part I concerned the effects of succession of States in respect of State property.

43. The new version of article 4 read:

Article 4

Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

44. Mr. USTOR said he welcomed the Drafting Committee's proposal to restrict the scope of the draft articles in part I to the effects of succession of States in respect of State property.

45. Mr. SETTE CÂMARA said that at a later stage, it might prove convenient to replace article 4 by a simple title. If the provision was retained as a separate article, it would be necessary to have an article of the same kind in each of the following parts.

46. Mr. BEDJAOUÏ (Special Rapporteur) said that article 4 should be left as it was. It applied solely to the part of the draft which dealt with State property. When the Commission had finished considering that part, it would take up the parts which dealt with the other two classes of public property. An article corresponding to article 4 would have to be included in each of them.

47. The CHAIRMAN, speaking as a member of the Commission, said he hoped that, when the Commission had dealt with public property other than State property, it would consider merging all the provisions on public property if it found that the rules governing the public property of other entities were similar to those governing State property.

48. Speaking as Chairman, he suggested that the Commission provisionally approve article 4 and the titles of part I and section 1, as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

1231st MEETING

Thursday, 21 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196; A/CN.4/L.197)

[Item 3 to the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 5¹

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 5 (A/CN.4/L.196).

¹ For previous discussion see 1223rd meeting, para. 1.

2. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 5 explained what was meant by "State property". It defined State property by reference to the internal law of the predecessor State; the Committee had considered that to be logical, since it was the internal law of the predecessor State which governed State property until the succession of States took place. In some cases the internal law of the successor State hardly existed on the date of the succession, the point in time to which article 5 referred, so that it would be illusory to define State property by reference to the internal law of the successor State. The position adopted in the article did not, of course, impair the right of the successor State to alter the definition or classification of State property in accordance with its own legal order. At the precise moment of the succession, however, it was only by reference to the law of the predecessor State that State property could be determined and classified.

3. The Drafting Committee was well aware that international practice and jurisprudence had often wavered between the internal law of the predecessor State and that of the successor State. The Committee therefore hoped that the commentary to article 5 would draw attention to the provisional nature of the text. It was, indeed, possible that, during its first reading of the draft, the Commission might decide to make the rule laid down in the article more flexible.

4. The Drafting Committee also hoped that two remarks would be made in the commentary regarding the expression "property, rights and interests" used in article 5. The first was that that expression, found in several treaties, referred only to legal rights and interests. The second was that the expression was not known to some legal systems. In view of the latter situation, the Commission might wish to explore, on first reading, the possibility of using a different expression having regard, in particular, to the whole set of provisions it adopted on property.

5. The text proposed for article 5 read:

Article 5
State property

For the purposes of the articles in the present Part, State property means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

6. Mr. QUENTIN-BAXTER said he was very pleased with the general shape of article 5 as it had emerged from the Drafting Committee. He had been one of those who believed that a relatively simple concept of State property would make a good starting point for the draft articles.

7. It was important to bear in mind, however, that the words "according to the internal law of the predecessor State" should be taken to mean the law in force in the territory which was the subject of succession.

8. New Guinea, one of the last important territories still governed by an administering authority, provided a useful example in that regard. From the outset of the Australian administration of that territory, there had been a law of New Guinea. Although that law was the ultimate

responsibility of the Parliament of Australia, it was made by the administration of New Guinea and, more recently, with increasing participation by representatives of the people of the territory. That law was made to suit local conditions and the philosophy of the people; the law of New Guinea had never at any time been described as the law of Australia.

9. In every case in which the administering authority responsible for a territory faithfully carried out its duty of leading that territory towards independence, the law which applied at the municipal level was entirely distinct, and often very different, from that of the metropolitan country. That raised a problem of principle which must be taken into account.

10. That position was also based on practical considerations. State property in New Guinea had for a long time been in the ownership of the Government of New Guinea. When the territory became independent, any problem that might arise in connexion with such property would have to be solved, not in accordance with the law of Australia, but in accordance with the law of New Guinea at the moment of independence. A similar solution would have to be adopted by the courts of a third State if called upon to deal with property situated outside the territory.

11. It was also important to stress that the territory which was the subject of succession changed hands as an entity and not as a lawless territory. The introduction of a reference to the law in force in the territory at the time of succession would have the further advantage of not impairing the sovereignty of the successor State. It would be clear that the new lawgiver was free to take whatever action it wished in the territory, with due regard to the successor State's obligations under international law.

12. Another principle to be kept in mind was that the property, rights and interests which changed hands had two elements: their physical features and the law which they carried.

13. Subject to those remarks, he welcomed article 5. He expressed his gratitude to the Drafting Committee and to the Special Rapporteur, whose work was beginning to bear fruit.

14. Mr. USTOR said that he was prepared to accept article 5 in view of its provisional character, subject to some comments which he hoped would be taken into account when the time came to adopt a final draft.

15. His first remark concerned the inconsistency of using the term "property" with two different meanings. In the expression "State property", as used both in the title and in the text of the article, the term "property" covered all forms or property of the State. In the expression "property, rights and interests" it covered only part of State property. In the context it was clear that the word "property" was being used with two different meanings, and consideration should be given, in due course, to removing that inconsistency.

16. The expression "property, rights and interests" was in itself somewhat obscure. It should perhaps be assumed that the term "interests" referred to something other than rights directly pertaining to the State, or property

directly owned by it. The term could thus be taken to refer to the interest which the State had in, for example, a State enterprise or even a trust or foundation. The retention of the term "interests" was therefore likely to create difficulties and to blur the distinction between State property and other public property. It would thus run counter to the intention of the Drafting Committee, which was to exclude from the scope of the articles in part I items of public property which did not constitute State property.

17. Mr. YASSEEN said that the question raised by Mr. Quentin-Baxter—that of locating, within the internal legal order, the rules that were applicable—also arose in other contexts. A case in point was the law applicable under the rules of applicability in private international law, when the legal order to which certain legal situations were attached was a complex one. The general practice was to look at the whole of the legal order in order to determine which of its various component systems was applicable.

18. In his opinion, therefore, the expression "internal law of the predecessor State" was sufficient. It was for the legal order of that State to determine which rules were applicable. It would be inadvisable, in a set of draft articles on succession of States, to try to solve such a general problem as that of determining which rules were applicable within an internal legal order.

19. Mr. RAMANGASOAVINA said that when the Commission had examined the original version of article 5, he had expressed approval of the wording then proposed. Nevertheless, he found the proposed new wording preferable; it was consistent with the position taken by the Drafting Committee in the previous articles. In article 3, for example, the Committee had emphasized that succession of States was essentially a question of responsibility for the international relations of the territory to which the succession related. In the proposed article 5, the emphasis was on State property; that was in keeping with the general spirit of the draft.

20. The new wording of article 5 would enable the Commission to go ahead, whereas the previous, much contested version might have prevented it from doing so. He therefore supported the text proposed, though he thought it might be made more precise later on.

21. Mr. USHAKOV said he provisionally accepted the text proposed by the Drafting Committee, as he had provisionally accepted the text originally submitted by the Special Rapporteur.

22. He thought that the words "property, rights and interests" should be amended to read "property, with the rights and interests relating thereto", as the Special Rapporteur had proposed to the Drafting Committee. The present formula might be clear to common-law jurists, but it was not clear to other lawyers.

23. In addition, article 5 contained a contradiction. While seeking to define the general notion of State property, in fact it only defined the State property of the predecessor State, since it defined State property by reference to the internal law of that State. The first part of the definition referred to State property in general, whereas the last part referred only to the property of the

predecessor State. It would be preferable to draft a definition of State property in general.

24. With regard to Mr. Quentin-Baxter's remarks on dependent territories which already had their own law, another point to note was that, when a new State became independent, there was no replacement of one sovereignty by another. In that situation it was not the internal law of the predecessor State which was applicable. More consideration should therefore be given to the case of newly independent States. However, he found the proposed text acceptable at the present stage.

25. Mr. KEARNEY said that, although the formulation adopted by the Drafting Committee for article 5 was not perfect, it would enable the Commission to go ahead with its work.

26. It should be borne in mind that the draft articles would constitute a set of residual rules. The formula in article 5 had to cover not only customary situations, but also unusual situations. He therefore favoured the retention of the expression "property, rights and interests", which provided as broad a coverage as possible in describing the different types of property.

27. To illustrate by an example the meaning of the term "interests" in the present context, he would remind members that there was a law in many countries to the effect that property of a deceased person which was not claimed by any heir within a specified time reverted to the State. The territory which was the subject of a succession of States could well contain property that was in suspense because its owner had died and the time-limit for claims by heirs had not yet expired. Such property would not be "owned" by the State on the date of the succession, yet the successor State might well become its owner if no heir appeared. It undoubtedly had what could correctly be termed an "interest" in the property.

28. The very valid point which had been raised by Mr. Quentin-Baxter would certainly have to be considered at the appropriate time, but he himself did not favour any change in the formula "according to the internal law of the predecessor State". It would not be possible to solve all the problems involved by adding to those words the formula: "as applied in the territory subject to succession". In particular, such an addition would be of no assistance in dealing with the very pertinent problem of property which was not actually in the territory and which might well be in the capital city of the predecessor State.

29. Another problem which would not be solved by such a change of language was that which might arise in the event of secession of a component state from a federal union. The seceding state would already have had its own property under its own laws while a member of the federal union, but there would also be in its territory federal property which was governed by federal law. In view of the extreme difficulty of covering all such problems, it would be preferable to retain the formula used in article 5.

30. Sir Francis VALLAT said that the point raised by Mr. Ushakov, regarding the reference in the concluding words of article 5 to property "owned by [the predecessor] State", touched on the essence of the draft articles. Those

articles dealt with the fate, in the event of a succession of States, of the property owned by the predecessor State at the date of succession. With regard to the property of an authority or of a non-State body, the presumption would be that the title would continue under internal law. In that context article 5 was fully justified. It dealt with the international problem of what happened to State property owned by the predecessor State. Any departure from that approach could only lead to confusion.

31. The reference to the internal law of the predecessor State was correct, because it was the law of that State which determined what constituted its property. It was necessary to leave aside, as a totally different question, the problems of the application of private international law and of the law applicable to the property.

32. Mr. MARTÍNEZ MORENO said that the expression "property, rights and interests" which, as pointed out by the Special Rapporteur, had been used in the Treaty of Versailles and in many other treaties, was not unknown to Latin American practice. It was used in a number of treaties between Latin American countries.

33. In the Latin American legal system it was perfectly possible to distinguish between "rights" and "property". The term "rights" was used, in contrast with "property", to describe incorporeal property such as debt-claims. As to the term "interests", the example given by Mr. Kearney was an excellent one. The term had also been used on a number of occasions in Latin America in declarations relating to the law of the sea, which had referred to the interests of the coastal State in the protection and utilization of the resources of the sea adjacent to its coast.

34. In conclusion, he thought that the Drafting Committee's formulation of article 5, despite its imperfections, constituted a satisfactory provisional basis for the Commission's work.

35. Mr. SETTE CÂMARA said that the new wording of article 5 was a great improvement on the earlier text. The controversial features had been eliminated, and that would greatly assist the Commission in its work. The Drafting Committee had abandoned the negative definition originally proposed for public property and had dropped the controversial reference to property "necessary for the exercise of sovereignty by the successor State".

36. The introduction of the concept of "State property" was a step forward. "State property" could properly be regarded as a concept of international law, whereas "public property" was essentially a concept of constitutional and municipal law.

37. With regard to the expression "property, rights and interests", he was inclined to agree with the views put forward by the Chairman of the Drafting Committee and was prepared to accept that formula on a provisional basis, on the understanding that it would be construed as broadly as possible.

38. He agreed that it would be very difficult to avoid making some reference to an internal law defining State property at the moment of succession; that law could be no other than the law of the predecessor State.

39. The fate of public property other than State property—such as the property of public bodies or State enterprises—would be decided by the internal law of the successor State. That law might well completely change the status of the property in question.

40. It would be useful to retain in article 5 a somewhat vague formula capable of covering all situations, including the one to which Mr. Quentin-Baxter had referred.

41. Mr. AGO said that, in order not to hinder the adoption of the proposed text, he would accept the expression "property, rights and interests", but he greatly hoped that a more satisfactory formula would be found. The main defect of the present wording was that it placed widely different notions on the same footing. The term "property" meant rights in corporeal property; the term "rights" applied also to rights in incorporeal property, including debt-claims; the term "interests" also denoted rights. The terms "interests" was taken from systems of law, both Anglo-Saxon and continental, in which there were legally protected interests which could not be classed as true subjective rights. A particular example was lawful interests. In other words, each of the three terms denoted rights or interests recognized and protected by the law. Mr. Martínez Moreno had given an example of an interest which was not covered by the wording of article 5: a State might have an interest in protecting certain resources, but that interest might not yet be protected by law. The successor State might inherit the interest in question, but it would not be comprised in the legal phenomenon of State succession.

42. The CHAIRMAN speaking as a member of the Commission, said he fully agreed with the new method adopted by the Drafting Committee for the formulation of article 5.

43. Both the other possible methods of drafting the article had already been tried without success. The first was to give an enumeration of the property in question. The second was to define that property in negative terms, as the Special Rapporteur had done in his sixth report (A/CN.4/267), as all property not under private ownership.

44. Both those methods had led into a blind alley. The only acceptable course which remained was that adopted by the Drafting Committee of defining State property by referring back to the internal law of the predecessor State. The Drafting Committee had adopted that approach with success in its new version of article 5.

45. The formula "property, rights and interests" was the best that could be found, bearing in mind the variety of legal systems. The three terms used in that formula had one common element: they all referred to items having an economic value items of what might be called a "patrimonial character".

46. The example given by Mr. Kearney to illustrate the meaning of "interests" was a very appropriate one. The term "interest" denoted a potential right, or the expectancy of a right; no actual right existed yet but, under certain circumstances, a rights could come into existence, emerging from the "interest".

47. He approved of article 5 as formulated by the Drafting Committee and suggested that in due course

an attempt should be made to introduce the idea that the "property, rights and interests" mentioned in the text all had an economic value.

48. Mr. USHAKOV explained that he was not opposed to the words "according to the internal law of the predecessor State". He merely thought that, if the reference to the predecessor State were deleted, the definition of State property would become general. To that end, the words "predecessor State" should be replaced by the words "State in question". Once a general definition of State property had been given, the subsequent articles could specify what State property was referred to. For instance article 8, sub-paragraph (i), expressly mentioned "public or private property of the predecessor State". It should be noted, in that connexion, that in the case of a partial transfer of territory not all the property of the predecessor State passed to the successor State.

49. Mr. BARTOŠ reminded the Commission that the expression "property, rights and interests" had not only been used in the Treaty of Versailles and in the treaties supplementing it, but had given rise to discussion in 1946 before being included in the treaties of Paris.² At the time, some people had opposed the use of the expression because, they had thought it unnecessary to mention interests. They had taken the view that legal interests were assimilable to rights, whereas non-legal interests were not subject to State succession. The Paris Conference had nevertheless adopted the expression, believing it useful to mention interests which had not yet become legal in character because they took the form of rights in process of formation, future rights, or interests which it was lawful to protect. In that connexion the draftsmen of the treaties of Paris had referred in particular to the lawful interest of a State in not being deprived, by diversion, of the waters of a river crossing the territory which was the subject of the succession. They had also referred to problems relating to the subsoil and, in particular, to oil.

50. The expression "property, rights and interests" had become part of the terminology of international treaties on succession of States. If it was not used in the draft articles under discussion, difficulties of interpretation might arise. The omission of the word "interests" might suggest that interests were excluded from succession. In his view, therefore, the traditional formula "property, rights and interests" was necessary.

51. Mr. MARTÍNEZ MORENO explained that the example he had given of the interest of a coastal State in the protection and utilization of the resources of the sea adjacent to its coasts had been intended to illustrate that the term "interest" should be taken to mean a legal interest; that was the point he had wished to make, and he was thus in agreement with the view expressed by Mr. Ago.

52. In that connexion it was worth noting that, at a recent meeting at San Salvador of a group of Latin American countries known as the Montevideo group, which upheld the claim to a territorial sea or sovereignty

zone of 200 miles, it had been urged that it was not the interests, but the rights of the coastal State that should be invoked.

53. Mr. RAMANGASOAVINA said there was a point connected with article 5 which needed clarification. In the event of a succession of States, the territory of the predecessor State and that of the successor States were not necessarily the same—for instance, in cases of secession or partition. The words "property, rights and interests" might suggest that everything which had belonged to the predecessor State passed to the successor State, whereas in some cases the succession comprised only part of the property.

54. The CHAIRMAN invited the Special Rapporteur to comment and make recommendations.

55. Mr. BEDJAOUI (Special Rapporteur) first thanked the Drafting Committee for the assistance it had given him in formulating article 5. The definition proposed in the article was purely provisional; it had the merit of avoiding a number of pitfalls, of enabling the Commission to go on with its work, and of indicating clearly to the Sixth Committee and the General Assembly the general direction the work was taking, which would have been impossible without a definition of public property. Of course, the definition in article 5 was just as provisional as the definition of succession of States in article 3, and the Commission would probably have to recast them both later.

56. The Commission would note that in defining State property in that way it had reverted to the method of determining public property which he had suggested in article 1 in his third report,³ that was to say by reference to the municipal law which governed the territory affected by the change of sovereignty. The Commission would have to determine later, in a second part of the draft articles and probably in the same manner, what public property belonged to territorial authorities and then, in a third part, what constituted the property of public enterprises. At an even later stage it might perhaps revert to a definition of the kind proposed in the third report, namely, that public property was property belonging to the State, a territorial authority thereof or a public body.

57. In his third report he had referred to the municipal law "which governed the territory affected by the change of sovereignty". That brought him to the very pertinent comment by Mr. Quentin-Baxter who, taking New Guinea as an example, had pointed out that cases could arise in which colonial legislation should normally be applied in defining what constituted State property. That difficulty had not escaped his attention when he had prepared his third report. In the former colonies, however, State property was reduced to its simplest form and, above all, the property of the metropolitan State was not necessarily governed by the territorial internal law of the colony but, in a sense, came under the law of the metropolitan State itself. Barracks and military installations, for example, and generally speaking all service property

² See, for example, Part VII of the Treaty of Peace with Italy, United Nations, *Treaty Series*, vol. 49, p. 160.

³ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 133, document A/CN.4/226.

called "crown property" and the services themselves, were not subject to the law of the territory. Thus difficulties were, indeed, to be encountered in determining State property by reference to colonial law.

58. Another difficulty might arise where the property of the former sovereign, who had preceded colonization, had not been regarded as public property by the colonizing State and had been abandoned to private ownership. In such a case, what law should be referred to for the purpose of defining public property in the event of succession?

59. He had therefore thought it would be wiser to make a comprehensive and, as it were, generic reference to the internal law of the predecessor State, rather than to allude to the particular branch of that law constituted by the legislation of the colony; for the latter too represented the internal law of the predecessor State, being the legal order which the metropolitan Power itself had established in the colony. In view of their complexity, perhaps the commentary should mention those problems and specify that the law of the predecessor State should, where possible, be understood to mean the local law, but that the local law was to be distinguished from the *lex loci* in order to avoid the problem of referring to the law of a third State in which the property in question might be situated. For the time being, it would be better to keep to the formula proposed by the Drafting Committee, which made it possible for the Commission to go ahead.

60. With regard to the comments of Mr. Ustor and Mr. Ushakov, he did not think it would be possible to avoid referring to the predecessor State; it was a legal necessity. Mr. Ushakov had explained that what he objected to was not the reference to internal law, but the reference to the internal law of the predecessor State. But if the text did not specify which internal law was meant, there would be serious uncertainty and a choice would have to be made between the laws of the two States concerned. Unfortunately, it was not possible to define property which necessarily belonged to the State. There was no property which was State property by its very nature, since the nature of State property was determined by the philosophy of each State. It was therefore impossible to mention the State without being more specific: a choice had to be made between the two States concerned. The best course would therefore be to accept the proposed definition, which in any case was only provisional.

61. With regard to the expression "property, rights and interests", which had been criticised by several members of the Commission, in particular Mr. Ustor, lawyers had been vainly seeking an alternative to it for nearly half a century. But as Mr. Bartoš had pointed out, it was a hallowed formula whose meaning and scope were well known despite its inherent uncertainties and imperfections. Perhaps the theoretical difficulties it raised could be indicated in the commentary, which might state that the Commission, having failed to find a more general definition for all public property that was compatible with the different legal systems, had considered the formula acceptable. As Mr. Castañeda had indicated, the word "interests" must be used to provide for the option which might be open to a natural or legal person—in the case

in point, the State. That interest was, of course, a legal interest, as Mr. Ago had observed. In any case, the rights to which the expression "property, rights and interests" referred were all the rights which could be described as "patrimonial" or, as Mr. Castañeda had said, rights of an economic character.

62. Mr. Ustor had said that the definition of State property given in article 5 was bound to bring the Commission up against the problem of State enterprises. But a clear distinction must be made between State enterprises and State property, which were two entirely different things. The property of a State enterprise did not necessarily belong to the State, since a State enterprise had its own patrimony; and article 5 dealt with State property, not with the property of a State enterprise. Nevertheless, direct participation of the State, and State property distinct from that of the enterprise, could exist in a State enterprise. The question was whether, in such a case, that property should pass to the successor State. He had answered that question affirmatively in other articles; in article 34, for example, he had spoken of property of the State in public establishments and he intended to revert to the matter later.

63. Mr. Ramangasoavina thought that article 5, as proposed by the Drafting Committee, might give the impression that all the property of the predecessor State, including property in territory which still belonged to it after the succession, would pass to the successor State. But article 5 only defined State property; it did not deal with its allocation, which was the subject of article 9. It was the determination of the geographical area in which one State replaced another that made it possible to specify what State property passed to the successor State. He had originally intended to refer direct to the territory affected by the change of sovereignty, as shown by the definitions given in his fourth, fifth and sixth reports.⁴ Mr. Reuter had dissuaded him from doing so by raising the question of property situated outside the territory.⁵ He had therefore adopted a more general formula in order to avoid referring to territory; but it was quite clear, as the succeeding articles showed, that not all State property would pass to the successor State.

64. Mr. USHAKOV said that there was a difference between the internal law of a particular State and the internal law of the State in general. It was to the internal law "of the State in question" that reference should be made.

65. The CHAIRMAN noted that a number of pertinent and important observations had been made on article 5, but no fundamental objections or real reservations. In view of its wholly provisional character, therefore, he suggested that the article should be approved.

It was so agreed.

66. The CHAIRMAN said that the Commission had completed its examination of the texts proposed by the Drafting Committee in document A/CN.4/L.196. Since articles 6 and 7 were under still consideration by the Com-

⁴ *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, p. 157, document A/CN.4/247 and Add.1; *ibid.*, 1972, vol. II, document A/CN.4/259; and *ibid.*, 1973, vol. II, document A/CN.4/267.

⁵ See 1223rd meeting, para. 30.

mittee, he invited the Special Rapporteur to introduce his new version of article 9 (A/CN.4/L.197), which was intended to replace the former articles 8 and 9.

ARTICLE 9

67. Mr. BEDJAOUI (Special Rapporteur) said that since the Commission had provisionally restricted the definition of State property, article 8 had lost much of its point, and its last two sub-paragraphs served no purpose for the time being. He had therefore submitted a new article 9 in place of the former articles 8 and 9.

68. The new article read:

Article 9

The substitution of the successor State for the predecessor State shall have the effect of substituting the former for the latter, freely and without compensation, in the ownership of all State property, save as may have been agreed otherwise.

For his part, he considered that article 9 also replaced articles 15, paragraph 2; 19, paragraph 2; 23; 27; 31, paragraph 2; 34 and 38; that was to say, the scattered provisions relating to State property held by public enterprises or territorial authorities, or situated outside the territory.

69. The Commission's discussion on article 5 was an excellent point of departure, because article 9 must be examined in the light of article 5. The provision in article 9 was clearly one of international law. There was now a rule of international law which allowed the substitution of the successor State for the predecessor State in the ownership of all State property unless, of course, the two States had agreed otherwise. That was a practically uncontested rule.

70. There was, indeed, a unanimity among writers which made it possible to regard the rule laid down in article 9 as a commonly accepted rule of international law. It was true that not all the authors referred specifically to State property, but that was because of the terminology used in the system of law to which they belonged. Some spoke, for example of property in the "public domain", as opposed to property in the "private domain" of the State, borrowing those concepts from the internal law of a particular legal system. In general, however, writers—whose example had been followed by international jurisprudence—were in agreement on the rule laid down in article 9.

71. That rule was based on the principle of the viability of the State, which should be taken as a guide in all cases of succession of States—or in nearly all, for it might be thought that in some cases there was no automatic transfer of State property; he would revert to that point. Property such as roads, barracks, harbour infrastructures and State public buildings—government headquarters and ministries—could not remain in the possession of the predecessor State. They were property which the predecessor State had deemed it useful, if not necessary, to own for social purposes which it had set itself in the general interest. But what had seemed necessary or useful to the predecessor State might also prove necessary or useful to the successor State.

72. The transfer took place on the elementary principle that the replacement of one State by another was incom-

patible with the concurrent exercise of two State authorities over the same territory. It was difficult to accept that the predecessor State could continue to hold certain State property which sometimes involved the highest forms of the exercise of sovereignty. That was why he had first defined such property as appertaining to sovereignty or necessary for its exercise, the main purpose being to overcome the difficulties arising from the differences between legal systems: for example, the French legal system referred to the private and public domains of the State, whereas those concepts did not exist in other legal systems. But he had discarded that formula, which might lead the Commission to a dead end.

73. In his view, the definition of State property adopted in article 5 made the Commission's task easier in regard to article 9. But although there were certain State practices which had become general and made it possible to infer the existence of a rule on the subject, it had also happened that some practices had not followed the same course. Some predecessor States had given up property in their possession only against indemnity or compensation. Compensation had been spoken of mainly in connexion with property constituting the private domain of the State. But that approach was neither general nor fully accepted in practice. Without wishing to ignore the existence of such practices, he had therefore concluded that exceptional situations could be covered by special formulas such as that of article 9. An agreement, for example, could provide for the handing over of State property against compensation or could allow the predecessor State to retain certain State property with the consent of the successor State.

74. In making a reservation to the principle that State property was transferred in all cases of State succession, he had been thinking, in particular, of the case of uniting of States, in which there was not a total transfer of all State property. It was clear that the transfer of some items of property, such as currency, could take place only at the level of union, and all the texts which referred to that type of succession of States also referred to such transfer at union level. But those were special cases which could be settled by agreement, and it was generally by agreement that a union of States was formed. The reservation could therefore be dropped, since article 9 provided for an exception to the rule by specifying that matters could be agreed otherwise.

75. In conclusion, he considered that the rule laid down in article 9 existed in practice and imposed on the predecessor State a legal obligation to transfer the ownership of State property, with all the legal consequences that might entail. He had left wide scope for agreement in order to take into account the diversity of situations, and had endeavoured to look beyond the theoretical problems and draft a text which was as practical as possible and which the Commission could support.

Other business

[Item 10 of the agenda]

76. The CHAIRMAN drew the Commission's attention to a letter dated 30 April 1973, addressed to the Secretary-

General of the United Nations, containing the comments of the Prime Minister and Minister for Foreign Affairs of Tonga on the draft articles on succession of States in respect of treaties (ILC (XXV)/Misc.2).

The meeting rose at 1 p.m.

1232nd MEETING

Friday, 22 June 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Ramangasoavina, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.197)

[Item 3 of the agenda]

(resumed from the previous meeting)

ARTICLE 9 (continued)

1. Mr. TAMMES said that in the new text of article 9 (A/CN.4/L.197), all reference to the different categories of public property had disappeared; it was now only State property—all State property—in the territory affected which would pass to the successor State without compensation. It had been agreed that at a later stage the Commission might consider other categories of public property, as enumerated in article 8, but that for the time being it would deal only with State property. That was undoubtedly a helpful solution; but he wondered whether the new article 9, just because of its simplification, did not go rather too far.

2. In studying the history of the present article he had again gone through the Special Rapporteur's earlier reports, which gave a well-organized account of the multifarious situations which history presented to the legal mind, but he had not found much evidence, either in judicial decisions or in the writings of qualified publicists, of an absolute rule that all State property in the territory in question passed to the successor State without compensation. In his fourth report the Special Rapporteur had indeed recognized that "while the transfer without compensation of property appertaining to the public domain is not in dispute, some legal authorities maintain that public property constituting the private domain can be transferred only against payment".¹ That point of view also seemed to be confirmed by the Special Rapporteur in the commentary to article 9 in his sixth report (A/CN.4/267).

¹ See *Yearbook of the International Law Commission*, 1971, vol. II (Part One), p. 177, document A/CN.4/247 and Add.1, part II, para. (2) of the commentary to article 6.

3. In that connexion an interesting example was the decision of 31 January 1953 taken by the United Nations Tribunal in Libya in the case of *Italy v. United Kingdom and Libya*.² That decision, which involved the interpretation of General Assembly resolution 388 (V), had quoted the following excerpts from Fauchille's *Traité de droit international public*:

"When a dismembered State cedes a portion of its territory, property which constitutes *public* property, namely property which by its nature is used for a public service, existing on the annexed territory, passes with its inherent characteristics and legal status to the annexing State; being devoted to the public services of the ceded province, it should belong to the sovereign power which is henceforward responsible for it. . .

"As regards *private* State property, i.e., property which the State possesses in the same manner as a private person, in order to derive income from it, it must be noted that failing any special provisions it does not become part of the property of the annexing State. In spite of the loss the dismembered State has suffered, it remains the same person as before and does not, any more than a private person, cease to be the owner of the things it possesses in the annexed territory and there is no principle preventing it from having the ownership of immovable property in that territory."

4. That decision, dealing with one category of public property, namely, alienable public property or *patrimonium disponibile*, which, as he understood it, came close to private property of the State, seemed to leave room for different kinds of treatment, and that had been the subject of the litigation.

5. In his opinion, whatever the terms used and the definitions made in internal law, such as public domain, private domain and *patrimonium disponibile*, there was at the present time no agreement in judicial decisions or other authorities on the existence of a rule so categorical as that laid down in the new article 9. The Commission was in effect working out a rule for the progressive development of international law, and that should be clearly stated.

6. He himself was partly in favour of such a rule, in particular where it referred to the free substitution of the successor State for the predecessor State, which he understood to be an automatic substitution not requiring any agreement. There would be an undeniable burden on the successor State if private property, independently of that State's sovereign will, passed within its jurisdiction with the characteristics of foreign property.

7. As to the absence of compensation, he was not quite sure that the new rule would be the just rule in all cases of succession. It might be so in typical cases of decolonization, but perhaps it might not be so in the more numerous cases of secession which might occur in the future, and which were precisely the cases in which there was often no prior agreement.

² *Ibid.*, 1970, vol. II, p. 173, document A/CN.4/232, para 16.

8. He therefore wondered whether, from the point of view of compensation, a distinction should not be reintroduced on the lines of that proposed by the Special Rapporteur in his original article 9 (A/CN.4/267), by including a reference to "property necessary for the exercise of sovereignty". To put it more precisely, the real point was that what belonged to the *imperium* of the State was part of the sovereign State itself and the problem of payment of indemnity did not arise although, as he interpreted Fauchille, that problem might arise in connexion with the "private domain" of the State. In any case, the problem was one which called for further reflection.

9. Mr. HAMBRO said that, as the representative of a pragmatic legal tradition, he was glad that the Special Rapporteur had been able to combine articles 8 and 9 in a new simplified article 9. He himself had had serious difficulties in accepting the expression "property necessary for the exercise of sovereignty".

10. Mr. Tammes had been right in stating that on many of the questions dealt with in the present draft articles there was no general agreement either in practice or among the learned authors. The duty of the Commission, however, was, precisely, to reach agreement where no agreement had existed before and to try to produce a text which could apply to all kinds of succession and all kinds of property.

11. At the beginning of his work the Special Rapporteur had perhaps been carried away by historical and political considerations, but it was gratifying to note that he had now reverted to a purely legal approach. The predecessor State and the successor State were, of course, always free to make their own rules, but the Commission's concern now was with the drafting of residual rules which would apply in the absence of contractual rules.

12. As Mr. Tammes had observed, it was obvious that article 9 called for further reflection, but he was prepared to accept it as a preliminary draft on condition that the Commission reconsidered it at a later stage in relation to the draft articles as a whole.

13. Mr. USHAKOV said he reiterated the opinion he had held ever since the Commission had begun studying succession of States in any form whatsoever: namely, that it was impossible to formulate rules which were uniformly applicable to all cases of succession; cases differed too widely, both in cause and in effect. Each specific situation—a transfer of territory, the accession of a State to independence, fusion or a union of States, and so forth—called for different rules. Thus the draft article 9 before the Commission at present could apply only—and then only in part—to the case of the formation of a unified State, in which all the property of the predecessor States became the whole of the property of the new State formed by the union of those predecessor States. In that case, however, there was not one, but several predecessor States and it was therefore necessary to speak of substitution for the "predecessor States". Hence draft article 9, as it stood, was not even applicable to the case of a union of States. Nor was it applicable to the case of States emerging from decolonization, since not all the property of the former metropolitan Power became the property of the newly independent State,

notwithstanding article 5, which made no exception for that case.

14. In addition, as provided for in article 25 of the draft articles on succession of States in respect of treaties,³ a newly independent State might be formed from two or more territories which had not been under the jurisdiction of the same predecessor State. Article 9 did not provide for that situation either. Moreover, the principle expressed in the words "save as may have been agreed otherwise", although correct, was not applicable to newly independent States, since only the predecessor State had existed as a sovereign State and the validity of devolution agreements was not confirmed by international law.

15. Thus it was clear that a single rule could not be applied to all cases of succession and that draft article 9 was too general to be acceptable. The Commission should not draw up the general articles until it had drafted the substantive ones.

16. The provision "freely and without compensation" was fair in principle, especially for newly independent States, but it was entirely appropriate to provide that the States concerned could decide otherwise by agreement.

17. The CHAIRMAN, speaking as a member of the Commission, said that the new article 9 represented a praiseworthy effort to simplify matters. Instead of the three categories of property covered by the former article 8 and the category covered by the former article 9, there was now only the single category "State property"

18. However, as Mr. Tammes had pointed out, that effort at simplification had not proved as simple as it had seemed at first. The essential difficulty lay in the plurality of legal systems to which public property was subject. In some countries there was the "public domain", in others "eminent domain", and in still others "original property of the nation". The Special Rapporteur had therefore done well to begin with the simplest category of all, namely, State property, though the underlying problems had not disappeared, but had merely been postponed until the subsequent parts of the draft came up for consideration.

19. Even in the case of State property, however, there might, as Mr. Tammes had suggested, be two categories subject to utterly different legal régimes. There was no difficulty in the case of public property of the State, which could pass to the successor State automatically and without compensation, but in the case of private property of the State it would, in his opinion, be unjust if certain items, such as private property situated abroad, should pass within the legal order of the successor State.

20. In the new text of article 9 the notion of "substitution" was used in two different senses. The word "substitution", at the beginning of the article, referred to a simple fact, the substitution of one State for another, whereas the word "substituting" referred to an entirely different phenomenon, namely, the transfer of property. He thought the article would gain much if the word "substituting" were replaced by the word "transferring".

³ *Ibid.*, 1972, vol. II, document A/8710/Rev.1, chapter II, section C.

21. It was his impression that the Special Rapporteur, in introducing the new text of article 9 at the previous meeting, had said that when the substitution took place it gave rise to a legal obligation to transfer State property;⁴ he himself was of the opinion that the transfer took place *ipso jure* and automatically. He hoped that that idea could be embodied in the article.

22. Lastly, he noted that the Special Rapporteur had said in his commentary to article 9 (A/CN.4/267) that "it was difficult to find a satisfactory expression to describe property of a public character, which, being linked to the *imperium* of the predecessor State over the territory, can obviously not remain the property of that State after the change of sovereignty, or, in other words, after the termination of that *imperium*". He thought, therefore, that the Commission should give some consideration to the possibility of retaining the concept of "property necessary for the exercise of sovereignty", which had been used in the former article 9.

23. Mr. RAMANGASOAVINA said he accepted the principle laid down in draft article 9, which met the Commission's desire to simplify basic notions as much as possible and to confine itself for the time being, to State property and the substitution of one State for another. The word "substituting" was preferable to the word "transferring", proposed by Mr. Castañeda; for "substituting" expressed the idea that the successor took the place of the predecessor, with all the legal consequences that entailed, whereas the word "transferring" would allow of changes in the transferable property. It would therefore be better to retain the word "substituting".

24. On the other hand he was in favour of replacing the word "freely" by the word "automatically", in order to avoid giving the impression that the successor State bore no share of the expenses which might arise from the transfer of the property. The expression "shall devolve, automatically and without compensation", used in the former article 9, was excellent. He therefore proposed that it be stated that the substitution of the successor State for the predecessor State "shall have the effect of substituting the former for the latter, automatically and without compensation, in the ownership of all State property...".

25. Mr. KEARNEY said he was inclined to agree with Mr. Ushakov that the new article 9 covered such a wide variety of situations that it would be difficult to foresee all their consequences and to do justice to all the interests involved.

26. Mr. Ushakov had raised a particularly important point with regard to unions of States. Where such unions were of a federal character, which was the standard type, it would seem an unjust rule, for example, to make public buildings in the capitals of the component states federal property, when they might still be needed for the proper functioning of those states. Or course, in most unions those matters were governed by special agreements, but the Commission was drafting residual rules for cases in which no such agreement existed. The problem might

be solved by accepting article 9 as a general principle and introducing it with some such phrase as "Subject to the provisions of subsequent articles dealing with particular forms of succession,".

27. Article 9 also raised problems concerning the kind of property that was subject to transfer upon succession. As the representative of a common-law country he saw no problem in distinguishing between the public and private property of the State. If a State operated oil refineries, for example, they were State property which should pass to the successor State; but some kinds of State property, such as military equipment, arms and bases, might give rise to more complex difficulties.

28. Article 9 did not attempt to deal with the problem of the location of the property; that was the subject of other articles such as article 15; but it might be necessary to consider the effects of articles 9 and 15 together in regard to State property. The main distinction would be between movable and immovable property: for example State-owned railways might raise the question of claims to rolling-stock which the predecessor State had removed from the territory before the succession. Likewise the widespread use of containers and "lighter-aboard-ship" vessels, which might turn up anywhere in the world, could give rise, in a State in which shipping was nationalized, to disputes that would not be covered by the present draft articles.

29. Subject to his concern about the indiscriminate application of article 9 to very difficult situations, whether with regard to the type of succession, the location of the property or the kind of property, he was prepared to accept the new version in principle, although he felt that it could not be discussed in isolation from article 15, which, in its turn, would have to be made more precise.

30. Mr. BARTOŠ said he wished to draw the Commission's attention to three points. First, a succession of States might take place through an intermediate subject of law. The unification of Germany, Italy and, in part, Yugoslavia had come about in that way. For example, Montenegro had united with Serbia before the formation of the Yugoslav State; Serbia had then joined the other States which had finally formed Yugoslavia. The question had then arisen which State was the successor to Montenegro, particularly with regard to the debts contracted with other States by the Government in exile.

31. The second point was whether there was a successor State in the case of States emerging from decolonization. Practice did not always bear out the legal logic of Mr. Ushakov's argument. It was well known that a State which was forced to grant independence often set up, beforehand, a government team with which it signed succession agreements in the first few minutes after the time at which independence took effect. That had happened in India, for example. The question arose whether the representatives with whom the administering authority dealt before independence already represented the successor State, or whether it was the agreements signed between those representatives and the administering authority which created the newly independent State. For instance, France held that it was the Evian Agreements which had created the independent State of Algeria, though Algeria did not agree.

⁴ See previous meeting, para. 75.

32. The third point to which he wished to draw attention was that the word "freely" and the words "without compensation" applied to different situations. The element of gratuitousness related mainly to the expenses that might arise from the transfer, and it raised problems too complicated for the Commission to solve. On the other hand the Special Rapporteur had been right to lay down the principle that there should be no compensation, while leaving the States concerned free to depart from that principle by agreement. The principle of no compensation was fairer to newly independent States; moreover, it was simpler to proceed on that basis in order to avoid the endless complications which might arise, and had arisen in the past, from distinguishing between items of property according to whether or not they conferred the right to compensation, having been created to serve the needs of the State or those of the people—police stations or small harbour works, for example—even though the States concerned must be left free to agree on possible exceptions.

33. Mr. AGO said he thought the drafting points raised by article 9 should be referred to the Drafting Committee. Not only should the notion of "substitution" not be used in different senses, but the debatable expression "all State property" should be examined.

34. With regard to the substance of the article he shared the concern expressed by Mr. Ushakov and Mr. Kearney. There was, indeed, a wide variety of situations, which might call for solutions other than that set out in article 9. That, of course, was why the Special Rapporteur had included the words "save as may have been agreed otherwise". Normally, States settled matters by agreement, so the principle embodied in the article under discussion was in the nature of a residuary rule. The only case of State succession which precluded any agreement was certainly that in which a new State was created as a result of a revolution or civil war.

35. He wondered whether, by laying down the rule in article 9, the Commission might not run the risk of hindering the conclusion of agreements between the parties. For if it was in a party's interests that that rule should be applied in a particular case, it would oppose the conclusion of an agreement. Yet in some cases it was objectively desirable that the parties should agree on a solution other than that provided in article 9, and it should not be possible for one party to impose the rule in the article by refusing an agreement.

36. With regard to the words "all State property", the normal position was that at least some of the property of the predecessor State passed automatically and without compensation to the successor State. In some cases, however, it might not be equitable for property to pass in that way. Since, in the Special Rapporteur's opinion, the words consideration applied to both patrimonial and domanial property, it might be asked whether the principle of transfer of State property without compensation, which was fair in the case of public property, was also fair for private property. The answer to that question depended on the fact of each particular case.

37. While some members of the Commission feared that it was not possible to lay down a general rule, he

himself believed that such a rule might make the normal solution—by agreement—more difficult.

38. Mr. BILGE said he approved of the new wording of article 9, and particularly admired its structure. The provision stated either a residuary rule or a peremptory norm, depending on whether an agreement existed or not.

39. So far the Commission had encountered three main difficulties. The difficulty of the definition of public property had been partly overcome when it had agreed to consider only State property. As to the problem of compensation, the Special Rapporteur had pointed the way by providing in his draft article for the conclusion of an agreement by the States concerned, which might, of course, deal not only with compensation, but also with the property to be transferred. The third difficulty related to the application of the article to the different types of succession. Mr. Ushakov had expressed serious misgivings. He himself was more optimistic, because the rule in article 9 applied only in the absence of an agreement. States were always free to agree on a different solution; and in any case practice showed that the commonest procedure was to conclude an agreement. That enabled States to take due account of the particular requirements of the situation.

40. Unlike Mr. Ago, he did not think the principle stated in article 9 made it less likely that an agreement would be concluded. The principle was that no compensation was payable, but that was no handicap to the predecessor State, since it could always be agreed otherwise. As the Special Rapporteur had demonstrated in his reports, the principle of no compensation, which was based on the principle of viability, was widely adopted. It was justified, in particular, in the case of newly independent States. Nevertheless, States should be left free to reach agreement.

41. With regard to terminology, he thought the word "freely" should be replaced by the word "automatically". Furthermore, the term "ownership" was too limited in meaning and less satisfactory than the expression "Property necessary for the exercise of sovereignty over the territory affected by the succession of States", which had been used in the former version of article 9. Lastly, the words "all State property", which would obviously include property situated outside the territory concerned, were too general. They would be justified only where the predecessor State disappeared completely. It should perhaps be made clear in the commentary that, if the predecessor State continued to exist, all its property was not transferred to the successor State.

42. Mr. MARTÍNEZ MORENO expressed his appreciation for the effort made by the Special Rapporteur to devise a simple solution to a very complex problem.

43. The new article 9 was satisfactory in the case of newly independent States. He had some doubts, however, about its application to cases of succession arising from the dissolution of a union of States. His own country had been one of the members of the Central American Federation which had become independent of Spain in 1821. That union had unfortunately been dissolved in 1838, under almost chaotic conditions. In the circumstances it had not been possible to conclude any agree-

ment between the five new States which had emerged from the dissolution, so each new State had retained the State property situated in its territory. Certain buildings and other property situated in the former capital of the dissolved federation, however, had remained in the ownership of Guatemala. That example showed how difficult it was to apply the formula of the new article 9 in cases of dissolution of States.

44. He shared some of the misgivings which had been expressed about the use of the word "freely". Apart from the question of charges on the property, to which Mr. Bartoš had referred, it was necessary to consider cases in which part of the price was still owing on property bought by the predecessor State, as, for example, when an island had been purchased and payment was spread over several years. The word "freely", used in article 9, could give rise to misunderstanding in that connexion, since the right of the vendor State to payment would not be recognized. His own suggestion would be to introduce into the text the idea of property being transferred "as it exists and with its legal status"—a phrase taken from article 6 in the Special Rapporteur's sixth report (A/CN.4/267). In any case the commentary should contain a reference to that matter.

45. Sir Francis VALLAT said that, bearing in mind that article 9 stated a residual rule, he was prepared to accept it in principle. It set the Commission on the right path and constituted a satisfactory starting point, but there were still a number of problems which required careful consideration.

46. The first was that it would not be easy to apply the rule in article 9 to different kinds of succession. In many cases it might apply quite well, but in the case of transfer of part of a territory—a case of succession which came fully within the Commission's definition of succession of States—its application would prove most difficult. It would be necessary to examine the implications of the principle stated in article 9 for different kinds of succession, before it could be accepted as a general principle.

47. The second problem related to the location of the property, a matter of considerable importance. That matter was not dealt with either in the definition of State property in article 5 or in the present wording of article 9. The provisions of article 9 were near the mark for property situated in the territory which was the subject of State succession, but it would be difficult to apply them to property situated elsewhere; in its present form, article 9 certainly could not apply to property situated in the territory of the predecessor State.

48. Other problems arose from the nature of State property. Nowadays States assumed responsibilities in a wide variety of matters. Moreover, certain types of property moved very readily. As a result the predecessor State might suffer great hardship if all property that happened to be in the territory of the successor State at the time of the succession was transferred freely and without compensation to the successor State.

49. For property to pass "freely and without compensation" was normal in the case of public property used for government purposes. In other cases, however, some compensation was often given to the predecessor State.

50. Mr. USHAKOV suggested that, in order to cover all possible situations, article 9 should be redrafted to read:

"The successor State shall, on the date of transfer, acquire full rights to the State property transferred to it on the occasion of a succession of States."

That wording could, of course, be amended according to whatever notion of transfer the Commission finally adopted. There should also be further provisions to indicate when and how the property was transferred.

51. Mr. AGO observed that, worded in that way, article 9 no longer served the purpose of stating a principle of transfer. The emphasis was on the date of transfer. The notion of transfer would be defined in other provisions.

52. Mr. USHAKOV said that there was no transfer, but the automatic substitution of the successor State for the predecessor State. Of course, that substitution occurred on a specific date.

53. Mr. BEDJAOUI (Special Rapporteur) said he had thought that the new version of article 9 would facilitate the Commission's task by simplifying certain problems. But some members, such as Mr. Tammes, had wondered whether the new article did not go rather too far with regard to the transfer of State property. Yet practice showed that it was not only the whole property of the State that was transferred freely, without compensation and automatically, but very often also other public property, under the same conditions. He thought that, in reality, perhaps article 9 did not go far enough and would have to be supplemented later. In that connexion he referred to the Treaty of Peace with Italy,⁵ concluded in 1947, which Mr. Ago had cited in his fourth report on State responsibility (A/CN.4/264 and Add.1). Under resolutions adopted by the United Nations,⁶ it had been decided to transfer to Libya and Eritrea not only State property, but also para-State property. Similarly, the Franco-Italian Conciliation Commission established to settle the dispute concerning the property of local authorities which had arisen between France and Italy at the time of concluding the Peace Treaty, had ruled that the successor State should receive, without payment, not only State property, but also para-State property, including municipal property.⁷ Hence article 9 was not unduly broad, for it did not cover all the property which was very often transferred to the successor State without compensation.

54. As Mr. Kearney had pointed out, article 9 raised three problems: the type of succession, the location of the property, and the nature of State property. Property situated outside the territory did present a problem, and article 9 should be read in the light of all the articles dealing with the various types of State succession, in particular articles 15, paragraph 2; 19, paragraph 2; 23; 27; and 31, paragraph 2. Article 34, on property of the State in public establishments, and article 38, on

⁵ United Nations, *Treaty Series*, vol. 49, p. 126.

⁶ General Assembly resolutions 388 (V) and 530 (VI).

⁷ United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publications, Sales No. 64.V.3), p. 501.

property of the State in territorial authorities, might also be borne in mind. In that connexion, Mr. Kearney had suggested that it should be specified that the transfer of all State property would be "subject to the provisions of subsequent articles dealing with particular forms of succession." The Drafting Committee might well consider a formula on those lines, which would not unduly mortgage the future. Some members of the Commission, including Mr. Castañeda and Mr. Tammes, had expressed a preference for the formula he had used previously, namely, "property necessary for the exercise of sovereignty". But in any case, whatever the formula selected, it was mainly a matter of the property necessary for the viability of the State.

55. He acknowledged that in the past there had been many cases of compensation and indemnification, particularly for property in the private domain of the State. But he did not think it could therefore be said, as Mr. Ago did, that it was unfair to transfer the private property of the predecessor State to the successor State without compensation. In his opinion the notion of equity should not be introduced in that context, because it was not applicable in all cases. In cases of decolonization, for example, equity lay in the opposite direction, since the successor State was merely taking back what had previously belonged to it, of which it had been despoiled.

56. Mr. Bartoš and, before him Mr. Ushakov, had said that they could not regard an agreement concluded between a metropolitan Power and a colony as a treaty under international law; they had cited the case of India, which had signed an agreement with the United Kingdom a few minutes after the declaration of its independence. The Commission would recall that he had dealt with that question in his first report.⁸ The case of Algeria was even more complicated, because since 1958 there had been a provisional Government in exile, which the French Government had not regarded as an entity empowered to conclude an agreement with it. Thus the Evian Agreements had begun as parallel declarations, and had subsequently become an agreement.

57. Although it was true, as Mr. Ago had pointed out, that article 9 gave the successor State a great advantage, since in the absence of an agreement the rule laid down in the article was directly applicable, in his own opinion it was nevertheless a general rule which was justified and which could not be departed from too far, even by agreement.

58. The wording proposed by Mr. Ushakov, to the effect that the successor State would, on the date of transfer, acquire full rights to the State property transferred to it on the occasion of a succession of States, did not reflect what he had tried to bring out in article 9, since it did not indicate what property was transferred, which he had tried to do in his draft.

59. The CHAIRMAN said that there appeared to be a general agreement on the essential elements of the rule stated in article 9. He therefore suggested that the article should be referred to the Drafting Committee to find a formula acceptable to all members of the Commission.

⁸ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 103, document A/CN.4/204, para. 63 *et seq.*

60. Mr. KEARNEY suggested that the Drafting Committee should also be authorized to examine article 15 (Property situated outside the transferred territory), since it would be very difficult to work out the text of article 9 without taking article 15 into account.

61. Mr. BEDJAOUI (Special Rapporteur) supported Mr. Kearney's suggestion, but pointed out that article 15 concerned only the particular case of a partial transfer of territory. It would be necessary to consider in general the case of property situated outside the territory and to find a generally valid formula.

62. Mr. BARTOŠ expressed reservations about the similarity between articles 9 and 15. The question dealt with in article 15 had raised many difficulties in international practice; it was very important for third States to know whether property situated outside the transferred territory was on the same footing as that situated within the territory. He was not opposed to referring article 9 to the Drafting Committee, but he fully reserved his position on that article until the Committee submitted a new text.

63. The CHAIRMAN suggested that, subject to those comments, the Commission should decide to refer article 9 to the Drafting Committee, on the understanding that the Committee would also examine not only article 15, but all the various articles dealing with property situated outside the territory subject to succession.

It was so agreed.⁹

Organization of work

64. The CHAIRMAN said that at its next meeting the Commission would take up item 5(a) of the agenda: Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General. He recommended that members who wished to suggest topics for the Commission's programme should do so as soon as possible.

Gilberto Amado memorial lecture

65. The CHAIRMAN announced that the Gilberto Amado memorial lecture would be given on Wednesday, 11 July 1973, at 4.30 p.m., by Mr. C. Eustathiades, a former member of the Commission.

The meeting rose at 1 p.m.

⁹ For resumption of the discussion see 1240th meeting, para. 1.

1233rd MEETING

Monday, 25 June 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

(a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245).

(b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

1. The CHAIRMAN invited the Commission to examine item 5 of the agenda. He drew attention to the "Survey of International Law" prepared by the Secretary-General (A/CN.4/245) and to the written observations submitted by three members of the Commission on its long-term programme of work (A/CN.4/254).

2. Mr. TAMMES said that the "Survey of International Law", which was the result of discussions over the last five years about the Commission's long-term programme of work, was intended to provide the Commission with a documentary and scientific basis on which to draw up a plan of work for the next generation. That had likewise been the purpose of the first *Survey of International Law* prepared in 1948.¹

3. However, the Commission had never really got down to considering its second long-term programme to the extent of contemplating the choice of new topics and the abandonment of others. When the *Survey* had appeared, in 1971, the Commission had been in the last year of its term of office and it had been thought that a newly elected Commission would be in a better position to take decisions about the future.

4. On the basis of the *Survey* it would seem that the Commission might now be able to reach conclusions, as the General Assembly would probably expect it to do on the occasion of its twenty-fifth anniversary. Nevertheless, he wondered whether it was really possible to undertake long-term prognostication of the development of international law. Some might well be sceptical and recall the Commission's experience at the outset of its work.

5. The first *Survey* had not excluded the possibility that the Commission, under its long-term programme, might be able to codify the whole of international law, but an unexpected situation had immediately come to light. New phenomena unknown to traditional international law as expounded in the 1948 *Survey* had appeared in the form of new branches of law, such as those covered in the 1971 *Survey* by chapter III, on the law relating to economic development, chapter XIII, on the law relating to the environment, chapter XIV, on the law relating to international organizations and chapter XV, on international law relating to individuals.

6. Those new developments had had only a limited effect on the long-term programme drawn up at the first session;² two major topics, State responsibility and State succession, were still under consideration, while the study of other topics had been completed more or less accord-

ing to plan. What the new situation had meant, however, was that the Commission would henceforth work within a narrower framework of United Nations law-making activities than had originally been conceived, except for the Commission on Human Rights, which had been planned from the outset. What had actually occurred was perhaps somewhat astonishing: the bulk of international law, as conceived in 1948 and delimited in the long-term programme, was now practically codified, so that the Commission needed major new topics to take up. On the other hand, whole new sectors of international law had meanwhile come into existence.

7. As to his own personal preferences and priorities, he considered that certain great projects of codification constituted the very structure of international law. One of those codifications, the law of treaties, had now been completed, while two others, State responsibility and State succession, were well under way. What similar broad areas were left to the Commission for doing the kind of work that was expected of it?

8. Going through the 1971 *Survey* he had singled out the topic of unilateral acts, which were dealt with in chapter VIII. As a counterpart to bilateral and multilateral acts, in other words to the law of treaties, it seemed to him that that was a neglected part of international law, although one very rich in practice. Not all aspects of that topic were ripe for codification, but the clarification of other aspects, such as unilateral promises and acts of protest, might contribute to the certainty of the law. A cautious approach to that subject-matter, not aiming directly at draft conventions, but rather at authoritative statements, as suggested by the Secretary-General in paragraph 283 of the *Survey*, might encourage the Commission to give the topic some consideration, especially since the participation of many new States in the law-making process might place in a new light a problem which had been neglected for generations.

9. There were also important subjects on which the Commission had already done some work. For example, the draft Code of Offences Against the Peace and Security of Mankind³ had resulted from one of the early assignments given the Commission by the General Assembly. Like other work of that period it had been relegated more or less to the background of the Commission's achievements, but if it was read again in the light of later problems, the draft Code might very well be considered a possible framework for the examination of "other offences of international concern", as they were called in chapter XVII, section 4 of the *Survey*, as well as of certain other fundamental issues which were also involved in the law of extradition. Chapter XV, which dealt with that topic, also included a section on the right of asylum, which was still outstanding on the 1949 list.

10. In considering new topics for possible inclusion in its programme of work, the Commission would also have to consider discarding some old ones, one of which should, in his opinion, be the right of asylum. The Commission had never tackled that topic, and in the meantime the General Assembly had adopted a Declara-

¹ Document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)).

² See *Yearbook of the International Law Commission, 1949*, p. 281, para. 16.

³ *Ibid.*, 1954, vol. II, n. 151, document A/2693, para. 54.

tion on Territorial Asylum,⁴ while the High Commissioner for Refugees had recently sent a draft Convention on Territorial Asylum to the United Nations.

11. The possibility of returning to the Commission's earlier work in the light of subsequent experience was closely bound up with the problem of revision. Mr. Reuter had referred to that problem in a most constructive manner in paragraph 27 of his written observations (A/CN.4/254). However, it might also happen that legal concepts which had been developed elsewhere in the United Nations would have an impact on the Commission's current work, in contradistinction to what it had already accomplished. One example was provided by the Commission's recent discussion of State responsibility, during which a need had been felt to take account of modern types of responsibility, which had been referred to the Commission by other bodies engaged in the law-making process in such fields as outer space, the human environment and the sea-bed. In that situation two things might happen: either the current work of codification would be adapted in the direction of progressive development, or the current topic would generate new topics, as had already been suggested in the case of State responsibility.

12. Those new topics would reach the Commission by "feedback" from its law-making environment in the United Nations and the regional bodies, but it was impossible to predict them and submit them to the General Assembly for approval. Nevertheless they would, he was sure, provide the Commission with much work for the next twenty-five years.

13. Mr. HAMBRO said that the present debate was a very important one and dealt with a very difficult matter. He himself believed that it would be dangerous, and probably not very wise, for the Commission to try to draw up a programme of work for twenty-five years.

14. The rate of development of international law was much quicker today than it had been at the time of the first *Survey* in 1948. Progress in the scientific and technological fields was being made at an unprecedented pace. That situation, combined with the evolution of legal rules in the community of nations, made it unrealistic to try to draw up a programme of codification and progressive development of international law for a quarter of a century to come. The Commission would do better to avoid engaging in "futurology" and concentrate on the problems that should engage its attention for the next five or six years.

15. It would be generally agreed that the Commission should try to draw up laws for nations and peoples, not just for lawyers. It should avoid the danger of being unduly esoteric. Subjects should be selected with an eye to their seriousness, but should not be so charged with political implications as to make it impossible to draw up legal rules.

16. In its work of codification and progressive development of international law, the Commission had benefited from the co-operation of the new States in building up

a law for all nations. Its work on the law of the sea had been a very great success, culminating in the 1958 Conventions. It would thus have been natural for the Commission to deal with the subject of the sea-bed and ocean floor, but that subject had been referred by the General Assembly to a special Committee, so that it could not be taken up by the International Law Commission.

17. The same applied to the law of the environment and the law of outer space—subjects which were of increasing importance. He believed that the problems the world had to face in regard to protection of the human environment were likely to prove much more important in the future than other matters now in the forefront of international relations. On the protection of the environment, as on outer space, however, new law was being made all the time and it would be dangerous to try to freeze the development of the law.

18. Another important subject which the Commission could not usefully take up in the near future was that of human rights. The controversies which arose on that subject showed clearly that it was not ripe for codification at the world level. The best results could be obtained at the regional level.

19. As to the topics which, in his view, were ripe for attention by the Commission, he agreed with Mr. Tammes that it would be useful to deal with unilateral acts as a continuation of some of the Commission's other work. In the immediate future, the topics of State responsibility and succession of States would continue to take up much of the Commission's time. In addition, it should study the topic of international watercourses, as the General Assembly had requested. As a sequel to its work on State responsibility, the Commission could also study the development of international law relating to ultra-hazardous activities. The subject of succession of governments seemed a natural continuation of the topic of succession of States. The Commission might perhaps follow its previous method of appointing a small working party of undertake a preliminary study of that subject. Another vast field which the Commission could usefully study was that of the recognition of States and governments, which would soon be ripe for codification.

20. Mr. SETTE CÂMARA said he doubted that, in the space of one week, the Commission would be able to deal with all the points raised in the Secretariat's excellent *Survey of International Law* and come to concrete decisions bringing its long-term programme of work up to date.

21. In 1949, on the basis of the 1948 *Survey*, the Commission had chosen for its long-term programme of work 14 topics out of the 25 suggested by the Secretariat. In the 24 years which had elapsed, the Commission had submitted final drafts or reports on only seven topics and two others were under examination, namely, succession of States and State responsibility. The remaining five topics, on which no work had so far been done, were: recognition of States and governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum. The Commission was now called upon to revise that list of remainin

⁴ See General Assembly resolution 2312 (XXII).

topics, discarding those considered no longer suitable and introducing new topics to meet the current needs of international life.

22. The situation had changed a great deal since the Commission had started with a clean slate in 1949, and the 1971 *Survey* was a very different document from that of 1948. It was based on the experience of years' work by the Commission and a thorough analysis of the modern realities of international law, and it took into account the general practice of the law of the United Nations and the evolution of international law over that period. It had benefited from the existence of a body of codified international law, much of it based on the Commission's own drafts. It gave due attention to the needs of co-ordination between the codified provisions of international law and the new branches of law which were emerging.

23. When the Commission had discussed the 1948 *Survey* it had been under pressure to draw up its first programme of work. The present situation was completely different; the Commission had its hands full with the topics of succession of States, State responsibility, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations. The limited progress achieved on those topics at the present session clearly showed that the Commission was occupied to the limit of its capacity. The work was advancing only slowly, and that fact would be reflected in the Commission's report to the General Assembly; in the circumstances it would not be appropriate for the Commission to submit to the Assembly an extensive and ambitious programme of work. Moreover, it was doubtful whether such a programme could be worked out in the very few days available for the review.

24. He considered that the *Survey* should be fully discussed, chapter by chapter, starting with the five topics still on the Commission's list. That would involve examining, first, sections 4, 5 and 6 of chapter I and the whole of chapter XV. Only when that had been done would the Commission be able to decide which topics should be retained. It should then take up the other chapters of the *Survey* to select items for a revised list of topics. Some of those chapters dealt with traditional fields of international law in which customary rules, international regulations and State practice abounded. Others related to new subjects such as the law of the air, the law of outer space and the law relating to the environment, in considering which great care must be taken to ascertain whether the experience of States had yet attained the degree of firmness needed to provide guidance for progressive development or codification. Chapter III of the *Survey*, concerning the law relating to economic development, deserved immediate attention and special priority.

25. It should be borne in mind that, over its 24 years of existence, the Commission had developed its own methods of work, which were directed to the drafting of specific texts with a view to their acceptance by States for adoption in future conventions. Subjects unlikely to be accepted by States should therefore be rejected.

26. In conclusion, he thought the Commission would need at least a month to draw up a long-term programme of work. It could not reject or adopt topics without a thorough discussion of each of them. Consideration of item 5 of the agenda should therefore be postponed until the twenty-sixth session, when it should be given the attention it deserved. However, if the Commission saw fit to start examining the item at the present session, he would be prepared to make a few comments on most of the subjects dealt with in the *Survey*. He would also wish, in that case, to comment on item 5 (b).

27. The CHAIRMAN said that at the twenty-fourth session he had suggested that each member should submit a brief list of topics which he considered to deserve priority. It was not his idea that the Commission should take a quick decision by a sort of poll. However, the discussion would probably reveal that certain topics were generally regarded as deserving attention.

28. At the meeting of the officers and former chairmen of the Commission it had been pointed out that one week was too short a period in which to discuss the *Survey*. It had been noted, however, that the item had been on the agenda for three successive sessions and that the Commission had not yet had time to take it up. It could give a week to discussion of the item at the present session, but might not have any time at all for it at the twenty-sixth session.

29. Mr. REUTER said that on the substance of the matter he had submitted his observations in writing, as members of the Commission had been asked to do (A/CN.4/254).

30. Those members who had spoken before him all seemed to think that the Commission should not make very long-term plans. It was rather difficult not to do so, however; for assuming that any important topic needed five to seven years' study and that the Commission could not handle two major topics at the same session, if it chose three topics it would in fact be adopting a programme of work for 20 years or so. What mattered now was not that the Commission should review all the topics proposed for study, which would be a waste of time, but that each member should arrange those topics in what he considered the most appropriate order of priority, so that the general feeling could be ascertained and the Commission, while remaining at the disposal of the General Assembly, could indicate to it two or three topics which might be given priority. Experience having shown that two major topics could not be dealt with at the same session, but had to be taken at alternate sessions, a few subjects of lesser importance and narrower scope should be selected in addition to the major topics.

31. He acknowledged that the Commission should not deliberately reject topics which were of unduly pressing concern, such as human rights, the environment, outer space and the sea-bed; but the General Assembly and the Security Council had seen fit to entrust them to other organs and it would be unseemly for the Commission to propose that it should deal with them. Unless, of course, it was asked to do otherwise, the Commission would do better to choose less urgent topics, which might be of less direct concern to peoples and nations—which were

more in need of peace and food than of legal texts—but were ripe for codification. His own choice, as he had stated in his written observations, would be the industrial use of watercourses and the immunities of foreign States and bodies corporate.

32. Mr. BARTOŠ said he endorsed Mr. Reuter's comments. The Commission's task was to contribute to the codification of international law as a whole, but it should not try to codify topics which were not yet ripe for codification unless the General Assembly asked it to do so. For however rational they might be, codified rules remained inoperative where principles had been codified prematurely, before they had been universally accepted or established by practice. For instance, the provisions of the Conventions on Fishing and Conservation of the Living Resources of the High Seas, which had been drawn up for reasons that were perhaps more political than legal, were not being applied, because they had not yet become custom. He therefore approved of Mr. Reuter's choices. The topics selected should not be those whose codification would enable the ideas of particular States to prevail, but those which were of general concern to all nations.

33. The Commission should nevertheless beware of being too traditionalist and conservative. It must find a happy medium between codifications and progressive development of international law.

34. Sir Francis VALLAT said he wished to make a few preliminary remarks and would not comment on the substance. It was extremely hard to choose among the many subjects suggested in the *Survey*. There were certain considerations which should guide the Commission in that difficult task. It was necessary to look beyond the subjects at present being studied by the Commission, in order to see which topics were likely to be suitable for codification and progressive development in the future.

35. Experience had shown that the time needed to prepare a topic was inevitably very long. It had taken, in all, no less than 18 years for the Commission's work on the law of treaties to come to fruition. The best results had been obtained by the Commission when its consideration of a topic had been preceded by very thorough initial research conducted a considerable time before a draft was submitted to it. The Commission should therefore choose a few topics which it could take up for study on completing its current programme of work. The General Assembly expected the Commission, on the basis of the 1971 *Survey*, to provide some indication of the direction of its future work.

36. He agreed with the two previous speakers that the Commission should not be over-ambitious. Its aim should simply be to select three, or possibly four topics of importance, to be given priority after it completed the work in hand. If the Commission could take such a decision, the present discussion would be extremely useful.

The meeting rose at 4.40 p.m.

1234th MEETING

Tuesday, 26 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

later: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

(a) **Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General**

(b) **Priority to be given to the topic of the law of the non-navigational uses of international watercourses**

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(continued)

1. The CHAIRMAN welcomed Mr. Tabibi, who had been unable, for health reasons, to attend the previous meetings. He invited the Commission to continue consideration of item 5 of the agenda.

2. Mr. USTOR said that the Statute of the International Law Commission made a clear distinction between codification and progressive development of international law. Article 18 required the Commission to survey the whole field of international law, but solely with a view to selecting topics for codification, and article 15 restricted codification to fields where there had already been extensive State practice, precedent and doctrine. Work on progressive development was undertaken by the Commission solely at the request of the General Assembly, but the Assembly had only rarely availed itself of its powers under article 16 of the Commission's Statute. Action had been taken by the Commission at the Assembly's request in only eight cases,¹ and in some of them the initiative had really come from the Commission itself.

3. However, experience had shown that codification and progressive development were practically inseparable, so that the distinction between those two aspects of the Commission's work had not been maintained in practice. It followed that, in attempting to draw up its future programme, the Commission was not bound by the strict interpretation of articles 15, 16 and 18 of its Statute, but had complete liberty to survey the whole field of international law and to choose not only subjects from fields in which there had already been extensive State practice, precedent and doctrine, but also subjects which had not yet been regulated by international law or in regard to which the law had not yet been sufficiently developed in the practice of States.

¹ See foot-note 6 to paragraph 5 of the "Survey" (A/CN.4/245).

4. It had to be recognized at the same time that the choice was of considerable political importance; that was perhaps why, in both article 16 and article 18 of the Statute, the power of decision had been left with the General Assembly. The Commission only had the power to make recommendations, and in doing so it would certainly wish to take the wishes of States into account; in that connexion he drew attention to paragraph 8 of the *Survey* (A/CN.4/245). It might be said, more simply, that codification and progressive development were not an end in themselves, but a means to an end—the end being the peaceful and just organization of the international community. On that basis, the General Assembly would be inclined to choose subjects closely connected with topical problems of international peace and security and with the economic development of the world, particularly that of the developing countries.

5. Topics of that kind, however, were fraught with political implications and were not ripe for codification and progressive development. In addition, they were linked with highly technical questions. The answer to those objections was that the matters in question were urgent and important; that the world political climate had greatly improved; and that the Commission was a forum in which the most delicate problems could be discussed calmly and objectively. As to technical questions, the Commission's achievements in dealing with the law of the sea, with its difficult technical aspects, were a sufficient reference. The General Assembly might therefore be induced to refer to the Commission the most diverse and difficult topics, which were more in the realm of progressive development than in that of codification.

6. The Commission, however, had to bear in mind its limited possibilities and the short time available to it. Its agenda was full for many years to come. Moreover, although codification and progressive development were inseparable, topics which came more within the scope of codification than of progressive development could be clearly distinguished.

7. Hence it might well be asked whether it was advisable to draw up a long-term programme of work. A long-term programme was no more than a list of topics with which the Commission proposed to deal at some time in the future. What mattered was not so much the programme itself as the priority given to each topic. A list of topics already existed in the excellent Secretariat *Survey*, and the Commission could always choose topics from it in the light of the progress of its current work. It would hardly be advisable to add any more topics to the 40 or so already listed in the *Survey*. His own view was that the Commission should place on its agenda every year the consideration of new items for inclusion in its programme and report whatever it decided to the General Assembly.

8. If the majority of members so desired, however, the Commission could perhaps also indicate some topics—but only a few—which it intended to study in the not too distant future. They could include the topic of international watercourses and that of State responsibility for damage caused by acts which were not wrongful under international law.

9. He would also recommend, although it was not a topic for codification, renewed consideration of ways

and means of making the evidence of customary international law more readily available. In accordance with article 24 of its Statute, the Commission had placed that subject on the agenda for its second session and had discussed it on the basis of an excellent working paper.² It would be extremely useful if that study could be revised or supplemented to bring it up to date. That work would have the advantage of revealing what national publications existed regarding State practice. If a circular note was addressed to governments asking whether such a publication existed in their country, it might induce States which did not have such publications to start them.

10. The Commission could also remind the General Assembly that it remained open at all times to any proposal referred to it by the Assembly under article 16. It might also refer to the now almost forgotten article 17, which entitled Member States, the principal organs of the United Nations, specialized agencies and even "official bodies established by inter-governmental agreement" to submit proposals and draft multilateral conventions to encourage the progressive development of international law and its codification. For example the International Court of Justice, as a principal organ of the United Nations, could well make interesting suggestions with regard to the Commission's future programme.

11. In conclusion, should the Commission refrain from drawing up a long-term programme of work such as that adopted in 1949, it could still decide to place on its agenda every year an item entitled "Consideration of the inclusion of new items in the Commission's programme of work". That would ensure continuity.

12. Mr. KEARNEY said he would merely add some brief comments to the observations he had already submitted in writing (A/CN.4/254). The present discussion had largely centred on what the Commission's work should be, with some indication of how that work should be done. In considering those questions it was well to remember that the Commission was the major organized body concerned with the codification of international law.

13. In the last 25 years the situation had changed considerably. Many new problems had emerged, some of them relatively unprecedented. Some of those problems had been entrusted to a variety of specialized bodies, and that situation had to be accepted as a fact. Moreover, in view of the Commission's methods of work, it was clearly impossible for it to take up many of the new subjects.

14. At the same time the Commission should not avoid a subject simply because there was little practice, custom or judicial precedent relating to it. Such an approach would mean abandoning part of the task assigned to the Commission. It would reduce the Commission to the secondary role of dealing only with subjects outside the active areas of international life.

15. The question arose what action the Commission should take on the 1972 *Survey* and what it should report to the General Assembly concerning its long-term programme of work. In his opinion the Commission should

² See *Yearbook of the International Law Commission, 1950*, vol. II, p. 24, document A/CN.4/16.

not decide on an exclusive list of topics which would preclude consideration of all others. But because of the extensive preparatory work required to deal with any topic, it would be wise to try to select certain topics as having the highest priority having regard to the needs of the international community. That would make it possible to plan the work ahead.

16. As Sir Humphrey Waldock had been wont to say, the Commission could deal with only one major and one minor topic at each session. That being so, the Commission had work on hand for 8 to 10 years to come. If it were to add three major topics and three less important topics to its present workload, it would in effect be covering the next 20 years. In that connexion, he stressed that a ten-week session was totally inadequate for the task of codifying a major portion of international law. The solution to that problem depended on convincing the General Assembly of the need for a change in the Commission's methods of work. One possibility, which would not involve undue expense, would be for a small committee to meet before each session to prepare matters for discussion by the Commission. The Commission itself would then be able to work more quickly.

17. The CHAIRMAN, speaking as a member of the Commission, said that the excellent Secretariat *Survey* amply showed, in paragraph 19, how the present situation differed from that of 1949.

18. In 1949 the Commission's task had been to codify traditional international law on subjects on which there had already been extensive State practice. The 14 topics then selected, out of the 25 originally proposed, had reflected that situation. The present problems, on the other hand, called for more energetic and systematic action than the creation of law solely by means of treaties and through the growth of customary law. Legal rules had to be framed for new activities, or to regulate activities traditionally regarded as lying within the discretion of States. Consequently, the Commission must take the international community's present needs into account when bringing its long-term programme of work up to date.

19. In the circumstances, it would be a mistake to select topics on the basis of the traditional criteria: extensive State practice, a large number of judicial decisions, legal writings that were more or less uniform, and possibly even relevant treaties.

20. It was worth noting that the Commission had not always been guided by those criteria when selecting topics for codification and progressive development. From 1949 to 1958, for example, it had done useful work concerning the continental shelf, a topic which met none of those criteria. The only relevant State practice had been that of 12 States in the Americas, one half of which had acknowledged the sovereignty of the coastal State over the superjacent waters of the continental shelf, while the other half had regarded those waters as part of the territorial sea or of the high seas as the case might be. Writers had been divided on the subject, and the only treaty had been the one concluded by the United Kingdom with Venezuela in 1942 on the subject of the continental shelf beneath the Gulf of Paria. The Commission had

nevertheless undertaken a codification of the topic in response to the clear needs of the international community and to the urgings of the General Assembly. That work had culminated in the 1958 Geneva Convention on the Continental Shelf.³

21. The same situation had arisen with regard to the problem of fisheries. The International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome in 1955, had acknowledged by a vote of 18 to 17, with 8 abstentions, "the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast".⁴ That narrow vote had sufficed to initiate the movement which had led to the acknowledgement of that special interest in article 6 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.⁵

22. Such a result had been possible because the concept of the special interest of the coastal State had been incorporated in articles 4 to 6 of the draft articles relating to the conservation of the living resources of the sea,⁶ prepared by the International Law Commission under the able leadership of Mr. J. P. A. François, the Special Rapporteur for the topic of the law of the sea. That piece of progressive development of international law thus had its origin not in any State practice or precedent, of which there was little or none, but simply in the decision taken by the 1955 Rome Conference to adopt a principle that went well beyond mere technical considerations.

23. Similarly, the Treaty adopted by the General Assembly on activities in outer space⁷ did not reflect any existing State practice. It was a legal framework for future State practice, deliberately adopted by the General Assembly in response to the needs of the international community.

24. That experience should be borne in mind when selecting topics for the long-term programme of work. Moreover, the topics selected should be those which were likely to attract the interest of the majority of countries.

25. That being said, he wished to consider briefly the five topics not yet examined by the Commission, out of the 14 accepted by the General Assembly in 1949.⁸ The first, that of recognition of States and governments, was one which the Commission had never tried to codify owing to lack of interest on the part of the General Assembly. The second, that of the jurisdictional immunities of States and their property, was an appropriate subject for codification and the Commission could well select it, even though it was not perhaps especially important or urgent. Some aspects of the third of those topics, namely, jurisdiction with regard to crimes com-

³ United Nations, *Treaty Series*, vol. 499, p. 312.

⁴ See *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea* (1955) (United Nations publication, Sales No. 1955.II.B.2), para. 18.

⁵ United Nations, *Treaty Series*, vol. 559, p. 286.

⁶ See *Yearbook of the International Law Commission*, 1955, vol. II, p. 33.

⁷ See General Assembly resolution 2222 (XXI).

⁸ See *Yearbook of the International Law Commission*, 1949, p. 281.

mitted outside national territory, had been codified by a number of recent treaties; the remaining aspects did not offer a promising field for the Commission. The position was somewhat similar with regard to the fourth topic, that of the right of asylum, since the adoption of a Declaration on territorial asylum by the General Assembly in 1967.⁹ That left the topic of the treatment of aliens, which the General Assembly must have had in mind when inviting the Commission to deal with the topic of State responsibility. On taking up the topic of State responsibility, however, the Commission itself had, of course, decided not to deal with substantive rules such as those governing the treatment of aliens.

26. He himself would suggest that the Commission should include the treatment of aliens in its programme of work; it was an important topic, some aspects of which were being codified piecemeal by a number of international bodies, including UNCTAD.

27. Among the subjects mentioned in the *Survey*, those in chapter III, on the law relating to economic development, were of great importance, but did not lend themselves readily to codification by the International Law Commission.

28. As to topics in chapter II, on the law relating to international peace and security, he did not believe that the Commission was disqualified from dealing with them. It should be remembered that in 1949 the Commission had adopted a draft Declaration on Rights and Duties of States.¹⁰

29. With regard to the law of the sea, the matters now outstanding were almost entirely within the realm of progressive development. The 1958 Geneva Conventions, which had emerged from the Commission's work, had already codified much of the traditional law of the sea. Hence there did not appear to be an important role for the Commission still to play in that sphere. Results could be achieved only by give and take, in the course of strenuous negotiations at the Conference to be held at Santiago in 1974. That was more a matter for representatives of States than for the Commission.

30. On the other hand, the question of the environment could lend itself to useful action by the Commission. The main difficulty arose from the diversity of sources and forms of pollution. The question of pollution of the sea by oil had been dealt with in a recent Convention,¹¹ and the Commission might well endeavour to identify five or six legal principles on the protection of the environment.

31. Another suitable topic for study by the Commission, was that of the objective liability of States for lawful acts. The topic was in urgent need of codification and was of especial interest to States owing to the problems it presented daily.

32. To sum up, he would suggest that the Commission should recommend to the General Assembly the inclusion of four new topics in its long-term programme of work:

first, the treatment of aliens; secondly, principles of law relating to the environment; thirdly, State responsibility for lawful acts; and fourthly, the law of the non-navigational uses of international watercourses.

33. He fully agreed that it was desirable not to overload the Commission's long-term programme of work, since three or four topics would keep it occupied for about 15 years.

34. Mr. TSURUOKA associated himself with the congratulations addressed to the Secretariat on the preparation of the *Survey*. The need to review the Commission's long-term programme of work was undeniable. The international situation had changed greatly since 1949 and new problems had arisen which called for regulation by international law.

35. Changes had also taken place within the United Nations, including the setting up of bodies to consider certain legal questions, and he wondered whether the Commission could leave the codification and progressive development of international law on those questions to other bodies. It might be feared that the Commission would have nothing but secondary matters to deal with if it allowed that trend to gain ground. It should be remembered, however, that the Commission was composed of jurists representing the different legal systems of the world and had always been successful in codifying the fundamental rules of international law. Unlike other bodies of its kind, it was not called upon to legislate in areas where immediate solutions were required; it should confine itself to the basic problems of international law. Consequently, the proliferation of bodies dealing with urgent and, in many cases, important matters was not a threat to the Commission's work.

36. Seven of the 14 topics on the 1949 programme had already been dealt with in final drafts or reports, and two others were under study, namely, State responsibility and succession of States. The Commission would still have to devote much time to those two topics, but it was obvious that the list of subjects for study should now be extended.

37. In drawing up a new list the Commission should be guided by two considerations. In the first place it should take into account the needs of the international community with regard to the codification and progressive development of international law. The Commission was the servant of the international community; it should not engage in purely academic studies, but should concentrate on the practical value of the provisions it proposed. Secondly, the Commission should select topics which were sufficiently ripe for codification or progressive development. It should not legislate at all costs, even if some situations did demand immediate solutions, nor should it succumb to the temptation of examining problems of urgent concern to the world. On the contrary, it should confine its work to those spheres of international law in which at least some rules of customary law could be identified.

38. With regard to the topics to be included in the new list, the Commission might well retain the five topics on the 1949 programme which it had not yet studied, namely, recognition of States and governments; jurisdictional immunities of States and their property;

⁹ General Assembly resolution 2312 (XXII).

¹⁰ See *Yearbook of the International Law Commission*, 1949, p. 287.

¹¹ See *International Legal Materials*, vol. XI (1972), No. 2, p. 262.

jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and the right of asylum. However, there was no disguising the fact that the question of recognition of States and governments would raise political difficulties, and that jurisdiction with regard to crimes committed outside national territory would present many problems.

39. As to new topics, he would recommend State responsibility for lawful acts, which he considered ready for study by the Commission. His other preferences were for international law relating to international watercourses; the law relating to the peaceful settlement of disputes, in particular conciliation procedure, which had recently gained in importance; and extradition.

40. If the Commission placed the question of unilateral acts on its list, the study of that topic would involve distinguishing between the different spheres to which such acts might belong. The denunciation of treaties, for instance, was closely bound up with the law of treaties.

41. He supported Mr. Kearney's suggestion that a small committee should be set up to meet before each session and prepare the Commission's work.

Mr. Yasseen took the Chair.

42. Mr. AGO, after congratulating the Secretariat on the high quality of the *Survey of International Law*, pointed out that the Commission differed from other United Nations bodies with responsibility for considering questions of international law in that it had been established expressly to deal with the codification and progressive development of international law, had general competence in that matter, and was a permanent organ. Its task was different from those of the special bodies set up to study specifically designated new subjects or matters of immediate interest as the need arose. Consequently, it had no need to seek popularity by drafting conventions in areas to which international law had not yet penetrated. He was glad that other bodies were dealing with legal questions, as that relieved the Commission, whose programme of work was already very heavy.

43. A radical change had taken place in the composition of the international community in the 1960s, as a result of the accession to independence of a very large number of States which, not having participated in the formation of the international law in force, considered, with some justification, that they were entitled to call its content in question. In the sphere of international jurisdiction, for example, what they mistrusted was not the judicial settlement of disputes as such, but the rules—especially unwritten rules—which the courts had to apply.

44. The role of the Commission had radically changed as well. To continue a technical task begun in the 1930s was no longer enough. Codification had become a necessity for imparting certainty to the law, above all unwritten law, and for strengthening its foundation with the co-operation of all members of the international community. That had been done, for example, by the Vienna Conference on the law of Treaties, and the Commission should therefore concentrate on codifying the main branches of international law.

45. So far, the Commission's codification work had resulted in Conventions on the law of the sea, diplomatic

law and the law of treaties. So far as the law of the sea was concerned, the effects of the rules drawn up had unfortunately been of short duration. No doubt the Commission might be partly responsible for that, but he nevertheless regretted that the topic had not been assigned to it again, for he was still convinced of the need for continuity in the criteria and methods used in codifying a given topic and in revising the codification to bring it up to date. In the sphere of diplomatic law there were still a few questions outstanding which the Commission could deal with in order to round off the Convention on Diplomatic Relations, the Convention on Consular Relations and the draft articles on the representation of States in their relations with international organizations. As to the law of treaties, the Commission would practically have covered the whole topic when it completed its studies of succession in respect of treaties, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations.

46. That left two major topics whose codification the Commission had undertaken and which would occupy it for many years yet: succession in respect of matters other than treaties, the study of which had only just begun and would certainly cover a number of matters besides State property; and State responsibility which, with the law of treaties, was the most extensive and important topic that the Commission had taken up, even though it had confined itself to responsibility proper, that was to say responsibility for internationally wrongful acts. Thus it could be seen that the Commission's present programme of work was already a long-term programme.

47. In those circumstances, the Commission should exercise the utmost caution in placing new topics on its agenda. For example, it would be unwise to take up the study, however interesting it might be, of questions such as the law relating to economic development, the law of outer space, international criminal law and so on, which required highly specialized knowledge and for which other bodies might be better qualified. The Commission would do better to concentrate on tasks whose scope was better adapted to its abilities. In addition to the major topics it had under study, two or three of which would occupy it at each session, the Commission would also do well to have, at the most, two or three other subjects in reserve.

48. Of the topics proposed, he would select the law relating to international watercourses, in particular rivers, which was a technical subject of great importance for many States; unilateral acts, which formed a logical sequel to multilateral acts, or treaties; and wrongful acts. If really necessary, the Commission could also adopt the topic mentioned by Mr. Castañeda, of liability for damage resulting from acts which he would not describe as "lawful", but rather as not yet prohibited by the international law in force. Lastly, the Commission would sooner or later certainly have to study the status of aliens, but it should not do so too soon, so as not to re-introduce confusion between international responsibility and the law of aliens, after having done everything possible to dispel it. It went without saying that the General Assem-

bly, if it saw fit, could add to those subjects any other matters it wished the Commission to study.

49. Mr. USHAKOV said he did not think the Commission should formally decide forthwith what topics it wished to include in its programme of work. No one could say what topics would be suitable for codification or would require it in 10 years' time. Besides, the Commission had chosen its subjects of study itself only at the beginning of its life; later, the initiative had always come from the General Assembly. That applied, for example, to the question of treaties concluded between States and international organizations or between two or more international organizations, and to the law of the non-navigational uses of international watercourses. Moreover, the General Assembly could hardly be asked to decide now, that in 10 or 15 years' time the Commission was to study one or another of the topics it proposed. Again, some of the topics which might be proposed, such as the law relating to the environment or the law of the sea, were either too far-reaching or had already been entrusted to other bodies, but one or more of their aspects might be referred to the Commission by the General Assembly. It was, indeed, for the Assembly to decide not only the subjects to be studied, but the most suitable bodies to study them.

50. It would therefore be better not to draw up a long list of possible topics for study or to decide formally what topics should be codified, but to report to the Assembly that, having examined the excellent *Survey of International Law* prepared by the Secretary-General, the Commission was submitting, for the consideration and information of the Assembly, several topics which its discussions had shown to be important.

Mr. Castañeda resumed the Chair.

51. The CHAIRMAN, speaking as a member of the Commission, pointed out that at its first session the Governing Council of the United Nations Environment Programme had unanimously adopted a report which included the following passage:

"So far as the topic of the international law regarding the environment was concerned, the suggestion was made that the General Assembly should be invited to consider the codification and progressive development of environmental law and possibly to refer the topic to the International Law Commission."¹²

The meeting rose at 1 p.m.

¹² See *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 25 (A/9025)*, para. 60.

1235th MEETING

Wednesday, 27 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter,

Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

(a) **Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General**

(b) **Priority to be given to the topic of the law of the non-navigational uses of international watercourses**

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(continued)

1. Sir Francis VALLAT said that Mr. Ustor had been right to remind the Commission that it should always bear in mind the provisions of its Statute. The Statute should be taken as it stood, at least until the General Assembly chose to amend it. In the context of the *Survey*, articles 16, 17, 18 and 24 were particularly relevant. Article 16, which dealt with the progressive development of international law, gave the initiative primarily to the General Assembly, while article 18, which dealt with the codification of international law, gave the initiative primarily to the Commission and placed upon it the duty of surveying the whole field of international law with a view to selecting topics for codification.

2. Article 18, paragraph 2, provided that, when the Commission considered that the codification of a particular topic was necessary or desirable, it should submit its recommendations to the General Assembly. He believed that the time had come for the Commission to submit such recommendations; the only question was whether a particular topic was ripe for codification. The real difficulty was to determine the area on which the Commission should concentrate. Some guidance on that point was given in article 15, which provided definitions of the expressions "progressive development of international law" and "codification of international law". That article read:

"In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systemization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."

3. It was perhaps difficult to be precise about the distinction between new and old subjects of law and between general and specific rules of law—in other words, between the foundation and the superstructure of the Commission's work. For example, the law of treaties clearly fell within the Commission's area, while the law of outer space and the ocean floor were in a different category. The Commission's object, as he saw it, should be to complete and fill out the main framework of inter-

national law and in so doing it should rely on the Statute as a useful guideline.

4. Useful guidance was also to be found in General Assembly resolution 2926 (XXVII). In operative paragraph 3 of that resolution the General Assembly had recommended that the International Law Commission should continue its work on State responsibility, succession of States in respect of treaties and of matters other than treaties, the most-favoured-nation clause and the question of treaties concluded between States and international organizations. In operative paragraph 4 the Assembly had approved the programme and organization of work of the Commission's twenty-fifth session, including the decision to place on the provisional agenda for that session an item entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General". He interpreted those paragraphs as meaning that the General Assembly expected the Commission to produce some positive proposal for the future in the broad field of codification.

5. Operative paragraphs 5 and 6 of the resolution were also very important. Paragraph 5 noted that the Commission intended to decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses, while paragraph 6 requested the Secretary-General to submit a study on the legal problems relating to the non-navigational uses of international watercourses. Since the General Assembly obviously wished to know what place the Commission intended to give that topic in its long-term programme of work, it was up to the Commission to provide a satisfactory answer. As long ago as 1970, in its resolution 2669 (XXV), the General Assembly had recommended

"that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate".

6. He fully agreed that the Commission should take up the subject of international watercourses, on which sources of law were abundant and some preparatory work had already been done. That subject, which involved some aspects of the environment and represented a blending of technology with legal study, would call for new methods and be a real test of the Commission's strength.

7. With regard to the question of priority, he thought it would be a mistake to organize the work on international watercourses in such a way as to interfere with the Commission's current programme. It would be better to organize the preliminary stage of that work and leave the question of priority to be decided by the General Assembly or the Commission at a later stage. For the time being, priority should be given to the international law relating to States, although the law relating to international organizations should not be excluded. That would represent a natural extension of the work from

the law of treaties and State responsibility to unilateral acts and the treatment of aliens.

8. The approach to the subject of unilateral acts required further definition and selection. Some help might be obtained from the first sentence of paragraph 279 and the last sentence of paragraph 280 of the 1971 *Survey* (A/CN.4/245). Mr. Kearney, in section VIII of his observations on the Commission's long-term programme of work (A/CN.4/254), had said that difficulties might be expected to arise in the realm of unilateral acts and that they were perhaps not a subject which should be recommended for study. He himself was not quite so pessimistic, but was inclined to support Mr. Kearney's suggestion that such a study might be undertaken by some organization other than the Commission, such as the International Law Association or the *Institut de droit international*.

9. As to his own preferences concerning the topics which the Commission should tackle, the first was succession of governments, which would be a natural development of the Commission's work on succession of States. In practice, problems concerning succession of governments occurred much more often than those concerning succession of States. His second preference, the jurisdictional immunities of foreign States and of their organs, agencies and property, was a topic on which vast experience had already been accumulated and one which affected both States and private persons, especially business concerns. In recent years, there had been a growing divergence in the practice of States with respect to immunities, and it was highly desirable that the Commission should attempt to find suitable solutions.

10. In regard to methods of work, he was not a revolutionary and believed that the Commission should continue to use those methods which had proved successful in the past, while always maintaining a certain flexibility. He recommended two methods in particular: first, the use of expert studies in fields having scientific aspects, such as that of international watercourses; secondly, increased recourse to the assistance of other professional bodies which could prepare the ground for the Commission on certain subjects.

11. Mr. QUENTIN-BAXTER said that the law relating to international watercourses seemed to be the kind of subject with which the Commission was pre-eminently qualified to deal and that, in his opinion, it should take a special decision in response to the request made to it by the General Assembly.

12. Unilateral acts formed an interesting topic which was a natural counterpart to the Commission's work on the law of treaties. It should be approached with caution, however, since it impinged on many other fields of law in which there had been dynamic developments in recent times, such as the law of the sea. The Commission should plan to take up the topic of unilateral acts in the not too distant future and meanwhile should encourage the collection of suitable material.

13. Sir Francis Vallat had mentioned the subject of jurisdictional immunities, which was a counterpart to the Commission's work on diplomatic and consular immunities. The subject was one rich in practice, and

did not call for so much caution as unilateral acts. A very definite need was felt among States for some international guideline on jurisdictional immunities, and he considered it a subject eminently suitable for the Commission's list.

14. He thought it would be a mistake to define methods of work too closely, for they needed to be adjustable in the light of experience. He could understand the reluctance of the older members of the Commission to accept dogmatic views about the need for change, but it was only proper that the Commission should face the possibility that it might have to consider international law in a wider context and perhaps slightly widen its span of topics. It would not be a satisfactory solution to extend either the length or the number of the Commission's sessions, since it was dependent on a quorum of members who had many other calls on their time. Nevertheless it might be appropriate to consider whether certain minor innovations could be made in the Commission's working methods.

15. With regard to the relationship between the Commission and the General Assembly, he noted that in recent years there had been a proliferation of other law-making bodies in specialized fields. For example, the General Assembly had entrusted the topic of the law of the sea to its main political Committee, and the question of the environment to another organ. The Commission thus had reason to feel some slight anxiety lest it be excluded from too many fields of law.

16. In responding to the recent request of the Commission on Human Rights,¹ the International Law Commission should make it clear that it did not intend to abdicate its responsibilities and confine itself to topics on which the issues were already settled and only scholarship was called for. After all, the members of the Commission were what might be called the guardians of international law; they worked on the basis of notions of pure law as opposed to mere political considerations, and nobody could take their place. He therefore considered that the Commission, while showing a proper responsiveness to the General Assembly's own wishes, should concentrate primarily on the traditional fields of international law. The Commission should make it clear to the General Assembly that the place of law in the international community was largely in its care, although it was fully conscious of the importance of the General Assembly itself as the embodiment of the existence and growth of law in that community.

17. Mr. CALLE y CALLE said he had listened with interest to the statements of members of the Commission, against the background of the 1971 *Survey of International Law*. The Commission's task was to compare what had been accomplished in the past with what could still be done in the future to create a legal order for the international community. The Commission should first explain to the General Assembly why some topics had not been dealt with, and say whether or not they should be discarded. It should also propose to the

Assembly a new list of topics which would take into account the present needs of the international community.

18. In his opinion the Commission should not be a mere depositary of residual tasks or a secondary organ of the United Nations. In recent years there had been a proliferation of organs to which the General Assembly had entrusted specific tasks, such as the definition of aggression, questions relating to human rights and the question of the sea-bed and ocean floor. A most important achievement of one such body had been the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.²

19. Over the past 25 years the Commission had developed its own methods of work, but he thought that in its report to the General Assembly it should express its willingness to accept new topics and begin new studies. The Commission was, after all, the servant of the General Assembly; in particular, it should be prepared to serve the new Member States and to deal with new areas of law where much practice already existed.

20. Among the topics which he considered of particular importance was the right of asylum, which had not yet been taken up by the Commission although it was of interest to the international community in general. The Declaration on Territorial Asylum³ had been adopted in 1967, but that instrument was transitional in character and it would be necessary to adopt more obligatory rules in the future. There was an abundance of precedent available regarding asylum, especially in Latin America, where many bilateral conventions containing provisions on that subject had been concluded.

21. The Commission should comply with the General Assembly's request and undertake to codify the law relating to international watercourses, on which much material had already been collected by the Secretary-General. The law relating to economic development was of particular importance. It was necessary to identify the legal principles regulating the basic duty of economic co-operation between States. Such co-operation was urgently needed to ensure a fair standard of living for the peoples of under-developed countries and to solve their tremendous social problems. It was necessary to protect their natural resources and to prevent illicit interference with them by large multinational corporations.

22. The Declaration adopted by the United Nations Conference on the Human Environment at Stockholm in 1972⁴ should be translated into legal rules determining the rights and duties of States in that field. Mr. Castañeda had already drawn attention to the suggestion made in the Governing Council of the United Nations Environment Programme that the General Assembly should be invited to consider the codification and progressive development of environmental law and possibly to refer the topic to the International Law Commission.⁵

23. He thought the topic of the jurisdictional immunities of foreign States and of their organs, agencies and

¹ See 1201st meeting, paras. 1 and 4-6 and 1228th meeting, paras. 33-36.

² See General Assembly resolution 2625 (XXV).

³ See General Assembly resolution 2312 (XXII).

⁴ See document A/CONF.48/14, section I.

⁵ See previous meeting, para. 51.

property, should also be examined, because there had been a number of recent cases in national courts concerning expropriated enterprises. A considerable amount of material was available on that subject, particularly in the Council of Europe and various Latin American bodies.

24. The topic of recognition of States and governments was also of great interest, especially in so far as it concerned the collective recognition of new States and of national liberation movements struggling to give their peoples the full sovereignty to which they were entitled.

25. Mr. Tammes had expressed himself in favour of tackling the subject of unilateral acts. Important studies had already been carried out on that subject which, by reason of its complexity, needed legal systematization.

26. Lastly, among the less important subjects calling for the Commission's attention was that of extradition. In the past it had been considered preferable to leave that matter for settlement by bilateral agreements, but in view of the very large number of conventions and treaties concluded on the subject it was undoubtedly ripe for codification. A multilateral convention would certainly help to bring order into that field and to improve judicial co-operation concerning the punishment of criminals. In view of the many new forms of international crime, such as those involving narcotics, genocide, attacks on diplomats and the hijacking of aircraft, such a convention would be extremely useful to the international community.

Mr. Castañeda took the Chair.

Co-operation with other bodies

(A/CN.4/272)

[Item 8 of the agenda]

(resumed from the 1228th meeting)

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

27. The CHAIRMAN welcomed the Observer for the Asian-African Legal Consultative Committee and invited him to address the Commission.

28. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said that as the Chairman of his Committee was prevented from attending by his new duties as Prime Minister of Sierra Leone, the honour fell to him, as Secretary-General of the Committee, to convey to the Commission the admiration which the Asian-African community felt for its work, and the hope of that community that the Commission's recommendations would be even more widely followed in the future.

29. The close ties between the two bodies had been further strengthened by the presence of an observer for the Commission at the Committee's fourteenth session, held at New Delhi in January 1973. Mr. Tabibi, the observer, had not only reported on the Commission's work, but had also made valuable contributions to the substantive discussions on a number of items on the Committee's agenda. Mr. Castañeda, the Commission's

present Chairman, had also attended the Committee's fourteenth session as observer for Mexico, and his statement on the concept of the patrimonial sea and the Santo Domingo Declaration had been a most valuable contribution. The Committee looked forward to welcoming him as the Commission's observer at its fifteenth session, to be held in Tokyo in January 1974. At its fourteenth session the Committee had had the satisfaction of welcoming 40 delegations of observers from States in the Americas and Europe.

30. The agenda for the Committee's fourteenth session had been a heavy one but, as at the previous two sessions, most of the plenary meetings had been taken up with the discussion on the law of the sea. Between sessions continuous consultations had been carried out by correspondence and working group meetings, between the Secretariat, the governments of States members of the Committee and the governments of other Asian and African countries. Extensive documentation had been prepared, abundant material had been collected, and an analysis had been made of the proposals before the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor, to help the governments of Asian and African States to prepare for the 1974 Conference on the Law of the Sea.

31. Another topic on the Committee's agenda had been the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, on which the Commission had prepared a set of draft articles at its previous session. The Committee had unfortunately not been able to discuss that question, because member governments had not had enough time to consider it in the light of the Commission's 1972 recommendations. State succession and State responsibility had also been on the Committee's agenda, as well as the question of pollution of international rivers. Since the latter subject was a new one, it would be some time before any specific proposals could be made on it.

32. The Committee had held a useful exchange of views on the organization of legal advisory services in Foreign Offices—a subject of great interest to developing countries in the region. It was most grateful to the observer delegation from the United States of America for its detailed description of the system functioning in that country. The Committee had decided to organize, at the appropriate stage, a meeting of Foreign Office legal advisers to exchange views and information.

33. Sub-Committees had dealt with the questions of the use of the waters of international rivers for agricultural purposes and prescription in international sales. After the Committee's fourteenth session, its Special Study Group on Landlocked States had met for five days and had put forward tentative draft proposals on some matters affecting such States. A meeting would be held at Geneva in a few days' time to enable the governments of Asian and African States to consult on the eve of the session of the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor.

34. Although the Committee worked primarily for its member States, it had extended its assistance during the

past three years to non-member States in Asia and Africa, many of which sent observers to its sessions and other meetings and regularly received the Committee's documents. Although the Committee worked mainly in English, its more important documents were now being translated into French, and simultaneous English-French interpretation was provided at all meetings.

35. The Secretariat of the Committee had arranged for a publisher in the United States to issue a publication on the constitutions of African States, which gave a brief account of constitutional developments in Africa. It was hoped thereby to arouse greater interest in African affairs and to focus attention on the process of constitutional development on that continent.

36. He had listened with great interest to the discussion on the Commission's long-term programme of work. Whatever the Commission might decide on that subject, he was sure that its work would always command the same respect as the draft articles on the law of treaties, the law of the sea and diplomatic and consular relations.

37. On behalf of the Asian-African Legal Consultative Committee, he invited the Chairman of the Commission to attend as an observer the Committee's fifteenth session, to be held at Tokyo in January 1974.

38. The CHAIRMAN warmly thanked the observer for the Asian-African Legal Consultative Committee for his statement. The increasing importance of the Committee's work was shown by the number of observers who had attended its fourteenth session. As one of those observers, he had been able to appreciate the high standard of the documentation provided for the session, particularly that on the law of the sea, which was very complete and most useful to jurists in all countries. The Committee's discussions on the law of the sea were certain to produce important proposals for the 1974 Conference.

39. Among the many items on the Committee's agenda he noted with interest the organization of a meeting of legal advisers to Foreign Offices. Exchanges of information at that level would be extremely useful.

40. Mr. TSURUOKA said that the success of the Asian-African Legal Consultative Committee's work was largely due to the devoted efforts of Mr. Sen, its Secretary-General. The membership of the Committee and the number of observers attending its meetings were increasing, and the scientific level of its work was rising higher and higher. He was very glad to find the links between the Committee and the Commission growing stronger from year to year and hoped that tendency would be accentuated in the future.

41. Mr. YASSEEN said that, under its statutes, the Committee placed on its agenda all the items which were on the Commission's agenda. The Commission could thus be kept informed of the trends developing in a vast region of the world embracing two continents, the oldest and the newest. Exchanges of views in the Committee between representatives of those two continents had led to conclusions which, on more than one occasion, had been helpful to the Commission and to certain codification conferences. In particular, the Committee had made useful contributions to the preparation of the drafts

on the law of treaties and on diplomatic relations. It had set itself the task of synthesizing the views of its member States on the codification drafts prepared by the Commission.

42. He hoped that the Committee would continue to work on those lines and that its links with the Commission would become even stronger. In conclusion, he wished to pay a tribute to the hard work, learning and ability of Mr. Sen, the Committee's Secretary-General.

43. Mr. TABIBI thanked the Observer for the Asian-African Legal Consultative Committee for his enlightening statement and paid a tribute to the contribution he was making, as Secretary-General of the Committee, to the cause of international law.

44. The Committee's fourteenth session had been a particularly important one because it had devoted most of its time to the law of the sea. The Committee's work would certainly contribute to the success of the 1974 Conference on that subject, as it had to the success of the Vienna Conference of the Law of Treaties. The good tradition of close contact between the Commission and the Committee should be maintained in their mutual interest.

45. Mr. KEARNEY reiterated the regret he had expressed at the opening meeting of the present session, at having been prevented at the last moment from attending the New Delhi session of the Asian-African Legal Consultative Committee. He was very grateful to Mr. Tabibi for having so well represented the Commission on that occasion. He had been glad to hear from Mr. Sen that the Committee had been further strengthened and its staff expanded, which would help it to continue its excellent work. He extended his best wishes for the success of the Committee in the performance of its tasks.

46. Mr. SETTE CÂMARA, speaking also on behalf of Mr. Calle y Calle and Mr. Martínez Moreno, two other Latin American members of the Commission, said that they associated themselves with the welcome given to the Observer for the Asian-African Legal Consultative Committee and with the praise addressed to the Committee for its work.

47. The very up-to-date documentation prepared by the Committee on the law of the sea would be most useful. He was glad to see signs that the work on that subject being done in Asia, Africa and Latin America was being usefully co-ordinated. He was also interested to note that the Committee had had the courage to take up the very difficult subject of the protection of diplomats. The results of the practical steps it had taken to give technical assistance to Foreign Office legal advisers would be watched with keen attention in Latin America, as would its work on the uses of the waters of international rivers. In conclusion, he expressed the hope that the co-operation between the Committee and the Commission would grow even closer.

48. Mr. USHAKOV, speaking also on behalf of Mr. Ustor, congratulated the observer for the Asian-African Legal Consultative Committee on his excellent statement. He himself had attended the Committee's eleventh session, in 1970, and had then had occasion to

admire the high quality of its work and the very full documentary material prepared for each of its sessions. That material was of interest to all international lawyers, and in particular to the members of the Commission. He hoped that the Committee would go on to ever greater successes.

49. Mr. HAMBRO, speaking also on behalf of Mr. Ago, Mr. Bilge, Mr. Reuter and Mr. Tammes, who, like himself, came from States members of the Council of Europe, said that they wished to associate themselves with the tributes paid to the Asian-African Legal Consultative Committee for the quality of its work and to Mr. Sen for his most interesting and admirably concise statement. They welcomed the friendly collaboration which had grown up between the Committee and the Commission and which, among other advantages, served to avoid the creation of regional international law in competition with general international law.

50. Mr. QUENTIN-BAXTER, speaking also on behalf of Sir Francis Vallat, said that they both took a special interest in the work of the Asian-African Legal Consultative Committee, whose very large membership included the great majority of Commonwealth countries. The lawyers of those countries brought to the Committee notions of law with which they were both very familiar and very much in sympathy. The Committee served a huge area which contained a great many countries, including some of the oldest and some of the newest in the world.

51. He was impressed at the very practical approach consistently adopted by the Committee in its work. The Committee was performing a great service to the Commission, and giving it real support and encouragement.

The meeting rose at 1.5 p.m.

1236th MEETING

Thursday, 28 June 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Milan BARTOŠ

later: Mr. Jorge CASTAÑEDA

Present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Co-operation with other bodies

(A/CN.4/272)

[Item 8 of the agenda]

(continued)

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE (continued)

1. Mr. RAMANGASOAVINA congratulated the observer for the Asian-African Legal Consultative Com-

mittee on his excellent statement. The Committee brought together the new ideas in the sphere of international law which were gaining acceptance in Africa and Asia. It was encouraging for the Commission that observers from such regional bodies should attend its sessions regularly, for they approached their work in the same spirit as it did.

2. The two observers who had already addressed the Commission at its current session had intimated, with regard to the law of the sea, that the younger States were claiming a greater role in the exploitation of their natural resources. That quite natural trend, which was soon to lead to revision of the Geneva Conventions on the law of the sea, might cause concern to the Commission, which had prepared the drafts of those instruments with especial care only about 15 years previously. It must be acknowledged, however, that in fact the situation had greatly changed in the meantime and that it had become necessary to harmonize the different positions in order to achieve the purposes of the United Nations Charter, namely, to maintain peace and to develop friendly relations among nations.

3. Mr. BARTOŠ said that his country, Yugoslavia, was keenly interested in the work of the Asian-African Legal Consultative Committee. He welcomed the fact that the Committee followed developments in the work being done on general international law and regularly informed the Commission of the position in regard to questions of interest to African and Asian countries. The Committee was composed of a large number of countries in the non-aligned group, to which Yugoslavia itself belonged. The excellent statement by the observer for the Committee showed that States wished to work together to develop an international law that was universal in outlook and conducive to co-operation between States. He wished the Committee every success in its future work.

Mr. Bartoš took the Chair.

(a) **Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General**

(b) **Priority to be given to the topic of the law of the non-navigational uses of international watercourses**

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(resumed from the previous meeting)

4. The CHAIRMAN invited the Commission to resume consideration of agenda item 5.

5. Mr. RAMANGASOAVINA congratulated the Secretariat on its excellent *Survey of International Law* (A/CN.4/245), which reviewed the Commission's work over its 25 years of existence and what remained to be done. The document gave an account not only of the work done by the Commission, but also of the debates and decisions of the General Assembly.

6. It must be admitted, however, that judged by the extent of the texts it had prepared since its establishment,

the Commission's achievements were rather slight. Furthermore, a process of obsolescence was affecting some of its work, in particular, the 1958 Conventions on the law of the sea. International society was changing rapidly, of course, and international law with it, so it was not surprising that even such carefully prepared texts should already be called in question. That might not be a cause for concern, but all the same it should incite the Commission to caution.

7. The Commission devoted only 10 weeks to its work every year, and some of its members could not attend the whole session owing to other commitments. In view of the short period at its disposal, the Commission should keep to topics which it was sure of being able to deal with in a reasonable time.

8. The obsolescence of the Conventions on the law of the sea should not be regarded as a setback for the Commission. The review of those instruments, which were essentially a codification of customary rules, was necessary because new States had become members of the international community and their aspirations and interests must be taken into consideration, having regard to the prodigious advances in science and technology. It was that course of events which had led the General Assembly to convene a conference on the law of the sea in 1974.

9. What was worrying, on the other hand, was the proliferation of special committees set up to study matters that would normally fall within the competence of the Commission. Those committees owed their existence to the fact that the Commission was often thought to be overloaded with work, too slow or too conservative. As to the review of the law of the sea, some had found it surprising that the Commission had not been given that task, which was a logical sequel to its previous work. Others had taken the view that the newer States were not sufficiently represented on the Commission for it to achieve anything useful in that sphere. He merely reported those opinions, but would suggest that criticism of the Commission for the slow pace of its work might be justified and that perhaps the opinions of members from new States did not carry enough weight in the Commission's deliberations.

10. With regard to the choice of topics for its programme of work, the Commission would recall that its Chairman, at the conclusion of the debate on State responsibility in the Sixth Committee, at the General Assembly's twenty-fifth session, had assured the members of the Committee that, in response to the wishes expressed by some of them, the Commission would give due consideration to the question of responsibility for lawful acts.¹ However, the Commission had had three important topics before it at its current session and had made little progress with the draft articles on State responsibility, of which it had discussed only a very few. It was to be feared that the General Assembly might one day withdraw that topic from the Commission and entrust it to a special committee. The Commission had already been supplanted by special committees in the study of

many interesting subjects, including questions of the law of the air—more particularly hijacking of aircraft—and the law of outer space. The study of many other topics, such as the law relating to the environment, the legal aspects of pollution, international criminal liability, and extradition, might fall within the Commission's purview, but it must first complete the study of the topics already on its programme of work.

11. Mr. TABIBI congratulated the Secretariat on the excellent *Survey* it had put before the Commission, which contained a full progress report on the codification and progressive development of international law, not only by the Commission but by other bodies as well.

12. The formulation of a long-term programme of work for the coming quarter of a century was a very delicate task. The world was moving very fast, and not only in matters of science and technology. Thus in one short week the United States had concluded several important treaties which would have been unthinkable only a few years previously. It would be recalled that certain topics had at one time been regarded as "cold war items" and therefore intractable. The General Assembly, which had the final say in the Commission's work, clearly expected the Commission to review its long-term programme in the light of experience and make suggestions.

13. Of the topics on the 1949 list,² two were under consideration by the Commission and several others had not yet been examined. There was a clear need to revise that list, but in doing so it would be well to remember that the work on a topic such as State responsibility would take about nine years to complete. He agreed with Mr. Ustor that, in selecting topics, the Commission should concentrate on those which met the needs of the world community, in so far as they were ripe for codification, and take them up for study in the spirit of the United Nations.

14. In his opinion the Commission should take up two kinds of subject: those connected with the maintenance of international peace and security within the meaning of Article 1 of the Charter, and those connected with economic rights.

15. A number of the subjects proposed in 1949 were connected with peace and security. They included: fundamental rights and duties of States; draft code of offences against the peace and security of mankind; pacific settlement of international disputes; and the question of international criminal jurisdiction. The last-named topic had long been regarded as altogether intractable, but perhaps tension had now been reduced sufficiently for it to be taken up.

16. Under the heading of economic rights it would now be appropriate to include the law of the sea. The Conference to be held at Santiago in 1974 would be mainly concerned with the economic aspects of that law, which were now in the forefront and had not been settled by the 1958 Conventions. Other economic items could be

¹ See *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1193rd meeting, para. 47.

² See *Yearbook of the International Law Commission, 1949*, p. 281, para. 16.

mentioned, such as sovereignty over natural resources and the law of the environment.

17. He was inclined to agree with Mr. Kearney that what was needed was not merely to select topics, but also to review the Commission's methods with a view to speeding up its work. One possibility was for the Commission to hold longer sessions of, say, 15 or 20 weeks instead of the present 10 weeks, which had proved insufficient. Another possibility was for the Commission to hold two separate sessions each year.

18. The term of office of members of the Commission also needed reconsideration. Its extension from the present five years to seven years would make for greater continuity. A longer tenure of office was also desirable for Special Rapporteurs; the replacement of a Special Rapporteur always created difficulties and sometimes delay.

19. Greater use of subsidiary bodies, such as sub-committees and working groups, was another idea worthy of attention. The European Committee on Legal Co-operation had not adopted the system of special rapporteurs; all its preparatory work was done by its secretariat and by subsidiary bodies.

20. It was also essential to strengthen the Codification Division; that was the only way to ensure that all documents were ready three months ahead of the session. Unfortunately the Legal Department of the United Nations, which at its inception in 1947 had been one of the strongest branches of the Secretariat, was the only one to have been reduced in size while other departments had greatly expanded. Even its name had been changed to the "Office of Legal Affairs".

21. Another method of work which had been used by the Commission in its early days might be worth reviving: that of consultation with experts. The choice of an expert was always a delicate problem, but was not insoluble. It should always be possible to find a qualified person sufficiently impartial to be generally acceptable.

22. At a time when the Sixth Committee of the General Assembly would be celebrating the International Law Commission's twenty-fifth anniversary, the Commission was in duty bound to contribute to the formulation of its long-term programme of work. It should either set up a committee to draft a list of topics or include in its report a survey of topics calculated to provoke fruitful discussion in the Sixth Committee.

23. The CHAIRMAN said that all the suggestions made by Mr. Tabibi should be noted, since the Commission's present methods of work could not produce really satisfactory results. It was important that the Commission's report to the General Assembly should contain suggestions for extricating the Commission from its present impasse.

24. Mr. MARTÍNEZ MORENO said he associated himself with the tributes paid to the Secretariat for its very comprehensible and well-documented *Survey*.

25. In the course of a debate in which the participants had shown a keen sense of their responsibilities, he had learned that it took, on an average, between seven and nine years for the Commission to complete its work on a topic and produce a set of draft articles. In the cir-

cumstances, he thought the Commission should proceed with great caution in drawing up a list of topics for its long-term programme.

26. In his view, the Commission should concentrate primarily on the topics at present on its agenda: State responsibility; succession of States; the most-favoured-nation clause; and the question of treaties concluded between States and international organizations or between two or more international organizations.

27. He understood the point of view of Mr. Calle y Calle, who wanted the Commission to take up important subjects of topical interest, but it was necessary to be prudent and to select only one or two such subjects.

28. In selecting topics it was necessary to apply certain criteria. The first was that the Commission should refrain from examining subjects which were already under examination by other bodies: for example, the definition of aggression, the law of outer space, and economic development and co-operation. The Commission should also refrain from taking up topics which were best discussed on a regional basis. An obvious example was the right of asylum, on which the Latin American States had a common position. Personally, he would be very glad if other regions of the world took the same position, but he had to admit that the time had not yet come to take up the topic at the world level, since there might be a risk of weakening that very necessary right. He endorsed the remark made by Mr. Reuter in paragraph 12 of his written observations (A/CN.4/254) that the choice of topics entailed "not only a technical evaluation of the scope of the subject-matter, but also a practical evaluation of the interest it might have for Governments and a political evaluation of the chances of reaching a wide consensus on the basic issues". Technical, practical and political aspects must all be borne in mind in the selection of topics if the Commission was to make a success of its work.

29. He believed that the law relating to the environment was a suitable topic for inclusion in the Commission's programme and that the General Assembly would welcome a suggestion to that effect. The practical and political aspects of the topic justified its consideration by the Commission. It was true that the topic presented many technical problems, but they could be rendered more manageable by dealing with only one or two aspects of that very complicated branch of law to begin with.

30. Unlike some members of the Commission, he was not in favour of including the topic of international watercourses in the programme. There was a great diversity of opinion on that topic in legal writings. The problem of the unity of river basins, and that of the difference between international rivers and international lakes, for example, had given rise to considerable difficulties. Another reason for caution was that a number of international disputes were still pending with regard to international watercourses and they could only be further complicated if the Commission were to undertake a study of the topic and adopt rules on the matters in dispute.

31. On the other hand, he would welcome the inclusion of the treatment of aliens as a topic in the Commission's

long-term programme of work. With the growth of economic integration and the emergence of common markets and free trade areas, increasing emphasis was being placed on the free movement of goods. The free movement of human beings was much more important, but at times did not receive as much attention. In Latin America it had been recognized that nations and aliens had equal civil rights.

32. He had been very interested to hear the suggestions made by Mr. Tabibi, particularly those concerning the strengthening of the Codification Division, consultation with experts and the lengthening of the Commission's sessions. He proposed that those valuable suggestions should be referred to the officers and former chairmen of the Commission.

33. Mr. BILGE commended the Secretariat on its *Survey of International Law*, which gave a comprehensive picture of present-day international law and indicated the topics susceptible of codification.

34. In reality, the Commission had little freedom of action in regard to its programme of work. It could only amend its existing programme, not draw up a new one. It was already examining a number of important topics which would keep it busy for a long time to come.

35. It should also be noted that even some of the topics listed in 1949 were not yet ripe for codification. It was true that there were many topics of current interest, but it must not be forgotten that the Commission's programme comprised both subjects which the Commission itself selected for study and subjects referred to it by the General Assembly. The latter group consisted mainly of current topics, calling for progressive development of international law rather than codification, and it was important that the Commission should leave room for more subjects of that kind which the General Assembly might entrust to it. In addition, it had to take into account the work of other bodies dealing with international law. That work generally concerned specific questions, particularly questions of human rights, and sometimes called for an effort to reconcile the interests of different States. Before undertaking the study of new topics, the Commission should also take into consideration the questions raised incidentally by topics under study. Examples were the question of responsibility for lawful acts, which arose in connexion with State responsibility, and the succession of governments or political régimes, which was connected with succession of States. All those considerations must lead the Commission to be prudent in its choice.

36. Of the five topics on the 1949 list on which no preparatory work had yet been done, he would give priority to the question of the jurisdictional immunities of States and their property. That topic was now open to codification, and the usefulness of codifying it was emphasized in paragraph 68 of the *Survey*. An added argument for its codification was that the world seemed to have accepted the principle of co-existence of political and economic systems.

37. As a second topic he would reject, for the time being, the question of jurisdiction with regard to crimes committed outside national territory, which seemed too

dispersed for codification in general rules. He preferred the right of asylum which, although a subject primarily of interest to Latin American countries, was one of world-wide importance and had implications for other subjects which the Commission was studying or would have to study.

38. As to the treatment of aliens, that subject seemed to be rather superseded by human rights and did not deserve any priority. He even doubted whether it should remain on the Commission's programme of work.

39. The question of recognition of States and governments should be set aside for the time being, for although it had legal consequences, it raised many political problems which did not lend themselves to regulations by law.

40. The Commission should limit its choice to two or three topics. It should not take too much notice of criticism of its rate of work. A set of draft articles worked out slowly was better than one prepared in haste and difficult to apply.

Mr. Castañeda took the chair.

Co-operation with other bodies

[Item 8 of the agenda]

(resumed)

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

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

42. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Commission's relations with the European Committee on Legal Co-operation, the Asian African Legal Consultative Committee and the Inter-American Juridical Committee, and the relations of those three Committees with one another were very important for the synchronized development of international law. He went on to comment on some of his Committee's activities which had a bearing on the Commission's programme of future work as it might be derived from the *Survey of International Law* (A/CN.4/245).

43. With regard to the fulfilment in good faith of the obligations of international law assumed by States, a problem arose in relation between the obligations created by internal law and those created by international law: that of the indirect effects of an international judgement in internal law. The European Court of Human Rights had recently taken a position on the application of article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,³ according to which an international court—in that instance the European Court of Human Rights—which found that an international obligation to a private person had been violated, could subsequently grant "just satisfaction" if internal law alone could not eliminate the consequences

³ United Nations, *Treaty Series*, vol. 213, p. 222.

of the breach of the international obligation. The Court, which had granted such "just satisfaction" for the first time in 1972, had recently been called upon to construe that judgement on a point directly relating to its effects in internal law. The members of the Commission would receive a copy of the Court's interpretation, which had a number of interesting aspects, in particular with regard to the implicit power of an international court to construe its own judgements and to the concept of good faith, to which Mr. Verdross, a former member of the International Law Commission, had referred in his dissenting opinion.

44. As to the jurisdictional immunities of States, the European Convention recently concluded on the subject would probably enter into force in 1974. Although its application was limited geographically, the Convention had the merit of bridging the gap between the different conceptions of the jurisdictional immunities of States held by the common-law countries and the countries of the European continent, only the latter countries recognizing the distinction between acts *jure gestionis* and acts *jure imperii*. The Convention did not take one side or the other, but affirmed the jurisdictional immunity of the acts of a foreign State except in matters enumerated in the Convention. It thus laid down procedure based on a negative list. The Convention also placed an obligation on States to comply with the judgements of foreign courts and made provision for the settlement of disputes.

45. With regard to extra-territorial questions involved in the exercises of jurisdiction by States, the Committee he represented was endeavouring to bring national systems of criminal law into line, as required by the ratification of the Hague Convention and the Montreal Convention of the International Civil Aviation Organization, by expanding the competence of courts in certain States members of the Council of Europe to deal with acts committed abroad. Attention should also be drawn to two other recent criminal law Conventions governing the transfer of proceedings from one State to another and the recognition and enforcement of foreign sentences. Such an arrangement was, of course, only workable between countries having the same conception of the role of criminal law. On the other hand, in the matter of recognition and enforcement of judgements rendered in civil cases, the situation was less "politicized", in the best sense of the term. A guide to the recognition and enforcement of foreign judgements by States members of the Council of Europe was in preparation and would appear in 1974. The conventions he had mentioned would be annexed.

46. The European Committee on Legal Co-operation was particularly interested in the question of State responsibility, for although it had been obliged to consider it on several occasions, it had not been able to define its position on the subject, either in the European Convention on Information on Foreign Law or, more recently, during the preparation of a draft European convention for the protection of international watercourses against pollution. The latter text, which concerned both the law of international watercourses and the law relating to the environment, was intended to settle a number of problems.

47. The first problem was that of the balance to be struck between uniform rules for all the future contracting parties—the 17 States members of the Council of Europe—and the particular obligations to be laid down for the riparian States of a particular watercourse. Hence the idea of preparing a "master convention" with two purposes: first, to draw up standards of quality for water, to be observed by all contracting parties, relating to both concentration (maximum tolerable content of undesirable substances in watercourses) and emissions (prohibition or limitation of the discharge of dangerous substances), and to provide for adjustment of those minimum standards, by agreement between the parties interested in a particular watercourse, so as to raise them to the level regarded as necessary to ensure that the waters in question could be used for certain purposes, such as drinking water supply; and secondly, to place an obligation on the contracting parties interested in a particular international watercourse to enter into negotiations for the conclusion of a co-operation agreement satisfying certain criteria and objectives laid down in the convention.

48. The second problem to be solved was the settlement of disputes regarding the interpretation or application of the future convention, of co-operation agreements and of any instruments drawn up pursuant to such agreements. The existing draft provided for compulsory arbitration at the request of one party. Owing to almost insurmountable technical difficulties, the idea of establishing a single procedure for settling disputes to which there were more than two parties, and, in particular, more than one respondent, had had to be abandoned. It was provided, however, that when there were several identical or related claims, contacts between the arbitral tribunals set up should be encouraged.

49. The third problem was that of balancing the charges to be borne by the contracting parties, which was rendered difficult by their respective geographical situations. With regard to compliance with the minimum standards laid down by the convention, the intention was to ask downstream States to assume certain obligations even if the watercourse for which they were responsible did not cross another common frontier with another contracting party: for example, in the case of estuaries.

50. Lastly, it would be necessary to solve the problem of the relationship between the pollution of fresh water and the telluric pollution of coastal waters. It was proposed to supplement the convention, which was limited to inland waters, by a convention against the telluric pollution of coastal waters, which would be prepared, at a diplomatic conference to be convened by the French Government late in 1973, by the States signatories of the Oslo Convention of 1972 for the Prevention of Marine Pollution by Dumping from Ships and Aircraft.

51. With regard to the law of treaties, the European Committee on Legal Co-operation would shortly answer Mr. Reuter's questionnaire. It was looking for ways to speed up procedures for the ratification of multilateral conventions and to reduce the number of reservations. In addition, an exchange of views on the techniques of international codification was to be held soon.

52. A collection of the European conventions concluded up to the end of 1971, with an analytical index, had just been published in two volumes and would be sent to the members of the Commission. Of the 15 States parties to the European Convention on Human Rights, 12 had so far recognized the jurisdiction of the European Commission of Human Rights and the European Court of Human Rights.

53. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his very interesting statement, which was particularly useful to the Commission at a time when it was planning its programme of future work.

54. Sir Francis VALLAT warmly thanked the observer, both on his own behalf and on behalf of the other members of the Commission from countries which were members of the Council of Europe, for an excellent description of the Council's legal work as such, and in relation to the work of the Commission. He was glad to note that, in drawing up its conventions and legal rules, the Council took great care not to impinge on the field of customary law, which came within the Commission's province. He had been especially interested to hear of the Committee's work on the subjects of jurisdictional immunities of States and pollution of international watercourses.

55. Mr. REUTER warmly thanked the observer for the European Committee on Legal Co-operation, for his outstanding statement and for the generosity of his Committee in providing the members of the Commission with documents of undeniable interest. The description of the European Committee's activities held many lessons for the Commission. In particular, the Commission might well adopt the technique of working out, side by side, a set of peremptory general rules and a set of more flexible rules agreed upon between the main parties concerned. If that procedure had been found necessary and convenient for 17 States which were close neighbours, it was all the more so for the international community. The fact that the Council of Europe had established a general system for the protection of human rights did not prevent it from taking up problems of more limited scope. Similarly, while the Commission had to take up major questions of international law, it should also, from time to time, study more limited subjects which could be quickly disposed of.

56. Mr. USTOR, speaking also on behalf of Mr. Ushakov, said it was a great pleasure every year to hear Mr. Golsong's report on the manifold activities of the European Committee on Legal Co-operation. It was especially interesting for members from eastern Europe to learn what was being done by legal bodies in western Europe at a time when preparations were under way for the European Conference on Security and Co-operation, 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.

57. Mr. MARTÍNEZ MORENO, speaking for the Latin American members of the Commission and for Mr. Yasseen, who had been unable to be present when Mr. Golsong had made his statement, said it was an

honour for him to welcome the observer for the European Committee on Legal Co-operation. Mr. Golsong's statement had confirmed that Europe was still in the vanguard of legal science and could count on worthy successors to such great jurists of its past as Vitoria and Grotius.

58. He had been particularly pleased to hear about the recent judgement of the European Court of Human Rights awarding pecuniary compensation to a private person who had been unable to obtain satisfaction in national courts. Latin American jurists followed the work of the European Commission of Human Rights with keen interest, for the Central American Court of Justice, founded in 1907, had been the first international tribunal of that kind in the world and had been open to private persons.

59. Mr. KEARNEY thanked Mr. Golsong not only for his very interesting statement but also for the cordial reception which he—Mr. Kearney—had met with on attending the meeting of the European Committee on Legal Co-operation at Strasbourg in the autumn of 1972. On that occasion he had been impressed by the number and variety of the Committee's activities in both public and private international law.

60. Mr. TSURUOKA, speaking also on behalf of Mr. Tabibi and Mr. Ramangasoavina, thanked Mr. Golsong for his remarks, which had been most enlightening to the Commission, and congratulated the European Committee on Legal Co-operation on its achievements.

61. Mr. BILGE said that the work of the European Committee on Legal Co-operation was most helpful to the Commission in its own fields of study. He welcomed the increase in the number of States which accepted the jurisdiction of the European Commission and the European Court of Human Rights, he hoped that their number would increase still further and that the European Convention for the Protection of Human Rights would be fully applied.

62. Mr. QUENTIN-BAXTER expressed his gratitude to the observer for the European Committee on Legal Co-operation for his detailed account of the Committee's many activities. He had been particularly touched to hear of the work being done by the Committee in the field of human rights.

The meeting rose at 1.0 p.m.

1237th MEETING

Friday, 29 June 1973, at 11.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

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

(a) **Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General**

(b) **Priority to be given to the topic of the law of the non-navigational uses of international watercourses**

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to resume consideration of item 5 of the agenda.

2. Mr. SETTE CÂMARA reminded the Commission that the General Assembly, in its resolution 2926 (XXVII), had noted that the Commission intended, in the discussion of its long-term programme of work, "to decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses". The advance report submitted by the Secretary-General pursuant to that resolution (A/CN.4/270) contained only a plan of the report being prepared to supplement the 1963 report on "legal problems relating to the utilization and use of international rivers". The supplementary report, like the previous one, would provide information on internal laws, bilateral and multilateral treaties, decisions of international tribunals and studies made by non-governmental organizations. The new report would also include studies by intergovernmental organizations and information concerning the problem of pollution of international waterways. Information from States, was coming in very slowly, however. Eight States had given information on treaties and only one had supplied information on national legislation. Only three international organizations had complied with the request to furnish material concerning their work on the subject, and the Secretariat reported that no decisions of international tribunals, other than those included in the initial report, had been found (A/CN.4/270, para. 9).

3. At the previous session he had pointed out that the Commission needed to have access to the supplementary report before deciding what priority to give the topic. The existing studies¹ had been published in 1963 and were based on evidence provided by a very limited number of States, since at the time only five States had sent information to the Secretariat. The very limited response to the recent Secretariat requests for information showed that there was no feeling of urgency among States concerning the codification of the rules governing international watercourses. The matter was one on which international agreements abounded: no less than 253 treaties governing the non-navigational uses of international watercourses were included in the Secretariat survey of Legislative Texts and Treaty Provisions² and the rules applicable varied from place to place and from river to river. It was essential that the Secretariat should digest the voluminous material announced in its advance report, so as to enable the Commission to extract valid

rules of international law from the fluid mass of State practice. What was more, the Secretariat stated in its Survey of International Law that at the General Assembly's fourteenth session the view had been expressed that an attempt to codify the matter would be premature and that it should be left to the International Law Commission to decide whether the subject was an appropriate one for codification (A/CN.4/245, para. 286).

4. It was common knowledge that interest in the subject, which had been dormant for 12 years, had been awakened by the adoption of the "Helsinki Rules" by the International Law Association in 1966.³ Those rules constituted a useful piece of academic research, but included some very controversial features, such as the doctrine of the unity of river basins, which might prevent developing countries from exploiting their water resources, since the use of even the smallest tributary would depend on the consent of the other States in the river basin concerned. To take a specific case, practically the whole territory of Brazil was included in two river basins: that of the Amazon and that of the river Plate. The doctrine of the unity of river basins would mean that the construction of a small hydroelectric power station on any one of the thousands of small rivers in Brazil would require the consent of all the other States in the basin concerned. Brazil had a balanced approach to the problem, for it was the upstream State in the river Plate basin and the downstream State in the Amazon basin, the largest river basin in the world.

5. The Helsinki Rules dealt with the problem of pollution and the Commission itself, in its 1972 report, had concluded that "the problem of pollution of international waterways was of both substantial urgency and complexity".⁴ Pollution was undeniably an important question; it was the by-product of centuries of heedless exploitation of natural resources, and the world had to devise means of controlling it. But world-wide concern over the problem went back only a few years; it could not be said that there were already international rules that were ripe for codification. The Stockholm Conference had produced a set of principles,⁵ but had revealed wide divergencies between industrialized and developing countries in their approach to pollution control. The Governing Council of the United Nations Environment Programme had recently discussed a number of problems relating to pollution, but only in a very preliminary way. The Commission had not received any specific recommendation to undertake the codification of rules on the pollution of watercourses, though it had recognized that the problem was both urgent and complex.

6. In his opinion no decision could be taken on the priority to be given to the subject until the supplementary report was received and the Commission had had time to study it thoroughly. The Commission should therefore wait until its next session before even discussing the problem of priority.

³ The International Law Association, *Report of the Fifty-second Conference (1966)*, p. 484.

⁴ See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter V, para. 77.

⁵ See document A/CONF.48/14, section I.

¹ Document A/5409 (3 vols.).

² ST/LEG/SER.B/12 (United Nations publication, Sales No. 63.V.4).

7. As to methods of work, Mr. Kearney's proposal seemed to provide a way for the Commission to reach some conclusions about the revision of the 1949 list. It was essential to arrange systematically, and analyse, the many and often conflicting suggestions which had been made during the discussion and the individual preferences which had been expressed, in order to arrive at conclusions that would represent the consensus of the Commission. Some members preferred the minor subjects, others the major ones. Some would choose the traditional problems of international law; others would prefer new and up-to-date subjects. He therefore supported the idea of setting up a small committee to meet for a few days immediately before the Commission's twenty-sixth session.

8. Mr. HAMBRO said he found Mr. Sette Câmara's comments thought-provoking, but feared that if the Commission should decide not to give priority to the question of the non-navigational uses of international watercourses, that might cause some surprise in the Sixth Committee.

9. He had also been interested by the various suggestions made concerning the Commission's methods of work. He hoped that emphasis would be placed on the usefulness of obtaining expert technical advice, as had been done on the question of the continental shelf. On the other hand he could not agree to the suggestion that the Commission should lengthen its sessions from 10 to 20 weeks. After all the Sixth Committee was not unaware of what went on in the Commission and might very well conclude that it was already difficult enough to persuade members to remain for a ten-week session. Membership in the Commission conferred such prestige that all members were in great demand for other tasks and would have difficulty in devoting more time to the work of the Commission itself.

10. He thought the Commission was slowly approaching a consensus on its future programme of work; he hoped it would not be necessary to vote on the matter.

11. Mr. KEARNEY said he agreed with Mr. Hambro that the Commission was reasonably close to a consensus on its future programme of work. However, that programme would necessarily be influenced by the current programme, which included some topics that had so far been considered only in part.

12. State responsibility was undoubtedly the most fundamental and the broadest topic on the Commission's list, and attention might well be given to those aspects of it which had not yet been dealt with by the Special Rapporteur. For instance, once the ground-work had been completed on the basis of the Special Rapporteur's draft, the Commission might consider State responsibility for the violation or breach of treaties and for the discharge of obligations which might be the consequence of termination of a treaty. Another aspect of the topic might be the problem of the abuse of rights giving rise to various kinds of liability. A third aspect, not at all well regulated, was the question of determination of damages. The Commission might also wish to decide on an order of progress for various other aspects of State succession, such as publicly owned property other than State property, public debts and nationality.

13. In addition, he thought that consideration should be given to the subject of the jurisdictional immunities of foreign States. Legislation was pending in the United States Congress which provided for a drastic revision of the Government's approach to the question of State immunity. Under that legislation, decisions would be left to the courts and not to the Department of State, and immunity—not only from jurisdiction, but also from execution—would be excluded from a very broad range of the economic activities of foreign States.

14. As to the law relating to international watercourses, he differed from Mr. Sette Câmara with regard to the urgency of the problem of pollution. Man had always polluted his sources of fresh water by using them to dispose of waste materials of all kinds; but now, suddenly, in almost every part of the world, there was a fear that the use of fresh water for waste disposal had outstripped, or was outstripping, the capacity of rivers and lakes to dispose of the waste. In order to judge whether that fear was justified and to determine whether action to preserve the quality of fresh water supplies was urgently needed, it might be helpful to review the basic factors that had given rise to pollution at an ever-expanding rate. The ultimate cause was the scientific revolution of the twentieth century and its three major consequences. The first was population growth which, by all estimates, would increase the world population to 4,000 million by 1980, while the amount of fresh water would remain the same. The second was the change in the location of people: the urban population had increased from 500 million in 1940 to nearly 1,500 million in 1973. Within the next 10 or 15 years about half the world's population would be living in urban areas. Urban development had always depended on the availability of sufficient quantities of water for domestic purposes and, to an increasing extent, for industrial purposes. The third consequence was industrialization, which had created a host of new products that were playing an even greater role than population growth and urbanization in degrading the river systems.

15. In the past, the process of river life had made the river a useful and available means of waste disposal. The flowing water had helped to dispose of the organic waste, which had then been broken down by bacteria into inorganic waste, by the use of oxygen. In turn, plant life had consumed the inorganic waste and recycled oxygen into the water. But in many places that system was collapsing under the threefold pressure of population growth, urbanization and industrialization. When the overloaded river systems broadened into lakes, for example, and the flow of water slowed down, algae feeding on substances in sewage, such as phosphorus and nitrogen, had multiplied spectacularly, as could be seen in Lake Erie in North America and Lake Constance in Europe.

16. In that situation the urgency of the need to reduce water pollution was obvious, but the question was whether it was also necessary to deal with that problem from the point of view of international law. In his opinion, in attempting to frame any legal rules it would be necessary to rely on scientific, engineering, economic and financial studies on a large scale. Such studies were

already being carried out in the river basins of the Lower Mekong, the Senegal, the Chad, the Nile, the Upper Paraguay, the river Plate, the Rhine and the Moselle. In North America, two commissions had long been established in that field, namely, the Mexican-United States Boundary and Water Commission and the Canadian-United States International Joint Commission.

17. It was interesting to note, however, that a panel of experts convened by the United Nations to study the question of integrated river basin development had reached the following conclusions in a report published in 1970:

"The vital character of current and impending disputes on international streams has been shown in chapter IV where it is pointed out that lack of accepted international law on the use of these streams presents a major obstacle in the settlement of differences, with the result that progress in development is often held up for years, to the detriment not only of the countries concerned but of the economy of the world in general."⁶

That panel, composed of outstanding experts on water uses from Colombia, France, the Netherlands, Pakistan, the Soviet Union, the United Kingdom and the United States, had consisted of scientists, with one lawyer.

18. It was evident, therefore, that the world was faced with a serious gap in an area of international law where lack of law could have disastrous effects upon one of the essentials for human life—fresh water. The pressure of population growth, industrial growth and urban growth upon water supplies would inevitably continue to mount. Where international river basins were concerned, co-operative action by all riparian and boundary States would be necessary to ensure that the available water was kept tolerably clean. As the experts' report had made clear, legal principles would have to be established to provide a working basis for that essential international co-operation.

19. The first step might be to consider what legal principles appeared to be applicable. The obvious ones would seem to be those drawn from the topic of State responsibility. For example principle 21 of the Stockholm Declaration on the Human Environment provided *inter alia* that:

"States have... the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States..."

An analysis of that principle showed, however, that the responsibility of the State in such situations differed basically from State responsibility as defined in draft article 1 on the subject prepared by the Commission's Special Rapporteur.⁷ In the first place a substantial problem of attribution was involved. In most States the pollution of a river basin derived from a variety of public and private sources, with the State organs as such

playing a large, but not necessarily dominant role. Even if the broad range of attribution in the Special Rapporteur's draft article 7⁸ was adopted, so that acts of municipal sewage systems, public irrigation systems and publicly owned industrial corporations were attributed to the State, it was likely that in many international rivers a large part of the pollutants would be discharged from private sources. Those sources would not be attributable to the State unless, under the Special Rapporteur's draft article 11,⁹ the State organ in question "ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so".

20. It would then be necessary to consider the second requirement of State responsibility, namely, that the State's conduct constituted failure to comply with an international obligation. In dealing with responsibility for river pollution, however, the first fact to be faced was that rivers had been used for waste disposal from time immemorial. States obviously had a right to use rivers for such purposes; the question was what limitations could be placed on that right, rather than whether the State had violated its international obligations. That was not to say that such international obligations did not exist. For example, a State which knowingly permitted the discharge of poisonous elements such as mercury into a river, in quantities which resulted in death in the downstream State, would, in his opinion, be considered as having violated its obligations under existing international law.

21. Thus the classical principles of State responsibility were not particularly helpful in dealing with river pollution, and it was necessary to look for other sources of law. Although a considerable amount of practice had been developed in that field, there were certainly no generally accepted customs drawing a clear line between what was permissible and what was not. However, by turning to generally accepted legal principles, reliance could be placed on the ancient principle of *sic utere tuo ut alienum non laedas*. In the field of pollution that principle might have been expressed for the first time in the *Trail Smelter* arbitration case of 1941 between Canada and the United States, when the tribunal had held that no State had the right to use or permit the use of its territory in such manner as to cause serious injury by fumes in or to the territory of another or the properties or persons therein.¹⁰

22. That principle had been supported by many jurists and had found expression in the formulations of a number of legal societies, such as the Madrid declaration of 1911 of the Institute of International Law, that Institute's amplifying statement of 1961¹¹ and the International Law Association's Helsinki Rules of 1966 on the Uses of the Waters of International Rivers. Regional studies on the subject included draft articles prepared by the Inter-American Juridical Committee and proposals by the

⁸ See document A/CN.4/264 and Add.1, annex I. *Ibid.*

¹⁰ See *The American Journal of International Law*, vol. 35, 1941, p. 684.

¹¹ See *Annuaire de l'Institut de droit international*, vol. 24, p. 365 and vol. 49 (II), p. 370.

⁶ *Integrated River Basin Development* (United Nations publication, Sales No. E.70.II.A.4), p. 44.

⁷ See 1202nd meeting, para. 16.

Economic Commission for Europe, the Council of Europe and the Asian-African Legal Consultative Committee. The draft rules under consideration in the competent sub-committee of the last-mentioned body had been somewhat along the lines of the Helsinki Rules, but had differed from them in one important respect: while the Helsinki Rules had imposed an obligation on States to abate existing pollution, the draft before the Sub-Committee had not included that requirement, because of the limited resources of developing countries.

23. In dealing with river pollution it was necessary to devote much attention to the scientific and economic aspects of the subject. One illustration of the complexities of those aspects was to be found in the Agreement of 1972 between the United States and Canada on Great Lakes Water Quality,¹² which first laid down certain general objectives, and then more specific ones, such as those concerning microbiology, dissolved oxygen, total dissolved solids, iron, phosphorus, radioactivity and so on. It was obvious, therefore, that any legal study of the subject of river pollution would call for the closest co-operation with such scientific agencies as WHO, FAO and others.

24. He hoped that recital of facts would convince members of the Commission that scientists, engineers and economists were in real need of principles of international law to guide them in their work. In that work, international lawyers should act as catalytic agents in inculcating some unity of approach to the various aspects of the question. In his opinion the Commission would be the most suitable body to undertake that task; but if it decided not to do so, urgent action would obviously be called for on the part of some other body.

25. Mr. YASSEEN said that, since the questions under examination by the Commission were enough to keep it occupied for several years, there was no urgent need to consider its future programme of work; but it would be useful to do so, in order to be prepared, if only psychologically, to take up other topics when the time came. The Commission should therefore report to the General Assembly that the general review it had made was without prejudice to its existing programme of work—State responsibility, succession in respect of treaties, succession in respect of matters other than treaties, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations—and that it intended to complete that programme, but might add a few more topics to it.

26. In selecting those topics the Commission should bear in mind that it did not have the same latitude in the progressive development of international law as it had in codification. Whereas it had a fair degree of freedom in regard to codification, it had to await the instructions of the General Assembly on questions of progressive development. Perhaps it might suggest to the General Assembly those of the topics already on its general programme of work to which it would like to give priority once the current work was completed. He had several such topics to suggest.

27. In the first place, jurisdictional immunities of foreign States and their property should be taken up as soon as possible after the Commission had completed its current work. Secondly, unilateral acts in international law should occupy a high place on the Commission's general programme of work: it was a subject of great practical importance, since it involved estoppel, waivers, and other notions which had been the subject of many arbitral awards and judicial decisions.

28. In the third place came the question of international watercourses, since it had been expressly referred to the Commission by the General Assembly in a resolution which, although couched in very measured terms, was nevertheless clear and must be interpreted as reflecting the Assembly's wish to accord some degree of priority to the examination of that topic.

29. When the time came, the Commission would also have to tackle the problem of risk, of which it was difficult to say whether it was a matter for codification or for progressive development, but which was more or less directly connected with the question of responsibility, at least in the minds of many lawyers.

30. With regard to the topics which came under the heading of progressive development, it must be recognized that the Commission had no monopoly of codification or of progressive development, and that many other bodies had been specially set up to perform those tasks. It would be best to leave aside any matters which had been entrusted to other bodies: for example, the law of outer space and the new aspects of the law of the sea.

31. There remained the question of the environment. He would not deny that there were some principles of international law relating to the subject, particularly where pollution was concerned, but the question had already been assigned to a recently established specialized body which, as the Chairman had pointed out, envisaged the possibility of inviting the General Assembly to refer to the Commission, for codification, the fundamental principles relating to the environment. It would therefore be better to await the outcome of that proposal and merely state in the report that the Commission regarded the law relating to the environment as a possible topic for study.

32. Mr. AGO said he fully supported Mr. Kearney's plea for the Commission to study the law relating to international watercourses. It was, indeed a topic of the greatest importance, to which the Commission, more than any other body, could give really objective legal treatment. He wished, however, to reply to some remarks Mr. Kearney had made concerning State responsibility.

33. The Commission would recall that during its discussion on State responsibility it had agreed on what should and what should not be covered by its study and what the various stages of that study should be. It had decided to codify the whole topic if possible, on the understanding any element alien to responsibility would be excluded, and to proceed in a particular order. He was therefore unable to support Mr. Kearney when he said that priority should be given to the study of responsibility arising from the violation of treaties. The Commission had established that responsibility was the consequence

¹² See *International Legal Materials*, vol. XI, No. 4, p. 694.

of the violation by a State of an international obligation. An international obligation could derive from a treaty, a customary rule or other source, and one of the first rules the Commission would meet with when it took up the chapter on violation, was that there was no difference in a violation according to whether the obligation violated arose from one source or from another. It would therefore be a departure from the basic criterion, and even a setback to the codification of responsibility, to attempt to study the violation of treaties before the violation of other obligations.

34. Mr. Kearney had also mentioned the problem of abuse of rights. When the Commission had discussed the question of responsibility, it had made one point clear: if there was a rule of international law to the effect that, at least in certain matters, the possessor of an international right could not go beyond a certain limit in exercising that right, then there was an international obligation not to abuse the right, and any violation of that obligation, as of any other obligation under international law, gave rise to international responsibility. But the real problem was not one of responsibility. It was a substantive problem, a problem of a primary rule, namely, whether there was or was not a rule of international law which set a limit to the exercise of a right. He was becoming more and more convinced that the problem of abuse of rights deserved study by the Commission, but that it did not come within the framework of responsibility and should be studied separately.

35. The question of the determination "*dommages*"—which did not correspond exactly to the English term "*damages*"—would be dealt with when the Commission took up the determination of the consequences of a wrongful act, which was the last stage in the study of responsibility. That question would thus find its place in the Commission's programme of work in due course.

36. As to pollution and its relationship to responsibility, he emphasized that the problem of river pollution was not one of responsibility, so could not be solved as part of the study of responsibility. That was why Mr. Kearney had not found in the draft articles on responsibility the answers to the questions he had raised. There was nothing surprising in that, since the question to be decided was whether there were any rules of international law to prevent States from engaging in certain activities calculated to produce the results complained of, or whether the Commission wished to establish such rules where none existed. The matter would be relatively simple if the activities of States or public authorities alone were involved, but it was also necessary to consider whether there were, or whether the Commission wished to establish, rules of international law obliging States to prohibit private persons from carrying on certain activities or to require them to take certain precautions. If such rules existed and pollution was the result of State activity, the State which had violated the obligation deriving from those rules incurred international responsibility, and if a private person caused pollution by acting contrary to the rules which the State should have prescribed for him, the State would incur responsibility for failure to take the necessary measures to prevent the pollution. There again, the problem was anterior to that

of responsibility; it should be studied, but outside the framework of responsibility.

37. The CHAIRMAN said that the officers and former chairmen of the Commission, at a meeting held that morning, had examined the question of the long-term programme of work and concluded that it would be extremely difficult to reach a consensus on a list of topics for recommendation to the General Assembly. Furthermore, it had been considered undesirable to adopt a list by voting.

38. In those circumstances, it was recommended that the report to the General Assembly should include a passage giving a detailed account of the Commission's discussion. The passage would record the fact that some members had stressed the importance of certain topics; it would also note that none of the members had suggested the inclusion of some other topics, such as the right of asylum and the recognition of States and governments, which remained outstanding from the 1949 list. The proposed passage would begin with a paragraph stating that the Commission's current agenda included State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause and the question of treaties concluded between States and international organizations, which would take up much of the Commission's time in the years ahead. The passage would not constitute a decision, but would simply inform the General Assembly of the discussion held, leaving it to the Assembly to decide which topics should be included in the Commission's long-term programme of work and to lay down priorities.

39. The question of international watercourses was, of course, another matter, for it was already included in the Commission's programme of work.

40. If there were no comments, he would take it that the Commission decided to adopt those suggestions.

It was so agreed.

The meeting rose at 1 p.m.

1238th MEETING

Monday, 2 July 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

[Item 3 of the agenda]

(resumed from the 1232nd meeting)

1. Mr. BEDJAOUÏ (Special Rapporteur) said it would be useful if the Secretariat could help in getting together

the information needed for continuation of the work on succession of States in respect of matters other than treaties. The many studies prepared by the Secretariat on other topics had proved extremely valuable. The research stage was over so far as the question of public property was concerned, but a study might be undertaken on public debts. In view of the great number of treaties on that subject, the study might be confined to treaties concluded since the Second World War; it could also review the state of international and internal jurisprudence and, if possible, the practice of governments and international organizations. Since the work would take about two years, the Commission should decide now whether it wished the Secretariat to undertake such a study.

2. Mr. KEARNEY said he had no objection to the proposal, but suggested that the Secretariat study should not be confined to problems which had arisen since the Second World War. Apart from any other considerations, those problems were inextricably bound up with those which had arisen after the First World War.

3. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to entrust the Secretariat with the study requested by the Special Rapporteur, but that it approved Mr. Kearney's suggestion.

It was so agreed.

Most-favoured-nation clause

(A/CN.4/257 and Add.1; A/CN.4/266; A/CN.4/L.203)

[Item 6 of the agenda]

(resumed from the 1218th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee (A/CN.4/L.203).

TITLE OF THE DRAFT

5. Mr. YASSEEN (Chairman of the Drafting Committee) said he would first introduce the title of the draft. It would be recalled that at its nineteenth session, in 1967, the Commission had placed the present topic on its programme of work as "The most-favoured-nation clause in the law of treaties".¹ At its twentieth session the Commission had taken the view that it should focus on the legal character of the clause and the legal conditions governing its application, and that it should clarify the scope of the clause as a legal institution in its various practical applications.² In the light of that opinion, the title of the topic on the successive agenda of the Commission and in the resolutions of the General Assembly had become simply "The most-favoured-nation clause". The Drafting Committee had found no reason to depart from that formulation.

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

It was so agreed.

ARTICLES 1 and 3

7.

Article 1

Scope of the present articles

The present articles apply to most-favoured-nation clauses contained in treaties between States.

Article 3

Clauses not within the scope of the present articles

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form, or (2) to a clause contained in an international agreement by which a State undertakes to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, or (3) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to a State, shall not affect:

(a) The legal effect of any such clause;

(b) The application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles;

(c) The application of the provisions of the present articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties.

8. Mr. YASSEEN (Chairman of the Drafting Committee) said he would introduce articles 1 and 3 together, because they were closely linked. The two articles had been prepared by the Drafting Committee on the basis of the instructions received from the Commission, although the Commission had not held a preliminary discussion on a text for such provisions. They were based on the corresponding articles—articles 1 and 3—of the Vienna Convention on the Law of Treaties³ and of the draft articles on succession of States in respect of treaties adopted by the Commission on first reading at its previous session. The purpose of article 1 was to limit the scope of the draft articles; that of article 3 was to remove any misconception that might arise from the express limitation of their scope.

9. Mr. USHAKOV said he approved of article 1, but the draft articles applied to the consequences of most-favoured-nation clauses rather than to the clauses themselves. It should therefore be indicated in the commentary that the wording of article 1 might be amended later.

10. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve articles 1 and 3 as proposed by the Drafting Committee.

It was so agreed.

¹ See *Yearbook of the International Law Commission, 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 48.

² *Ibid.*, 1968, vol. II, p. 223, document A/7209/Rev.1, para. 93.

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.

ARTICLE 2

11. *Article 2*
Use of terms

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) "Granting State" means a State which grants most-favoured-nation treatment;

(c) "Beneficiary State" means a State which has been granted most-favoured-nation treatment;

(d) "Third State" means any State other than the granting State or the beneficiary State.

12. Mr. YASSEEN (Chairman of the Drafting Committee) said that, as was customary, article 2 defined the sense in which terms were used in the draft articles. It was based on the draft article 1 proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). The reason why the Drafting Committee considered it useful at that stage to propose definitions of the terms used in the articles it had adopted was mainly to facilitate understanding of the articles to be included in the report to the General Assembly. In accordance with the Commission's practice, the article on the use of terms would be supplemented if necessary at later stages of the work. The final text of article 2 would be established after all the articles of the draft had been formulated.

13. Article 2 contained a definition of the term "treaty" which was taken from the Vienna Convention on the Law of Treaties. In addition, it defined the term "granting State" as a State which granted most-favoured-nation treatment, and the term "beneficiary State" as a State which had been granted such treatment. The verb "grant" had been used to make it clear that not only was the treatment effectively accorded and enjoyed, but the legal obligation and the corresponding right relating to the treatment were created.

14. Finally, the article defined, for the purposes of the other articles—and for those purposes only—the term "third State". The Drafting Committee was well aware that in the draft articles on succession of States in respect of treaties the Commission had preferred the term "other State party" to the term "third State", which could not be used because it had already been made a technical term in the Vienna Convention on the Law of Treaties. The Committee had considered, however, that the reasons why that term could not be used with a different meaning in a draft that was essentially within the framework was the Vienna Convention were not necessarily applicable in the present case.

15. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve article 2, as proposed by the Drafting Committee, on the understanding that other definitions could be added later.

It was so agreed.

ARTICLE 4⁴16. *Article 4*
Most-favoured-nation clause

Most-favoured-nation clause means a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations.

17. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 4 defined the meaning of the expression "most-favoured-nation clause". It was based on paragraph 1 of the article 2 proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). The Drafting Committee had retained the expression "most-favoured-nation clause", which had become a technical term in treaty practice. As the Commission wished the effect of the clause to be examined in its various practical applications, the Drafting Committee had decided to add the words "in an agreed sphere of relations". The Drafting Committee had found it preferable to replace the words "one or more granting States" by the words "a State" and the words "one or more beneficiary States" by the words "another State". It had also decided to delete paragraph 2 of the original article, since the idea it expressed would be better placed in the commentary.

18. Mr. BILGE said he hoped the commentary would explain why a separate provision had been devoted to the definition of the most-favoured-nation clause, when the other definitions were grouped together in article 2.

19. Mr. USTOR (Special Rapporteur) said that the commentary to article 4 would explain that the definition of the expression "most-favoured-nation clause" had been placed in a separate article because it was the cornerstone of the whole draft.

20. The CHAIRMAN said that, in the light of that explanation, he took it that the Commission agreed to approve article 4 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 5⁵21. *Article 5*
Most-favoured-nation treatment

Most-favoured-nation treatment means treatment by the granting State of the beneficiary State or of persons or things in a determined relationship with that State, not less favourable than treatment by the granting State of a third State or of persons or things in the same relationship with a third State.

22. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 5, which defined the meaning of the expression "most-favoured-nation treatment", was based on paragraph 1 of the article 3 originally proposed by the Special Rapporteur in his third report (A/CN.4/257). Article 5 dealt with the treatment accorded by the granting State both to the beneficiary State itself and to persons or things in a determined relationship with that State, by reference to treatment likewise accorded to a

⁴ For previous discussion see 1215th meeting, para. 11.

⁵ *Ibid.*

third State or to persons or things in the same relationship with a third State.

23. The Committee had decided to delete paragraph 2 of the Special Rapporteur's original article in case the enumeration "treaty, other agreement, autonomous legislative act or practice" might be considered exhaustive.

24. Mr. KEARNEY said he feared that the reference in the concluding words "to persons or things in the same relationship with a third State" might be somewhat confusing. It was unlikely that persons or things would be found in exactly the same relationship with a third State. The intention was undoubtedly to refer not so much to the same relationship as to a relationship of a similar nature. Wording such as "the same type of relationship" might be more appropriate.

25. Mr. USHAKOV said that the words "in the same relationship" were obscure in themselves. They referred back to the words "in a determined relationship with that State", but an explanation should be given in the commentary.

26. Mr. USTOR (Special Rapporteur) said that the point raised by Mr. Kearney had been discussed in the Drafting Committee, which had not been able to find any better expression. The commentary would explain that the words "in the same relationship" had the meaning attached to them by Mr. Kearney.

27. Mr. KEARNEY said that for the time being he could accept that solution. On second reading, the wording could be clarified in the light of governments' comments.

28. Mr. USHAKOV considered that to explain the words "the same relationship", it would be necessary to add the words "as the persons or things in a determined relationship with the beneficiary State" at the end of the article. Since the point was purely one of drafting, it could be left till later.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 5 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 6⁶

30.

Article 6

Legal basis of most-favoured-nation treatment

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.

31. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 6 corresponded to the article 4 originally proposed by the Special Rapporteur in his third report (A/CN.4/257). After careful consideration the Drafting Committee had decided to retain that provision, which confirmed a generally accepted and well-established rule. In order to make the rule explicit enough to constitute the main safeguard it was intended to be, the

article stressed the need for the existence of a legal obligation as the basis of the right of a State to be accorded most-favoured-nation treatment by another State.

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

It was so agreed.

ARTICLE 7⁷

33.

Article 7

The source and scope of most-favoured-nation treatment

The right of the beneficiary State to obtain from the granting State treatment accorded by the latter to a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State. The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State.

34. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 7 corresponded to the article 5 originally proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). It related both to the source of most-favoured-nation treatment and to the nature and scope of the treatment. On the first point, the Drafting Committee had considered that the idea of the actual source of the beneficiary State's right to enjoy a certain treatment was better conveyed by the expression "the right... to obtain" than by the original expression "the right... to claim". In addition the Drafting Committee had thought it useful to specify that the most-favoured-nation clause in question was the clause in force between the granting State and the beneficiary State.

35. The second sentence of the article clearly indicated that it was the treatment extended by the granting State to a third State that determined the treatment to which the beneficiary State was entitled under the most-favoured-nation clause.

36. Mr. KEARNEY said that, in the second sentence of the article, it was necessary to make it clear that the treatment referred to was treatment extended not only to the third State itself, but also to persons or things "in a determined relationship with that State", to use the language of article 5.

37. Sir Francis VALLAT said it would have to be explained in the commentary that the words "under that clause" in the second sentence referred to the possible limitation of the extent of the treatment by the terms of the clause itself. The commentary would also have to explain that the words "is determined by the treatment", used in the same sentence, meant "is determined by reference to the treatment". The idea which it was intended to convey was that the standard for determining the treatment of the beneficiary State was the treatment actually extended to the third State.

⁶ For previous discussion see 1216th meeting, para. 57.

⁷ For previous discussion see 1217th meeting, para. 62.

38. Mr. USTOR (Special Rapporteur) said that the commentary would deal with the valid points raised by Mr. Kearney and Sir Francis Vallat. The background to article 7 was that the contracting parties were States and that the treatment in question would be given to persons or things only through States.

39. The treatment to which the beneficiary State was entitled was determined by the relations between the granting State and the third State, but it would be granted within the framework of the most-favoured-nation clause. If that clause specified certain limitations, or—an important matter which would be dealt with in later articles—if it set certain conditions for the granting of the treatment, the agreement between the granting State and the third State would operate within the limits set by the most-favoured-nation clause.

40. Lastly, the commentary would explain that the treatment extended by the granting State was the standard which determined the scope of the treatment which the beneficiary State was entitled to claim.

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that, in fact, the treatment accorded to the third State constituted the standard for determining the scope of the treatment which the beneficiary State could claim. Obviously, one treatment could not be determined “by” another treatment. But that raised a very difficult drafting problem, and the Drafting Committee had been unable to accept the English formula “with reference to”, which he personally would have preferred.

42. Mr. REUTER said he could agree to the necessary explanations being given in the commentary, but he wished to draw attention to the difference between the first and second sentences of article 7. The first sentence involved a legal link between the beneficiary State and the granting State. The second sentence, on the other hand, referred to a factual situation, so that it was incorrect to speak of the “the treatment extended by the granting State to the third State”. The treatment was not necessarily extended to the third State; it might be extended to private persons. In regard to the first sentence, it could be held that, even if the beneficiaries of the treatment were private persons, a legal link existed between the two States.

43. The CHAIRMAN asked the Special Rapporteur whether it would be possible to explain in the commentary the point raised by Mr. Reuter.

44. Mr. USTOR (Special Rapporteur) said that Mr. Reuter's point was a valid one. It was for the Commission to decide whether it should be covered by changing the wording of the article or by giving an explanation in the commentary.

45. Mr. YASSEEN (Chairman of the Drafting Committee) considered that the difference pointed out by Mr. Reuter called for clarification in the commentary.

46. Mr. USHAKOV said he thought that if article 7 was read in conjunction with article 5 it was clear that the treatment referred to in article 7 meant not only the treatment extended to a third State, but also the treatment extended to persons or things.

47. In the first sentence of article 7 he would like the words “arises from the most-favoured-nation clause”

to be amended to read “arises only from the most-favoured-nation clause”. The purpose of that amendment was not to emphasize the source of the right of the beneficiary State, but to stress that its right could not arise in any other way.

48. Sir Francis VALLAT said it was desirable that the English and French texts should be fully in accord. In the first sentence of the article, the word “accorded” was rendered in French by the word “*accordé*”. In the second sentence, however, the same French word was used to render “extended”. There was a difference in English between the two terms. The term “accorded” implied a legal obligation; the word “extended” referred to a *de facto* situation. He believed that that difference in wording correctly reflected an intended difference in meaning. He therefore suggested that the French wording should be adjusted to correspond with the English.

49. Mr. REUTER associated himself with Sir Francis Vallat's comments and suggested that, in the second sentence of article 7, the word “*accordé*” should be replaced by the word “*appliqué*” in order to bring the French text into line with the English. He considered that the words “persons or things” should be added at the end of that sentence.

50. Mr. USTOR (Special Rapporteur) said he would prefer to leave the second sentence as it stood, because any change in it could alter the meaning of the first sentence as well. It could be explained in the commentary that the word “treatment” was intended to refer to the treatment defined in article 5.

51. Mr. YASSEEN (Chairman of the Drafting Committee) said he did not think article 7 could be left as it stood. Either the concluding words, “to the third State”, should be deleted, or the whole of the formula employed in article 5 should be used. In the former case, that formula would be implied.

52. Mr. USHAKOV referring to the distinction drawn by Mr. Reuter between the first and second sentences of article 7, agreed that the text should be amplified and that it was not enough to read it in conjunction with article 5. Article 5 did not refer to the treatment extended by the granting State to the third State in the terms used at the end of article 7.

53. Mr. USTOR (Special Rapporteur) said that Mr. Yasseen's proposal did not solve the problem. It relied on part of the definition of most-favoured-nation treatment given in article 5. The second sentence of article 7, however, applied to almost any type of treatment extended to the third State or to persons or things in a determined relationship with that State. His suggestion would therefore be to insert the expression “most-favoured-nation” before the word “treatment” at the beginning of the second sentence and, at the end of that sentence, to replace the reference to “the third State” by a reference to “the third State or to persons or things in a determined relationship with that State”.

54. Sir Francis VALLAT proposed that the concluding words of the article, “to the third State”, should be replaced by the words: “to the third State, or to persons or things in the determined relationship with the latter State”. It was necessary to use the definite article “the”,

because the phrase referred back to the relationship mentioned in article 5.

55. Mr. USTOR (Special Rapporteur) accepted that proposal.

56. Mr. USHAKOV thought that the first sentence of article 7 should also be amplified by inserting, after the words "a third State", the words "or to persons or things in a determined relationship with a third State".

57. Sir Francis VALLAT said that, if the words he had proposed for addition at the end of the second sentence were also inserted in the first sentence, the word "accorded" in the first sentence would have to be changed to "extended".

58. Mr. BILGE suggested that, in view of the length of the new wording, article 7 should be divided into two paragraphs.

59. Mr. YASSEEN (Chairman of the Drafting Committee) approved of that suggestion.

60. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 7 with the changes proposed by Sir Francis Vallat and Mr. Ushakov and on the understanding that the second sentence would become a separate unnumbered paragraph.

It was so agreed.

61. Mr. MARTÍNEZ MORENO said that he had agreed to the approval of the draft articles, in particular articles 4 and 5, on the clear understanding that the Special Rapporteur would submit, at a later stage, articles dealing with the exceptions. He was interested, in particular, in the exceptions relating to developing countries and to common markets and customs unions.

62. The CHAIRMAN said that the reservation by Mr. Martínez Moreno would be placed on record.

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

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

63. The CHAIRMAN invited the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations to introduce his first and second reports (A/CN.4/258 and A/CN.4/271).

64. Mr. REUTER (Special Rapporteur) said that his main purpose in introducing his first and second reports was to elicit the Commission's views on several questions which had arisen during his preparatory work and on which it was important that the Commission should give him some guidance.

65. The first question was one of method. The Vienna Conference on the Law of Treaties⁸ and the General

Assembly, in resolution 2501 (XXIV), had recommended that a set of draft articles on treaties to which international organizations were parties should be prepared in consultation with the principal international organizations. It should be decided what form that consultation was to take. It was probably too early to attempt to solve the substantive problem, namely, how a set of draft articles could acquire legal force for the international organizations concerned. That in turn raised the questions whether international organizations should normally be called upon to become parties to a multilateral treaty; whether the Commission wished to confine itself to a formula for which there were precedents, such as that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies;⁹ or whether, if neither of those solutions was adopted, a recommendation by the General Assembly could suffice.

66. He was not suggesting that the Commission should settle those questions immediately. However, it had been necessary to enlist the help of the international organizations at the start of the work, so with the agreement of the Secretary-General he had sent a questionnaire, the text of which was annexed to his second report, to the international organizations which had been invited to submit observations on the draft articles on the law of treaties and to participate in the Vienna Conference. He had informed the organizations that unless they indicated otherwise, their replies would remain confidential. For the time being, therefore, it was not proposed to publish those replies; but since the information thus obtained had been used in his second report, and since the Commission's discussions were public, there was every reason to hope that the international organizations would authorize publication later.

67. After three years of preliminary work, he should be in a position to submit a set of draft articles to the Commission at its twenty-sixth session. He would very much like to have the benefit of further comments by international organizations, on the understanding that they would be treated with the same discretion for another year. Greatly as he desired publication of the extremely interesting documents he had received from certain organizations, in particular the United Nations, he was bound to tell the Commission that the international organizations generally had most serious misgivings about the future draft articles, because they feared that the rules to be formulated might deprive them of some of their freedom of action. That anxiety was justifiable, and his main concern was to win the confidence of the international organizations. He thought that the Commission's work would have the effect, not of making life even more difficult for the secretariats of the international organizations, but of consolidating the legal position of the agreements concluded by those organizations and giving them a status they seemed to lack. That was the first question on which he would like to have the views of the members of the Commission.

68. The second question concerned the scope of the topic entrusted to him. That scope was determined by

⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (United Nations publication, Sales No. E.70.V.6), p. 178, para. 38 *et seq.*

⁹ United Nations, *Treaty Series*, vol. 33, p. 262.

the Vienna Convention on the Law of Treaties.¹⁰ It had always been understood that it was his task to ascertain what adaptations of substance or form would be required to make the Convention applicable to treaties concluded by international organizations. But that position of principle made it necessary to consider certain particular aspects of the topic.

69. He had asked himself whether there were not some questions completely foreign to the Vienna Convention which concerned international organizations only: for example, the question of agreements concluded by subsidiary organs, since the definition of an international organization given in article 2 of the Vienna Convention did not apply to such organs. He did not propose, however, that the Commission should pursue the study of that question, for the replies to the questionnaire had shown that it was not yet ripe for study.

70. There was also the question of representation. The Vienna Convention devoted a number of articles to the representation of States by natural persons, particularly the articles concerning powers, but it left aside the more general question of the representation of one State by another in international law. He had considered whether international organizations could, for example, represent a territory for the purpose of concluding treaties. Although practice did not exclude that possibility, the replies to the questionnaire had generally been negative; some organizations had even shown lack of interest in the question, which they considered too theoretical; but the United Nations had made an admirable survey, which deserved to be published, since a new phenomenon was now appearing, in particular in connexion with Namibia. The question was not ready for codification, of course, and it would be pointless to pursue it further. The reason why he had put questions in the questionnaire which might seem strange, was to prevent anything important from being overlooked.

71. Still with regard to the scope of the topic entrusted to him, he would like to have the Commission's opinion on the definition of the term "international organization". He himself proposed to keep to the definition given in the Vienna Convention—a fairly wide definition which covered all international organizations—rather than revert to the notion of an organization of universal character which the Commission had adopted in the draft articles on the representation of States in their relations with international organizations. His reason was that the Vienna Convention laid down, for agreements concerning international organizations, certain rules which applied to all organizations. If, on the pretext of codification, the Commission were to prepare a draft concerning a certain class of international organizations only, it would create a second source of international law alongside the Vienna Convention, and there would still be yet a third: uncodified customary practice. That would make the codification a failure. So either the Commission should follow the Vienna Convention very closely, in which case it could provide the complement to that Convention

which the General Assembly had requested, or, if it found that to be impossible, it should not submit a draft at all. The Commission should bear in mind that it was required to formulate general provisions, not special rules. For whereas in law States enjoyed absolute sovereign equality, international organizations differed widely according to whether they were universal, regional, technical or of some other kind.

72. The third question he wished to refer to the Commission was whether the draft articles should deal with the capacity of international organizations to conclude treaties. The Commission was aware that there were two schools of thought on the question. According to the first, that capacity was inherent in the very notion of an international organization, no international organization existed without international capacity, and the most immediate of an organization's capacities was the capacity to conclude international agreements. That capacity could not, of course, be as extensive as the capacity of States, but was commensurate with the functions of the organization. That conception was based on the jurisprudence of the International Court of Justice, which continued that of the Permanent Court of International Justice, and was valid mainly for the United Nations. According to the second school of thought, the capacity of an international organization depended on its statutes in each individual case—not on the constituent instrument, but on the relevant rules. It was held to be a matter for the constitutional law of the organization concerned, just as the constitution of a federal State could not be interpreted according to rules laid down in the constitution of another federal State. In his view it would be better not to propose too ambitious a formula; first, because the topic under study concerned agreements and not the capacity of organizations in general, and secondly, because the Commission, in its work on the codification of the law of treaties, had always been divided on the question and had preferred to leave it aside. However, he would follow whatever instructions the Commission saw fit to give him on that point.

73. The problem of capacity indirectly raised the question of the effects of agreements concluded by international organizations, particularly the effects for member States. It would be illogical to affirm that international organizations had very extensive capacity and at the same time to attribute the widest possible effects to the agreements they concluded, even including that of binding the member States. For if the organization as such had the capacity to conclude treaties, the rules of the Vienna Convention would apply and the member States of the organization should not be bound by the agreements it concluded. He therefore submitted two solutions for the Commission's consideration. If the agreements concluded by international organizations were to produce effects with regard to the member States, they could do so in two different ways. First—according to a theory he did not at present favour, which had been adopted by Professor René Jean Dupuy in a report recently submitted to the Institute of International Law—they could do so under the agreement itself; that meant saying that member States were not third States, and the provisions of the Vienna Convention on that point would then have to be

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. 289.

clarified or amended. Secondly, they could do so under the organization's constituent instrument, and not under the agreement itself; if the statutes or practice of an organization included a rule that agreements concluded by the organization were binding on its member States, there was no derogation from the Vienna Convention, since that rule was none other than the *pacta sunt servanda* rule laid down in the Convention. A famous example was that of the constituent instrument of the European Economic Community, an article of which provided that agreements concluded by the Community were binding on Member States.¹¹

74. At present he was inclined to favour the second solution, which did not depart from the principles of the Vienna Convention and reserved to each organization the right to model the effects of the agreements it concluded according to its own rules. For example, the member States of an international financial organization which borrowed or lent funds would never consent to the agreements concluded by the organization being directly binding on them. It was thus a matter of interpreting the relevant rules of the organization. Conversely, it was unthinkable that agreements concluded by an organization of the Customs union type should not be binding on the member States, for otherwise third States would never sign any agreement with the union. For the time being, therefore, he had adopted the position which afforded the greatest possible flexibility.

75. Lastly, he would like to have the Commission's views on a matter which was not entirely within the scope of the topic under study, but which might later lead the Commission to broaden it. That was the question, not of agreements concluded by an international organization, but of the effects on an international organization of agreements concluded by certain States. It was now very common for States to entrust a new function to an international organization by treaty. That had been done in all the major treaties on nuclear safety, for example. Unless they adopted that rational solution, States would only have a choice of two alternatives, both of which were impracticable: either to revise the constituent instrument of the organization, or to establish a new organization by the treaty whenever it created the need for one. The question was whether the provisions on third States in the Vienna Convention should be strictly applied to such treaties, that was to say whether the written consent of the organization was required. The practice was much more flexible. The consent of the organization was essential, but the formalities prescribed by the Vienna Convention for protecting States against the effects of treaties concluded without their consent seemed excessive. He himself would be in favour of recognizing the mechanism of the collateral agreement, but making it as flexible as possible.

76. Mr. USHAKOV asked the Special Rapporteur whether a distinction should not be made in the future draft articles between treaties concluded between States

and international organizations and treaties concluded between international organizations.

77. Mr. REUTER (Special Rapporteur) replied that, if the Commission agreed that questions concerning the capacity of international organizations should be handled with discretion, it would seem unnecessary to distinguish between two classes of treaty. Apart from certain questions of drafting and difficult issues such as those of powers and the effects of agreements, the subject was very simple. Agreements between organizations or between States and organizations should, broadly speaking, be subject to the rules of the Vienna Convention, which established the consequences of the consensual principle. So far, he had found no reason to draw any distinction. Perhaps reasons for doing so would appear later, depending on what instructions he received from the Commission as to the questions it wished him to handle. In its work on the law of treaties, however, the Commission had always taken great care not to introduce any classification of treaties. Although a classification might follow indirectly from certain articles, it was never expressly established.

The meeting rose at 5.50 p.m.

1239th MEETING

Tuesday, 3 July 1973, at 10.5 a.m.

Chairman: Mr. Milan BARTOŠ

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

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.196/Add.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

1. The CHAIRMAN, inviting the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.196/Add.1), said that unfortunately, the Special Rapporteur was unable to be present, so Mr. Yasseen, the Chairman of the Drafting Committee, had been asked to take his place so far as possible.

2. He called on the Chairman of the Drafting Committee to introduce draft article 6.

¹¹ See article 228 of the Treaty establishing the European Economic Community, United Nations, *Treaty Series*, vol. 298, p. 90.

ARTICLE 6¹

3. Mr. YASSEEN (Chairman of the Drafting Committee) said that the drafts of articles 6, 7 and 8 adopted by the Drafting Committee the previous day, differed considerably from the corresponding articles in the Special Rapporteur's sixth report (A/CN.4/267). The main reason for the difference was that the provisions proposed by the Special Rapporteur had related to all public property, whereas the Commission had decided to deal, for the time being, with only one category of such property, namely State property.

4. Article 6 stated the rule that a succession of States entailed the extinction of the rights of the predecessor State and the simultaneous arising of the rights of the successor State to State property. Hence the article did not speak of State property "transferred to the successor State", but of "such of the State property as passes to the successor State". As the last phrase clearly showed, it was not the purpose of the article to determine what State property passed to the successor State. That would be done by other provisions in part I of the draft articles.

5. The text proposed by the Drafting Committee for article 6 read:

*Article 6**Rights of the successor State to State property passing to it*

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

6. Mr. SETTE CÂMARA asked why the Drafting Committee had abandoned the traditional concept of the "transfer" of State property in favour of the wording "passes to the successor State".

7. Mr. YASSEEN (Chairman of the Drafting Committee) said that the word "transfer" was a legal term and described a legal operation. The transfer of a right presupposed the existence of that right and its continuation. Since the rule stated in article 6 confirmed the extinction of the rights of the predecessor State and the arising of those of the successor State, it would be difficult to imagine a transfer. The Drafting Committee had therefore looked for a neutral term which did not prejudice the question of transfer or evoke any idea of a legal operation. It had preferred to speak of property which "passed" rather than property which was "transferred".

8. Mr. SETTE CÂMARA thanked the Chairman of the Drafting Committee for his enlightening explanation; he himself had no difficulties with article 6, though he thought there was certainly some "transfer" of property involved.

9. Mr. QUENTIN-BAXTER said he could understand why the Drafting Committee had considered it advisable to avoid using the word "transfer", which would imply an act on the part of the previous owner. As he understood article 6, the succession in itself was what caused the passing of State property to the successor State, thus

involving a certain element of automaticity. He had some doubts and hesitations about the article, but it would have to be read in conjunction with article 8. He was inclined to regret the disappearance of the Special Rapporteur's original article 8, since in his opinion all the draft articles should be based on the notion of a juridical order which continued even if it changed.

10. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had preferred the term "passing" to the term "transfer", as having the advantage of being neutral and of reflecting reality. True, the term was not confirmed by usage, but it did not have the same connotation as "transfer". As to article 8, he would reply to Mr. Quentin-Baxter's remarks when the Commission examined that provision.

11. Mr. MARTÍNEZ MORENO said he was glad to note that the Drafting Committee had eliminated the word "transfer". Most of the Latin American codes, which were based on the Code Napoléon, made a distinction between transfer *inter vivos* (*transferencia*) and transmission *mortis causa* (*transmisión*).

12. Mr. REUTER said he accepted the draft article 6 submitted by the Drafting Committee, as the new text was an advance on the previous version. However, he had reservations on the general conception reflected in the article. In his view, the opening of succession entailed the extinction of the principle of sovereignty and the birth of a new principle of sovereignty. Immediately after that change, the content of the legislation remained the same. There was always a period, be it long or short, during which all the previous legislation remained in force in the name of another sovereignty. It could therefore be said that the legal order changed, but that the material content of the laws was not immediately modified on that account. What changed was the holder of certain rights deriving from the legislative system provisionally kept in force. Since it was very difficult to express those ideas succinctly, he was prepared to accept the text proposed, but he would try to find better wording at the second reading.

13. The CHAIRMAN expressed the hope that the Special Rapporteur would take Mr. Reuter's comments into account for the second reading of the draft articles.

14. Mr. SETTE CÂMARA reminded the Commission that Mr. Reuter had previously expressed the view that, in a case of succession, there was prolongation of one legal order into another;² perhaps something might be inserted in the commentary to deal with that transitory situation.

15. Mr. YASSEEN expressed his admiration of Mr. Reuter's penetrating analysis. For his part, however, he thought that from the point of view of substance it could not be held that the legal order in force immediately after the opening of succession was that of the predecessor State. The legal order in force, although identical with that of the predecessor State, was that of the successor State.

¹ For previous discussion see 1226th meeting, para. 29.

² See 1227th meeting, paras. 32-35.

16. The CHAIRMAN suggested that the Special Rapporteur should take account of the ideas expressed by Mr. Reuter and supported by Mr. Sette Câmara, and that he should include them in the commentary. If there were no objections, he would take it that the Commission decided to approve draft article 6 provisionally.

It was so agreed.

17. Mr. USHAKOV said that, although he had not raised any objection to the approval of draft article 6, that provision seemed to him to have a very limited effect, if any. It did not determine the moment at which the rights of the predecessor State were extinguished and those of the successor State arose. There was nothing to preclude the idea that the extinction and arising of rights occurred long before or long after the moment of succession. It would be retorted that it was self-evident that they occurred at the moment of succession, but for lawyers nothing was self-evident. However, he would not press for his opinion to be reflected in the commentary.

ARTICLE 7³

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft article 7.

19. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 7 simply provided that the date of the passing of State property was that of the succession of States. The latter date was defined in article 3, subparagraph (d),⁴ 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”.

20. Article 7 was a residuary provision; in practice, the predecessor and successor States sometimes agreed to choose another date for the passing of State property. Some members of the Committee had therefore proposed the insertion, at the beginning of the article, of the proviso “Unless it may be otherwise decided”. They had deliberately used the term “decided” and not “agreed” in that formula, because the date of the passing of property could be fixed not only by agreement between the States concerned, but also by a decision taken, for example, by the Security Council. Other members, without denying the residuary character of the rule stated in article 7, had thought that the proposed proviso had no place there. They had maintained that in some types of succession, for example decolonization, no agreement was possible between the predecessor State and the colonial territory, because the latter was not yet a State. Since article 7 was a provision of general scope it ought not, in their opinion, to contain any proviso for partial application. Since it had not been possible to reach any agreement on that point, the Committee had placed the proviso between square brackets, leaving it to the Commission to decide whether or not to retain it.

21. The text proposed by the Drafting Committee for article 7 read:

Article 7

Date of the passing of State property

[Unless it may be otherwise decided] the date of the passing of State property is that of the succession of States.

22. Mr. USHAKOV said that he approved of the proposed article, including the phrase in square brackets. With regard to its effect, however, he held views contrary to those of all the other members of the Drafting Committee. In his opinion article 7 was limited to determining the date of the passing of State property. It was not a substantive article, for it did not lay down any rule of law. In drafting that provision, the other members of the Drafting Committee had thought they were stating another rule which might be formulated to read: “Unless otherwise provided in these articles, the State property of the predecessor State is transferred to the successor State on the date of the succession of States”. In its present form, however, article 7 did not lay down any obligation to transfer State property.

23. To illustrate his point he referred to the date of marriage as conceived in Soviet law. That date was the date of the registration of the marriage with the competent authority. The rights and duties of the spouses came into being on that date, but they were not derived from that date. In the case of article 7, the determination of the date of the passing of State property did not mean that the State property had to be transferred on that date; it could be transferred at any time before or afterwards. Incidentally, that was why the phrases in square brackets, “Unless it may be otherwise decided”, had been added.

24. Article 7 in fact contained only a definition, which ought rather to be placed in article 3 on the use of terms.

25. In conclusion, he accepted draft article 7, because it contained a definition of the date of the passing of property which was entirely acceptable. But it did not contain anything else, and the commentary should not refer to a rule, which in fact was not stated.

26. Mr. SETTE CÂMARA congratulated the Drafting Committee on having found a new and simpler way to deal with the question of the date of the passing of State property. He did not consider it necessary to retain the words in square brackets “Unless it may be otherwise decided”; if they were retained, a similar proviso would have to be inserted in all the draft articles.

27. Mr. RAMANGASOAVINA said he approved of the principle that the date of the passing of State property should be that of the succession of States.

28. The phrase in square brackets stated a condition which was always understood in that type of article and was therefore unnecessary. As the Chairman of the Drafting Committee had explained, the word “decided” had been preferred to the word “agreed”, because it was possible that a decision might be taken, for example, by the Security Council. He saw no reason why the word “agreed” should not be used, for even in the event of arbitration or of a decision by the Security Council, the two States concerned would have to agree on the date of the passing of the State property. The term “agreed” was appropriate even if a third party was involved. The word “decided”, on the other hand, implied a unilateral act and might give the impression

³ For previous discussion see 1228th meeting, para. 56.

⁴ See 1230th meeting, para. 9.

that one of the two States concerned could take a unilateral decision on the date of the transfer of State property. The word "agreed", which would prevent any misunderstanding, would therefore be preferable to the word "decided".

29. Mr. REUTER said he approved of the text proposed for article 7 and was inclined to favour the deletion of the phrase in square brackets, for the reason given by Mr. Sette Câmara.

30. The meaning which the Commission proposed to attach to the article under consideration should be clearly reflected in the commentary. Personally he thought that what the Commission had in mind was not the physical passing of State property, but the replacement of one sovereignty by another. It was in fact possible that the predecessor State might retain physical responsibility for the State property after the date set for its passing to the successor State. In such cases, the predecessor State administered the property for the successor State and had to give an accounting of its administration when the property was physically handed over. As Mr. Ushakov had pointed out, article 7 did not lay down a rule of law, but was more in the nature of a definition.

31. Under article 3, the date of the succession of States meant "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". He doubted whether there was a single date in every case, particularly in cases of decolonization. It was conceivable that the replacement of the colonial Power by the new State might take place on different dates according to the third States involved. Article 7 assumed the existence of a single date. Hence it might perhaps be advisable to specify that the date of the passing of State property was the date upon which the predecessor State recognized its replacement in the responsibility for international relations. If article 7 was to be interpreted in that sense, that should be made clear in the commentary.

32. Mr. KEARNEY said he could understand Mr. Ramangasoavina's objection to the use of the word "decided", which was not consistent with the language used in the draft articles on the law of succession in respect of treaties. He suggested that perhaps a general article should be inserted at the beginning of the draft, to the effect that nothing in the following articles should be construed as placing a limitation on the rights of either the predecessor or the successor State.

33. Mr. TABIBI said that article 7 should be deleted; it would not solve any problems, but it might well create some. It was impossible in practice to lay down a clear-cut date of succession. Article 7, as now worded, could give rise to difficulties for successor States which were developing countries. For example, the State property in question might consist of installations or factories whose operation required technical knowledge, and the successor State would need some time to make the necessary arrangements for taking over such property.

34. More flexibility was required for other reasons as well. Succession to State property could give rise to some

very complex problems, particularly where there was more than one successor State. An interesting example was provided by the British Embassy at Kabul, which had been paid for with money from the Indian Treasury and had been claimed in 1947 by both India and Pakistan. Each of those countries had put forward what it regarded as valid grounds for claiming that it should succeed to the property, but twenty-five years had elapsed and the matter was still unsettled. The Embassy thus remained in the possession of the United Kingdom.

35. In view of all the difficulties likely to arise, he urged that article 7, in its present wording, should be dropped. The only provision that could be adopted on the subject was one to the effect that the date of the passing of State property was for the successor State and the predecessor State to determine by agreement between them.

36. Mr. PINTO said that he had no objection to article 7, with or without the proviso in square brackets. He merely wished to express some concern regarding the wording of that proviso.

37. It was clearly useful to make provision for the parties concerned to agree otherwise regarding the date of the passing of State property. He had no strong feelings as to whether that provision should take the form of a separate article covering the whole draft or of a clause reproduced in each article. He had misgivings, however, about the use of the word "decided", although he well understood the reasons given by the Chairman of the Drafting Committee for using it instead of the word "agreed". A formula should be found which would not prejudge the way in which the date would be established. He suggested the phrase: "Unless it may be otherwise established as between the parties". That form of words would mean that the date would not necessarily be established by the parties themselves. But it would still leave the main problem to be solved, namely, between whom the agreement would be concluded, or by whom the decision would be made.

38. That remark applied not only to article 7, but also to article 8 and other articles of the draft. In some places the appropriate expression would be: "Except as the parties otherwise agree". Where the context left no doubt as to the identity of the parties, the short formula "Unless otherwise agreed" could be safely used. If it was intended to refer to an agreement between the successor and the predecessor States, the proviso should expressly say so. If other interests were involved, different language would have to be used. Those remarks applied with even greater force to the concluding proviso, also in square brackets, of article 8.

39. The problems to which he had referred would have to be solved in due course, either by means of a general article or by a suitable saving clause in each article.

40. Sir Francis VALLAT said that he agreed with the provision in article 7, as proposed by the Drafting Committee; in principle, the date of the passing of State property should be the date of succession.

41. Clearly circumstances would vary from one case to another and the date of succession might not be the appropriate date in certain cases. He was therefore

in favour of retaining the opening proviso. As the discussion had clearly shown, provision would have to be made in one way or another for a different decision on the question of the date. It could be done then or later; in the text of article 7, in the commentary or in a general article.

42. With regard to the technique of drafting, he did not agree with Mr. Ushakov that article 7 contained a definition, which would be better placed in article 3. Article 7 was a clarification of the contents of article 6. It was not an explanation of the sense in which a term was used in the draft as a whole, and therefore had no place in article 3 on the use of terms.

43. Mr. EL-ERIAN said he could accept article 7 as proposed by the Drafting Committee, with or without the opening proviso. He was inclined, however, to favour retaining the proviso, because it would introduce an element of flexibility into the article.

44. A distinction should be made between the transfer of the territory and the procedure for the passing of State property. He thought the proviso "Unless it may be otherwise decided" should cover cases of the type mentioned by Mr. Tabibi. From his experience with the 1953 Committee of Experts set up by the United Nations to deal with the problems arising out of the taking over of former Italian property by Libya, then newly independent, he could vouch for the complexity of the problems involved. In those cases, what mattered was to lay down a principle, and article 7 did so. The opening proviso was sufficiently flexible to cover all the difficulties that might arise in practice.

45. Mr. HAMBRO said he could accept article 7 as proposed by the Drafting Committee.

46. The opening proviso, however, was unnecessary. The Commission had already agreed that all the draft articles were residuary rules. It would therefore create confusion to insert a saving clause of that type in one article and not in others. All the provisions in the draft articles were subject to the condition that no agreement to the contrary should exist.

47. The Drafting Committee should be asked to frame a general article safeguarding the possibility of an agreement to the contrary, for application to all the provisions of the draft. It was wholly unnecessary to discuss the saving clause separately in connexion with each article.

48. Mr. BILGE said that he agreed with the general idea expressed in article 7, but wondered whether it was justifiable to speak of the "passing of State property", when the Commission had accepted, in article 6, the principle of the extinction of the rights of the predecessor State. It was no longer a matter of passing, but of acquisition of property. Subject to that terminological amendment, he accepted the residuary rules specifying or fixing the date of such acquisition.

49. He was in favour of retaining the clause in square brackets, provided that the word "decided" was replaced by a more neutral term expressing the idea of both agreement and decision.

50. Mr. USHAKOV said that in its present form article 7 was meaningless and had no legal effect. The date of the passing of State property would differ from one case of

succession to another—transfer of territory, fusion or union and so forth—and might be fixed in various ways—for example, by agreement—in each specific case. Hence it was the subsequent articles which would have to indicate, for each case of succession, the date on which the property passed and the manner in which that date must be fixed.

51. Mr. QUENTIN-BAXTER said he supported the idea for including in the draft a general provision to the effect that parties having full capacity to do so could vary the rules laid down in the articles. In many cases, however—and they were by no means limited to cases of decolonization—there was no opportunity for the parties to conclude an international agreement to vary the rules governing the way in which succession occurred.

52. The use of the word "decided" constituted recognition that article 7 was intended to cover more than just the ordinary case; provision had to be made for practical arrangements to vary the date of the passing of State property. Thus although the opening proviso was valid, the word "decided" was unacceptable because, as Mr. Ramangasoavina had pointed out, it could be misleading. It could be construed as referring to a unilateral decision, which was not, of course, the intention of the drafters.

53. He therefore suggested that the opening proviso should be replaced by some such wording as: "Subject to arrangements made between the predecessor State and the successor State".

54. Mr. TSURUOKA said he was in favour of retaining article 7 as proposed by the Drafting Committee. In order to allay the misgivings of some members of the Commission, perhaps the word "decided" in the phrase in square brackets could be replaced by "agreed or decided".

55. The CHAIRMAN,* speaking as a member of the Commission, observed that the purpose of article 7 was to settle, in international law, situations which were not regulated by treaty; it was not, as some members of the Commission seemed to think, to provide for the case in which property passed under a treaty.

56. As to the phrase in square brackets, he thought it should be retained in the form proposed by the Drafting Committee. The reasons put forward by the Chairman of the Drafting Committee to justify the use of the word "decided" in preference to the word "agreed", which presupposed the existence of an agreement, were convincing and confirmed by practice.

57. As to the question whether or not the date of the passing of State property coincided with the date of the succession of States, the date of transfer of territory should not be confused with the performance of certain operations connected with that transfer. That point should be explained in the commentary.

58. Speaking as Chairman, he invited the Chairman of the Drafting Committee to reply to the objections raised.

59. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had tried to

* Mr. Bartoš.

draft a provision which would meet the wish, expressed by most of the members of the Commission, that the draft articles should indicate, but not expressly fix, a date for the passing of State property upon a succession. The date which the Committee had considered most appropriate was the date of succession, which was defined in another article. However, the rules the Commission were formulating were not mandatory; the parties could always decide otherwise. But since an agreement was not possible in some cases, it was also necessary to provide for the possibility that the date would be fixed by a competent body in the international legal order. The Drafting Committee had merely followed the trend of the discussion in the plenary Commission.

60. The clause in square brackets was a saving clause which derived from the very nature of the rule laid down. Whether the Commission decided to retain it or not, would really make no difference. States would always be free to fix, by mutual agreement, a date other than that of succession, just as a competent body in the international legal order could always decide on a different date. If the Commission decided to delete that clause, however, it would have to give the necessary explanations in the commentary.

61. The CHAIRMAN observed that the majority of the members of the Commission were in favour of retaining the clause in square brackets, subject to the replacement of the word "decided" by a more appropriate term. The Commission was only giving the draft articles a first reading, however, and would be free to go back on its decision later. At all events the Special Rapporteur would mention all the objections in the commentary.

62. Mr. KEARNEY said that the Commission should not rely on the commentary to indicate the need for correcting a word like "decided", to which valid objection had been raised by most of the members. His own suggestion was that it should be replaced by the word "agreed", which was used in article 8, and that the commentary to article 7 should indicate that the Commission nevertheless had in mind such special circumstances as decisions of United Nations organs which might deal with the passing of State property.

63. The CHAIRMAN said that the commentary would make it clear that the Commission's decision was not final and that it would take its final decision when it gave the draft articles their second reading.

64. Mr. BILGE said he maintained his reservation on the word "passing", which was not correct once the principle of the extinction of the predecessor's rights had been recognized.

65. Mr. EL-ERIAN said he shared Mr. Kearney's apprehensions regarding the use of the word "decided" in article 7, as opposed to the word "agreed" in article 8. It might perhaps be possible to construe the word "agreed" broadly enough to cover cases decided in United Nations organs, since in a sense those decisions represented agreements.

66. In any event, he was not in favour of leaving the opening proviso in square brackets. It was true that on a few occasions the Commission had adopted that method in the past to offer governments and the General Assembly

alternative texts, but that had always been done by way of exception, and the practice should remain exceptional.

67. The CHAIRMAN said that the commentary would state that the Commission had hesitated between several terms.

68. Mr. USHAKOV said he was in favour of retaining the square brackets. The article did not specify who could take the decision in question. To delete the square brackets would be absurd from the legal standpoint. Their retention, on the other hand, would indicate that the Commission had deliberately selected a very vague form of words whose meaning it intended to clarify later.

69. The CHAIRMAN said the Commission need only ask the Special Rapporteur to state in the commentary that several members had opposed the opening proviso and that the Commission would take a decision on it at the second reading, when it had received the comments of governments.

70. If there were no objections, he would take it that the Commission decided to approve article 7 as proposed by the Drafting Committee, to retain the words appearing in square brackets and to delete the brackets.

*It was so agreed.*⁵

The meeting rose at 1 p.m.

⁵ See also next meeting, para. 53.

1240th MEETING

Wednesday, 4 July 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.196/Add.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 8

1. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 8 replaced articles 8 and 9 submitted by the Special Rapporteur in his sixth

report (A/CN.4/267) and in document A/CN.4/L.197.¹ The purpose of the article was not to determine what State property passed to the successor State, but to lay down the substantive rule that the successor State received that property free.

2. As the Special Rapporteur had pointed out during the discussion, some writers distinguished in that respect between the public and private domains of the State, and held that only property in the public domain passed to the successor State free, while property in the private domain gave rise to compensation. That doctrine had never been universally applied, because many legal systems made no distinction between the public and private domains of the State. Moreover, in the systems which did make that distinction, the greater part of the State property, as defined in article 5, belonged to the public domain.

3. Article 8 contained two clauses in square brackets, on which the Drafting Committee had been unable to agree. The first reserved the rights of third parties. Some members of the Committee had considered that unnecessary, because the draft articles would contain provisions concerning those rights. They had also maintained that, if the saving clause appeared in article 8, it would have to be repeated in many other provisions.

4. The second clause in square brackets—"unless otherwise agreed"—had attracted the same criticism in the Drafting Committee as a similar formula used in article 7.

5. The proposed article was very different from the previous articles 8 and 9, the purpose of which had been to determine State property. In view of the difficulty of doing so, since State property varied according to the type of succession, the Drafting Committee had decided, in agreement with the Special Rapporteur, that the new article should not lay down any criteria for determining such property, but should simply state the rule that the property in question passed from the predecessor State to the successor State without compensation. The criterion to be applied in determining State property would be laid down later for each type of succession.

6. The new text proposed for article 8 read:

Article 8
Passing freely of State property

[Without prejudice to the rights of third parties] State property passing in accordance with the present articles shall pass from the predecessor State to the successor State without compensation [unless otherwise agreed].

7. Sir Francis VALLAT said he supported the inclusion of article 8 in the draft, subject to some small changes. The article stated the essential principle, namely, that State property which passed from the predecessor State to the successor State did so without compensation. That principle had to be stated, because article 6 specified the effect of succession on rights to State property, but did not say whether that effect occurred with or without compensation. Experience had shown that, where no

provision was made on that point, sooner or later disputes would arise as to whether compensation should be paid or not.

8. It was necessary, however, to include two safeguards to cover certain particular cases. The first was contained in the opening proviso placed in square brackets, and concerned the rights of third parties. It was a safeguard and no more; it did not say what the effect of those rights would be. Its purpose was simply to state that the absence of compensation as between the predecessor State and the successor State did not mean that the rights of third parties could be disregarded. Under some systems of law there might be no private rights, so the rights of private individuals would not survive. Under other systems, where private rights did exist, the saving clause would protect them. The question was one to which the Commission would have to revert in connexion with later articles.

9. The second safeguard was embodied in the concluding proviso "unless otherwise agreed", also in square brackets. In that connexion, Mr. Bartoš had drawn attention to the fact that in certain cases a tribunal might have to decide the question of compensation. Hence it seemed desirable—although normally the purpose of the proviso would be to safeguard variation by agreement—to make provision for the possibility of variation by decision. He therefore suggested that the concluding proviso should be expanded to read: "unless otherwise agreed or decided" and that a suitable explanation should be included in the commentary.

10. Lastly, to be consistent with article 6, he proposed that the words "in accordance with the present articles" should be amplified to read "in accordance with the provisions of the present articles".

11. Mr. USHAKOV suggested that the second proviso should be retained without the square brackets and that, for the sake of clarity, the words "by the predecessor State and the successor State" should be added after the words "unless otherwise agreed".

12. With regard to the substance of the article, he supported the principle that the property should pass without compensation, but he doubted whether it was possible to draft a general rule applicable to all cases of State succession. Such a rule would not be applicable, for example, to the case of transfer of territory, which was governed by the general principle of agreement between the parties, or to the case of fusion of two States, in which there could be no compensation since all the property of each State became the property of the State resulting from the fusion. In addition, the proviso expressed by the words "unless otherwise agreed by the predecessor State and the successor State" would not be applicable in the case of accession to independence, since there could be no question of agreement between the former metropolitan Power and the former colony. A rule ceased to be general once it was outweighed by exceptions. The Commission would therefore have to provide for each case of succession separately.

13. The first proviso in square brackets was meaningless. It specified neither what third parties nor what rights were meant and was therefore open to the broadest, and

¹ For previous discussion see 1229th meeting, para. 48 and 1231st meeting, para. 67.

even to absurd, interpretations. If the Commission thought it necessary to safeguard certain rights of certain third parties, it should state clearly what rights and third parties they were.

14. Mr. EL-ERIAN supported Sir Francis Vallat's suggestion that the words "or decided" should be added at the end of the concluding proviso. During the discussion on article 7, he had suggested that the word "agreed" might perhaps be construed broadly enough to cover the case of a decision.² On further consideration, however, he thought that such an interpretation would be reading too much into the word "agreed".

15. He shared Mr. Ushakov's apprehensions about the problem of mentioning compensation, in view of cases of fusion of States. Those cases were by no means hypothetical: one such fusion was at present under serious discussion in the capital of his country. It was therefore necessary to clarify the point in the commentary.

16. He was not certain that a specific reference to agreement by the predecessor State and the successor State would suffice. There might be cases in which the agreement of a third State would be also necessary.

17. Mr. REUTER said that with regard to the second clause in square brackets, he would refer the Commission to the comment he had made on the similar proviso in article 7.³

18. For the body of the article he proposed the following wording: "... the passing of State property from the predecessor State to the successor State shall take place without compensation ...". That drafting change did not affect the substance of the article.

19. With regard to the substance, he could accept the principle laid down, but with many reservations and on condition that it would be stated in the commentary that in reality the rule laid down was one which generally was valid. That being so, it might be more straightforward to say in the body of the text that the passing of State property "shall generally take place without compensation", thus indicating that the Commission left room for wide departures from the principle.

20. The reservations which, in his opinion, should be made to the principle, related to the diversity of types of succession, the nature of the property, the location of the property and the real rights of third parties—the latter point being covered by the first clause in square brackets. That proviso could be interpreted in two different ways. His own interpretation was that the rights contemplated were rights created internationally by the predecessor State. If that State had granted real rights to a subject of international law, the succession did not affect them; the rights of the third parties were grounded in international law itself. The other interpretation—and that was the point on which opinions might differ—was that the rights in question might be rights of private persons created by the internal law of the predecessor State; but in so far as that law disappeared, the rights of those third parties would also disappear. The Com-

mission would be considering later whether the rights of private persons should be safeguarded, but the two hypotheses were different.

21. It would therefore be best to replace the opening proviso by the words "Subject to the provisions of the present articles", to mention in the commentary the differences of opinion to which it had given rise and to state that the Commission would consider the question of the rights of third parties later. Article 8 would read: "Subject to the provisions of the present articles, the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided".

22. The CHAIRMAN,* speaking as a member of the Commission, said that the new wording proposed by Mr. Reuter greatly improved the drafting, without affecting the substance of the article in any way. He was therefore quite willing to accept it.

23. Mr. MARTÍNEZ MORENO said that he approved of article 8 as proposed by the Drafting Committee, but would have no objection to the rewording proposed by Mr. Reuter provided that, either in the text or in the commentary, it was made perfectly clear that the provisions of article 8 were without prejudice to the rights of third parties. He had in mind the hypothetical case of a predecessor State which had bought an island from another State and had agreed to pay the price in instalments; if its territory passed to a successor State while instalments were still outstanding, it would be necessary to safeguard the rights of the third State which was the seller. In the absence of such a safeguard, article 8 might deprive that State of the right to claim the outstanding instalments.

24. He approved of Sir Francis Vallat's suggestions that the form of words used in article 6, "in accordance with the provisions of the present articles", should be adopted, and that the words "or decided" should be added at the end of the article after the word "agreed".

Mr. Castañeda took the Chair.

25. Mr. RAMANGASOAVINA said he approved of the general principle laid down in article 8, as proposed by the Drafting Committee. As to the two saving clauses, he found the final one acceptable in the amended form suggested by Sir Francis Vallat and Mr. Reuter. He had serious doubts, however, about the clause reserving the rights of third parties. In his opinion, the rights and property of third parties were automatically safeguarded in the case under consideration because only State property was involved, so that the clause was not justified. On the other hand, it was open to a broad interpretation which might provide justification for such controversial notions as that of acquired rights. The idea of succession without compensation applied solely to State property which passed from the predecessor State to the successor State, to the exclusion of property of third parties; for a State could not transfer what did not belong to it. The principle of succession without compensation therefore meant that everything which belonged to the predecessor

² See previous meeting, para. 65.

³ See previous meeting, para. 29.

* Mr. Yasseen.

State must pass to the successor State without requiring, for example, the discharge of encumbrances.

26. Members of the Commission should bear in mind that article 8, as submitted by the Drafting Committee, was much watered down as compared with the corresponding texts previously proposed by the Special Rapporteur. They should avoid watering it down still further by expressly reserving the rights of third parties.

27. He found the wording proposed by Mr. Reuter perfectly acceptable, since the reservation of the rights of third parties, although implied, was not expressly stated.

28. Mr. TABIBI said he thought the wording proposed by Mr. Reuter had the drawback of not specifically safeguarding the rights of third States. It was not sufficient to include a reference to the matter in the commentary. The Drafting Committee's idea of embodying a proviso in the article itself was far preferable.

29. With regard to the rights of private persons he drew attention to grazing rights, which had existed from time immemorial in many parts of the world. It was quite common for herdsmen in semi-arid zones to have to send their beasts to graze on the other side of an international boundary. Rights of that kind were of vital importance to the people concerned and had to be preserved in the event of a succession of States.

30. Mr. KEARNEY said that on the fourth of July he could not refrain from giving the example of his own country in connexion with the statement made during the discussion that a newly independent State could not make a succession agreement with the former metropolitan Power. The United States had in fact made an agreement with its predecessor State, and that agreement had lasted, in part at least, for some 180 years. It was possibly the first agreement of that kind entered into by a newly independent State and, as such, seemed to constitute a valid precedent.

31. As to the text of article 8, he supported Sir Francis Vallat's suggestion that the concluding word "agreed" should be amplified to read "agreed or decided". Even in that form, however, the passage would remain ambiguous, and at some later stage it would be necessary to make it clear who "agreed" and who "decided". At the present stage—that of first reading—he could accept the proposed formula, provided that it was accompanied by a suitable explanation in the commentary.

32. As to the opening proviso, he urged the retention of a precise reference to the rights of third parties, as proposed by the Drafting Committee, in preference to the more general language "Subject to the provisions of the present articles", proposed by Mr. Reuter.

33. It was a common practice of the World Bank and of regional banks to make advances for the construction of such properties as dams, and to subject the resulting property to a negative pledge. The pledge did not represent a monetary claim, but carried with it the right to ensure eventual repayment by means of a limitation on the use or disposition of the property. Obviously that kind of right would continue to be attached to the property on its transfer to a successor State. It was necessary to make it clear that there was no intention of interfering

with third-party rights of that kind. An important safeguard of that nature should be placed in the text of the article itself, rather than be relegated to the commentary.

34. Mr. QUENTIN-BAXTER also supported the addition of the words "or decided" at the end of article 8. He agreed with Mr. Kearney about the ambiguity of the words "agreed or decided", but was prepared to accept that formula for the time being, on the understanding that the Commission would revert to the matter at the second reading.

35. He saw no place in article 8 for the opening proviso on the rights of third parties. Nevertheless, he would be prepared to accept its retention on the understanding that it would be kept in square brackets to draw attention to the very tentative nature of the draft. He agreed with Mr. Ramangasoavina that the property of a third party who was a private person could under no circumstances be State property, so that it would not be affected by the substantive provision of article 8. Hence there was no more reason to introduce a safeguard into that article than into many other articles of the draft.

36. The rights of third parties depended on the survival of the predecessor State's juridical order, at least until the new State chose to change it. The problem was a very real one and the Commission would sooner or later have to deal with it. The present difficulties had arisen from the fact that the Commission was dealing with a narrowly defined type of property—State property—but in the process was encountering problems of a general character which could not very well be set aside.

37. Mr. BILGE said that, as the Commission had already discussed the principle stated in article 8 when examining the new wording of article 9 submitted by the Special Rapporteur,⁴ it was not necessary to revert to the matter. With regard to the text of article 8 proposed by the Drafting Committee, he merely reiterated the reservations he had expressed concerning articles 6 and 7.⁵ In his view, there was neither passing nor transfer of property, but acquisition without compensation.

38. Mr. USTOR said he had reservations regarding article 8, which was almost superfluous and practically in contradiction with article 6. Article 6 specified that State succession entailed "the extinction" of the rights of the predecessor State. That being so, no problem of compensation could arise. The successor State's position could be compared to that of a person who inherited property from a deceased relative; it was obvious that the heir did not have to pay "compensation" for the property he inherited.

39. If article 8 was to be retained at all, the opening proviso should be expressed in the general terms proposed by Mr. Reuter: "Subject to the provisions of the present articles".

40. With regard to the last clause, he supported Sir Francis Vallat's proposal that the word "agreed" should be amplified to read "agreed or decided".

⁴ See 1231st meeting, para. 67 *et seq.* and 1232nd meeting.

⁵ See previous meeting, para. 48.

41. Mr. SETTE CÂMARA said that, shorn of the two provisos in square brackets, the substantive provision of article 8 amounted to very little. It simply stated a very general rule which was subject to many obvious exceptions following from the different types of succession. In a fusion of two States, of course, there was no place for the payment of compensation.

42. As to third parties, it seemed to him that the passing of State property from the predecessor State to the successor State could not possibly affect the rights of third parties, including private persons, in any way. The problems which might arise in practice should be examined in connexion with later articles of the draft.

43. Article 8 was not really necessary. If the Commission decided to retain it, however, he would support the simpler and clearer wording proposed by Mr. Reuter.

44. Mr. TSURUOKA, noting that most members of the Commission accepted the principle stated in the text proposed by Mr. Reuter for article 8, appealed to his colleagues to approve that text. At the first reading it was more important to agree on substance than on form, for it was understood that drafting changes could always be made later. Moreover, the wording proposed by Mr. Reuter ensured that provisions would be devoted to the rights of third parties. For the time being it would be better not to make any substantive changes in article 8 that might cause confusion.

45. The CHAIRMAN, speaking as a member of the Commission, said that for the opening proviso he preferred the more general formula proposed by Mr. Reuter. He shared Mr. Ustor's misgivings regarding the use of the term "compensation", which did not adequately reflect the true position. Nevertheless, he would not oppose its retention at the present stage, on the understanding that the matter would be examined with care on second reading.

46. Speaking as Chairman, he noted that there was unanimous agreement on Mr. Reuter's wording for the substantive provision of article 8: "... the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided."

47. There was, however, a difference of opinion on the opening proviso. Some members preferred the Drafting Committee's formula "Without prejudice to the rights of third parties"; others preferred Mr. Reuter's more general formula "Subject to the provisions of the present articles". He therefore suggested that he should informally take the sense of the meeting on the choice between those two formulations. If there were no objections, he would take it that the Commission agreed to adopt that procedure.

It was so agreed.

48. The CHAIRMAN, having taken the sense of the meeting, noted that nine members favoured the Drafting Committee's wording and five members Mr. Reuter's wording of the opening proviso. The Drafting Committee's wording for the proviso would therefore be attached to Mr. Reuter's wording for the substantive provision, and the two together would form the text of article 8 adopted on first reading.

49. Mr. YASSEEN pointed out that it was necessary to insert the words "in accordance with the provisions of the present articles" after the words "to the successor State".

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the text of article 8 in the form which he had indicated, with the addition suggested by Mr. Yasseen.

It was so agreed.

51. Mr. MARTÍNEZ MORENO proposed that, in order to make the title consistent with the text of the article, the word "freely" should be deleted from the title and the words "without compensation" should be added at the end.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the title of article 8 to read: "Passing of State property without compensation".

It was so agreed.

ARTICLE 7 (Date of the passing of State property) (resumed from the previous meeting)

53. Sir Francis VALLAT said that, in consequence of the adoption of the new text for article 8, the opening proviso of article 7 should be reconsidered. He proposed that the words "otherwise decided" in article 7 should be replaced by the words "otherwise agreed or decided".

54. The CHAIRMAN said that, if there were no objections he would take it that the Commission agreed to make the opening proviso of article 7 consistent with the closing proviso of article 8, as proposed by Sir Francis Vallat.

It was so agreed.

The meeting rose at 1.5 p.m.

1241st MEETING

Wednesday, 4 July 1973, at 3.50 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(resumed from the 1238th meeting)

1. Mr. PINTO congratulated the Special Rapporteur on his admirable reports. He was fully cognizant of the variety of international organizations and of their

functions, but he considered that, as stated in paragraphs 20 and 21 of the second report (A/CN.4/271), those organizations were called upon to follow common general rules and there should be no major obstacles to the establishment of a body of rules governing the agreements they concluded.

2. He thought that, in the present circumstances, the best method would be to submit a second questionnaire to certain organizations with a view to obtaining the necessary information. To allay any anxiety on their part, the Commission should assure the organizations that it had no intention of limiting their freedom of action. At the moment he had no fixed views as to the form in which the final instrument would acquire legal force for the international organizations; presumably it would take the form either of an international agreement concluded as the outcome of a diplomatic conference or of a recommendation by the General Assembly.

3. He had been impressed by the Special Rapporteur's frequent references to the practice of States, but would point out that inter-State law could also benefit from the practice of international organizations, many of which had developed rational procedures of their own that were free from parliamentary influence.

4. On the question of scope, he noted that the Special Rapporteur had first attempted to determine to what extent the Vienna Convention on the Law of Treaties¹ would be applicable to international organizations. The Special Rapporteur had also taken up the question of treaties concluded by subsidiary organs of such organizations and the question of representation of the organizations by some appropriate agent. Treaties concluded by subsidiary organs did not, in his own opinion, constitute a subject that was ripe for codification, since it was difficult to conceive of agreements by subsidiary organs which would not ultimately involve the responsibility of the organization itself. The question of representation of an international organization was also one which was perhaps not ripe for codification. To be sure, he could think of at least two organizations—the International Atomic Energy Agency and the World Bank—whose organizational procedures were fully systematized and could serve as a basis for more general provisions. It was obviously not possible, however, to permit the officials of such organizations to commit them, since, as corporate entities, they required a corporate act to form the basis for the authority of their officials.

5. As to the application of the rules of the law of treaties to international organizations, he noted that one of those rules related to capacity to conclude treaties. The Special Rapporteur had indicated that he did not wish to formulate a general provision on the capacity of international organizations to conclude international agreements, a subject which in his opinion was not ready for codification. He himself thought that it was necessary to distinguish between the capacity of international organizations to conclude treaties and their right to do so. That

capacity might be limited, and it would be advisable to specify the fields in which international agreements could be concluded. It was also necessary to consider the effect of such agreements on the members of the organization. He thought that agreements concluded by international organizations would not be totally without legal effects for their member States, and he favoured the retention of a corporate distinction between membership in the organization and the organization itself.

6. The question arose whether members of international organizations were third parties within the meaning of the Vienna Convention. He did not think that they were third parties, but the consent of the organization to be bound by a treaty would undoubtedly be necessary. There were cases in which the organization assumed certain responsibilities, as the International Atomic Energy Agency had done in relation to treaties dealing with nuclear tests, and the World Bank in relation to conventions on the settlement of investment disputes.

7. Lastly, with regard to agreements concluded with a view to applying other agreements, which were referred to in paragraphs 79-82 of the Special Rapporteur's second report, it was possible to distinguish between two types of treaty: first, treaties specifically authorized by a parent treaty, and secondly treaties which, like those relating to the settlement of investment disputes, were concluded within the organization itself.

8. Mr. HAMBRO said he fully endorsed the principle stated by the Special Rapporteur in paragraph 52 of his second report. He recognized the need to exercise caution in the formulation of general rules in order not to damage the still fragile constitutions of the international organizations and not to hinder their development. But he wondered whether on some occasions such caution did not betray a somewhat pessimistic view concerning the future of the international organizations, even though the Special Rapporteur disclaimed any such view and affirmed that, on the contrary, his attitude implied a basic confidence in their natural and spontaneous development.

9. The Commission's objective was to facilitate the development of the international organizations, and it had to be recognized that they were not transitory phenomena, but an integral part of the international society of today and, above all, of tomorrow. He did not think the absolute nature of State sovereignty should be emphasized, as it was in paragraph 10 of the Special Rapporteur's first report (A/CN.4/258). It would be better to stress the need to establish inter-State links. An unqualified respect for State sovereignty would make it impossible to do what the international community was now doing in such fields as the law of the sea. It should also be remembered that it was on the basis of the principle of sovereignty that States had opposed the introduction of international passports. The Special Rapporteur was right in saying that it was difficult to lay down universal rules applicable to international organizations and that care must be taken not hamper their development. But it should be possible to apply some rules to universal organizations and other rules to organizations which were not universal. He appreciated that it would be difficult to reach a decision on the matter

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.

before receiving governments' replies and without knowing the positions of the organizations themselves, which had always been very cautious; but it was not a case in which he favoured excessive caution.

10. Mr. USHAKOV said he shared nearly all the views expressed in the Special Rapporteur's second report, though he approached some questions from a slightly different angle. For the notion of a "party", he thought it would be best to use the definition given in the Vienna Convention on the Law of Treaties, since the adoption of a different definition might cause difficulties in regard to existing conventions.

11. As to the capacity of international organizations to conclude treaties, he endorsed the conclusion stated by the Special Rapporteur in paragraph 40 of his second report, albeit for slightly different reasons. His own opinion was that that question should be excluded from the draft because it was outside the scope of the topic. It must be assumed *a priori* that there were international organizations which possessed capacity to conclude treaties, just as in the case of succession of States it had been assumed that there was a lawful change of sovereignty over territory. Thus the question which international organizations could conclude treaties did not arise.

12. In his opinion the question of representation did not fall within the scope of the topic either. For the answer to the question who authorized the conclusion of a treaty was given by international law and depended on each organization. In paragraph 56 of his second report, the Special Rapporteur spoke of the "natural person" empowered to represent the organization. In many cases, however, it was not a person but an organ that represented the organization: for instance, Heads of State, Heads of Government or ministers for foreign affairs, not acting in a personal capacity.

13. The question of agreements concluded by subsidiary organs of an international organization seemed to him badly framed, for if a subsidiary organ of an organization was authorized by that organization to conclude an agreement, it was just as though the agreement were concluded by the organization itself. Similarly, the question of treaties concluded by an organization on behalf of a territory was outside the scope of the topic, for in such cases it was not a treaty of the organization as such that was concluded, but a treaty of the territory which the organization represented.

14. On the subject of agreements concluded with a view to applying other agreements he endorsed the conclusion reached by the Special Rapporteur in paragraph 82 of his second report.

15. Contrary to what the Special Rapporteur had said in paragraph 83 of his second report, he did not think that agreements concluded between an organization and its member States could be regarded as internal agreements. Agreements concluded between different organs of an organization seemed to him to be outside the scope of the topic.

16. In discussing the effects of agreements with respect to third parties, the Special Rapporteur had raised the question whether an international organization could be

regarded as a third party in relation to certain treaties between States. He himself believed that it could, but he thought the question was outside the scope of the topic and rather came under the Vienna Convention on the Law of Treaties, since it concerned treaties between States and not between international organizations and States.

17. Lastly, he thought the question whether States members of an international organization were third parties in relation to agreements concluded by that organization was ill-conceived. For if an agreement was concluded by an organization with one of its members, the other member States were of necessity third parties. There could be no middle course; all States which were not parties to an agreement were third States, whether they were members of the organization or not. Treaties concluded by an international organization with a State or with another international organization might have consequences for third States, but in his opinion those consequences were the same for member States as for States not members of the organization.

18. Mr. KEARNEY said that Mr. Ushakov had raised a basic question of principle concerning the field of study entrusted to the Special Rapporteur. He seemed to think that most of the questions discussed in the Special Rapporteur's second report were outside his mandate, and that would appear to call for a decision by the Commission. The Special Rapporteur had produced an extremely searching inquiry into some of the vital questions which arose in connexion with the capacity of international organizations to conclude treaties. He himself considered that those questions fell within the area entrusted to the Special Rapporteur, but if other members should disagree with that view, then it might be necessary for the Commission to define more precisely what it expected the Special Rapporteur to accomplish.

19. On the basic issues which the Special Rapporteur had put to the Commission, it seemed to him obvious that the work should take the form of a set of draft articles, since that was the Commission's customary mode of procedure and the instrument to be prepared was a logical extension of its previous work on the law of treaties.

20. In his opinion it would be desirable for the Special Rapporteur to delineate the distinction between contracts and international agreements so far as international organizations were concerned. Such organizations were established to perform certain specific functions, which might be of a financial, commercial or scientific character, and the agreements they concluded with States or among themselves might fall to be dealt with under private or public law, depending on their object and purpose, the circumstances of their conclusion and similar factors.

21. One minor point which occurred to him was that an agreement between one international organization and another might raise a series of questions that were quite outside the scope of the articles of the Vienna Convention. On other points, he thought that the definition of an international organization given in that Convention should be retained, and that it would be a mistake to try to formulate different rules for different categories of organization, for example: universal, regional and

functional; that would lead to an extraordinarily complex set of articles and would make the characterization of individual agreements extremely difficult.

22. With regard to the capacity of international organizations to enter into treaties, on the basis of pragmatic considerations he thought it desirable to lay down some general principles. One result of including a draft article on capacity would be to induce States and international organizations to comment on that article and to make their thinking known to the Commission. That was certainly an argument in favour of including such an article; it might take the form of the one quoted in paragraph 39 of the Special Rapporteur's second report, though perhaps it would be better to omit the reference to the exercise of the organization's functions and the achievement of its objectives.

23. The most difficult problems connected with representation had been dealt with by the Special Rapporteur in paragraph 64 of his second report. Eventually, however, it would be necessary to lay down some general rule dealing with authority to bind the organization.

24. On the subject of agreements concluded by subsidiary organs, he agreed with the conclusions stated by the Special Rapporteur in paragraph 68 of his second report.

25. The problem of an international organization representing a territory seemed to him to be one which would be rather rare in practice and which might not call for any special rule. An obvious possible exception might arise as a consequence of the current negotiations concerning the sea-bed.

26. The subject of agreements concluded with a view to applying other agreements involved the important problem of the dividing-line between agreements and contracts; such agreements could very often be in the nature of contracts. In United States practice, for example, a variety of subsidiary agreements of that kind were not regarded as treaties and were not registered as such with the United Nations Secretariat.

27. On the problem of the application of article 46 of the Vienna Convention, he agreed with the conclusions reached by the Special Rapporteur in paragraph 88 of his second report. In his opinion it should be possible to apply the principle of article 46 of the Vienna Convention, without too much alteration, for the purposes of international organizations. On the question whether an international organization could be a third party in relation to certain treaties between States, he agreed with the conclusion reached by the Special Rapporteur, in paragraph 92 of his second report, that that was not possible.

28. Lastly, as to whether rules were needed to establish that an international organization had accepted responsibilities or rights under treaties to which it was not a party, he thought that a less restrictive set of rules than those of the Vienna Convention was called for.

29. Mr. HAMBRO agreed with Mr. Kearney that the Commission should accept the Special Rapporteur's wide interpretation of the scope of his task.

30. With regard to capacity to conclude treaties, he was inclined to accord as great a capacity as possible to

international organizations. He did not base his argument on the purely pragmatic reasons mentioned by Mr. Kearney; in his opinion, the mere fact that the Commission was discussing the character and scope of treaties concluded by international organizations indicated that those organizations did possess the necessary capacity. In that connexion it was only necessary to cite the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*.²

31. The Special Rapporteur had mentioned that the international organizations were not parties to any general treaties; that did not mean, however, that organizations were in fact precluded from adhering to such treaties. In his opinion some multilateral treaties should be open to international organizations; for example, he himself had always advocated the adherence of the United Nations to the Red Cross Conventions and considered it strange that that point of view still met with opposition.

32. Another question was whether an international organization was bound by treaties concluded under its auspices. As a member of the Appeals Board of the Council of Europe, he had opposed a decision of the Council of Ministers which had openly implied discrimination against women in violation of certain rules already accepted by the members of the Council.

33. Mr. SETTE CÂMARA said that the Special Rapporteur's second report, like his first, was a most enlightening document which would provide the Commission with excellent guidance for its future work.

34. He wished to reply briefly to the main points raised by the Special Rapporteur in his introductory statement.³ He believed that there was only one possible method at work. The Commission should aim at producing draft articles to serve as the basis for an instrument that would supplement the Vienna Convention on the Law of Treaties and would cover the problems relating to the treaties of international organizations.

35. As to the scope of the draft, he agreed with the Special Rapporteur that the Commission should adhere as closely as possible to the Vienna Convention, since its work would form a complement to that Convention. He was therefore in favour of retaining the definition of an international organization given in the Vienna Convention. That flexible and broad definition was very suitable for the present topic, in the context of which, unlike that of privileges and immunities, no harm would be done by giving the broadest meaning to the concept of an international organization.

36. As the Special Rapporteur had stressed, it was a difficult task to codify general rules on the treaties of international organizations. If the Commission succeeded in that task, it would introduce into the régime of such treaties an element of stability and generality which the organizations themselves were not always anxious to have. The present uncertainty sometimes

² *I.C.J. Reports* 1949, p. 174.

³ See 1238th meeting, para. 64 *et seq.*

suit them better than a system of specific and rigid rules, and it was significant that the Special Rapporteur had encountered some difficulty in obtaining information.

37. With regard to the form of the agreements to be studied, he considered that, as in the Vienna Convention, unwritten agreements should be excluded. That was even more justified in the case of international organizations than in the case of States. The written form ensured a clarity which was absolutely necessary. It was even more important in the practice of international organizations than in State practice to rule out ambiguity regarding consent to be bound by a treaty. In the case of a State, the whole treaty-making process included certain steps—such as parliamentary approval—which removed all doubt about consent to be bound; no similar safeguards existed in the case of international organizations.

38. He was inclined to agree with Mr. Kearney that it was desirable to include in the draft a provision to the effect that international organizations had the capacity to conclude treaties. It could be said that, following the 1949 advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*, there could be no doubt regarding the objective personality of international organizations. In his own view it was nevertheless necessary to state clearly in the draft that international organizations possessed treaty-making capacity. As to the language to be used, the Special Rapporteur, although he was not himself inclined to introduce a provision on capacity, had made a very good suggestion in his second report: "In the case of international organizations, the capacity to conclude treaties depends on any relevant rule of the organization" (A/CN.4/271, para. 49 *in fine*).

39. With regard to problems of representation he found the Special Rapporteur's conclusions absolutely correct. Where international organizations were concerned, those problems were still in a very fluid state, and he did not favour the inclusion in the present draft of an article on the lines of article 7 of the Vienna Convention. In a State, certain organs were traditionally in charge of international relations and had powers of representation in virtue of their functions; but that was not the case in international organizations. In view of the pyramidal structure of the secretariats of international organizations, however, it should be possible to settle doubts on that point. The chief executive officer of an organization—Director-General or Secretary-General as the case might be—was the unquestioned head of its secretariat.

40. With regard to agreements concluded by subsidiary organs, he fully agreed with the Special Rapporteur's conclusion that the organization itself should be considered as entering into the agreement in each case.

41. The question of representation of a territory by an international organization had been given very thorough study by the Special Rapporteur. That question had been of great importance in the past, but was likely to arise very rarely in the future.

42. On the subject of agreements concluded with a view to applying other agreements, the Special Rapporteur's conclusions were absolutely correct. In his own view,

however, it was doubtful whether the Commission need go into that matter at the present stage.

43. Lastly, he had noted Mr. Kearney's remark concerning the need to draw a dividing-line between contracts and treaties. But it was difficult to see how an international organization could conclude a contract with a State, except with the host State for certain specific purposes.

The meeting rose at 6 p.m.

1242nd MEETING

Thursday, 5 July 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

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

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

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of item 4 of the agenda.

2. Mr. TAMMES said that, in his enlightening reports, the Special Rapporteur had opened up new horizons of international law, and the manner in which he had been able to maintain the confidence of the organizations and at the same time collect valuable information on their practice, provided a promising starting-point for the Commission's work.

3. The hierarchical relationship between international law and national law had been a subject of discussion among international lawyers for a long time. In considering the present topic, however, the problem was that of the interaction between different legal systems each belonging to international law. The Commission was examining what appeared to be a largely technical question, namely, how agreements concluded by international organizations would fit into the system of the Vienna Convention on the Law of Treaties.¹ What was really at stake, however, was the relationship between the all-embracing system of general international law, on the one hand, and various international systems of different degrees of organization, on the other.

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.

4. The Special Rapporteur wished to have the Commission's views on the desirability of including in the draft an introductory article, corresponding to article 6 of the Vienna Convention, which would state the capacity of every international organization to conclude treaties. He considered that the function of article 6 of the Vienna Convention was a special one, in the light of history, because the full capacity of States to conclude treaties had not always been taken for granted. A similar article would not be necessary for organizations. There did not seem to be real problem in that regard because the validity of the innumerable agreements concluded by international organizations—a validity which depended on their capacity to conclude agreements—was unlikely to be denied by anyone. Or course, if an article were to be included on the lines of article 6 of the Vienna Convention, a reservation would have to be made to cover the case in which the constitutional law of the organization contained a contrary rule.

5. As to the degree of applicability of part III of the Vienna Convention, dealing with the observance, application and interpretation of treaties, he generally agreed with the Special Rapporteur's conclusions concerning the effects of agreements on third parties (A/CN.4/271, paragraphs 89 to 107). For the purposes of international organizations, it was necessary to adapt the more rigorous provisions of the Vienna Convention on that subject. The Special Rapporteur had rightly pointed out that the consent of an organization would always be required for obligations arising from a *res inter alios acta*, but that consent need not necessarily be express or in writing, as article 35 of the Vienna Convention prescribed in order to protect State sovereignty. With regard to rights arising for an organization as a third party in relation to a treaty, the Special Rapporteur's position was quite reasonable. An organization, as a body serving the international community, could not invoke any "subjective right" to retain a function when all the States which had instituted that function had decided to abolish it. Article 37 of the Vienna Convention, on revocation, would thus apply to only a limited extent.

6. The question whether or not a State was a third party in relation to an agreement concluded by an organization of which it was a member was a most interesting one. It had its parallel in internal law in the question of the direct effect, if any, within the legal order of a State, of treaties concluded by that State. If that parallel was valid, the problem of the applicability of the Vienna rules did not arise. The acceptance by a member State of obligations arising from a treaty concluded by the organization was implicit in its very membership, which presupposed acceptance of the fundamental distribution of powers in the organization. The case would be one of implicit acceptance, in advance, of any future obligations of the organization, rather than of tacit consent under the Vienna rules. The general rule in the matter was stated with considerable caution by the Special Rapporteur: "In no case does it seem possible for a member State to ignore agreements regularly concluded by an organization" (A/CN.4/271, paragraph 105). He himself would submit that it was preferable to have a clear rule on the subject, that would be followed by

practice, rather than unsteady practice followed by a hesitant rule.

7. Lastly, there was a fundamental rule in the Vienna Convention whose relevance to international organizations would have to be considered. It was the rule stated in article 27, that a party might not invoke the provisions of its internal law as justification for its failure to perform a treaty. That issue was the key to the problem of the relationship between different international legal systems, since the so-called "internal law" of an organization (A/CN.4/271, paragraphs 83 to 88) was at the same time a portion of international law. The question was therefore essentially that of determining which of two systems, both belonging to international law, but situated at different levels, would prevail. The Special Rapporteur had expressed himself on one aspect of the broad question covered by article 27 of the Vienna Convention: that was in connexion with article 46 of that Convention, on provisions of internal law regarding competence to conclude treaties.

8. He had been able to mention only a very few of the issues raised by the Special Rapporteur in his two reports. He looked forward with keen interest to seeing the draft articles that would follow.

9. Mr. MARTÍNEZ MORENO associated himself with the tributes paid to the scholarly reports of the Special Rapporteur on the important and difficult topic of the treaties of international organizations, which was the logical complement of the law on treaties between States. The development of the doctrine of subjects of international law, the growing importance of international organizations in the life of the world community, the need to strengthen institutions working for peace and security and, in general, the facts of life in the contemporary world society, made it necessary to codify—and to codify with some boldness—the law governing the treaties of international organizations, both regional and world-wide.

10. Before considering some of the points raised by the Special Rapporteur in his second report (A/CN.4/271), he wished to express regret at the fact that a number of organizations had not answered his questionnaire. Perhaps those organizations feared that their powers might be restricted by a treaty on the present topic, but the real intention was the very opposite. An international organization should not fail in its duty to co-operate in the progressive development of the law.

11. It was true that the great diversity exhibited by international organizations in structure, functions and objectives militated against codification. The formulation of general and uniform rules for the various organizations would be extremely difficult. Nevertheless, the problems could be solved by proceeding step by step and adopting common rules wherever possible.

12. The question of the capacity of international organizations to conclude treaties was vital to the present topic. He firmly believed that international organizations had that capacity, even if it was more limited than that of States; without it, no international organization could attain its objectives in international relations. He respected the views of the school of thought which held

that the capacity to conclude treaties existed only subject to the provisions of the constituent instrument of the organization concerned; and he agreed that, in such a constituent instrument, the States which established an organization could even go so far as to deny it the capacity to conclude treaties, though he knew of no practical example of such a restriction. However, the rules that the Commission would frame were intended to deal with the bulk of the practical cases.

13. It was natural that nearly all the treaties concluded by international organizations should be of an administrative or operational nature, but some of those treaties, such as technical assistance agreements, were of great importance. Apart from that he saw no reason why an international organization should not become a party to such treaties as the Geneva Conventions on humanitarian law. If the capacity of organizations to conclude treaties were denied, the United Nations would be prevented from subscribing to those treaties and invoking them in regard to its peace-keeping operations.

14. That would be an undesirable result; but the omission from the draft of an article on capacity to conclude treaties would have much more serious consequences in that it could lead, on the basis of reasoning *a contrario* from the clear provision of article 6 of the Vienna Convention on the Law of Treaties, to the assertion that international organizations had no such capacity. Since the capacity of all States to conclude treaties was expressly affirmed in article 6 of the Vienna Convention, it was essential to make an express provision to the same effect for international organizations, thereby recognizing a fact of international life. So far as the formulation of the rule was concerned, the wording put forward by Professor Dupuy in his report to the Institute of International Law (A/CN.4/271, paragraph 39) was acceptable to him.

15. On the question of representation, he believed it was essential to include in the future draft an article dealing specifically with treaties concluded by an organization on behalf of a territory it represented.

16. Agreements concluded by subsidiary organs had to be regarded, as a general rule, as treaties of the organization itself. There could, of course, be exceptions to that general rule, as in the case of a fund established for a specific purpose; an agreement signed on behalf of such a fund would not commit the mother organization financially. Discussions were at present under way with a view to the establishment of an international body to be entrusted with the conservation and utilization of the resources of the sea-bed and ocean floor beyond the limits of national jurisdiction. If such an organization was established, it could not be denied the power to conclude treaties in matters within its competence.

17. Mr. TSURUOKA associated himself with the commendation addressed to the Special Rapporteur on his second report, which bore witness to the erudition of its author. Under its apparent simplicity, it was based on a very thorough analysis of the topic under discussion.

18. In that report the Special Rapporteur had stated his own opinions and the arguments in support of them, and had asked for the views of members of the Commission on several points. On the matters on which he had

expressed an opinion, it seemed desirable that the Special Rapporteur should go ahead. On the matters on which the Special Rapporteur had put questions to the Commission, he (Mr. Tsuruoka) did not feel able to reply immediately and intended to submit comments in writing. Indeed there was not time at the present session for all the members of the Commission to state their views orally on the various questions which the Special Rapporteur had raised.

19. Mr. USTOR associated himself with the expressions of appreciation for the clarity and logic of the reports prepared by the Special Rapporteur on an extremely difficult topic. That topic provided a good example of the close connexion between codification and progressive development. It was one on which there had already been "extensive State practice, precedent and doctrine", to use the language of article 15 of the Commission's Statute, referring to codification. Yet it was true to say that the law on it had "not yet been sufficiently developed in the practice of States", so that it belonged to the realm of progressive development as defined in the same article.

20. It was worth remembering, however, that the relevant practice included not only State practice, but also the practice of the organizations themselves. Unfortunately it was difficult to get at the sources of that practice. There were hardly any relevant decisions of either international or national courts, and the practice of States and international organizations was usually buried in official files that were difficult of access. The better to identify trends in customary law, the Special Rapporteur had wisely followed the method of establishing contacts with the organizations themselves; that was undoubtedly the most practical method of exploring their practice. Another possible course would be to make a systematic study of all the treaties signed by international organizations. That would be a formidable task, however, because there were already several thousand such treaties. Without the use of a computer, it was difficult to see how meaningful results could be achieved.

21. It was, of course, possible that most of the agreements concluded by international organizations would turn out to be contracts rather than treaties. In theory, the line of demarcation between the two was clear: a treaty was an agreement governed by international law, whereas a contract was an agreement governed by the law of a particular State. In practice, however, there were agreements which were governed in some respects by international law and in other respects by the law of a particular State. That problem was of great importance for the delimitation of the present topic, as other members had already pointed out.

22. On most of the other issues raised by the Special Rapporteur there appeared to be unanimous support for his approach. On the question of the capacity of international organizations to conclude treaties, the Special Rapporteur had reached the conclusion that it was preferable not to include a provision on that matter in his draft (A/CN.4/271, paragraph 40). A valid argument in favour of that solution had been given by Mr. Ushakov, who had pointed out that the law of treaties as a whole operated only when the capacity to

conclude treaties existed. He could not accept the formula suggested by Professor Dupuy and quoted by the Special Rapporteur in paragraph 39 of his second report. It assumed that every international organization had the capacity to conclude agreements in the exercise of its functions and for the achievement of its objectives, and would deny that capacity only where the constituent instrument of the organization provided otherwise. That was going much too far. The formula tentatively put forward by the Special Rapporteur himself was much more appropriate and reflected existing international practice fairly closely. It read: "In the case of international organizations, the capacity to conclude treaties depends on any relevant rule of the organization" (A/CN.4/271, paragraph 49 *in fine*).

23. On the subject of representation, he fully shared the view that it was impossible to adopt, for the purposes of the present topic, a rule such as that laid down in article 7, paragraph 2, of the Vienna Convention on the Law of Treaties. In the case of an international organization it was not possible to say that certain persons had full powers of representation "in virtue of their functions".

24. On the interesting question of agreements concluded by subsidiary organs he agreed that the solution would depend on the constituent instrument and the internal rules of the organization concerned.

25. The problem of the application to international organizations of the *pacta tertiis* rule was extremely complicated. In the case of a treaty signed by the member States of an organization and relating to that organization, it was clear that the organization was not a third party within the meaning of part III, section 4, of the Vienna Convention on the Law of Treaties. Clearly, the organization would be affected by the agreement. It was therefore essential to adapt the Vienna rules for the purposes of the present topic. The need to do so was evident in the case of an agreement between two organizations. To take an extreme example, if two economic associations of States concluded an agreement to establish a large free trade area, it would be impossible to assert that the member States of the two associations were "third States" in relation to that agreement.

26. Mr. EL-ERIAN paid a tribute to the quality and scholarship of the two reports submitted by the Special Rapporteur, who was an authority on international institutions.

27. In the interests of brevity he would speak only on four of the many interesting issues which had been raised. The first was co-operation with the secretariats of the United Nations and the specialized agencies, a subject on which he fully supported the Special Rapporteur's views. There was an understandable apprehension on the part of organizations that codification might introduce an element of rigidity which would inhibit their present flexible practices. At the beginning of any work of codification reticence of that kind was often encountered, not only on the part of international organizations, but also on the part of governments. It was perhaps true that in certain matters the formulation of rigid rules might do a disservice; but in regard to the present topic there was a clear need to establish certain general rules.

28. With regard to regional organizations, it had been suggested that if the future draft was to be limited to universal organizations its usefulness might be undesirably restricted. In his view, however, it would be better to follow the practice adopted in 1971 for the Commission's draft articles on the representation of States in their relations with international organizations, and confine the work to international organizations of a universal character. The first reason for doing so was that regional organizations had not been consulted, so it would be advisable to confine the study to the organizations of the United Nations family, with which consultations had been held. The second reason was that regional organizations invariably benefited from the codification work done by the United Nations. In the matter of privileges and immunities they had taken the United Nations conventions as a model. Clearly, however, the Commission itself could not undertake to codify the law for regional organizations.

29. On the question of capacity, his own experience as Special Rapporteur for the topic of relations between States and international organizations had convinced him of the wisdom of not entering into such theoretical issues as those of international personality and treaty-making capacity. He fully supported the Special Rapporteur's view on the need to adopt a purely pragmatic approach.

30. On the question of treaties concluded by subsidiary organs, he thought the Special Rapporteur's analysis (A/CN.4/271, paragraphs 65 to 68) contained all the necessary guidance for arriving at satisfactory decisions. The problem was not purely theoretical; it had important practical implications, particularly in financial matters. Although situations varied, it was desirable to frame a general rule, because there was in practice some uncertainty about the identity of the party to a treaty when it was concluded by a subsidiary organ of an organization. He himself accepted the Special Rapporteur's conclusion that, as a general rule, the organization itself was the party to the treaty unless there was evidence to the contrary. The problem was really one of agency.

31. Mr. TABIBI said that the Special Rapporteur's valuable reports well illustrated the complexity of the topic, which justified his cautious approach. The Commission must also exercise caution, for international organizations were performing a great service to mankind and their development should not be hampered. It was also necessary to take their sensibilities into account. The problems involved were well illustrated by the difficulties encountered in the Administrative Committee on Co-ordination (ACC), on which the executive heads of the specialized agencies met under the chairmanship of the Secretary-General of the United Nations. In view of the complexity of the problems and in order to take account of the views of the organizations themselves, he suggested that the legal advisers of the international organizations of a universal character should be invited to participate in the Commission's discussion of the topic. That would enable them to reply direct to any questions that members of the Commission might wish to put to them.

32. With regard to the various issues raised by the Special Rapporteur, it was difficult to take a definite

stand. On the question how closely to follow the pattern of the Vienna Convention on the Law of Treaties, it should be remembered that there were great differences between States and international organizations and that the rules governing inter-State treaties were based on the sovereign equality of States.

33. In matters of capacity and representation, in particular, there was a marked difference between States and international organizations. There were also differences among the organizations themselves. The Secretary-General of the United Nations, for example, had broader authority than the executive heads of other international organizations. In some organizations, treaties were concluded, not by the executive head, but by an organ of the organization. He agreed with the Special Rapporteur that it would be appropriate to define a minimum capacity possessed by all international organizations, though some of them would have a more extensive capacity (A/CN.4/SR.271, paragraph 45). He also agreed with the Special Rapporteur that the criteria for capacity to conclude treaties on behalf of an international organization should be sought not only in the constituent instrument, but also in the relevant rules of the organization.

34. With regard to agreements concluded by subsidiary organs, it should be remembered that the role of some of those organs could be very important in practice. The regional economic commissions of the United Nations, for example, took decisions and concluded agreements on matters of great moment. Nevertheless, he could accept the idea that the Commission should concentrate, at the present stage, on treaties concluded by the organizations themselves.

35. In conclusion, he expressed the hope that arrangements would be made for the legal advisers of international organizations to participate in the discussion of the present topic at the twenty-sixth session; that would facilitate acceptance of the draft by the international organizations which had a major interest in it.

36. Mr. QUENTIN-BAXTER said he had been persuaded by the Special Rapporteur's magnificent reports that the Commission had before it a topic which was both worthy and capable of codification and which would in due course take its place in the Vienna family of treaties.

37. The Special Rapporteur had very properly stressed the relationship between the future draft articles and the Vienna Convention on the Law of Treaties, though he had been scrupulous in drawing attention to the differences between them. After all, States were characterized by sovereign equality, whereas international organizations varied widely in nature and functions. The word "State" itself, however, covered a variety of situations. For example, in some multilateral administrative agreements, territories had their own place as signatories; that also applied to associate States, which had their own sovereign law-making bodies, but might choose to merge their national personality with a larger State. States might also choose to bestow an important section of their sovereign competence on an international organization. An organization such as the European Economic Community could be said to possess some of the characteristics

of a State, so he would not wish the draft articles on international organizations to differ too greatly from the Vienna Convention on the Law of Treaties.

38. In connexion with what the Special Rapporteur had said on the subject of representation, it should be noted that it was possible for an international organization itself to be a territorial sovereign. The United Nations, for example, might have been established in an enclave where the Organization would have been territorially sovereign, as in the case of the Holy See. It was also necessary to distinguish cases in which an international organization might be responsible for territory which was not capable of acquisition by States, such as the sea-bed or Antarctica.

39. Article 6 of the Vienna Convention provided that every State possessed capacity to conclude treaties. The question that arose was one of definition, and the present draft articles might conceivably include some such provision as "For the purposes of the present instrument an international organization is considered to possess rights under customary law, including the power to conclude treaties". It was necessary to reassure the representatives of international organizations that they would not be subjected to some Procrustean plan which would deprive them of their distinguishing characteristics and their autonomy. A provision might be included, therefore, to the effect that "For the purposes of the present articles an international organization is one which has the capacity to enter into treaties".

40. It should also be borne in mind that the internal law of an international organization was already, in a certain sense, on the international level, in a way which the constitutional law of a State was not. What was obviously needed was a detailed study of the progress made by international organizations. It was impossible to propound a rule under which the executive head of an international organization would have the same powers as a minister for foreign affairs, although international organizations, especially those of a financial character, might have to enter into arrangements with States which called for legal assurances at the highest level. Some rule was therefore needed to give a State which dealt with an international organization confidence in the capacity of those who represented the organization. From that point of view the Vienna rules were clearly not appropriate.

41. It was not his aim to elevate intergovernmental organizations to a position equivalent to that of States, for in many cases States considered that international organizations were primarily mechanisms designed to carry out their collective purposes. However, he would like to regard the future draft articles as applying to intergovernmental organizations which possessed treaty-making power. After all, no one had applied the Vienna rules more assiduously than the legal advisers of international organizations. The Commission should make it clear that it wished to adopt a position of absolute neutrality with regard to the status of those organizations. Accordingly, a certain looseness in the Commission's approach seemed to be indicated, since it was often difficult for intergovernmental organizations to undertake obligations which could be undertaken by States.

In that connexion, he referred to the difficulties in making the United Nations peace-keeping force responsive to the various Red Cross Conventions.

42. He had no doubt that the rich practice of the international organizations themselves would supply the Special Rapporteur with the proper solutions and enable the Commission to promote the progressive development of international law in that field.

43. Sir Francis VALLAT said he had read the Special Rapporteur's reports with admiration. If the first report had seemed somewhat pessimistic, the second had given grounds for hope. Whatever problems might be inherent in the Special Rapporteur's task, there was no reason to be discouraged by the fundamental problem: how to give effect to the draft articles.

44. Like other members of the Commission he welcomed the Special Rapporteur's investigation of the practice of international organizations, although not every external practice of those organizations was necessarily satisfactory. That practice would have to be examined critically, and it was to be hoped that in due course the Commission would be provided with the necessary information for a better assessment of the Special Rapporteur's work.

45. He agreed that the Vienna Convention should be taken as the basis for the draft articles, but hoped that it would not be regarded as a straitjacket. In other words, it must not be assumed that everything which had proved satisfactory for the Vienna Convention would hold good for international organizations.

46. The problem of capacity was one of the most important and difficult with which the Commission would have to deal. In the Vienna Convention it was possible to say that "every State possesses capacity to conclude treaties", but he doubted whether the Commission could make such a statement with regard to international organizations. Nevertheless, since an article on capacity had been included in the Vienna Convention, it would seem strange if no such article were included in the present draft. He hoped that the Special Rapporteur would attempt to produce one or more articles on that subject.

47. He had no *a priori* theory about the personality of international organizations; in his opinion the Commission should not approach the problem with a presumption of personality from which a capacity to conclude treaties could be inferred. It should rather work from the other direction, that was to say, on the basis of the need to establish such capacity and its extent in the case of each organization.

48. Lastly, on the subject of third parties, article 2, paragraph 1 (h) of the Vienna Convention was inappropriate in the case of international organizations, since there was a special relationship between the organization and its members; hence treaties concluded by the organization might have some effect on its members without their necessarily being parties thereto.

49. Mr. RAMANGASOAVINA said that, as the Special Rapporteur had rightly emphasized in his two excellent reports, the topic under discussion was closely related

to the Vienna Convention on the Law of Treaties. The question whether international organizations should or should not fall within the field of application of that Convention had been discussed on several occasions during the preparatory work on it, and it was therefore significant that in their answers to the Special Rapporteur's questionnaire, the international organizations had been reticent about stating their positions with regard to multilateral treaties in general and the Vienna Convention in particular. Some of them had made a distinction between the status of a "party" to, and "participation" in, a convention. Hence he could only be glad that the Special Rapporteur was going to prepare articles dealing specifically with treaties concluded by international organizations, and he approved of the method chosen.

50. He urged the Special Rapporteur to continue his work on those lines in the light of the Commission's discussions and of any additional information he could obtain. Perhaps at a later stage the Commission would do well to bring representatives of the United Nations family into its discussions, as Mr. Tabibi had proposed.

51. In view of the growing importance of international organizations, it would be very useful to produce a set of draft articles on the topic. For as things stood, international organizations were subjects of international law, but marginal subjects so far as the Vienna Convention was concerned.

52. Mr. YASSEEN said he would confine his comments to four questions which the Special Rapporteur had raised when introducing his excellent reports.

53. With regard to general method, it was desirable to follow the Vienna Convention wherever possible, but also to take into account the special character of international organizations. An international organization was not a State. The reason why international organizations and treaties concluded by them had not been mentioned in the Vienna Convention was that the Commission itself had considered that that question did not exactly coincide with what the subject of the Convention should be, and that it should not trust in analogies which were sometimes deceptive.

54. With regard to the capacity of international organizations to conclude treaties, a convention on treaties concluded between international organizations should include a rule on that matter. The Commission must respect the independence of the organizations, however, and it could not, by a convention it prepared, change the status of an organization or enlarge or reduce its competence. Any article on capacity to conclude treaties should therefore reflect reality and seek the organization's competence where it was to be found: in the organization's own law—that was to say in its relevant rules.

55. The same applied to representation. A convention prepared by the Commission could not endow the head of a secretariat with competence not conferred on him by the law of the organization. There again, the solution must be sought in the relevant rules of the organization.

56. The question of agreements concluded by subsidiary organs was also governed by the internal law of the organization, on which any rule on the subject should be based.

The meeting rose at 1 p.m.

1243rd MEETING

Friday, 6 July 1973, at 9.40 a.m.

Chairman: Mr. Jorge CASTAÑEDA

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

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

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion and present his conclusions.
2. Mr. REUTER (Special Rapporteur) said he inferred from the discussion that the Commission wished him to continue his work and submit to it, at its next session, a third report containing the beginning of a set of draft articles. He was glad to be able to speak henceforth as a rapporteur, that was to say, as one responsible for expressing no longer his own ideas, but those of the Commission. The following seemed to be the gist of the exchange of views that had taken place.
3. So far as method was concerned, the Commission had generally approved the method followed so far and had agreed that it should continue to be applied in the immediate future. The Secretariat would therefore be asked to transmit his second report and the summary records of the discussion on it to the organizations which had furnished information and to those which had not yet done so, requesting them to comment on the second report in the same way as on the first. The Secretariat would also point out to the organizations that it was desirable that they should authorize the Special Rapporteur to publish the information which they furnished or had furnished, after amending or amplifying it, if necessary, according to their instructions. The organizations should also be asked for information on new points, in particular the point raised by Mr. Kearney and Mr. Ustor concerning the distinction between agreements which were international agreements proper and those which were really contracts.

4. The theoretical answer to that question was simple: agreements which were subject to public international law were international agreements; those which were subject to any other rule of law, whether internal or transnational, were not. As to the distinction made in fact, however, it would be useful to have some information on the practice of the organizations in a matter which affected their finances, their premises and their supplies; if any conclusions could be drawn from that information, he would put them before the Commission, which would decide whether they could form the subject-matter of a draft article. In addition he would ask the Secretariat to see whether any of the constituent instruments of the international organizations, especially the United Nations, contained provisions which expressly limited the organization's capacity. That seemed to be the case with certain international commodity agreements; but generally speaking the capacity of organizations was governed by practice.

5. With further reference to method, he wished to reply to some suggestions which had been made. Mr. Ustor had asked whether the Special Rapporteur might not be able to extend the scope of this study by recourse to data processing. Computerized studies of treaties in general had been made in the United States and in some European universities and were of great interest of purposes of political science, but it was questionable whether the results they could provide would be of immediate interest for the Commission's study and whether the United Nations would be prepared to meet the cost, which would be very high. However, he would consult the Secretariat on that point.

6. Mr. Tsuruoka had said that he would send him comments in writing on his second report. Generally speaking, he was greatly in favour of the practice of submitting written observations and he invited members of the Commission who had been unable to participate in the discussion, or who had had to confine their remarks to essentials, to adopt it if they thought it important to draw his attention to any particular point. Despite the extra work it entailed, that method was one to be recommended for the Commission's future work.

7. He agreed with Mr. Hambro that it was highly desirable that all the members of the Commission should be familiar with the comments which the international organizations had sent him, and he would ask them to authorize publication, if necessary in an amended form.

8. Several members of the Commission, including Mr. Tabibi, had suggested that the legal advisers of the international organizations should take part in the Commission's discussions as observers. That would be a most judicious way of giving effect to General Assembly resolution 2501 (XXIV), which recommended the Commission to study the question in consultation with the principal international organizations. The time would even come when their participation would be essential. However, those concerned would obviously have to be consulted informally beforehand, and he and the Commission would have to be absolutely sure of their conclusions and their respective positions before engaging in a "confrontation" of that kind. For the moment, it was no more than a possibility to be considered for the

future. The time to exploit that possibility would have to be decided in due course, with the greatest circumspection.

9. On one important point, which concerned the actual definition of the topic, almost general agreement had been reached and the Commission thus appeared to have taken a decision: the studies and the draft articles were to be based on the definition of an "international organization" given in article 2 of the Vienna Convention on the Law of Treaties. Some members, however, had qualified their position. Mr. Hambro and Mr. El-Erian wished a distinction to be made in certain articles between universal organizations and regional organizations. He would certainly bear that comment in mind, as well as the question raised by Mr. Ushakov, namely, whether the same rules were applicable to agreements concluded between organizations as to agreements concluded between States and organizations, or whether there were separate rules for each kind of agreement. He could say at once that the rules differed on at least one point: the provisions of article 7 of the Vienna Convention, concerning full powers, were applicable to agreements concluded between States and organizations, but not to agreements concluded between organizations.

10. With further reference to the definition of the topic, although the members of the Commission had, in general, considered that a set of draft articles, if any, should follow the general structure of the Vienna Convention, some of them, including Sir Francis Vallat, had wondered how far that Convention should be strictly adhered to, and had expressed the view that the Special Rapporteur should have some degree of latitude. It would clearly be absurd to depart without reason from such a "miraculous" instrument as the Vienna Convention, but if it proved necessary that must be done. All the members of the Commission seemed to share that view.

11. As to the questions of agreements concluded by subsidiary organs, participation by an international organization in a treaty concluded on behalf of a territory it represented, and agreements concluded between organs of the same organization, which he had raised in his second report, the Commission had considered, as he did, that they were not yet ripe for study and should not be pursued further, either with the organizations or in the Commission's work. He wished to stress two points, however. First, it was desirable that international organizations should always state on whose behalf an agreement was concluded—who committed whom—but it would not be advisable to lay down such a condition in an article at once, because it might at present be convenient for the international organizations to be indefinite about the identity of the parties, as, for instance, in the case of Namibia. It would therefore be preferable to leave the matter aside.

12. The second point concerned representation of a State by an organization and representation of an organization by another organization. The members of the Commission had generally agreed that, to the extent that the Vienna Convention had not settled those questions, they should be shelved. Mr. Ushakov had observed that, under the Vienna Convention, representation might be by an organ, but not by a person. But article 7 of the

Vienna Convention, concerning full powers, referred to persons. In that connexion the Commission had appeared doubtful whether a sufficiently general practice yet existed to show what persons were authorized, in virtue of their functions, to represent an international organization. Mr. Yasseen had expressed the opinion that it would be difficult to legislate on a matter which involved the practice, since in any case, for the time being at least, that practice respected the independence of the organizations. The question therefore remained open and he would examine it again to see whether he could formulate any proposals.

13. On the question of the capacity of international organizations to conclude treaties, three schools of thought had emerged. The first not only wished the future draft to include articles on the capacity of international organizations to conclude treaties, but wished those articles to be based on the idea that such capacity was inherent in an international organization. That amounted to making the international community into an instrument which attributed competence and conferred capacity to conclude treaties on new subjects of law, merely by virtue of their existence. Although he had said in his second report (A/CN.4/271) that he was not in favour of an article on capacity, he nevertheless considered that first school of thought to be that of the future.

14. The second school, corresponding to the position taken by Mr. Ushakov, held that as the topic under study concerned the agreements of international organizations and those agreements existed, the Commission was not called upon to pronounce on the capacity of the organizations to conclude them, which was another subject for study. A similar position had been taken by Mr. Quentin-Baxter, who considered that a provision on capacity would constitute a kind of disguised definition of an international organization, while Mr. Yasseen had taken the view that the practice of the international organizations constituted their sphere of independence and must be fully respected, and that if the Commission attempted to regulate the matter it might encroach upon that independence.

15. The third and last school of thought was in favour of introducing one or more articles on capacity into the draft, but wished their formulation to stop short of the idea of inherent capacity.

16. The conclusion he drew from the discussion, therefore, was that he should propose one or more draft articles on capacity. He would accordingly abandon the opinion he had expressed in his second report, propose a choice of wording accompanied by commentaries, and try to work out solutions acceptable to as many members of the Commission as possible.

17. As to the effects on third parties of certain agreements concerning international organizations, two kinds of agreement had been envisaged: agreements between States and agreements between organizations. As to agreements between States, in so far as they created new rights and duties for an organization not a party to them, Mr. Ushakov had said that they were outside the scope of the topic under study. That objection could perhaps be disposed of if it were acknowledged that, as provided in the Vienna Convention, an agreement could

produce effects for third parties by virtue of a collateral agreement. The collateral agreement, however, would be concluded between an organization and States and, consequently, would not come under the Vienna Convention; it would therefore fall directly within the topic under study. In any case, the majority of members of the Commission had agreed that the provisions of the Vienna Convention on that point should be transferred and that it was for him to do so.

18. Mr. Tammes had dwelt on the question of agreements between international organizations and their effects on member States, and seemed to have been thinking of the privileged situation in which an international organization was entitled to legislate on behalf of its member States, as in the case of a Customs union. In such cases, given that the organization was entitled to conclude international agreements, those agreements must of necessity be binding on the member States. He hoped to find a reasonable and universally acceptable solution to that problem without departing too far from the machinery of the Vienna Convention, which the Commission had taken great pains to elaborate, although in his opinion that machinery was not entirely satisfactory; for instance, an international organization was not a third party in relation to its constituent instrument.

19. In conclusion, he thought he would be able to prepare a short set of draft articles without undue delay. He hoped that the topic would be one which could be disposed of quickly. That would show that the Vienna Convention, which remained the Commission's masterwork, was made to last and to extend its influence.

20. Mr. AGO expressed his admiration for the way in which the Special Rapporteur had dealt with his topic. He himself considered that the framework of the Vienna Convention should be adhered to as closely as possible. In addition to the reasons given by the Special Rapporteur, it should be remembered that the Vienna Convention and the convention which might one day result from the Special Rapporteur's work would have to complement each other and would be applied together. Consequently, in dealing with the treaties of international organizations, no departure should be made from the Vienna Convention except where absolutely necessary.

21. The Special Rapporteur still had a long and arduous task before him, owing to the great differences which divided treaties concluded between States from treaties to which international organizations were parties. Those differences appeared in many matters: in particular, the conclusion of treaties, and in general, the whole subject-matter of part V of the Vienna Convention, which dealt with invalidity, termination and suspension of the operation of treaties. All the situations contemplated in that part of the Convention would have to be reviewed. The notions of error, coercion and corruption were difficult to accept in regard to treaties concluded by international organizations. The provisions of the Vienna Convention concerning fundamental change of circumstances, *jus cogens* and the settlement of disputes could not be applied as they stood to the treaties of international organizations. As to the capacity of international organizations to conclude treaties, it certainly seemed that a residuary

rule would be necessary, even though a general rule was perhaps in process of formation.

22. Like the Special Rapporteur, he wished to emphasize the rapid expansion of international organizations and the growing number of treaties they were concluding; those treaties were less and less of an exception, and it was important that the Commission should take account of the foreseeable trend in that direction.

23. The CHAIRMAN declared the discussion on item 4 of the agenda closed.

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

(A/CN.4/L.198; A/CN.4/L.200)

Chapter I

ORGANIZATION OF THE SESSION

24. The CHAIRMAN invited the Commission to examine chapter I of its draft report (A/CN.4/L.200) paragraph by paragraph.

Paragraphs 1-5 were approved.

Paragraph 6

25. Mr. BARTOŠ suggested that, at the end of paragraph 6, it should be mentioned that two small groups, each composed of three members of the Commission, had been set up, one to study the question of *apartheid* from the point of view of international criminal law and the other to consider the commemoration of the Commission's twenty-fifth anniversary.

It was so agreed.

Subject to that addition, paragraph 6 was approved.

Paragraphs 7-10 were approved.

Chapter II

STATE RESPONSIBILITY

A. Introduction (A/CN.4/L.198)

Paragraphs 1-11 were approved.

Paragraph 12

26. After a brief exchange of views in which Mr. HAM-BRO, Mr. AGO (Special Rapporteur), Mr. Ustor, the Chairman, Mr. Sette Câmara, Mr. Bartoš and Mr. Kearney took part, the Chairman proposed the deletion of the second sentence of paragraph 12, reading: "All the members of the Commission present at the twenty-first session participated in the discussion", which was not strictly accurate. He pointed out that if a statement of that kind was approved, it would also have to be made in other parts of the report.

The Chairman's proposal was adopted.

Paragraph 12, as amended, was approved.

Paragraphs 13 and 14 were approved.

Paragraph 15

27. After a brief exchange of views, in which Mr. Hambro, Mr. Bartoš, Mr. Tsuruoka and Mr. Ago (Special Rapporteur) took part, the CHAIRMAN noted that the members of the Commission were in favour of retaining the words "Because of the limited time at its disposal" at the beginning of paragraph 15, to emphasize that the Commission's sessions were not long enough.

28. He suggested that, after the reference made in paragraph 15 to particular meetings, the session at which those meetings had taken place should be mentioned in brackets.

It was so agreed.

Subject to that addition, paragraph 15 was approved.

Paragraph 16 was approved.

Paragraph 17

29. The CHAIRMAN asked the Secretariat to check whether the General Assembly, in its resolution 2634 (XXV), had not stressed the urgency of the need to continue the work on State responsibility. If so, that urgency should be mentioned in paragraph 17.

Subject to that addition, if necessary, paragraph 17 was approved.

Paragraphs 18-20 were approved.

Paragraph 21

30. The CHAIRMAN suggested that paragraph 21 should be divided into two separate paragraphs, one relating the events of 1971 and the other to those of 1972.

It was so agreed.

Paragraph 21, as amended, was approved.

Paragraphs 22 and 23 were approved.

Title of section 2

31. Mr. TSURUOKA proposed that the concluding words of the title, "now being prepared", should be deleted, as they were unnecessary.

32. Mr. AGO (Special Rapporteur) accepted that proposal. The shorter title "General remarks on the draft articles" was sufficient.

The title of section 2, as amended, was approved.

Paragraph 24

33. Mr. KEARNEY proposed that, in the last sentence, the word "codification" should be deleted. The possibility should not be ruled out that the convention which would emerge from the draft articles might contain elements of progressive development as well as codification.

34. Mr. AGO (Special Rapporteur) said that he had no objection to the proposed deletion, although he maintained that codification always involved some element of progressive development.

Paragraph 24 was approved with the amendment proposed by Mr. Kearney.

Paragraph 25

35. Mr. KEARNEY proposed that, in the English text only, the second sentence should be split into two sentences by deleting the conjunction "but" and substituting a full stop for the semicolon.

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

36. Mr. KEARNEY said he had two remarks to make on paragraph 26 which touched to some extent on substance.

37. In the first place, in view of the further discussion which had taken place in the Commission he thought the term "responsibility" should be used only in connexion with internationally wrongful acts and that, with reference to the possible injurious consequences arising out of the performance of certain lawful activities, the more suitable term "liability" should be used. He therefore proposed that before the words "for possible injurious consequences", in the second sentence of paragraph 26, the word "responsibility" should be replaced in the English text by the word "liability".

It was so agreed.

38. Mr. AGO (Special Rapporteur) said that the change was pertinent so far as the English text was concerned. The word "liability" implied the necessity to make reparation and was therefore the right word in that context; "*responsabilité*" appeared to be the only word available in French to express both notions.

39. The CHAIRMAN pointed out that the difference between the concept of responsibility for internationally wrongful acts and that of liability for the injurious consequences arising out of certain lawful, but hazardous activities, was made clear in the rest of the paragraph. Indeed, the penultimate sentence specifically stated that it was "only because of the relative poverty of legal language" that the same term was habitually used to designate both responsibility for wrongful acts and liability for the consequences of certain lawful activities.

40. Mr. KEARNEY said that his second remark related to the words "definitively prohibited" in the second sentence. Those words were very obscure. It should be remembered that, in certain cases, dangerous activities might be merely regulated, rather than totally prohibited.

41. Mr. AGO (Special Rapporteur) said that the second sentence was intended to take into account a remark by Mr. Kearney to the effect that certain activities were halfway between the lawful and the wrongful. It was true that rules of international law, especially customary rules, applied to activities that had been lawful before becoming wrongful. For instance, before the 1963 Treaty, nuclear tests had been considered lawful. At the present time, underground tests had not yet been prohibited, though they could not really be regarded as lawful. The words "not yet... definitively prohibited" were intended to reflect that trend.

42. Mr. SETTE CÂMARA pointed out that an activity could be regulated in such a way that, if it was performed

in breach of the regulations, the legal consequences would be the same as if it was prohibited.

43. Mr. RAMANGASOAVINA suggested that reference should be made to "activities not yet regulated by international law", without specifying whether the regulation entailed prohibition or authorization.

44. Mr. AGO (Special Rapporteur) observed that the effect of a regulation was to make an activity lawful when it was performed in a certain way and wrongful when it was performed in another way. For example, the transport of oil was regulated in such a way that it was lawful in certain cases and wrongful in others, in which responsibility was consequently incurred.

45. Mr. KEARNEY said that, where an activity was regulated, the problem which arose could be a matter of degree. A distinction had to be drawn between prohibited activities and activities which implied the assumption of a risk. The whole problem was that of drawing the dividing line between primary obligations and secondary obligations.

46. Mr. HAMBRO said he thought the purpose of paragraph 26 was to reflect the discussion in the Commission on the important question of what might be called the "moving frontiers" between lawful and wrongful acts. As a result of legal developments, certain actions which were at present lawful might soon become wrongful.

47. The CHAIRMAN speaking as a member of the Commission, said that it might perhaps be better to use a less categorical formula than "activities which international law may not yet have definitively prohibited". Those words were followed by a number of examples, such as activities in the atmosphere and in outer space. Many international lawyers believed that certain activities coming under those headings were already prohibited by contemporary international law.

48. Mr. AGO (Special Rapporteur) proposed that a clear distinction be made between responsibility for an internationally wrongful act and the obligation to stand surety for the possible consequences of lawful activities and other activities which, for the time being, were still lawful, but were on the point of being prohibited.

49. Mr. YASSEEN suggested the wording "activities which are still lawful, but particularly dangerous".

50. Mr. SETTE CÂMARA suggested the wording "certain activities not yet considered illicit under general international law".

51. Sir Francis VALLAT said that he would have no objection to that change of language, but was concerned at the examples given and the controversy surrounding some of them.

52. The CHAIRMAN, speaking as a member of the Commission, said he understood that concern. He suggested that the difficulty be overcome by deleting the words "such as certain maritime activities, activities in the atmosphere or in outer space, and nuclear and other activities, particularly in connexion with the protection of the environment".

53. Mr. KEARNEY supported that suggestion and proposed that the preceding words "or activities which

international law has not yet definitively prohibited" should be replaced by the words "such as those which because of their nature give rise to special hazards".

The meeting rose at 11.50 a.m.

1244th MEETING

Monday, 9 July 1973, at 3.15 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

(A/CN.4/L.198)

(continued)

Chapter II

STATE RESPONSIBILITY

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the introduction to chapter II of its draft report (A/CN.4/L.198).

A. INTRODUCTION

Paragraph 26 (continued)

2. The CHAIRMAN reminded the Commission that at the previous meeting, on Mr. Kearney's proposal,¹ it had agreed to replace the word "responsibility" by the word "liability" in the English text of the second sentence, where it related to the consequences of lawful activities.

3. Mr. AGO (Special Rapporteur) proposed that, in the French text, the words "*la responsabilité pour*", in that passage, should be replaced by the words "*l'obligation de réparer*".

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted that proposal.

It was so agreed.

5. The CHAIRMAN reminded the Commission that at the previous meeting Mr. Kearney had also proposed that the last part of the second sentence, from the words "or activities which", should be replaced by the words "such as those which because of their nature give rise to special hazards".²

¹ See previous meeting, para. 37.

² *Ibid.*, para. 53.

6. Mr. USTOR pointed out that it was not only activities giving rise to special hazards that were envisaged, but, in general, all activities which might cause damage, for instance pollution.

7. Mr. AGO (Special Rapporteur) proposed that, in order to cover the ideas of both hazard and damage, the passage in question should read: "especially those which because of their nature give rise to certain hazards".

It was so agreed.

8. Mr. KEARNEY proposed that the word "simultaneously", in the third sentence, should be replaced by the word "jointly", and the word "simultaneous", in the fourth sentence, by the word "joint".

9. Mr. AGO (Special Rapporteur) accepted those changes; in the French text the words "*en même temps*" would be replaced by the word "*ensemble*" and the word "*simultané*" by the word "*conjoint*".

It was so agreed.

Paragraph 26, as amended, was approved.

Paragraph 27

10. Sir Francis VALLAT proposed that the word "merely", in the second sentence, should be deleted.

It was so agreed.

11. Mr. KEARNEY, referring to the expression "responsibility for risk", in the third sentence, observed that the more familiar legal expression was "assumption of risk".

12. Sir Francis VALLAT suggested that the expression "responsibility for risk" should be retained, since it was preceded by the words "so-called", which indicated that it was not used as a precise legal term.

It was so agreed.

13. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of the word "even", before the words "do so simultaneously but separately", in the last clause of the third sentence.

The proposal was adopted.

14. Mr. KEARNEY proposed that, in the last sentence of paragraph 27, the concluding words "source of that responsibility" should be amended to read "source of 'responsibility'".

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

15. Sir Francis VALLAT proposed that, in the penultimate sentence, the word "means" should be replaced by the word "intends" and the comma after the word "obligations" should be deleted. Those changes affected the English text only.

Paragraph 28 was approved with those amendments to the English text.

Paragraph 29

16. Mr. KEARNEY proposed that, in the English text of the first sentence, the words "a grading of" should be

replaced by the words "a distinction between" in order to render the French original more accurately.

17. Sir Francis VALLAT proposed that, in the same sentence, the word "consequence" should be put in the plural.

Paragraph 29 was approved with those amendments to the English text.

Paragraph 30.

Paragraph 30 was approved.

Paragraph 31

18. Sir Francis VALLAT proposed that, in the English text of the first sentence, the words "may later take on the matter" should be amended to read "may take later".

19. Mr. KEARNEY observed that, in the English text of the fourth sentence, the words "determine what facts and what circumstances must be established in order to attribute to a State the existence of an internationally wrongful act" did not render the French original accurately. He proposed the following rewording: "determine on the basis of what facts and in what circumstances there exists on the part of the State an internationally wrongful act".

20. In the last sentence, the term "implementation", which was placed between quotation marks, was not a suitable rendering of the original French "*mise en œuvre*".

21. Sir Francis VALLAT proposed that paragraph 31 be approved with the changes to the English text of the first and fourth sentences proposed by Mr. Kearney and himself, and on the understanding that a more suitable rendering would be found for the expression "*mise en œuvre*", which would also be inserted, in brackets, in the English text.

It was so agreed.

Paragraph 32

22. Mr. KEARNEY proposed that paragraph 32 be approved on the understanding that a more suitable rendering than "to provide" would be found for the French "*réunir*" in the fourth sentence.

It was so agreed.

Paragraph 33

23. The CHAIRMAN, speaking as a member of the Commission, observed that the explanation of article 3 was not as full as the explanations of the other articles. He suggested that the conditions for the existence of a wrongful act by the State should be specified.

24. Mr. AGO (Special Rapporteur) agreed. He proposed that, in the sentence dealing with article 3, the words "the conditions" should be replaced by the words "the two elements, subjective and objective,".

It was so agreed.

Paragraph 33, as amended, was approved.

Paragraph 34

25. Mr. KEARNEY proposed that, in the second sentence, the words "to clear away certain theoretical difficulties caused basically by incorrect premises" should be replaced by the more modest formula: "to take into account certain theoretical difficulties".

26. He further proposed that, in the fifth sentence, the opening words "It will next be seen that other acts" should be amended to read: "The Commission will then examine whether other acts".

27. Mr. AGO (Special Rapporteur) accepted those changes. In the first amendment, the words "to take into account" would be rendered in French by "*tenir compte*". In the second, the French text would read: "*La Commission examinera ensuite si d'autres comportements...*".

28. Sir Francis VALLAT proposed that, in the sixth sentence, the words "whether of all these different types of conduct, conduct adopted in certain particular conditions" should be replaced by the words "whether conduct falling under all these different categories in certain particular conditions". The purpose of that change was to make it clear that the reference was to the author, and not to the nature, of the conduct.

29. Mr. AGO (Special Rapporteur) accepted that proposal, which affected only the English text. The meaning was clear in the French original.

30. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph 34 with the amendments proposed by Mr. Kearney and Sir Francis Vallat.

It was so agreed.

Paragraph 35

31. Mr. KEARNEY proposed that, in the last sentence, the opening words "In connexion with" should be replaced by the words "As a corollary to".

32. In the interests of clarity he further proposed that the words "but that these factors are irrelevant to the attribution of its conduct to the State" should be deleted and that the same idea, should be transferred to the first part of the sentence, which would then read: "... states that for purposes of attribution, it is immaterial whether the organ in question is part of the main branches of the State structure, whether its functions concern international relations or are of a purely internal character, or whether it holds a superior or subordinate position...".

33. Mr. AGO (Special Rapporteur) accepted those changes. The first would be rendered in French by the words: "*En tant que corollaire*". The second was a matter of English drafting which did not affect the French text.

34. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved paragraph 35 with the changes proposed by Mr. Kearney.

It was so agreed.

Twenty-fifth anniversary of the International Law Commission

STATEMENT BY THE REPRESENTATIVE OF THE SECRETARY-GENERAL

35. The CHAIRMAN welcomed Mr. Stavropoulos, Legal Counsel of the United Nations representing the Secretary-General, and invited him to address the Commission.

36. Mr. STAVROPOULOS (Representative of the Secretary General) said that, when the Commission had been founded twenty-five years previously—an occasion on which he had been present—doubts had been expressed about the future of the new organ, because it was thought in some quarters that governments were not prepared to establish rules binding them in international law. He was happy to note that those doubts had proved groundless and that the Commission had succeeded in drawing up new international laws which had gained general acceptance.

37. In its resolution 2927 (XXVII) the General Assembly had commended the Commission and its distinguished members and had recommended that the Commission's twenty-fifth anniversary should be observed in an appropriate manner by the General Assembly during its twenty-eighth session. He had been informed that the Commission had decided to commemorate that anniversary at its next regular session. He wished to express personally his satisfaction at that decision, which would enable the Secretariat to organize the commemoration in an appropriate manner.

38. He had learned with great interest of the work done by the Commission at its present session. The Commission had a heavy agenda and it had accomplished substantial work in considering the reports of four Special Rapporteurs and adopting several draft articles on three of the topics before it. He had also noted with pleasure that the Commission had found time to hold a general exchange of views on its programme of work, on the basis of the Survey of International Law which had been prepared by the Secretary-General pursuant to a decision of the Commission, and which he had had the honour to introduce to the Commission on the Secretary-General's behalf in 1971.³

39. As they had done in the past, the Office of Legal Affairs and, in particular, its Codification Division would continue to render, within the means at their disposal, all assistance that might be required by the Commission or its Special Rapporteurs.

40. The CHAIRMAN thanked the representative of the Secretary-General for his statement and, on behalf of the Commission, expressed its appreciation of the efficient contribution which the Secretariat had made to the present session.

³ See *Yearbook of the International Law Commission, 1971*, vol. I, p. 360, 1141st meeting, para. 2 *et seq.*

Organization of future work

[Item 7 of the agenda]

41. The CHAIRMAN said that at their last meeting the officers and former chairmen of the Commission had reached a number of conclusions about the organization of the Commission's future work. First, they had decided that at its next session the Commission should concentrate on two major topics: succession in respect of treaties and State responsibility. Secondly, they had agreed that the Commission should attempt to persuade the General Assembly to increase the length of its sessions to 14 weeks or, if that was not possible, to at least 12 weeks. That would enable the Commission to devote six or seven weeks to the topic of succession in respect of treaties and five or six weeks of State responsibility. It would thus be possible to complete two whole topics, rather than merely parts of several topics. The grounds for the extension should be stated clearly in the Commission's report and he, as Chairman, would do his best to persuade the General Assembly of the need for it. It was, of course, desirable that the Commission's next session should not overlap with the preparatory meeting for the coming conference on the law of the sea which was to be held at Santiago.

42. Mr. STAVROPOULOS (Representative of the Secretary-General) said he feared that, if the length of the Commission's session was increased to 14 weeks, some clash with the Santiago conference might be inevitable. However, he acknowledged the pertinence of the argument that such an extension would enable the Commission to complete its work on two major topics.

43. Mr. SETTE CÂMARA asked whether the date for the opening of the next session had been discussed.

44. The CHAIRMAN replied that the normal date for the opening of the Commission's session was the first Monday in May. Several members had expressed the wish that the date should be set as early as possible, but in view of the Santiago conference he thought it would be difficult to start the session earlier than 4 or 5 May 1974.

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

(A/CN.4/L.198 and Add.1)

(resumed)

Chapter II (continued)

A. INTRODUCTION (A/CN.4/L.198)

Paragraphs 36 and 37

Paragraphs 36 and 37 were approved.

Paragraph 38

45. Mr. KEARNEY proposed that the beginning of the second sentence should be amended to read: "In principle, for the purposes of State responsibility, section 8 excludes the possibility...".

Paragraph 38 was approved with that amendment.

Paragraph 39

46. Mr. AGO (Special Rapporteur), referring to the second sentence, said that in his opinion the word "violation" was an incorrect translation of the French word "*infraction*".

After a brief discussion in which Mr. AGO, the CHAIRMAN, Sir Francis VALLAT and Mr. SETTE CÂMARA took part, *it was decided to replace the word "violation" in the English text by the words "breach of obligation"*.

47. Mr. KEARNEY proposed that the fourth sentence should be amended to read as follows: "It will first be necessary to examine whether the source of the international legal obligation (customary, treaty or other) had any implication when it comes to determining whether the breach is an internationally wrongful act". He further proposed that the definite article "The" at the beginning of the sixth sentence should be replaced by the indefinite article "An".

It was so agreed.

48. Sir Francis VALLAT pointed out that, if the words "the violation of an international obligation" were replaced by "breach of obligation", that would necessarily involve a number of consequential amendments to the remainder of the paragraph.

49. Mr. AGO (Special Rapporteur) suggested that wherever the word "*infraction*" appeared in the French text it should be translated by "breach".

It was so agreed.

Paragraph 39, as amended, was approved.

Paragraph 40

50. Mr. AGO (Special Rapporteur) proposed that, in the first sentence, the words "criteria proposed" should be replaced by "criteria followed".

51. Sir Francis VALLAT said that, for criteria, the word "applied" would be more appropriate than "followed".

It was so agreed.

Paragraph 40, as amended, was approved.

Paragraphs 41 to 46

Paragraphs 41 to 46 were approved.

Section A of chapter II of the draft report, as amended, was approved.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (A/CN.4/L.198/Add.1)

Chapter I. General principles

Introductory paragraph

52. Mr. USTOR proposed that the third sentence should be amended to read: "The term 'general principles' is used in this context as meaning rules of the most general character applying to the draft articles as a whole". He further proposed that the next sentence should be amended to read: "Other expressions such as

'fundamental rules' or 'basic principles' appear in other chapters of the draft articles as meaning rules having a less general character but still of fundamental importance".

It was so agreed.

53. Sir Francis VALLAT proposed that the word "clearly" in the fifth sentence should be deleted.

It was so agreed.

The introductory paragraph of chapter I, as amended, was approved.

Commentary to article 1

(Responsibility of a State for its internationally wrongful acts)

Paragraph (1)

54. Mr. SETTE CÂMARA, supported by Mr. AGO, proposed that the word "classifies" should be replaced by the word "considers".

Paragraph (1) was approved with that amendment.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

55. Mr. KEARNEY said he had objections of principle to the words "the accomplishment by a State of any internationally wrongful act" in the first sentence; such an act could hardly be described as an "accomplishment".

56. The CHAIRMAN suggested that the word "accomplishment" should be replaced by the word "commission".

It was so agreed.

57. Sir Francis VALLAT said he failed to understand the meaning of the eighth sentence which read: "The obligation to make the reparation would thus be no more than a subsidiary duty placed, by the law in municipal law and by a possible agreement in international law, between the wrongful act and the application of coercion". He suggested that the Secretariat should check that wording against the original French text.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

58. Mr. KEARNEY said he was not sure what the subject of the first sentence was. Was it "the unanimity of views" or "the existence of the principle"?

59. The CHAIRMAN suggested that the sentence would be clearer if the first phrase was amended to read: "... the unanimity of views that prevails in State practice...".

Paragraph (7) was approved with that amendment.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were approved.

Paragraph (12)

60. Mr. KEARNEY said he had not realized that in accepting article 1 the Commission had also accepted the thesis propounded in paragraph (12). He hesitated to accept the conclusion stated in the third sentence, because he did not think that the matter had ever been discussed by the Commission.

61. Mr. AGO (Special Rapporteur) said that the Commission had discussed that point at length and some members had even proposed that the words "except in certain circumstances" should be added at the end of article 1; they had dropped that addition after receiving an assurance that those circumstances had the effect of precluding not only responsibility, but also wrongfulness.⁴

62. Mr. THIAM said that the Commission had not discussed the question thoroughly and had left it for further consideration when it came to examine the provision specifying the circumstances in which responsibility was not incurred.

63. Mr. YASSEEN said it had been agreed in the Commission that the circumstances in question precluded wrongfulness, not responsibility.

64. Mr. AGO (Special Rapporteur) considered that it was that aspect of the matter which should now be stressed in the report. It was, of course, true that the circumstances in question would have to be considered specifically later on.

65. Mr. BARTOŠ said that those circumstances gave the measure of the State's responsibility. They made it possible, for example, to determine the extent to which the injured State had given its consent. In the past it had been possible for a State to relinquish its right to sovereignty; that would now be contrary to the Charter of the United Nations. However, since the circumstances in question were to be considered later, the Commission should not at the present stage, adopt a form of words which implied that the question had been finally settled.

66. Mr. KEARNEY said he was concerned about the type of case in which there might be a plurality of causes of the injury sustained. One of the causes might be excusable, while another might not. There were also situations in which there could be contributory factors to fault on both sides.

67. The CHAIRMAN suggested that Mr. Kearney's difficulty might be overcome by adding some such sentence as "Some members of the Commission were of a different opinion".

68. Mr. AGO (Special Rapporteur), referring to the objections raised by Mr. Thiam and Mr. Bartoš, proposed that the words "insofar as they affected the matter" should be inserted in the third sentence after the words "the existence of those circumstances". Mr. Bartoš had, indeed, appeared to be thinking of cases in which the circumstances in question would perhaps have no effect.

⁴ See 1204th meeting, para. 11.

69. The enumeration of the circumstances had not been drawn up by the Commission; it had been gleaned from the literature.

70. Mr. USHAKOV proposed that, after the third sentence, a new sentence should be inserted reading: "The real effect of those circumstances will be considered by the Commission at a later stage".

The meeting rose at 6.30 p.m.

1245th MEETING

Tuesday, 10 July 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

(A/CN.4/L.198/Add.1-5; A/CN.4/L.199)

(continued)

Chapter II

STATE RESPONSIBILITY

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)

Commentary to article 1

(Responsibility of a State for its internationally wrongful acts) (A/CN.4/L.198/Add.1)

Paragraph (12) (continued)

1. Mr. AGO (Special Rapporteur) proposed that, in order to meet the objection raised by Mr. Kearney at the previous meeting,¹ the words "felt bound to reject" in the first sentence should be replaced by the words "felt unable to accept" and that the word "etc." at the end of the sentence should be deleted.

It was so agreed.

2. Mr. AGO (Special Rapporteur), referring to the comments made by Mr. Thiam and Mr. Bartoš at the previous meeting,² said that the second sentence of paragraph (12) expressed the opinion of certain writers, not that of the Commission, and should therefore be retained. He proposed that the rest of the paragraph should be replaced by a new text, which he read out in French, and suggested that he should hand that text to the Secretariat for translation into the other languages.

It was so agreed.

Paragraph (12), as amended, was approved.

¹ See para. 60.

² See paras. 62 and 65.

Paragraph (13)

3. Mr. AGO (Special Rapporteur) proposed that the words "international responsibility" in the second sentence should be placed in inverted commas.

Paragraph (13) was approved with that amendment.

Paragraph (14)

Paragraph (14) was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2

(Possibility that every State may be held to have committed an internationally wrongful act)

(A/CN.4/L.198/Add.2)

Paragraph (1)

4. Mr. KEARNEY said that the last part of the last sentence was imprecise. The reference should be, not to "its conduct", that was to say the conduct of the State in question, but to the conduct of a State in general. He therefore proposed that the word "its" before "conduct" should be deleted and that the words "if committed by any State" should be inserted after the words "considered internationally wrongful".

Paragraph (1) was approved with those amendments.

Paragraph (2)

5. Mr. SETTE CÂMARA proposed that the unsatisfactory metaphor "States come of age" should be dropped from the sixth sentence, which should be reworded to read: "States establish themselves as equal members of the international community as soon as they achieve an independent and sovereign existence".

Paragraph (2) was approved with that amendment.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

6. Mr. KEARNEY proposed that the word "evade", at the end of the second sentence, should be replaced by the word "escape". That change would affect the English text only.

Paragraph (4) was approved with that amendment to the English text.

Paragraph (5)

7. Mr. HAMBRO proposed that, in the first sentence, the words "*à avoir été*" should be deleted from the French text, as they were unnecessary. That change would not affect the text in other languages.

It was so agreed.

8. Mr. KEARNEY said that the last two sentences of the paragraph did not adequately express the real position. The case referred to in the previous sentences did not represent an exception to the principle that every internationally wrongful act of a State entailed the international responsibility of that State. The real question

was whether the federal State or the member state, or both of them, would have international responsibility for the wrongful act of the member state.

9. Mr. AGO (Special Rapporteur) said that he did not share Mr. Kearney's view on the problem. However, he proposed that the last two sentences be deleted, which would be the simplest solution.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

10. Mr. THIAM proposed that, in the fifth sentence, the words "committed an act or omission" should be replaced by the words "render themselves guilty of an act or omission".

Paragraph (6) was approved with that amendment.

Paragraph (7)

11. Mr. KEARNEY proposed that, in the first sentence, the words "circumstances precluding wrongfulness" should be amended to read "circumstances which might preclude wrongfulness". That amendment would be consistent with the changes already made in the commentary to article 1.

Paragraph (7) was approved with that amendment.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

12. Mr. SETTE CÂMARA proposed that the word "evading", in the first sentence, should be replaced by the word "escaping". That change would affect the English text only.

It was so agreed.

13. Mr. KEARNEY proposed that, in the seventh sentence, the words "whatever the State" should be expanded so as to convey the idea that the conduct of the State would be regarded as an internationally wrongful act regardless of whether the State was large or small, new or old.

14. Sir Francis VALLAT suggested that the point might be met by using some such wording as "whatever the strength or stature of the State".

15. Mr. AGO (Special Rapporteur) said that an expression of that type would perhaps be too specific. The original French wording "*quel que soit l'Etat*" adequately rendered Mr. Kearney's idea.

16. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "whatever its conditions" should be used in the English text; the French original would remain unchanged.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

17. Sir Francis VALLAT proposed that, in the last sentence, the words "the wrong idea" should be replaced by the words "the wrong impression". That change would affect the English text only.

Paragraph (11) was approved with that amendment to the English text.

The commentary to article 2, as amended, was approved.

Commentary to article 3

(Elements of an internationally wrongful act of a State)

(A/CN.4/L.198/Add.3)

Paragraph (1)

18. Sir Francis VALLAT said he wished to make a reservation regarding the description, in the last sentence, of the "subjective element" as consisting of "conduct that must be capable of being attributed not to the human being or collectivity of human beings which has actually engaged in it, but to the State as a subject of international law". As it stood, that passage could be read as excluding the possibility of personal liability once the conduct in question was attributed to the State. He wished to make it clear that there were cases in which conduct attributed to the State as a subject of international law could be attributed to individuals as well.

19. Mr. HAMBRO supported those remarks.

20. Mr. AGO (Special Rapporteur) said that in his opinion no change should be made in the text of the commentary. The general purpose of the article was to attribute to the State wrongful conduct which was physically the act of human beings.

21. The CHAIRMAN noted that no proposal for amendment was being pressed. He would therefore take it that the Commission agreed to approve paragraph (1) as it stood.

It was so agreed.

Paragraph (2)

22. Mr. KEARNEY proposed that paragraph (2) be deleted. Its contents largely duplicated material already contained in the commentaries to articles 1 and 2.

23. Mr. AGO (Special Rapporteur) said that the exceptional circumstances in which an act should not be characterized as internationally wrongful had in fact been mentioned during the discussion on each of the three articles. Nevertheless, he saw no objection to the proposed deletion.

24. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to delete paragraph (2) from the commentary to article 3.

It was so agreed.

Paragraph (3)

25. Mr. SETTE CÂMARA proposed the deletion of the word "these" before the words "terminological

questions” in the first sentence. That amendment would affect the English text only. The French original did not use the equivalent of the word “these”, which gave the false impression that the opening words of paragraph (3) referred back to the contents of the now deleted paragraph (2).

Paragraph (3) was approved with that amendment.

Paragraph (4)

26. Sir Francis VALLAT said that the concluding words of the ante-penultimate sentence, “material or psychological imputation”, were not clear. He proposed that the word “material” should be replaced by the word “factual”. That change would affect the English text only.

Paragraph (4) was approved with that amendment to the English text.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

27. Mr. KEARNEY found the opening statement of the second sentence excessive. Instead of “The State is an absolutely real organized entity”, it would be sufficient to say “The State is a real entity”.

28. Mr. AGO (Special Rapporteur) considered that the word “organized” should be retained as it supplied a useful shade of meaning. He proposed that, to meet Mr. Kearney’s objection, the word “absolutely” should be deleted.

Paragraph (6) was approved with the amendment proposed by the Special Rapporteur.

Paragraph (7)

29. Mr. KEARNEY said that the expression “natural causality”, used in the first, second and third sentences, was quite unfamiliar to lawyers in his country and would also be difficult for many other readers to understand.

30. Mr. AGO (Special Rapporteur) explained that the expression “*causalité naturelle*” had been used in contradistinction to purely legal causality, which was a fiction created by the law.

31. Mr. KEARNEY suggested that, in the English text only, the words “natural causality” should be replaced throughout by the words “factual causality”.

32. Mr. QUENTIN-BAXTER proposed that Mr. Kearney’s formula should be used in the English text, followed by the French expression “*causalité naturelle*” in brackets. The useful idea expressed in the original would then become more familiar to English-speaking lawyers.

Paragraph (7) was approved with the amendment to the English text proposed by Mr. Quentin-Baxter.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

Paragraph (11)

33. Mr. KEARNEY proposed that the third, fourth and fifth sentences be deleted. As a consequential amend-

ment, the words “for its part”, after the opening words “The Commission”, would be dropped from the sixth sentence.

34. He saw no reason why the very speculative theory of abuse of rights should be discussed in the commentary. It was impossible to deal in such a short passage with that very difficult problem, which raised the whole question whether it was possible to have rights without corresponding obligations.

35. Mr. AGO (Special Rapporteur) pointed out that in his report he had not mentioned the theory of abuse of rights. But the problem had been broached in the Commission’s discussions and he had felt bound to mention it in the commentary. However, he would not oppose the proposed deletions.

Paragraph (11) was approved with the amendments proposed by Mr. Kearney.

Paragraph (12)

36. Sir Francis VALLAT said that the meaning of the expression “an internationally wrongful act of conduct”, used in the fourth sentence, was not at all clear, especially in the context of article 3.

37. Mr. AGO (Special Rapporteur) observed that the problem arose from the difficulty of translating into English the original French expression *un fait internationalement illicite de comportement*.

38. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (12) on the understanding that the Languages Division would try to find a better English rendering for that French expression.

It was so agreed.

Paragraph (13)

39. Mr. KEARNEY said that he was not at all sure of the accuracy of the statement in the fourteenth sentence that, if an international labour convention was violated, the breach thus committed did not “cause any prejudice of an economic nature to the other countries parties to the convention”. A breach of that kind might give the defaulting State an economic advantage by enabling it to produce goods more cheaply.

40. Mr. AGO (Special Rapporteur) said that the fourteenth sentence should be read in conjunction with the previous sentence, which referred to “the conventions on human rights or most of the international labour conventions”. The idea intended was that a State which violated a human right, such as the freedom of speech or association, did not normally derive an economic advantage from that breach. He proposed that the words “does not cause any prejudice” should be amended to read “does not normally cause any prejudice”.

Paragraph (13) was approved with that amendment.

Paragraph (14)

41. Mr. SETTE CÂMARA proposed that, in the first sentence, the quotation marks round the word “schematic” should be deleted.

Paragraph (14) was approved with that amendment.

Paragraph (15)

Paragraph (15) was approved.

Paragraph (16)

42. Mr. KEARNEY said that there was a risk that English-language readers, and in particular Americans, might have difficulty in understanding the third sentence, in which terms were used in a sense different from that attached to them in Anglo-Saxon law. He acknowledged, however, that it would be difficult to alter the form of the sentence without altering its substance.

43. Mr. AGO (Special Rapporteur) suggested that the Commission might accept paragraph (16) on the understanding that the meaning of the third sentence would be made clearer in the English text.

Paragraph (16) was approved on that understanding.

The commentary to article 3, as amended, was approved.

Commentary to article 4

(Characterization of an act of a State
as internationally wrongful)
(A/CN.4/L.198/Add.4)

The commentary to article 4 was approved without comment.

Chapter II

The act of the State according to international law

Introductory commentary (A/CN.4/L.198/Add.5)

The introductory commentary to chapter II was approved without comment.

44. The CHAIRMAN said that since the next part of chapter II, containing the commentary to article 5 (A/CN.4/L.198/Add.6), was so far available only in French, he would invite the Commission to take up chapter IV on the most-favoured-nation clause (A/CN.4/L.199).

Chapter IV

THE MOST-FAVOURED-NATION CLAUSE

A. INTRODUCTION (A/CN.4/L.199)

1. *Summary of the Commission's proceedings**Paragraphs 1 to 16*

Paragraphs 1 to 16 were approved.

Paragraph 17

45. Mr. AGO proposed that, in the French text of the third sentence, the words "*matière de la clause*" should be amended to read "*matière couverte par la clause*".

Paragraph 17 was approved with that amendment to the French text.

Paragraph 18

46. Mr. USTOR (Special Rapporteur) reminded the Commission that during the discussion Mr. Tammes, as General Rapporteur, had suggested that the Special Rapporteur should submit a note to the Commission setting out the problems with which he proposed to deal in future draft articles.³ That matter was dealt with in paragraph 18.

47. Mr. TSURUOKA asked whether it was correct to give the name of the member in question in the foot-note to paragraph 18.

48. The CHAIRMAN said it was the established practice of the Commission, in its report, to refer simply to a "member" or "members" and not to give their names. He suggested that the beginning of the first sentence should be amended to read: "The General Rapporteur suggested. . .", and that the foot-note should give only the symbol of the relevant summary record.

It was so agreed.

Paragraph 18, as amended, was approved.

Paragraph 19

Paragraph 19 was approved.

2. *Scope of the draft articles**Paragraphs 20 to 23*

Paragraphs 20 to 23 were approved.

3. *The most-favoured-nation clause
and the principle of non-discrimination**Paragraph 24*

49. Mr. AGO, referring to the French text of the second sentence, said that there was no "*droit à la non-discrimination*", but a principle of non-discrimination. The word used in the English text was "claim". He therefore suggested that the sentence should be amended to read: "*Elle s'est demandé, en particulier, si le principe de la non-discrimination n'impliquait pas la généralisation du traitement de la nation la plus favorisée*".

50. Mr. BARTOŠ said that, in Soviet doctrine and in that of a few other countries, there was a right to non-discrimination, and it had been violated by States on several occasions.

51. Mr. USTOR (Special Rapporteur) said that he accepted the wording proposed by Mr. Ago. However, the fact that a principle existed did not preclude the existence of a right.

52. The CHAIRMAN noted that the members of the Commission accepted the wording suggested by Mr. Ago. The Secretariat would find a corresponding form of words for the English text.

Paragraph 24, as amended, was approved.

Paragraphs 25 to 27

Paragraphs 25 to 27 were approved.

³ See 1217th meeting, para. 76.

4. *The most-favoured-nation clause and the different levels of economic development*

Paragraphs 28 and 29

Paragraphs 28 and 29 were approved.

Paragraph 30

53. In reply to a question put by Mr. AGO, Mr. USTOR (Special Rapporteur) said that treaties sometimes contained a most-favoured-nation clause specifying certain particular advantages which could not be claimed by the beneficiary State. Those were exceptions which would have to be specified in detail. But there was also the problem of customary rules of international law which had to be taken into account when including a most-favoured-nation clause in a treaty. That applied, for example, to treaties concluded with developing countries, which might enjoy certain trade advantages that could not be claimed by a developed country.

54. Mr. TABIBI supported that view and cited as an example the 1965 Convention on Transit Trade of Land-locked States.⁴

55. Mr. USTOR (Special Rapporteur) said that Convention was a good example of an exceptional case in which preferential treatment could not be claimed by a beneficiary State. Most exceptions would in fact be of a conventional nature, although it was not always clear whether they were based on a convention or on some customary rule of international law.

Paragraph 30 was approved.

Section A of chapter IV of the draft report, as amended, was approved.

The meeting rose at 1 p.m.

⁴ United Nations, *Treaty Series*, vol. 597, p. 42.

1246th MEETING

Tuesday, 10 July 1973, at 3.30 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/L.195 and Add.1; A/CN.4/L.199/Add.1)

(continued)

Chapter IV

THE MOST-FAVOURED-NATION CLAUSE

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of chapter IV of its draft report.

B. DRAFT ARTICLES ON THE MOST-FAVOURED-NATION CLAUSE (A/CN.4/L.199/Add.1)

Commentary to article 1
(Scope of the present articles)

The commentary to article 1 was approved.

Commentary to article 2
(Use of terms)

The commentary to article 2 was approved.

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

The commentary to article 3 was approved.

Commentary to article 4
(Most-favoured-nation clause)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

Paragraph (6)

2. Mr. USTOR (Special Rapporteur) drew the Commission's attention to the explanations given in brackets in paragraph (6).

Paragraph (6) was approved.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were approved.

Paragraph (11)

3. Sir Francis VALLAT proposed that the words "attached to", in the second sentence, should be replaced by the words "in a particular relationship with".

Paragraph (11) was approved with that amendment.

Paragraph 12

4. Mr. AGO proposed that the words "is a constitutive element of", in the first sentence, should be replaced by the words "is the constitutive element of".

Paragraph (12) was approved with that amendment.

Paragraphs (13) to (17)

Paragraphs (13) to (17) were approved.

The commentary to article 4, as amended, was approved.

Commentary to article 5
(Most-favoured-nation treatment)

Paragraph (1)

5. Mr. USHAKOV pointed out that the concept of "nation" had been reintroduced into the Russian expression equivalent to "most-favoured-nation treatment".

6. Mr. USTOR (Special Rapporteur) said that paragraph (1) would be amended accordingly.

Paragraph (1) was approved subject to that amendment.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were approved.

Paragraph (9)

7. Mr. SETTE CÂMARA pointed out that the enumeration appearing between brackets in the second sentence after the words "member States of the international community" was not exhaustive. He proposed that it be deleted.

8. Mr. AGO supported that proposal. He further proposed that the words "member States of the international community" should be replaced by the words "members of various groups of States within the international community", and the words "certain States or a group of States" by the words "the treatment granted to a certain group of States".

9. Sir Francis VALLAT supported those proposals.

The proposals submitted by Mr. Sette Câmara and Mr. Ago were adopted.

Paragraph (9), as amended, was approved.

The commentary to article 5, as amended, was approved.

Commentary to article 6

(Legal basis of most-favoured-nation treatment)

The commentary to article 6 was approved.

Commentary to article 7

(The source and scope of most-favoured-nation treatment)

10. Mr. USHAKOV reiterated the reservations he had made during the discussion on article 7.¹ In his opinion, the text of the article did not convey the idea that the right of the beneficiary State to obtain most-favoured-nation treatment from the granting State could only arise from the most-favoured-nation clause in force between the two States. The wording proposed was not clear enough and could be taken to mean that that right could also arise from other sources.

11. Mr. AGO shared Mr. Ushakov's reservations.

12. Mr. USTOR (Special Rapporteur) pointed out that paragraph (1) of the commentary specified that the most-favoured-nation clause "is the exclusive source of the beneficiary State's rights".

The commentary to article 7 was approved.

Section B of chapter IV of the draft report, as amended, was approved.

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS
OTHER THAN TREATIES

A. INTRODUCTION

13. The CHAIRMAN invited the Commission to examine section A of chapter III of its draft report (A/CN.4/L.195 and Add.1).

Paragraphs 1 to 6

Paragraphs 1 to 6 were approved.

Paragraph 7

14. Mr. AGO proposed that, in order to avoid any possible confusion, the quotation marks in the second sentence should be deleted, and that the sentence should be amended to read: "It decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to sources, in order to avoid any ambiguity regarding the delimitation of the topic entrusted to the Special Rapporteur".

15. Sir Francis VALLAT supported that proposal.

The proposal was adopted.

Paragraph 7, as amended, was approved.

Paragraph 8

Paragraph 8 was approved.

Paragraph 9

16. Mr. AGO questioned whether public property was really an economic aspect of State succession, as the fourth and fifth sentences of paragraph 9 seemed to suggest. He was not convinced by the explanations given in paragraph 10, and proposed that the fourth and fifth sentences of paragraph 9 should be replaced by the following sentence: "The report suggested that the problems of public property and public debts should be considered first".

17. Mr. SETTE CÂMARA said that he shared Mr. Ago's views, but wondered whether it was possible to delete from the text all reference to the economic aspects of the question without having to amend sub-heading (ii), which read "Priority given to succession of States in economic and financial matters".

18. Mr. AGO proposed that, in that heading, the words "in economic and financial matters" should be replaced by "in matters of public property and public debts".

19. The CHAIRMAN said he thought it would be difficult to leave out the economic aspects of the question and to mention only the problems of public property and public debts, because it was stated in the sixth sentence that, since that aspect of the question appeared too limited, "it was proposed that it should be combined with the question of natural resources...".

20. Sir Francis VALLAT said that, if it deleted the passage relating to the economic aspects of the question, the Commission might place the Special Rapporteur in an embarrassing position, because his second report, submitted in 1969 at the Commission's twenty-first session, was entitled "Economic and financial acquired rights and State succession".² In any case it was a fact that the question of State succession had economic and financial aspects.

¹ See 1218th meeting, paras. 27-29 and 1238th meeting, para. 47.

² See *Yearbook of the International Law Commission*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

21. Mr. THIAM said that in his view sub-heading (ii) should not be changed, for public debts constituted a financial aspect of the problem.

Paragraph 9 was approved.

Paragraphs 10 to 20

Paragraphs 10 to 20 were approved.

Paragraph 21

22. Mr. SETTE CÂMARA said he doubted whether the preliminary cautions in paragraph 21 were really necessary.

23. Mr. AGO shared that doubt. He proposed that paragraphs 21 and 34 should be combined by deleting paragraph 21 and adding to paragraph 34 a sentence to the effect that the articles reproduced in section B were only the first provisions of the draft which the Commission intended to prepare.

24. Sir Francis VALLAT said he thought paragraph 21 should be kept as it stood in order to stress the provisional nature of the work.

Paragraph 21 was approved.

Paragraph 22

25. Mr. USTOR proposed that, in the heading, the words "which are being prepared" should be deleted, since they were unnecessary.

It was so agreed.

26. Mr. AGO proposed that the word "articles" should also be deleted; draft articles generally resulted in a convention, but it was not yet known, in the present case, whether the work would lead to a convention or a code. He therefore proposed that the heading should be amended to read: "General questions relating to the form of the draft".

27. Mr. USTOR supported Mr. Ago's proposal.

28. Mr. RAMANGASOAVINA observed that the expression "draft articles" did not commit the Commission, since paragraph 23 specified that "the form to be given to the codification of succession of States in respect of matters other than treaties cannot be determined until consideration of this subject has been completed".

Paragraph 22 was approved.

Paragraph 23

29. Mr. USTOR proposed that, in sub-heading (a), the word "articles" should be deleted, so that the heading would read: "Form of the draft".

30. Mr. USHAKOV supported that proposal.

31. Mr. BARTOŠ said he saw no reason to depart from the expression "draft articles", which had always been used so far.

32. The CHAIRMAN said that, since only a sub-heading was involved, he thought there would be no harm in deleting the word "articles"; the expression "draft articles" remained in the main heading.

33. Mr. THIAM agreed with the Chairman.

Mr. Ustor's proposal was adopted.

Paragraph 23, as amended, was approved.

Paragraph 24

34. Mr. USHAKOV proposed that the sub-heading (b) should be amended to read "Meaning of the expression 'matters other than treaties'"; there was no "concept" involved.

35. Mr. BARTOŠ supported that proposal.

The proposal was adopted.

36. Mr. SETTE CÂMARA proposed that paragraph 24 should simply be deleted, as being unnecessary. Paragraph 25 would then begin with the words "The expression 'matters other than treaties' did not appear...".

37. Sir Francis VALLAT supported that proposal.

The proposal to delete paragraph 24 was adopted

Paragraph 25

38. Mr. AGO proposed that, in the first sentence of paragraph 25, the words "any of" should be deleted.

It was so agreed.

39. Mr. AGO said he found the third sentence difficult to understand. He proposed its deletion.

40. Mr. TSURUOKA and Mr. THIAM supported that proposal.

41. Mr. USTOR pointed out that that sentence was derived from the report submitted by the Special Rapporteur in 1968.³

42. Mr. BARTOŠ said he did not think the sentence should be deleted; he feared that its deletion might be interpreted by the Special Rapporteur as showing lack of confidence in him.

43. Mr. USHAKOV said he thought the Commission was free to quote whatever it wished.

44. The CHAIRMAN and Mr. RAMANGASOAVINA shared that view.

45. Mr. AGO proposed, as a compromise, that the third sentence should be amended to read: "In the first case the treaty was regarded as the subject-matter of succession, in the second as the source of succession".

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

Paragraph 26 was approved.

Paragraph 27

46. Mr. USHAKOV observed that the Commission had never decided that the various questions enumerated at the end of paragraph 27 were matters of State succession. He himself did not believe that territorial problems, for example, came within the topic. He proposed that the second sentence of the paragraph should be deleted and only the first retained.

³ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 97, document A/CN.4/204, para. 19.

47. Mr. BARTOŠ said that the second sentence did not imply any decisions by the Commission, since it stated that the matters in question had simply been "referred to during the discussions". He therefore opposed its deletion.

48. Mr. USTOR supported Mr. Ushakov's proposal.
The proposal was adopted.

Paragraph 27, as amended, was approved.

Paragraphs 28 and 29

Paragraphs 28 and 29 were approved.

Paragraph 30

49. Sir Francis VALLAT objected to the expression "property belonging to the territory", at the end of the third sentence; in his opinion, a territory could not own property.

50. Mr. RYBAKOV (Secretary to the Commission) said that the Special Rapporteur had wished to draw a distinction between State property situated in the territory and property belonging to a territory which had some measure of legal personality, as Algeria had had.

51. Mr. AGO agreed with Sir Francis Vallat that the expression "property belonging to the territory" was unacceptable.

52. Mr. SETTE CÂMARA endorsed that view.

53. Mr. BARTOŠ said that there were forms of property belonging to a territory, such as territorial waters, which were not property of the State, but were in the public domain in the broad sense of the term.

54. Mr. THIAM said he found it difficult to see what difference there could be between property belonging to the territory and property of territorial authorities or of the State.

55. Mr. USHAKOV proposed the deletion from the last sentence, of the words "has for the time being given up the idea of formulating rules governing all these categories of public property *en bloc* and it".

56. Sir Francis VALLAT proposed that the last sentence should be replaced by the following text: "After full discussion, and on the proposal of the Special Rapporteur, the Commission has decided to begin its study with State property, to which part I of the draft articles is devoted". He reminded the Commission that it had taken that decision after a very long discussion.⁴

Sir Francis Vallat's proposal was adopted.

Paragraph 30, as amended, was approved.

Paragraph 31

Paragraph 31 was approved.

Paragraph 32

57. Mr. AGO proposed that the last part of the first sentence, beginning with the word "namely", should be deleted.

Paragraph 32 was approved with that amendment.

Paragraph 33

Paragraph 33 was approved.

Paragraph 34

Paragraph 34 was approved with some minor drafting amendments.

Section A of chapter III of the draft report, as amended, was approved.

The meeting rose at 6.30 p.m.

1247th MEETING

Wednesday, 11 July 1973, at 10.15 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/L.195/Add.2; A/CN.4/L.198 and Add.6-7; A/CN.4/L.200/Add.1; A/CN.4/L.201)

(continued)

Chapter III

SUCCESION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

(continued)

B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

1. The CHAIRMAN invited the Commission to examine the commentaries to the draft articles on succession of States in respect of matters other than treaties (A/CN.4/L.195/Add.2).

Commentary to the introduction

The commentary to the introduction was approved without comment.

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. The CHAIRMAN, after reminding the Commission of the changes it had made the previous day in the draft introduction to chapter III of the report (A/CN.4/

⁴ See 1230th meeting, para. 41 *et seq.*

L.195/Add.1), suggested that the penultimate sentence of paragraph 2 should be deleted and that the opening words of the last sentence, "At the same time, the Commission considered" should be replaced by the words "It considered".

Paragraph (2) was approved with those amendments.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Cases of succession of States covered by the present articles)

The commentary to article 2 was approved without comment.

Commentary to article 3 (Use of terms)

The commentary to article 3 was approved without comment.

Part I. Succession to State property

Commentary to the title of part I

3. The CHAIRMAN suggested that the Commission should follow up the changes made the previous day in the draft introduction to chapter III of the report (A/CN.4/L.195/Add.1) and replace the commentary to the title of part I by the following text: "As stated above, the Commission decided to consider separately the three categories of public property envisaged by the Special Rapporteur and to begin its study with property in the first category, namely, State property. Part I of these draft articles is therefore concerned with State property."

It was so agreed.

The commentary to the title of part I, as amended, was approved.

Commentary to section 1 (General provisions)

4. After an exchange of views in which Mr. USHAKOV, Mr. AGO and Mr. BARTOŠ took part, the CHAIRMAN suggested that the commentary to section 1 should be deleted, since it was not very clear and duplicated the commentary to article 4.

It was so agreed.

Commentary to article 4 (Scope of the articles in the present Part)

The commentary to article 4 was approved without comment.

Commentary to article 5 (State property)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

5. Sir Francis VALLAT proposed that the heading "Criterion for the determination of State property", before paragraph (2), should be deleted. It did not serve much purpose and interrupted the commentary unnecessarily.

It was so agreed.

6. Mr. USHAKOV referred to the reservations he had expressed during the discussion of article 5.¹ The defect of the provision was that it confused the notion of State property in general with that of State property of the predecessor State. That being so, the commentary to article 5 could not be satisfactory to him.

7. The CHAIRMAN observed that Mr. Ushakov's reservations were duly reflected in paragraph (13) of the commentary.

8. Mr. BARTOŠ said that the Special Rapporteur had sought to show that several criteria could be used to determine State property. One criterion was the fact of belonging to the public domain and another was belonging to the predecessor State. The Special Rapporteur had cited several treaties in that connexion. It could not be said that a general conception of State property existed.

9. Mr. AGO stressed that article 5 referred to State property of the predecessor State only; it obviously had nothing to do with State property of other States. The examples given by the Special Rapporteur were intended to show what property of the predecessor State passed to the successor State. They were not in any way intended to illustrate how State property in general was determined.

10. Sir Francis VALLAT said it was generally recognized that the text of article 5 needed improvement. As it stood, it did not clearly state the intended meaning.

11. He suggested that the first sentence of paragraph (2) of the commentary should be amended to refer to examples of treaty provisions determining State property for the purpose of succession of States. The treaty provisions in question did not define State property in the abstract; what they did was to determine—not to define—what property passed from the predecessor State to the successor State upon a succession.

12. The CHAIRMAN, noting that the general opinion of members of the Commission was that paragraph (2) of the commentary to article 5 should not be changed, suggested that the paragraph should be kept as it stood in the draft.

It was so agreed.

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

¹ See 1231st meeting, paras. 22-24.

Paragraph (4)

13. Mr. USHAKOV found the expression "general rule" unsatisfactory. It was not to be expected that a general rule of international law would make it possible to determine State property in general.

14. Mr. AGO agreed with Mr. Ushakov and proposed that the words "No general rule", at the beginning of the paragraph, should be replaced by the words "No generally applicable criteria". He also proposed that the second sentence be deleted; it merely emphasized the mistaken idea to which Mr. Ushakov had drawn attention. The third sentence should begin with the word "Moreover" instead of the word "However".

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the changes proposed by Mr. Ago.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

16. Mr. AGO proposed that the first two sentences of the paragraph should be deleted. He did not think the Commission had had to choose between the internal law of the predecessor State and that of the successor State.

17. Mr. USHAKOV said he thought the sentences in question reflected a discussion which had actually taken place in the Commission.

18. Mr. RAMANGASOAVINA warned the members of the Commission against the temptation to prune the draft report too much. The choice in question had been mentioned by the Special Rapporteur more than once.

19. The CHAIRMAN said he thought there would be no harm in deleting the first two sentences, and also the words "in fact" in the third sentence. If there were no objections, he would take it that the Commission accepted those changes.

It was so agreed.

20. Sir Francis VALLAT said that the last sentence, "Such a decision is therefore not covered by these articles", was unsatisfactory in that it referred to articles which were yet to be drafted.

21. Mr. AGO proposed that the sentence should be amended to read: "Such a decision is therefore outside the scope of State succession".

It was so agreed.

Paragraph (5), as amended, was approved

Paragraph (6)

22. Mr. USHAKOV questioned the accuracy of the first sentence. If it referred to the characterization of a piece of State property in general, it was surprising that the successor State should apply its own internal law for that purpose. If it referred to the characterization of a piece of State property of the predecessor State, it was even more surprising that the successor State should apply its own law.

23. The CHAIRMAN said that the sentence did not reflect the opinion of the Commission, but simply recorded an observed fact.

24. Mr. AGO suggested that the sentence should state that in several cases in diplomatic practice the successor State had disregarded the characterization given by the predecessor State and applied its own internal law to determine what property would be State property after the succession. As it stood, paragraph (6) gave the impression that the successor State attributed to the predecessor State property which it had not owned.

25. Mr. BARTOŠ observed that successor States sometimes made a characterization unilaterally, disregarding the characterization given by the predecessor State.

26. Mr. RAMANGASOAVINA pointed out that the cases referred to in paragraph (6) were exceptional. Perhaps it would suffice to say that it was only in cases of dispute that some international tribunals had not taken the internal law of the predecessor State into consideration in characterizing its property as State property.

27. Mr. BARTOŠ supported the formulation proposed by Mr. Ago. He cited as an example the dispute which had arisen between Yugoslavia and France, after the annexation of part of Macedonia, about the status of the railway in that territory as State property.

28. Sir Francis VALLAT said that in the first sentence of paragraph (6) the verb "to categorize" should be replaced by the verb "to characterize". The Commission had decided that the latter term should be used throughout.

29. The CHAIRMAN said that the Secretariat would ensure that the verb "to characterize" was used throughout the draft.

30. Mr. AGO proposed that paragraph (6) should be amended so as to emphasize the exceptional nature of the cases to which it referred. He proposed the following text: "The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute".

Mr. Ago's proposal was adopted.

Paragraph (6), as amended, was approved.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were approved.

Paragraph (9)

31. The CHAIRMAN suggested that the sub-heading before paragraph (9), reading "Text of article 5", and paragraph (9) itself should be deleted. That paragraph was only concerned with the structure of the commentary.

It was so agreed.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

32. After an exchange of views in which Mr. USHAKOV, Mr. BARTOŠ, Mr. AGO, Mr. TSURUOKA and

Mr. RAMANGASOAVINA took part, the CHAIRMAN suggested that the last sentence of paragraph (11) should be deleted, since it was not very clear. Moreover it was stated in the preceding sentence that the Commission proposed to consider whether there was a better expression to designate the whole of a State's tangible and intangible property.

33. Sir Francis VALLAT strongly urged the deletion of the last sentence. The paragraph could very well end with the previous sentence, which indicated that the Commission would endeavour to find a better expression than "property, rights and interests". It was both misleading and unwise to attempt to define that expression.

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to delete the last sentence of paragraph (11).

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

35. Mr. AGO said he found the first sentence rather ambiguous. He proposed that it should be amended to read: "In article 5, the expression 'internal law of the predecessor State' refers to rules of the legal order of the predecessor State which are applicable to State property".

The proposal was adopted.

Paragraph (12), as amended, was approved.

Paragraph (13)

Paragraph (13) was approved.

The commentary to article 5, as amended, was approved.

Mr. Castañeda took the Chair.

Chapter II

STATE RESPONSIBILITY

(resumed from the 1245th meeting)

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)

Commentary to article 5

(Attribution to the State of the conduct of its organs)
(A/CN.4/L.198/Add.6)

36. Sir Francis VALLAT said that the only problems presented by the commentary to article 5 seemed to be points of translation; he proposed, therefore, that unless questions of substance arose the Commission should merely call the Secretariat's attention to such points.

37. Mr. BARTOŠ said he could accept that procedure provided that the points in question really were only matters of translation.

Paragraphs (1) and (2)

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

Paragraph (3)

38. Sir Francis VALLAT said that the word "offences" in the first sentence of the English text was not appropriate;

it might perhaps be replaced by the expression "wrongful acts".

39. Mr. AGO (Special Rapporteur) reminded the Commission that it had been agreed that the French word "*infraction*" should be translated into English as "breach of obligation".²

40. Mr. HAMBRO observed that minor changes in translation often necessitated changes in the original text. If Sir Francis Vallat's suggestion was adopted, that would call for some slight modification of the original French version.

Paragraph (3) was approved.

Paragraphs (4) to (12)

Paragraphs (4) to (12) were approved.

Paragraph (13)

41. The CHAIRMAN, speaking as a member of the Commission, said he doubted whether a person could be described as an organ, especially in administrative law. It would be more normal to speak of the agent of an organ. It was not the organ which acted, but the agent or official. Moreover, those were the terms which the Special Rapporteur had used in describing several cases he had cited: for example, in paragraph (3) of the document under consideration. It was true that the Commission had agreed to use the term "organ", as stated in paragraph (13), but perhaps the Special Rapporteur could find wording to indicate that there was a difference of opinion on that point and that it could also be maintained that the organs was not necessarily the person who committed the act.

42. Mr. BARTOŠ said he shared Mr. Castañeda's view. In most countries, contemporary constitutional law made a distinction between an "organ" and an "agent". In certain cases, the person was merged with the organ—for example, a Head of State or *juge d'instruction*—but not always. The Commission had decided to make a distinction between the two terms and it should abide by that decision.

43. Mr. AGO (Special Rapporteur) said that in practice there was some confusion in the use of the two terms, but judicial decisions and diplomatic practice most often spoke of an "act or omission of an organ". That was tantamount to saying that it was the person having the status of an organ who acted. It would not be wise to introduce distinctions which could only lead to difficulties. However, in order to take account of the opinion of Mr. Castañeda and Mr. Bartoš, he proposed that the following phrase should be inserted after the word "Finally" at the beginning of paragraph 13: "without prejudice to the different meanings which the term 'organ' may have, particularly in the internal public law of different legal systems,".

It was so agreed.

Paragraph (13), as amended, was approved.

The commentary to article 5, as amended, was approved.

² See 1244th meeting, paras. 46-49.

Commentary to article 6
(Irrelevance of the position of the organ
in the organization of the State)
(A/CN.4/L.198/Add.7)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

44. Sir Francis VALLAT proposed that, in the English text, the words "On this view" at the beginning of the second sentence, should be replaced by "On that theory".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (17)

Paragraphs (4) to (17) were approved.

The commentary to article 6, as amended, was approved.

Section B of chapter II of the draft report, as amended, was approved.

A. INTRODUCTION (*resumed from the 1244th meeting*)

45. Mr. TORRES-BERNARDEZ (Secretariat), referring to the discussion which had arisen concerning the translation of the French expression "*mise en œuvre*" into English by "implementation" in paragraph 31 of the introduction to the chapter on State responsibility (A/CN.4/L.198),³ said that the same English rendering had been used by the Commission in its 1970 report.⁴ Perhaps, therefore, the term "implementation" might be retained in the English text and followed by the French expression "*mise en œuvre*" in brackets.

It was so agreed.

Chapter I

ORGANIZATION OF THE SESSION
(*resumed from the 1243rd meeting*)

F. LETTER FROM THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION TO THE PRESIDENT OF THE ECONOMIC AND SOCIAL COUNCIL (A/CN.4/L.200/Add.1)

46. The CHAIRMAN drew the Commission's attention to the letter he had prepared, in collaboration with the officers and former chairmen of the Commission, in response to the request received from the Economic and Social Council for comments on the report of the *Ad hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid*.⁵ The text of the letter had been compiled, after careful thought, by a group specially appointed for the purpose and presided over by Mr. Yasseen.

³ See 1244th meeting, paras. 20 and 21.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (d).

⁵ See 1201st meeting, paras. 1 and 4-6.

47. Mr. BILGE said he did not think the text before the Commission exactly answered the question which had been put to it. The African States wished to know the Commission's opinion on certain specific points.

48. The CHAIRMAN pointed out that the reasons why the Commission had confined itself to general observations were clearly stated in paragraph 3.

49. He suggested that the Commission should approve the conclusions expressed in the letter and decide to transmit it to the President of the Economic and Social Council.

It was so agreed.

Chapter I as a whole, as amended, was approved.

Chapter V

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

50. The CHAIRMAN invited the Commission to examine chapter V of its report (A/CN.4/L.201) paragraph by paragraph.

Paragraphs 1 to 7

Paragraphs 1 to 7 were approved.

Paragraph 8

51. Sir Francis VALLAT said that the question of the capacity of international organizations to conclude international agreements was one of the most important questions that had arisen during the discussion. To the best of his recollection, the Special Rapporteur had promised to prepare one or more draft articles on the subject of capacity, and he therefore proposed that a short sentence to that effect should be added at the end of the paragraph.

It was so agreed.

Paragraph 8 was approved subject to that amendment.

Paragraphs 9 and 10

Paragraphs 9 and 10 were approved.

Chapter V as a whole, as amended, was approved.

The meeting rose at 1 p.m.

1248th MEETING

Thursday, 12 July 1973, at 9.30 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

**Draft report of the Commission on the work
of its twenty-fifth session**

(A/CN.4/L.195/Add.3; A/CN.4/L.202)

(continued)

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS
OTHER THAN TREATIES (*resumed from previous meeting*)

**B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT
OF MATTERS OTHER THAN TREATIES (continued)**

1. The CHAIRMAN invited the Commission to continue its examination of the commentaries to the draft articles on succession of States in respect of matters other than treaties (A/CN.4/L.195/Add.3), beginning with the commentary to article 6.

Commentary to article 6

(Rights of the successor State to State
property passing to it)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. The CHAIRMAN observed that the English and French texts of the opening phrase of the first sentence differed considerably. He proposed that the French text should be brought into line with the English translation, which conveyed the meaning better. That could be done by replacing the words "*L'article 6 donne une expression unique à*" by the words "*L'article 6 exprime en une seule disposition*".

Paragraph (2) was approved with that amendment.

Paragraph (3)

3. Sir Francis VALLAT proposed that the final words in the penultimate sentence "...imply a break" should be expanded to read "...imply a break in continuity".

4. The CHAIRMAN noted that that amendment would not affect the French text.

5. Mr. QUENTIN-BAXTER proposed that, in the first sentence the words "and not the more traditional notion" should be deleted; they were not really necessary.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the amendments proposed by Sir Francis Vallat and Mr. Quentin-Baxter.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

7. Sir Francis VALLAT proposed that the words "at the moment of succession" should be inserted in the third sentence after the words "Although, however,".

Paragraph (4) was approved with that amendment.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

The commentary to article 6, as amended, was approved.

Commentary to article 7

(Date of the passing of State property)

8. Mr. USHAKOV reiterated the reservations he had made during the discussion on article 7,¹ as recorded in paragraph (7) of the commentary.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

9. Following a remark by Mr. USHAKOV, the CHAIRMAN suggested that, in the first sentence of the paragraph, the word "often" should be replaced by the word "sometimes".

It was so agreed.

10. Mr. USHAKOV, referring to the last sentence, said it was nowhere specified that only States could agree on a date for the passing of State property other than the date of succession. The opening proviso of article 7, "Unless otherwise agreed or decided," did not necessarily mean agreed or decided by States.

11. Following a remark by Mr. BARTOŠ, the CHAIRMAN suggested that the last sentence of paragraph (3) should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

12. Mr. USHAKOV, referring to the first sentence, said he was not satisfied with the words "on the date at which certain State property should pass from the predecessor State to the successor State"; article 7 did not impose any obligation as to the passing of the property.

13. Mr. HAMBRO suggested that the words "should pass" be replaced by the words "had passed".

14. The CHAIRMAN suggested the words: "what was the date of the passing".

The Chairman's suggestion was adopted.

15. Mr. USHAKOV said the second sentence might give the impression that an international court could decide otherwise on its own initiative, whereas it was essential that the States parties to the dispute should first apply to it.

16. Mr. BARTOŠ thought that the sentence was correct, because States sometimes stipulated by treaty that in the event of a dispute an arbitral tribunal would decide the date of the passing of the property.

17. Mr. USHAKOV, referring to the last sentence, observed that, although it was true that no agreement could be signed with a former colony before the date of

¹ See 1239th meeting, paras. 22-25 and 50.

succession, it would be going too far to say that it was for an organ to determine the date of the passing of the property. It was unthinkable that a former colony, having fought for independence and won it, should then have to wait for an organ to decide the date on which State property passed.

18. The CHAIRMAN observed that it was quite conceivable that the independence of a State, having been fought for and won, should then be confirmed by a decision of an international organ, such as the Security Council.

19. Mr. AGO said that the Special Rapporteur had had in mind not so much the case in which an international organ determined the date of the passing of the property as the case in which that date was determined by the metropolitan Power. As an example, the Special Rapporteur had mentioned the Evian agreements, which were not true international agreements, and had indicated that the measures adopted on that occasion had been taken by France in the form of unilateral decisions.²

20. Mr. BARTOŠ said he was in favour of retaining the last sentence of paragraph (4) in order to convey the Special Rapporteur's idea clearly. It sometimes happened that, by mutual consent, certain property was left for a time with the predecessor State: for example, to allow it to train staff.

21. After an exchange of view in which Mr. USHAKOV, Mr. AGO, Mr. USTOR and Sir Francis VALLAT took part, the CHAIRMAN suggested that the last sentence of paragraph (4) should be deleted.

It was so agreed.

22. Mr. AGO proposed that the words "in practice", in the first sentence, should be deleted. They did not apply to State practice as usually distinguished from judicial opinion.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

23. Mr. USHAKOV found it surprising that the first sentence should expressly refer to "organs" which might be called upon to take a decision in the matter. An organization, such as the United Nations, could equally well take such a decision.

24. The CHAIRMAN explained that the sentence reflected a discussion in the Commission, in the course of which some members had expressed the hope that the commentary would indicate that the use of the word "decided" did not imply a unilateral decision by one of the States concerned, but could refer to the case in which the decision was taken by an organ such as the Security Council.³ In the context, the term "organ" had to be construed very broadly, so as to cover any international authority which might take such a decision. Obviously the term could apply to the United Nations.

25. Mr. BARTOŠ said he was in favour of the term "organ", which applied equally well to a collegiate body and to an individual representing an organ. It was not uncommon for a treaty to specify that the date of the passing of State property would be determined, in the event of a dispute, by the President of the Swiss Federal Court or the President of the International Court of Justice.

26. Sir Francis VALLAT said that from a logical point of view Mr. Ushakov was perfectly right. He therefore proposed that the words "what organs" should be replaced by the word "who".

27. Mr. QUENTIN-BAXTER supported that proposal.

28. Mr. USHAKOV observed that the second part of paragraph (5) implied that the Commission had decided that, in principle, the date of the passing of the property could be determined by an international court. In reality the Commission had taken no decision on that point.

29. The CHAIRMAN explained that the situation resulted from the article itself, which did not specify who could decide otherwise.

30. Mr. AGO proposed that paragraph (5) should be deleted and that the following sentence should be added at the end of paragraph (4): "However, the Commission did not intend to specify from whom a decision might come".

31. Mr. QUENTIN-BAXTER said he feared that, since the preceding paragraph had been shortened, the deletion of paragraph (5) would leave the reader in the dark as to the reason for including the words "or decided" in article 7.

32. The CHAIRMAN said that, if there were no further objections, he would take it that the Commission accepted Mr. Ago's proposal.

It was so agreed.

Paragraph (6)

33. Sir Francis VALLAT proposed that the words "In their opinion" should be inserted at the beginning of the second sentence to show that it represented the views of only certain members of the Commission.

Paragraph (6) was approved with that amendment.

Paragraph (7)

34. Mr. USHAKOV proposed that the words "of the date of the passing of State property" should be inserted after the words "a definition" in the second sentence.

Paragraph (7) was approved with that amendment.

The commentary to article 7, as amended, was approved.

Text of Article 8

35. Following an observation by Mr. USHAKOV, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to reconsider the wording of the French text of article 8, in order to improve it.

It was so agreed.

² See 1232nd meeting, para. 56.

³ See 1239th meeting, paras. 21 *et seq.*

36. After an exchange of views in which Mr. USHAKOV, Mr. AGO, Mr. THIAM, Sir Francis VALLAT, Mr. TSURUOKA and Mr. USTOR took part, the CHAIRMAN suggested that the words “*se faisant*” should be inserted before the word “*conformément*” in the French text of article 8.

It was so agreed.

Commentary to article 8

(Passing of State property without compensation)

Paragraph (1)

37. The CHAIRMAN suggested that the French text of the second sentence should be amended to correspond to the amended wording of article 8.

It was so agreed.

Paragraph (1) was approved subject to that amendment to the French text.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

38. After an exchange of views in which Mr. THIAM, Mr. USHAKOV, Mr. TSURUOKA and Sir Francis VALLAT took part, the CHAIRMAN suggested that the opening phrase of paragraph (3), “Although provisionally accepting the rule that State property passes without compensation”, should be deleted, in order to avoid stressing the provisional character of the acceptance or giving the impression that the other members of the Commission had accepted the rule finally.

Paragraph (3) was approved with that amendment.

Paragraph (4)

39. Mr. USHAKOV observed that the Commission had not taken any formal decision to study the questions mentioned in the second and third sentences.

40. After an exchange of views in which Mr. RAMANGASOAVINA, Mr. USHAKOV and Mr. AGO took part, the CHAIRMAN suggested that only the first sentence should be retained and that it should be amended to read: “The first subsidiary clause of article 8 reserves the rights of third parties, a question which the Commission proposes to study at a later stage”.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 8, as amended, was approved.

Section B of Chapter III of the draft report, as amended, was approved.

Mr. Castañeda took the Chair.

Chapter VI

REVIEW OF THE COMMISSION'S PROGRAMME OF WORK
(A/CN.4/L.202)

Paragraphs 1 to 19

Paragraphs 1 to 19 were approved without comment.

Paragraph 20

41. Mr. AGO proposed that the words “in part” should be inserted before the words “went far back”, in the first sentence.

Paragraph 20 was approved with that amendment.

Paragraph 21

Paragraph 21 was approved.

Paragraph 22

42. Mr. TAMMES (Rapporteur) proposed that the word “only” should be deleted from the second sentence.

Paragraph 22 was approved with that amendment.

Paragraphs 23 to 26

Paragraphs 23 to 26 were approved.

Paragraph 27

43. Mr. AGO said that he could not subscribe to the philosophy set out in paragraph 27 because the Commission had always endeavoured to distinguish between criminal law relating to individuals and international criminal law. He therefore proposed that, in the second sentence, the words “the sense of the new international law was already laid down” should be replaced by the words “interest in this field was already expressed”; for as he saw it, the reference was to human rights and not to international law as a whole. He also proposed the deletion of the words “under international law” at the end of the third sentence, since he could not accept the notion of responsibility of individuals under international law; the deletion of the words “of duties and responsibilities directly under international law” in the fifth sentence; and the deletion of the whole of the last sentence, because, in his opinion, the Commission had already given a very precise definition of the concept of offences of international concern in its draft Code of Offences against the Peace and Security of Mankind.⁴

44. Mr. USHAKOV said that the last sentence was totally unacceptable, since it did not reflect the Commission's views at all. It was dangerous, in his opinion, to assert that there were offences of international concern, because individuals were responsible under internal law and not under international law.

45. Mr. TAMMES (Rapporteur) pointed out that since the early 1950s there had been an increasingly marked tendency to recognize the responsibility of individuals under international law and that it was possible to speak of “offences of international concern”, for example, in

⁴ See *Yearbook of the International Law Commission, 1954*, vol. II, p. 151, document A/2693, para. 54.

the case of *apartheid*, war crimes and crimes against the peace and security of mankind. The expression "offences of international concern" was used in chapter XVII of the Survey of International Law (A/CN.4/245).

46. Mr. BARTOŠ agreed with the Rapporteur. The Charter of the Nürnberg Tribunal and the Judgments of the Nürnberg and Tokyo Tribunals had affirmed the existence of international crimes. In his opinion, internal law could not rule out international responsibility and the rules of international law should be placed above the rules of States.

47. Sir Francis VALLAT said that, if it deleted the last sentence, the Commission would only be closing its eyes to an important problem; it should, on the contrary, recognize the existence of that problem and try to solve it. He therefore opposed the deletion of the last sentence.

48. Mr. TABIBI agreed with Sir Francis Vallat. As the Rapporteur had pointed out, as long ago as the 1950s—in the middle of the cold war—the Commission had dealt with offences of international concern by formulating the Nürnberg Principles and preparing the draft Code of Offences against the Peace and Security of Mankind. Now that close co-operation had been established between the great Powers, there was all the more reason why it should rethink the concept of offences of international concern, in the interests of the peace and security of mankind.

49. Mr. AGO agreed to the retention of the last sentence on condition that the concluding words "both of a political and of an anti-social nature" were deleted, and that the words "to rethink the whole concept of offences of international concern" were amended to read "in which to re-examine the question of offences of international concern committed by individuals", so as to avoid any possible confusion.

50. Mr. TAMMES (Rapporteur) accepted the amendments proposed by Mr. Ago, but pointed out that the concept of offences of international concern applied only to individuals, never to States, as witness the definition given in the draft Code of Offences against the Peace and Security of Mankind.

51. Sir Francis VALLAT proposed that, in the second sentence, the words "sense" and "laid down" should be replaced by the words "seed" and "planted".

52. Mr. TAMMES (Rapporteur) accepted that amendment and proposed that, in order to take into account Mr. Ago's reservations, the word "the" before the words "new international law" should be replaced by "this". He also proposed that the third sentence, and the words "of duties and responsibilities directly under international law" in the fifth sentence, should be deleted.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the amendments submitted by Mr. Ago, Sir Francis Vallat and the Rapporteur.

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

54. The CHAIRMAN, speaking as a member of the Commission, suggested that it would be appropriate to add a further example of recent developments in international law. He was thinking of the acceptance by the General Assembly of the concept of the "common heritage of mankind" in relation to the sea-bed and ocean floor beyond the limits of national jurisdiction and the resources of the area.⁵

55. Mr. TAMMES (Rapporteur) said he would be prepared to include a passage on that important matter in the report. He believed, however, that it would be more appropriate in paragraph 29, in connexion with the law-making activities following after technical innovations, particularly those relating to the law of the sea, outer space and the human environment.

56. Mr. USHAKOV observed that the relevant General Assembly resolutions had only expressed an idea; they had not laid down any rules of international law. The forthcoming Conference on the Law of the Sea might perhaps formulate rules of law on the matter, but so far that had not been done.

57. The CHAIRMAN, speaking as a member of the Commission, said that the passage of the report under discussion gave an account of contemporary trends in the development of international law. It was by no means confined to a description of actual legal rules. In any case, the General Assembly resolution which had established the concept of the "common heritage of mankind" and recognized the need for institutional arrangements for the exploration and exploitation of sea-bed resources, had been adopted unanimously.

58. Mr. HAMBRO supported the inclusion in the report of a passage dealing with that important development in international law. Suitable language would, of course, have to be found in order to ensure unanimous acceptance by the Commission. The passage could state, for example, that the acceptance of new concepts such as that of the common heritage of mankind had marked an important development in international law.

59. Mr. SETTE CÂMARA said he saw some attraction in the idea of mentioning the General Assembly resolutions concerning the sea-bed. It should be remembered, however, that the whole matter was at present under consideration by other United Nations bodies, and rules of international law could be expected to emerge from that work. He thought it would be premature for the Commission to subscribe to a concept which was not yet a rule of international law, and suggested that, if a passage on the subject was included in the report, it should not mention the "common heritage of mankind".

60. Mr. TSURUOKA said that he agreed with Mr. Sette Câmara. The Commission should be careful not to appear to encourage the present tendency to extend the limits of national jurisdiction.

61. The CHAIRMAN, speaking as a member of the Commission, said that the adoption of the concept of the

⁵ See General Assembly resolution 2749 (XXV), paragraph 1.

“common heritage of mankind” had, on the contrary, the effect of restricting the extent of exclusive national jurisdiction.

62. Mr. TABIBI said he favoured the idea put forward by Mr. Castañeda. The problem was to find wording which would satisfy all the members of the Commission. The notion that the sea-bed and ocean floor and their subsoil were the common heritage of mankind constituted a genuine rule of international law. Indeed, since those areas lay under the high seas, they had belonged to all nations from time immemorial. The same was true of the resources to be found in the area. It was not possible to separate the rules governing the high seas from the General Assembly resolutions concerning the sea-bed.

63. The Organization of African Unity had adopted a declaration recognizing that the sea-bed and ocean floor, and the subsoil thereof under the high seas and beyond the limits of national jurisdiction, constituted the common heritage of mankind.

64. Mr. HAMBRO said it would be over-cautious to say that no rule of law existed on a matter on which resolutions had been adopted unanimously by the General Assembly. At its twenty-fifth session the General Assembly had solemnly adopted resolution 2750 (XXV), part A of which began with the words “Reaffirming that the area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction and its resources are the common heritage of mankind”. He therefore proposed that the Chairman and the Rapporteur should consult together and prepare, for submission to the Commission at its next meeting, a text expressing, in language acceptable to all members of the Commission, the idea that the acceptance of the concept of the “common heritage of mankind” as part of the vocabulary of international law was an indication of a certain development.

65. Mr. MARTÍNEZ MORENO supported that proposal and expressed the hope that the wording of the passage submitted to the Commission could be accepted unanimously, just as the General Assembly had adopted unanimously the concept of the common heritage of mankind not only for the sea-bed, but also for the moon and other celestial bodies. That concept had been formally endorsed by the Inter-American Juridical Committee.

66. Mr. USHAKOV observed that the question of the sea-bed had never been on the Commission’s programme of work in the past, nor was it included in the programme of future work.

67. The CHAIRMAN said he would consult with the Rapporteur on the drafting of a passage for inclusion in the report. The text would be submitted to the Commission at its next meeting.

68. Sir Francis VALLAT drew attention to the fact that the point under discussion was related not to paragraph 28, but rather to paragraph 29 or even paragraph 30.

The meeting rose at 1.10 p.m.

1249th MEETING

Friday, 13 July 1973, at 9.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

(A/CN.4/L.202; A/CN.4/L.204)

Chapter VI

REVIEW OF THE COMMISSION’S PROGRAMME OF WORK (continued)

1. The CHAIRMAN invited the Commission to continue its examination of chapter VI of the draft report on the work of its twenty-fifth session (A/CN.4/L.202).

Paragraph 28 (continued)

2. He announced that the Rapporteur preferred to insert at the end of paragraph 30 the text concerning the concept of the common heritage of mankind which the Commission, at its previous meeting, had requested him to submit for insertion at the end of paragraph 28.

Paragraph 28 was approved.

Paragraph 29

3. Mr. RAMANGASOAVINA criticized the words “have taken place outside the Commission’s competence”, which appeared in the second sentence; in his view it was not a question of competence. He proposed that the passage should be amended to read: “have taken place outside the Commission”.

4. The CHAIRMAN suggested that the words “The law-making activities” should be amended to read: “Certain law-making activities”.

5. Mr. TAMMES (Rapporteur) accepted those amendments.

6. Mr. USHAKOV said he could not accept the last sentence because he considered that the concept of international responsibility remained unchanged; what was changing was the concept of damage caused by certain activities.

7. Mr. USTOR associated himself with Mr. Ushakov’s reservation.

8. Mr. AGO proposed that the words “like international responsibility” in the last sentence should be deleted.

It was so agreed.

Paragraph 29, as amended, was approved.

Paragraph 30

9. Mr. USTOR said he could not subscribe to the idea embodied in the sixth sentence, because the statement that "private persons, individual as well as corporate, are able to control an increasing amount of physical and economic power" held good, in his opinion, only for the capitalist world and could not be applied to socialist States.

10. Mr. TAMMES (Rapporteur) pointed out that the phenomenon in question was apparent in many parts of the world and that the United Nations had decided to study it.

11. The CHAIRMAN suggested that, in order to take Mr. Ustor's reservation into account, the words "in certain parts of the world" should be inserted before the words "private persons".

It was so agreed.

12. Mr. USHAKOV said he wondered what was meant by the words "human duties and responsibilities under international law", in the same sentence.

13. Mr. TAMMES (Rapporteur) said he maintained that individuals could have obligations and responsibilities under international law; he was surprised to find certain members of the Commission apparently disowning texts which the Commission had adopted on that matter. Those texts were still valid, and until such time as the Commission formally decided to cancel or amend them, it was free to refer to them.

14. The CHAIRMAN stressed the importance of the Nürnberg Principles¹ which the Commission had formulated and of the draft Code of Offences against the Peace and Security of Mankind² which it had adopted. That early work of the Commission was all the more valid in that the principles of international law recognized by the Charter of the Nürnberg Tribunal had been expressly affirmed by General Assembly resolution 95 (I), which had thus affirmed the responsibility of individuals under international law.

15. Mr. AGO said there was no question of going back and repudiating principles already established; but the Commission must not confuse the responsibility of the State as such with the penalty to which an individual was liable, for example, in a case of piracy.

16. Mr. USHAKOV said he thought a distinction should be made between the responsibility of subjects of international law and criminal liability. He therefore proposed that, in the sixth sentence, the word "responsibilities" should be replaced by the words "criminal liability".

17. Mr. TAMMES (Rapporteur) observed that the responsibilities in question covered more than just criminal liability, for example, in the case of damage caused by pollution. He would therefore prefer to retain the broader term.

18. The CHAIRMAN agreed with the Rapporteur. Consideration was now being given to the idea of drawing up a code of conduct for multinational companies.

19. Mr. HAMBRO, referring to the seventh sentence, said that as early as 1921 scientists had warned mankind of the grave dangers which the development of nuclear energy would present. It could hardly be said, therefore, that "The technological world makes difficult any prediction in the sense that major breakthroughs, such as the discovery of nuclear energy... take place at short notice". He proposed that the sentence in question should be reworded, without giving any examples, to read: "The speed of scientific and technological development makes any prediction very difficult."

20. Mr. TAMMES (Rapporteur) said he thought examples spoke more directly to the imagination and it would be preferable to give some.

21. The CHAIRMAN suggested that the sentence should be amended to read: "The rapid development of science and technology in such fields as nuclear energy, the conquest of outer space and the exploitation of the sea-bed, makes any prediction very difficult."

It was so agreed.

22. The CHAIRMAN suggested that the following text, submitted by the Rapporteur, should be inserted at the end of paragraph 30: "The idea of a common heritage of mankind, which was developed mainly under the pressure of modern technological conditions, may become an important new subject in the sense that the Commission, at some stage of its future work, may have to pay due regard to it."

23. Mr. AGO said he doubted whether the notion of the common heritage of mankind was really new. In his opinion it was centuries old.

24. The CHAIRMAN said that the notion was far from being accepted by all States.

25. Mr. USHAKOV formally opposed the insertion of the proposed text. In his view, the notion in question was highly controversial and gave rise to widely different interpretations. Moreover, the question was not on the Commission's agenda, so there was no reason to mention it in the report.

26. Mr. HAMBRO said he considered that the question was very important and that the proposed text should be put to the vote.

27. Mr. USHAKOV formally opposed the Commission's voting on a question which was not on its agenda and on which there had been no previous discussion.

28. Mr. BARTOŠ reminded the Commission that the Chairman had invited members to inform the Rapporteur of a few topics they thought the Commission might examine in the future. Accordingly, certain possible subjects of study, such as the notion of the common heritage of mankind, could quite well be merely mentioned in the report without committing the Commission. It could also be stated that the subjects in question had not been approved by certain members.

29. Mr. TSURUOKA said that a certain balance should be maintained in the report; if the notion of the common heritage of mankind was to be mentioned, reference should also be made to the notion of national sovereignty, which had developed considerably since the Second World War. But the Commission was not obliged

¹ See *Yearbook of the International Law Commission*, 1950, vol. II, p. 374 *et seq.*, document A/1316, part III.

² *Ibid.*, 1954, vol. II, p. 151, document A/2693, para. 54.

to mention all the trends which had appeared in recent years, and he himself would prefer no reference to be made to the common heritage of mankind, so as to preserve the objectiveness of the report.

30. Mr. AGO said that he too thought it would be better to drop the proposal, in order not to introduce an element of disharmony.

31. Sir Francis VALLAT agreed with Mr. Ago. Personally, he would have preferred to include the proposed text in the report, but he believed it would be wiser not to open a debate on such a controversial question at the present stage.

32. The CHAIRMAN withdrew his suggestion.

Paragraph 30, as amended, was approved.

Paragraph 31

33. Mr. SETTE CÂMARA proposed the deletion of the first sentence which, in his opinion, did not add anything to the paragraph.

34. Mr. TAMMES (Rapporteur) said that that sentence provided a link with what had been said in the preceding paragraph and should not be left out. Surely there could be no doubt that, amid the turmoil of international law-making activity, the Charter had been a stabilizing and consolidating factor.

35. Mr. SETTE CÂMARA said that that activity could be highly beneficial. The conclusion of many international conventions could only help the international community, but the first sentence of paragraph 31 would give the impression that the role of the Charter was to protect the world against irresponsible legislation.

36. Mr. QUENTIN-BAXTER said no one could doubt that the Charter had been a stabilizing factor, but he wondered whether the words "In contrast..." were really justified.

37. Sir Francis VALLAT proposed that the first two sentences in the paragraph should be combined to read: "The Charter of the United Nations has been a stabilizing and consolidating factor, but its formulations were wide enough to be adapted..."

It was so agreed.

38. Mr. AGO, referring to the fourth and fifth sentences, said that it was going too far to regard the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States as established legal data for the Commission. It would be enough to say that the Commission had often referred to that Declaration in its discussions.

39. Mr. TAMMES (Rapporteur) said that he personally believed that the major resolutions of the General Assembly, which were the fruit of many years' work, should be regarded by the Commission as binding law.

40. Mr. KEARNEY said he had a number of objections to paragraph 31. He did not understand, for example, why the Rapporteur had mentioned the Special Committee on the Question of Defining Aggression, which had accomplished little during its long lifetime, but ignored the work of the Committee on the Peaceful Uses of Outer Space. Again, the Declaration on Principles

of International Law concerning Friendly Relations and Co-operation among States had received much support, but it contained many internal contradictions and had been assailed by a number of writers. There was also a violent division of legal opinion concerning the legal effects of General Assembly resolutions. He proposed that everything between the revised first sentence of paragraph 31 and the last sentence, which he could fully endorse, should be deleted.

41. Mr. BARTOŠ said he shared Mr. Kearney's opinion on the importance of the Committee on the Peaceful Uses of Outer Space, but could not agree that the work of the Special Committee on the Question of Defining Aggression was not worth mentioning. Nor could he agree with Mr. Kearney about the legal effects of General Assembly resolutions, which were undoubtedly a source of international law. It was inconceivable to him that the Commission, which was an organ of the United Nations and not merely the sum of its individual members, should oppose solemn declarations which had been adopted by the General Assembly.

42. Mr. USTOR said he agreed with Mr. Bartoš that the Commission could not place itself above the General Assembly, but the question of the legal effects of General Assembly resolutions was such a difficult and complex one that it could not be dealt with in one sentence. He could therefore agree to the deletion of the sentence referring to these resolutions. He hoped that the reference to the Special Committee on the Question of Defining Aggression would be retained.

43. Mr. KEARNEY said he would not press for the deletion of the reference to the Special Committee.

44. The CHAIRMAN suggested that the penultimate sentence should be shortened and amended to read: "The Commission, in its discussions, has often referred to that important Declaration, which was adopted solemnly and unanimously."

It was so agreed.

45. Sir Francis VALLAT proposed that the words "according to article 103", in the last sentence, should be amended to read: "having regard to Article 103".

It was so agreed.

46. After a brief discussion, in which Mr. HAMBRO, the CHAIRMAN and Sir Francis VALLAT took part, Mr. QUENTIN-BAXTER proposed that the words "Another important case was the Special Committee..." at the beginning of the fourth sentence should be amended to read: "Of special importance was the Special Committee..."

It was so agreed.

Paragraph 31, as amended, was approved.

Paragraph 32

47. Mr. AGO said he thought it would be imprudent to tell the General Assembly that the Commission regarded itself as a law-making body. He therefore proposed that the first sentence should be amended to read: "Among the different bodies that work or have worked within the United Nations system on the definition

of the principles of international law, the International Law Commission has very distinctive features.”

It was so agreed.

48. Mr. USHAKOV proposed the last sentence, which in his opinion was not really necessary, should be deleted.

It was so agreed.

Paragraph 32, as amended, was approved.

Paragraph 33

49. Mr. USHAKOV proposed that the term “legislative conference”, in the second sentence, should be replaced by the term “codification conference”.

It was so agreed.

50. Mr. USHAKOV said that the last sentence was not correct, since the Commission had, on occasion, responded to urgent requests.

51. Mr. KEARNEY thought the sentence hinted that the General Assembly should not confront the Commission with any urgent requests.

52. Mr. TAMMES (Rapporteur) said it was an undeniable fact that the Commission had a great deal of work on its regular agenda and that urgent requests might interfere with that work.

53. Mr. QUENTIN-BAXTER suggested that the words “urgent requests” might be replaced by the words “short-term-needs”.

54. Mr. KEARNEY said that expression was too vague, since some urgent requests, such as the one concerning the protection of diplomats, might involve long-term needs.

55. Sir Francis VALLAT suggested that the last sentence might be somewhat qualified by replacing the words “limits the Commission’s capability” by the words “places certain limits on the Commission’s capability”.

56. Mr. AGO observed that the words “inbuilt periodicity” had not been correctly translated into French.

57. The CHAIRMAN said the Secretariat would correct the French text. He suggested that the Commission should adopt the amendment submitted by Sir Francis Vallat.

It was so agreed.

Paragraph 33, as amended, was approved.

Paragraph 34

58. Mr. USHAKOV said that the word “*souverain*” in the French text of the first sentence was not an accurate translation of the word “pre-eminent”.

59. Mr. TSURUOKA said he hoped the Secretariat could find more elegant wording for the French text of the sixth sentence.

60. Mr. YASSEEN challenged the suggestion in the seventh sentence that the Commission had “from time to time proposed certain specific innovations”. The concept of *jus cogens*, in particular, had certainly existed in connexion with treaties long before the adoption of the Vienna Convention. It would be better to omit the examples given by the Rapporteur, for they were not really “innovations” at all.

61. Mr. TAMMES (Rapporteur) said he would regret having to omit certain examples of concepts which represented important contributions by the Commission to the international legal system. He hoped that the Commission would agree to retain those examples and that it would be possible to find a more apt word than “innovations”.

62. Mr. AGO said that the concept of *jus cogens* and the principle *rebus sic stantibus* were not innovations; they were old, unwritten rules which the Commission had formulated in writing. Examples of real innovations would be the notions of coercion and corruption as grounds for the invalidity of a treaty.

63. The CHAIRMAN suggested that the last two sentences of paragraph 34 should be deleted.

It was so agreed.

Paragraph 34, as amended, was approved.

Paragraph 35

64. Mr. THIAM proposed that the beginning of the first sentence should be amended to read: “With regard to the nature of the future tasks of the Commission, it was decided to complete to the full extent the great structural projects that are already on its programme...”.

65. Mr. USHAKOV proposed the deletion of the word “great” before “structural projects”.

66. The CHAIRMAN suggested that Mr. Thiam’s proposal should be adopted, subject to the amendment proposed by Mr. Ushakov and the replacement of the words “it was decided” by the words “it was envisaged”.

It was so agreed.

Paragraph 35, as amended, was approved.

Paragraph 36

67. Mr. SETTE CÂMARA said he could not agree to the second sentence, which in his opinion was not entirely accurate. Moreover, he regretted the omission of any mention of bilateral treaties, which were also an important means of carrying forward the work of codification.

68. Mr. USTOR said he could accept the first two sentences, but thought that the rest of the paragraph should be revised. In practice, the Commission had adopted the convention system, but perhaps it should not be given too much emphasis. One or two sentences concerning the possibility of a change of method might be included at the end of the paragraph. Mention should also be made of the concern of the Commission’s members that the process of ratification of conventions which had been unanimously adopted was so slow.

69. Sir Francis VALLAT found much that was convincing in what Mr. Sette Câmara and Mr. Ustor had said. He himself saw no merit in attempting to evaluate the codification convention as an instrument of international law and agreed with Mr. Ustor that it would perhaps be unwise to take one particular method out of context. After all, the Commission had often said that it would decide at a later stage of its work about the ultimate form to be given to the instrument it was preparing.

70. He had considerable doubts about the paragraph as a whole and thought that it might be sufficient to add a sentence to the preceding paragraph. In particular, he doubted whether anything should be said about the difficulties of securing the ratification of conventions.

71. Mr. KEARNEY said he could agree to the deletion of the whole paragraph.

72. Mr. AGO supported the views expressed by Mr. Ustor and Mr. Sette Câmara. In particular he did not like the term "legislative convention".

73. Mr. TAMMES (Rapporteur) said he would not like to drop paragraph 36 in its entirety, but he agreed with Sir Francis Vallat that the idea expressed in it might be better placed at the end of paragraph 35. His intention had been merely to remind the General Assembly of the distinction between a code and a codification convention. He had based his thinking on the Commission's report on the work of its fourteenth session, in which certain ideas of principle had been expressed concerning the advantages of conventions.³

74. However, the interesting suggestion had been made in the 1971 Survey of International Law (A/CN.4/245) that there were other ways of developing international law besides codification. Perhaps reference might be made in a foot-note to the relevant paragraph in the Survey. He was prepared to consider any change in paragraph 36 which Mr. Ustor might suggest.

75. Mr. USHAKOV and Mr. AGO said they were in favour of retaining the paragraph.

76. Mr. SETTE CÂMARA said that, in common with Mr. Kearney, he was in favour of its deletion.

77. Mr. YASSEEN said he hoped that paragraph 36 could be retained with suitable amendments.

78. The CHAIRMAN, speaking as a member of the Commission, said that he too would prefer paragraph 36 to be retained, though he noted that the views of members of the Commission were divided.

79. Mr. TSURUOKA thought it should be possible to produce a new paragraph 36 with the assistance of Mr. Yasseen and Mr. Ustor.

80. Mr. KEARNEY said he had no objection to the first two sentences, but that the end of the paragraph raised a number of problems. If the paragraph was to be retained, further discussion of those problems would be necessary.

81. Mr. USTOR proposed that paragraph 36 should be reworded. The first sentence would be retained, with the words "legislative convention" replaced by the words "codification convention". In the second sentence, the words "its wide publicity moulding public opinion and doctrine into the hard language of precise articles" would be replaced by the words "and that it is published". The third, fourth and last sentences would be replaced by a single sentence reading: "Nevertheless the Commission, in the interest of the effectiveness of the codification process, would consider it desirable if the conventions adopted at codification conferences could receive

as soon as possible the formal consent (ratification or accession) of States."

Paragraph 36, thus amended, was approved.

Paragraph 37

Paragraph 37 was approved.

Paragraph 38

82. Mr. QUENTIN-BAXTER said it was going too far to say that the Commission "will be, during the coming years, fully occupied" with the active consideration of the five topics which constituted its current programme of work. He suggested that those words be replaced by the words: "will, for some years, have ample work to do".

83. Mr. TABIBI proposed that foot-notes should be added to indicate that four of the topics mentioned in paragraph 38 had been considered during the twenty-fifth session and were dealt with in other chapters of the report.

84. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph 38 with the amendments proposed by Mr. Quentin-Baxter and Mr. Tabibi.

It was so agreed.

Paragraph 38, as amended, was approved.

New paragraph 38bis

85. Following a comment by Mr. USHAKOV, the CHAIRMAN suggested that a new paragraph 38bis should be added, to indicate that, in addition to the five topics listed in paragraph 38, the Commission's programme of work included topics referred to it by the General Assembly.

It was so agreed.

Paragraphs 39 and 40

86. Mr. KEARNEY said he was disappointed at the feeble conclusions stated in paragraph 39, which did less than justice to that major work, the Survey of International Law. The conclusion that substantive consideration of additional topics might seriously delay the completion of work on the topics already under study would have been justified if the Commission had been considering its short-term programme of work. It had no relevance, however, to the long-term programme, which was the matter under consideration.

87. He thought that paragraph 40, which accurately reflected the discussion in the Commission, should be placed first. He therefore proposed that the order of paragraphs 39 and 40 should be reversed and that the text of paragraph 40 should be preceded by the following proviso: "In the course of the consideration of the long-term programme of work,".

It was so agreed.

88. The CHAIRMAN asked whether there were any comments on the text of paragraph 40, which had now become paragraph 39.

³ See *Yearbook of the International Law Commission, 1962*, vol. II, p. 160, document A/5209, para. 17.

89. Mr. USHAKOV observed that the paragraph mentioned both topics that were already on the Commission's programme of work and topics not yet on it. He thought those two categories of topic should be kept completely separate.

90. The CHAIRMAN explained that the first list enumerated those topics whose priority had been repeatedly stressed, while the second consisted of topics which had merely been mentioned by one or more members. Hence, either list might contain both topics already on the Commission's programme of work and new topics.

The new paragraph 39, as amended, was approved.

91. Mr. KEARNEY proposed that, for the reasons he had already given, paragraph 40 (the former paragraph 39) should be replaced by the following shorter text: "The Commission decided that it would give further consideration to the foregoing suggestions in the course of future sessions".

It was so agreed.

The new paragraph 40, as amended, was approved.

92. Sir Francis VALLAT said that he wished to place on record his misgivings with regard to paragraphs 38 to 40. The new paragraph 38*bis* should have referred to the 1949 list of topics and to the list in the Survey of International Law; more important, it should have given some account of the discussion which had taken place in the Commission.⁴ With regard to the important subject of unilateral acts, for example, many comments and in particular many reservations had been made during the discussion. A mere reference to "unilateral acts" was much too vague, because the subject itself was a very broad one.

Paragraph 41

93. Mr. USHAKOV proposed that a reference to the relevant General Assembly resolution should be introduced.

It was so agreed.

94. Mr. USHAKOV said it might also be indicated that in 1974 the Commission would consider setting up a working group.

95. Mr. SETTE CÂMARA opposed that idea. At the present stage the Commission was only concerned with the adoption of its report, and it would be premature to mention in the report a question which had not been discussed at the session.

96. Mr. USHAKOV said he would not press his suggestion.

97. Mr. KEARNEY said that he had made a statement during the discussion suggesting that action should be taken at an early stage on the topic of the law of the non-navigational uses of international watercourses.⁵ He believed that there should be some trace in the report of the view he had put forward; it had received considerable support.

98. Mr. AGO suggested that the Rapporteur and the Secretariat should revise the wording of paragraph 41 so as not to give the impression that the Commission meant to postpone the study of the topic indefinitely.

99. Sir Francis VALLAT suggested that the new wording should indicate that the majority of the members showed great interest in the topic and a desire that work on it should begin as soon as possible.

100. Mr. USTOR said that reference might perhaps be made to the possibility of appointing a Special Rapporteur for the topic in due course.

101. Mr. SETTE CÂMARA opposed that suggestion. He thought it would be premature to mention the matter. It was the practice of the Commission to appoint a small group to study a topic before a Special Rapporteur was appointed.

102. Mr. TSURUOKA observed that there was general agreement on the need to replace paragraph 41 by more positive wording.

103. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to entrust the Rapporteur with the task of re-drafting paragraph 41 on the lines indicated.

It was so agreed.

Paragraph 42

Paragraph 42 was approved.

Chapter VI of the draft report, as amended, was approved.

Chapter VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

104. The CHAIRMAN invited the Commission to examine chapter VII of its draft report (A/CN.4/L.204).

Paragraph 1

Paragraph 1 was approved.

Paragraph 2

105. Mr. RYBAKOV (Secretary to the Commission) said he had been informed by the Budget Division of the financial implications of the request for a fourteen-week session, made in paragraph 2. The additional cost would be \$130,000.

106. Mr. USHAKOV said he wished to place it on record that he was opposed to a fourteen-week session.

Paragraph 2 was approved.

Paragraphs 3 to 30

Paragraphs 3 to 30 were approved.

Paragraph 31

107. The CHAIRMAN suggested that the twenty-sixth session should open on Monday, 6 May 1974. If members agreed, that date would be inserted in the blank space in paragraph 31.

It was so agreed.

Paragraph 31, as amended, was approved.

⁴ 1233rd-1237th meetings.

⁵ 1237th meeting, paras. 13-24.

Paragraphs 32 to 40

Paragraphs 32 to 40 were approved.

Chapter VII of the draft report, as amended, was approved.

The draft report of the Commission on the work of its twenty-fifth session as a whole, as amended, was adopted.

Closure of the session

After an exchange of congratulations and thanks, the CHAIRMAN declared the twenty-fifth session of the International Law Commission closed.

The meeting rose at 1.35 p.m.

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