

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1974

Volume I

*Summary records
of the twenty-sixth session
6 May-26 July 1974*

UNITED NATIONS



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OF THE
INTERNATIONAL
LAW COMMISSION

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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. References to the *Yearbook of the International Law Commission* are in a shortened form consisting of the word *Yearbook* followed by suspension points, a year and a volume number, e.g. *Yearbook . . . 1971*, vol. II.

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

OFFICERS

<i>Chairman:</i>	Mr. Endre USTOR
<i>First Vice-Chairman:</i>	Mr. José SETTE CÂMARA
<i>Second Vice-Chairman:</i>	Mr. Abdul Hakim TABIBI
<i>Rapporteur:</i>	Mr. Doudou THIAM

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 1250th meeting, held on 6 May 1974:

1. Filling of casual vacancies on the Commission (article 11 of the Statute)
 2. Commemoration of the twenty-fifth anniversary of the opening of the first session
 3. State responsibility
 4. Succession of States in respect of treaties
 5. Succession of States in respect of matters other than treaties
 6. Most-favoured-nation clause
 7. Question of treaties concluded between States and international organizations or between two or more international organizations
 8. Long-term programme of work, including:
 - (a) Consideration of recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses (para. 4 of General Assembly resolution 3071 (XXVIII));
 - (b) Consideration of recommendation concerning undertaking at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (para. 3 (c) of General Assembly resolution 3071 (XXVIII))
 9. Organization of future work
 10. Co-operation with other bodies
 11. Date and place of the twenty-seventh session
 12. Other business
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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-SIXTH SESSION

Held at Geneva from 6 May to 26 July 1974

1250th MEETING

Monday, 6 May 1974, at 3.20 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Later: Mr. Endre USTOR

Present: Mr. Ago, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, 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. Tsuruoka, Mr. Ushakov, Mr. Yas-seen.

Opening of the Session

1. The CHAIRMAN, after declaring open the twenty-sixth session of the International Law Commission, expressed his deep sorrow at having to begin the proceedings in the absence of their highly esteemed and respected colleague, Mr. Milan Bartoš, the sad news of whose death, which had occurred in his native Yugoslavia on 11 March 1974, had been received by all the members through the Secretary-General of the United Nations.

2. Mr. Bartoš had completely identified himself with the International Law Commission. He had shared with two other members, Mr. Ago and Mr. El-Erian, the distinction of seniority of membership, having served on the Commission since 1957. His connexion with the Commission, however, went back even further, for he had been a member of the Committee on the Progressive Development of International Law and its Codification—the “Committee of Seventeen”—which had been set up by the General Assembly in 1947 and had initiated the establishment of the International Law Commission as a permanent subsidiary body of the General Assembly.

3. During his sixteen years on the Commission, Mr. Bartoš had rendered outstanding services, not only as an assiduous member, but also as Rapporteur and Vice-Chairman, and as Chairman of the seventeenth session. In addition, he had made an outstanding contribution to the work of the Commission as Special Rapporteur on the topic of special missions, an office to which he had been appointed in 1963. On the basis of four

reports submitted by Mr. Bartoš between 1963 and 1967, the Commission, at its nineteenth session, had submitted to the General Assembly a final draft on special missions consisting of 50 articles, and had recommended to the General Assembly “that appropriate measures be taken for the conclusion of a convention on special missions”.¹ At the twenty-third and twenty-fourth sessions of the General Assembly, held in 1968 and 1969, the Sixth Committee, with the participation of Mr. Bartoš as Expert Consultant, had examined the item “Draft Convention on Special Missions” on the basis of the draft prepared by the Commission. On the recommendation of the Sixth Committee, the General Assembly, by its resolution 2530 (XXIV) of 8 December 1969, had adopted the Convention on Special Missions—one of the concrete results of the work of the codification which would always be associated with the memory of their illustrious and lamented colleague.

4. But the contribution made by Mr. Bartoš to the task of codification and progressive development of international law certainly could not be measured solely in terms of his work on special missions, for he had always participated actively and constructively in the discussion of all the great topics with which the International Law Commission had dealt. His statements, as reflected in the records of the commission, would be consulted in the future as eloquent examples of the product of a powerful intellect and an open mind, which combined learning virtually without parallel on both the practice and the theory of international law with a keen awareness of the changing needs of the modern world, in particular those needs which had resulted from decolonization and underdevelopment.

5. From consultations with members, he had gathered that there was a unanimous wish to hold a special meeting of the Commission to pay tributes to the memory of Mr. Bartoš. Meanwhile, the new Chairman, as soon as he was elected, would no doubt send telegrams of condolence on the Commission’s behalf to Mr. Bartoš’s widow and to the Yugoslav Government.

6. He warmly welcomed Mr. Suy, the newly appointed Legal Counsel of the United Nations, who was attend-

¹ See *Yearbook ... 1967*, vol. II, p. 347, para. 33.

ing the Commission for the first time as representative of the Secretary-General, and invited him to address the Commission.

7. Mr. SUY (Representative of the Secretary-General) said that the grievous news of the recent death of Mr. Bartoš had saddened the whole of the United Nations. All international lawyers knew what an eminent position Mr. Bartoš had held in modern legal science. He had owed that position to his teaching, to a considerable volume of writing and to his fruitful activity in numerous learned societies and in the International Law Commission. An ambassador as well as a teacher, he had played a leading part in contemporary diplomacy. As representative of Yugoslavia to major conferences of plenipotentiaries and to several United Nations bodies, he had strongly impressed his personality on post-war international relations. As a delegate to the "Committee of Seventeen", set up by the General Assembly to study methods of promoting the progressive development of international law and its codification, he had been one of the founders of the International Law Commission, of which he had subsequently become a member, Special Rapporteur, General Rapporteur, Vice-Chairman and Chairman.

8. Everywhere and at all times Mr. Bartoš had shown himself to be a fearless champion of the cause of law, peace and understanding among peoples. His colleagues had esteemed him for his great intellect, his eloquence, his legal erudition and his exceptional culture, which had made him a truly complete man of the twentieth century.

9. His intellectual qualities had been matched by a keen sense of what was human and by great kindness. To members of the Secretariat, he had always shown great generosity and courtesy. All United Nations officials who had had the honour of knowing him—those of the Legal Office and of the Conference Services—cherished an undying memory of Milan Bartoš.

10. He conveyed to the Commission the heartfelt condolences of the Secretary-General and of the entire United Nations Secretariat.

11. The CHAIRMAN read out the text of a telegram of condolence sent to the Commission by Mr. Thiam, who was unable to attend the meeting.

On the proposal of the Chairman, the members of the Commission observed a minute's silence in tribute to the memory of Mr. Milan Bartoš.

Statement by the outgoing Chairman

12. The CHAIRMAN, reporting on the discussion of the Commission's report at the twenty-eighth session of the General Assembly, said that the text of his own statement to the Sixth Committee had already been circulated to members of the Commission, so he would confine his remarks to the main conclusions reached. At the beginning of the Committee's discussion there had been some legitimate complaints about the delay in distributing the Commission's report, which had reached delegations only a few days previously. A senior official of the United Nations had given what had

seemed to be a satisfactory explanation, and had said that a special effort would be made to ensure that in future the Commission's report would be distributed in good time—say, a month before the debate in the Sixth Committee. A suggestion that the report might be taken up later in the session had been opposed by most speakers, who believed that its early consideration provided useful material and ideas for subsequent debates. The report would therefore continue to be the first item on the Sixth Committee's agenda.

13. Many comments had been made on the Commission's future work. There was considerable support for the view expressed in the report that the Commission was the best forum for the codification of international law, because the interplay between the expertise of its members and the reactions and views of governments produced results of great practical value. Asked whether the Commission's work took sufficient account of current trends in world affairs, he had replied that the Commission was aware of those trends and had not been insensitive to the feelings of developing countries. He had cited as examples the excellent reports prepared by Sir Humphrey Waldock on succession of States in respect of treaties. The drafts prepared by the Commission had been very favourably received in developing countries.

14. Many speakers had emphasized the provisional nature of the six articles on State responsibility submitted in the report, and some had felt unable to express any views on the substance of the articles without more background information on the Commission's deliberations and the comments made by its members. He hoped that Mr. Ago would bear that in mind in his future work on the topic. There had been some discussion about whether objective liability should be included in the topic of State responsibility or treated as a separate subject.

15. Mr. Bedjaoui and Mr. Ustor had been praised for their reports and encouraged to continue their work. In commenting on Mr. Ustor's report many speakers, especially speakers from developing countries, had emphasized that the interests of those countries should be borne in mind in studies on the most-favoured-nation clause, particularly in the context of chapter IV of the General Agreement on Tariffs and Trade (GATT).²

16. Many delegations had expressed the view that the law of non-navigational uses of international water-courses could now be codified by the Commission, which had accordingly been invited by the General Assembly to begin that work. However, as Mr. Sette Câmara had pointed out, the Commission would have to await completion of the Secretary-General's report on the subject.

17. References had been made to the long period which often elapsed between the completion of codification and the signature and ratification of the resultant instruments. The reasons given by States for that delay were not always valid. He had reported Mr. Ago's com-

² United Nations, *Treaty Series*, vol. 55, p. 194.

ments on the subject³ and there had been some discussion, but no conclusions had been reached.

18. He had attended a special plenary meeting held by the General Assembly to commemorate the Commission's twenty-fifth anniversary. Eloquent statements had been made about the Commission's work by Mr. Lachs, a former member, and Mr. Benites of Ecuador. The Secretary-General had discussed the Commission's report and the representatives of the various geographical groups had paid tributes. On behalf of the Commission, he had thanked the General Assembly for holding the commemorative meeting.⁴

19. The General Assembly had endorsed the suggestion made by the Advisory Committee on Administrative and Budgetary Questions that the Commission might shorten its sessions by holding more frequent meetings—say, seven a week. He had explained that, although the Commission generally held five formal meetings a week, groups of members, special rapporteurs and the officers of the Commission also met two or three times a week. However, the number of formal meetings held was not important, since the codification of international law was meticulous work requiring concentration, research and reflection, which could not be speeded up by increasing the number of meetings. A fuller programme of meetings would in fact reduce the time available for such work. He had made that clear to the General Assembly, pointing out that the Commission could not be assimilated to the many other specialized bodies in the United Nations and treated on the same financial basis. Its members had very high intellectual and professional qualifications and their attendance at the Commission's sessions involved considerable personal sacrifice, since the remuneration was inadequate for even a modest standard of living and they had to drop their own work to serve the Commission. The remuneration received by special rapporteurs was often insufficient to cover the material cost of preparing their reports, and he had therefore asked the General Assembly to consider the possibility of improving the conditions under which the Commission's members were required to work. He invited the Commission to discuss the subject and prepare recommendations for submission to the General Assembly. The Fifth Committee of the General Assembly had agreed to extend the Commission's present session to twelve weeks, but not to fourteen weeks.

20. On behalf of the Commission, he had attended a session of the Asian-African Legal Consultative Committee at Tokyo, where the main topic had been the law of the sea. It had not been possible for the Commission to be represented at the last session of the Inter-American Juridical Committee, but Mr. Bilge had attended, at some inconvenience to himself, the recent session of the European Committee on Legal Co-operation at Strasbourg.

21. Mr. KEARNEY thanked the Chairman for defending the Commission's interests in the General

Assembly and especially for drawing attention to the inadequacy of the remuneration paid to special rapporteurs. The preparation of the Commission's report in time for the General Assembly was unfortunately an endemic problem, since the time available between the end of the Commission's session and the opening of the General Assembly was short and would indeed be shorter after the present longer session. He had helped with the preparation of the previous year's report, and it might be useful if two or three members of the Commission could remain in Geneva after the session to help the Secretariat put the report into its final form in the different languages.

22. Mr. AGO congratulated the Chairman on the masterly way he had represented the Commission at the General Assembly and said that it would be useful to be able to read the full text of his statements. The sometimes conflicting views expressed in the General Assembly concerning the Commission's work in 1973 showed that the Commission had followed the only course capable of gaining support from all sides, in particular where the question of State responsibility was concerned.

23. Above all, the Chairman should be congratulated on the manner in which he had answered certain remarks which had been repeated for some time in the General Assembly. In the first place, he had had to explain the financial aspect; it was undeniable, for example, that the fees paid to a member of the Commission, and particularly to a Special Rapporteur, were quite insufficient to meet the costs of research and secretarial assistance incurred in his work. That aspect, however, was, after all, only secondary, for the members of the Commission devoted themselves to the cause of international law with enough enthusiasm to be willing to incur personal expenses.

24. What was more serious was that some people seemed to be insinuating that the Commission was not working hard enough or that it was too slow to take decisions. That showed misunderstanding of the Commission's work. The codification of international law was a delicate task which, even more than in the past, had to be carried out with due reflection. Not a single article could be drafted without taking into account the interests of all States, including those of the increasingly numerous new States. Codification was not something that could be done in a hurry. It was also necessary to realize that many members of the International Law Commission made great sacrifices in their professional lives in order to perform their duties. He hoped that future Chairmen would be able to defend the Commission in the General Assembly as spiritedly as the outgoing Chairman had done.

Election of officers

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

26. Mr. USHAKOV nominated Mr. Ustor, a man who was not only a distinguished jurist in his own country, but also a diplomat, a teacher and a well-known scholar. In the Commission he had held with

³ See *Yearbook ... 1968*, vol. II, p. 172, paras. 4 *et seq.*

⁴ For verbatim record see A/PV. 2151.

distinction the offices of Vice-Chairman and Special Rapporteur, and among his personal qualifications were his great patience and kindness.

27. Mr. TABIBI seconded the nomination and associated himself with the tributes paid to the outgoing Chairman.

28. Mr. HAMBRO and Mr. EL-ERIAN supported the nomination of Mr. Ustor and also congratulated the outgoing Chairman on the manner in which he had represented the Commission at the General Assembly.

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

29. The CHAIRMAN thanked the Commission for the honour it had done him in electing him Chairman. He knew that he could rely on the members' spirit of friendship and co-operation, which was a tradition of the Commission. He fully associated himself with the tributes paid to the outgoing Chairman.

30. Mr. YASSEEN, speaking on a point of order, said that, traditionally, the first Vice-Chairman acted as Chairman of the Drafting Committee. He proposed that, in order to relieve the first Vice-Chairman of that arduous task and to overcome certain difficulties regarding the designation of officers, the Commission should elect a Chairman for the Drafting Committee.

31. Mr. TABIBI and Mr. USHAKOV likewise considered that the Chairman of the Drafting Committee should be elected.

It was so agreed.

32. The CHAIRMAN called for nominations for the office of first Vice-Chairman.

33. Mr. ELIAS nominated Mr. Sette Câmara.

34. Mr. YASSEEN and Mr. REUTER seconded the nomination.

Mr. Sette Câmara was unanimously elected first Vice-Chairman.

35. Mr. SETTE CÂMARA thanked the members of the Commission for electing him.

36. The CHAIRMAN called for nominations for the office of second Vice-Chairman.

37. Mr. YASSEEN congratulated the outgoing Chairman on the manner in which he had discharged his duties, in particular on having so ably explained and defended the International Law Commission's work in the General Assembly and on the remarkable statement he had made in connexion with the twenty-fifth anniversary of the Commission. He congratulated the new Chairman on his election.

38. He nominated Mr. Tabibi for the office of second Vice-Chairman.

39. Mr. USHAKOV, Mr. TSURUOKA, Mr. CASTAÑEDA and Mr. RAMANGASOAVINA associated themselves with the congratulations addressed to the outgoing Chairman and to the new Chairman and supported the nomination of Mr. Tabibi.

Mr. Tabibi was unanimously elected second Vice-Chairman.

40. Mr. TABIBI thanked the members of the Commission for electing him.

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

42. Mr. EL-ERIAN nominated Mr. Thiam.

43. Mr. MARTÍNEZ MORENO, Mr. ELIAS, Mr. YASSEEN and Mr. RAMANGASOAVINA supported the nomination.

Mr. Thiam was unanimously elected Rapporteur.

44. The CHAIRMAN, acting on the Commission's decision taken on the proposal of Mr. Yasseen, called for nominations for the office of Chairman of the Drafting Committee.

45. Mr. AGO nominated Mr. Hambro.

46. Mr. YASSEEN and Mr. KEARNEY seconded that nomination.

47. Mr. RAMANGASOAVINA proposed that the Drafting Committee should appoint its own Chairman.

48. Mr. EL-ERIAN said he welcomed the nomination of Mr. Hambro, but as a matter of principle he thought the proposal to separate the office of Chairman of the Drafting Committee from that of First Vice-Chairman, which raised some delicate technical issues, should have been the subject of ample preliminary consultations. He suggested that the whole question should be considered by the officers of the Commission before a final decision was taken.

49. Mr. KEARNEY said that on the basis of his own experience, he could strongly support the proposal to appoint a separate Chairman of the Drafting Committee. He had held the office of First Vice-Chairman and had found it something of a burden to have to preside over both the Drafting Committee and the Commission itself when the Chairman happened to be absent.

50. The CHAIRMAN said that the Commission had before it three proposals: first, that a separate Chairman of the Drafting Committee should be elected in the person of Mr. Hambro; second, that the election of the Chairman of the Drafting Committee should be left to that Committee itself; third, that a decision should be postponed until the officers of the Commission had held consultations.

51. Mr. USHAKOV said that the proposal made by Mr. Yasseen and adopted by the Commission had been intended to strengthen and broaden the representative character of the Commission's officers, who would gain the advantage of representing five different legal systems. He warmly supported the nomination of Mr. Hambro.

52. Mr. EL-ERIAN said he had only wished to place on record his feeling that the matter should have been handled by means of prior consultations. He would not press his suggestion.

53. Mr. RAMANGASOAVINA withdrew his proposal.

54. Mr. TSURUOKA stressed that the members of the Commission sat in their personal capacity and not as representatives of their countries or of regional

groups. The Chairman of the Drafting Committee played an important part in the Commission's work in any given year, and in the current year that work would be concerned mainly with the topic of State responsibility; the Special Rapporteur on that topic, Mr. Ago, had himself nominated Mr. Hambro. In his (Mr. Tsuruoka's) opinion Mr. Hambro fulfilled all requirements for the post of Chairman of the Drafting Committee, but he would not have objected to a postponement of the election in order to allow members of the Commission to engage in consultations.

55. Mr. ELIAS said that, as a matter of principle, Mr. Yasseen's proposal was a sound one. Nevertheless, he thought that a proposal to separate two important functions for the first time in the practice of the Commission should have been preceded by adequate consultations.

56. Mr. CALLE Y CALLE urged that Mr. Hambro should be elected Chairman of the Drafting Committee immediately. No disagreement had been expressed regarding the proposal to separate that office from the office of First Vice-Chairman, and it would have the additional advantage of reinforcing the officers of the Commission.

57. Mr. AGO stressed that the Chairman of the Drafting Committee should be one of the Commission's officers.

58. The CHAIRMAN said that, since no objection had been made to Mr. Yasseen's proposal, he took it that the Commission agreed to appoint Mr. Hambro Chairman of the Drafting Committee and, as such, an officer of the Commission.

It was so agreed.

59. Mr. SETTE CÂMARA said he fully concurred with the wise decision to separate the functions of Chairman of the Drafting Committee from those of First Vice-Chairman. In recent years, the Commission's enlarged Bureau had played an increasing role in the organization of its work and the decision just taken would strengthen that body.

60. Lastly, he warmly associated himself with the welcome extended by the Chairman to the new Legal Counsel of the United Nations, who was attending the Commission for the first time as representative of the Secretary-General.

Adoption of the agenda

The provisional agenda (A/CN.4/273/Rev.1) was adopted unanimously.

The meeting rose at 6 p.m.

1251st MEETING

Tuesday, 7 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Elias, 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. Yasseen.

State responsibility

(A/CN.4/246 and Add.1 — 3; A/CN.4/264 and Add.1; A/9010/Rev.1; A/9334)

[Item 3 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

1. Mr. AGO (Special Rapporteur) summarized the work of the International Law Commission on the draft articles on State responsibility, taking into account the observations and recommendations made by the Sixth Committee at the twenty-eighth session of the General Assembly. He referred, in particular, to chapter II of the report of the International Law Commission on the work of its twenty-fifth session (A/9010/Rev.1)¹ and to paragraphs 25 to 58 of the report of the Sixth Committee on the report of the International Law Commission (A/9334). He also drew the attention of the members of the Commission to General Assembly resolution 3071 (XXVIII), in particular, operative paragraphs 3 (b) and (c).

2. The comments of the Sixth Committee were encouraging and could not fail to facilitate the work of the Commission, because they confirmed the general conclusions members had reached the previous year and the basic criteria they had adopted. Those conclusions and criteria were set out in chapter II of the Commission's report on the work of its twenty-fifth session, under the heading "General remarks concerning the draft articles" (paragraphs 36 to 57). Although the Sixth Committee had considered that the remarks on the form of the draft were self-explanatory, since the International Law Commission had decided to give its work on State responsibility the form of draft articles, with a view to the eventual conclusion of an international convention, it had given particular attention to the remarks concerning the scope of the draft. It had endorsed the distinction made by the Commission between two types of rules, namely, those termed "primary", which, in one sector of inter-State relations or another, imposed obligations on States, and those termed "secondary", not, of course, because they were less important than the primary rules, but because they determined the legal consequences of failure to fulfil obligations established by the primary rules. It had also approved of the Commission's intention to concentrate the current study on the "secondary" rules and to maintain a strict distinction between that task and the task of defining the rules which imposed on States obligations the violation of which could be a cause of responsibility.

3. The Commission had decided to confine its study of international responsibility to State responsibility for internationally wrongful acts. However, in addition to

¹ Reproduced in *Yearbook ... 1973*, vol. II.

questions of responsibility for internationally wrongful acts—responsibility in the classical sense of the term—it had recognized, in its report, the importance of questions relating to a form of responsibility thought to be more accurately called “liability” in English, which was associated with a guarantee, that was to say, responsibility for possible injurious consequences of certain unlawful activities, or activities which had not yet been definitely prohibited by international law, such as activities carried out at sea, in the atmosphere or in outer space and activities relating to nuclear energy and the protection of the environment. The Commission had thought that the fact that it was limiting the draft articles in preparation to responsibility for internationally wrongful acts should not prevent it from undertaking, at the appropriate time, a study of that other form of responsibility which was the obligation to assume the risks associated with such activities. It had considered that the so-called responsibility “for risk” might be studied after completion of the study of responsibility for wrongful acts, or even parallel with it, but separately. It had been of the opinion that that second category of problems should not be examined in conjunction with the first, because simultaneous examination of the two subjects could only make the understanding of both more difficult.

4. Most of the representatives in the Sixth Committee had recognized that the two subjects were entirely different and should be studied separately, and the Committee had approved the Commission’s decision to limit the scope of the draft articles in preparation to State responsibility for internationally wrongful acts. The Sixth Committee had also considered it necessary to study liability for injurious consequences of activities other than internationally wrongful acts. In that connexion, representatives in the Committee had reiterated considerations already put forward in the Commission concerning the problem raised by certain activities which were difficult to characterize as lawful or unlawful, because they were not prohibited by any rule of general international law and were said to lie in a twilight zone between the lawful and the unlawful. Several representatives had affirmed that the line of demarcation between the two questions was fluid and that with the development of international law some dangerous activities, until recently considered lawful, had become wrongful. Like the International Law Commission, the Sixth Committee had considered whether the two separate questions should be studied side by side or in succession. Some representatives had taken the view that the study of liability for risk should be undertaken forthwith, since the subject was sufficiently ripe, whereas others had thought that it should be left till later. The Commission would have to settle that question.

5. So far as the distinction between primary and secondary rules was concerned, the Commission would not always be able to disregard the content of the obligation the breach of which engaged the responsibility of the State, for it was in the light of the content of certain obligations that it would be able to judge, for example, how useful it would be to draw a distinction in interna-

tional law between two categories of internationally wrongful acts: serious wrongful acts, which might possibly be called international crimes, and less serious wrongful acts. The Commission would have to distinguish between acts entailing only a duty to make reparation and those producing more serious consequences and involving sanctions, for example, such as acts of aggression or breaches of certain essential obligations concerning the maintenance of peace. It was in the light of such considerations that some representatives in the Sixth Committee had pointed out that at some point in its study of State responsibility the Commission would probably have to take account of the existence of different classes of obligation specified in the primary rules and to distinguish between those classes according to their importance for the international community. Other important distinctions between different types of internationally wrongful act would also have to be made, according to the content of the obligation violated.

6. With regard to the method to be adopted in preparing the draft, the Commission had expressed its preference for an inductive method based on the practice of international relations, seeking to determine the rules of State responsibility as far as possible on the basis of the jurisprudence and the practice of States, rather than of theoretical considerations. The Sixth Committee had approved of that method, though some representatives had observed that their States, being relatively new, had not built up a large body of practice. The Commission would have to judge which practices ought to be followed and which should be corrected or developed, having due regard to the historic context of each practice and, especially, to its ultimate objective. For while certain matters were intrinsically fairly stable, others were not found in the older or even in recent practice and were largely material for the progressive development of international law.

7. He noted that the members of the Sixth Committee had approved, in general, of the text of draft articles 1 to 6 adopted the previous year by the International Law Commission (A/9010/Rev.1) and had not proposed any radical changes. In discussing the texts, they had often referred to questions already discussed in the Commission. The Commission still had to consider those articles on second reading, and it would then take into account the comments made in the Sixth Committee and the written observations of governments. It seemed preferable not to revise the articles already adopted until the second reading, and for the time being to continue consideration of the subsequent articles of the draft.

8. In the section of its report dealing with the structure of the draft (paras. 43 *et seq.*), the Commission had taken stock of the work done and indicated how it proposed to continue the work at the present session. It had very clearly defined the object of chapter II of the draft, which dealt with the subjective element of the internationally wrongful act and, hence, with the determination of the conditions in which a particular act must be considered as an act of the State in international law. The Commission still had to consider one very difficult question: was it possible to attribute to the State, as a subject of international law, the conduct of

organs not of the State itself, but of separate public institutions—national public institutions separate from the State or local public entities? Similarly, was it possible to attribute to the State, for the purpose of establishing its international responsibility, the conduct of persons or groups of persons who, while formally lacking the status of organs, had in fact acted as such? Lastly, was it possible to attribute to the State the act or omission of an organ placed at its disposal by another State or by an international organization? Those were the three questions dealt with in draft articles 7, 8 and 9, which the Commission must now try to answer.

9. Mr. KEARNEY agreed with Mr. Ago that the term “liability” might be preferable in the case of legitimate acts which did not entail State responsibility in the classical sense, but could have consequences harmful to other States. A recent meeting of OECD experts on trans-frontier pollution, which he had attended, had also concluded that the term “liability” was more appropriate than “responsibility” for describing the legal consequence of such pollution. However, the whole question of legitimate acts which could give rise to certain rights on the part of other States had to be approached with caution, because in practice such cases often involved a combination of acts, some of which had a responsibility aspect, while others did not.

10. Mr. REUTER said that sooner or later the Commission would have to study the question of liability for risk, for there was a close connexion between responsibility for a wrongful act and objective liability for risk. He did not, however, think it advisable to appoint a Special Rapporteur to study the latter subject forthwith, since the Special Rapporteur for the topic of State responsibility for internationally wrongful acts would be bound, in the course of his work, to examine the essential question of damage, which was common to both subjects; and it was to be feared that when the Special Rapporteur appointed to study the second subject looked at that same question from his point of view he might reach different or even conflicting conclusions. Hence it would be preferable to consider the question of damage in the current study, before another Special Rapporteur was asked to study the subject of liability for risk.

11. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Kearney that the question of liability for risk was a complicated one, regarding which primary rules had not yet been established. They should perhaps first be established in specific sectors, such as pollution, where interdisciplinary problems might well arise. The Commission might revert to the question later, to consider whether it should be studied or not.

12. Mr. AGO (Special Rapporteur) said he had listened with great interest to the comments of Mr. Kearney, Mr. Reuter and Mr. Ustor; he would be grateful to Mr. Kearney for any additional information he could provide on the work of OECD on the subject. As had rightly been observed, the facts of international life were very complex, and it was difficult in some cases to determine whether a particular activity was lawful or wrongful; not because there was a kind of twilight zone

between what was lawful and what wrongful, but because in some spheres, international law was evolving so fast that an activity permitted today might be prohibited tomorrow. In any case it was essential to make a very clear distinction between responsibility for wrongful activities and liability for lawful activities liable to cause damage. In the case of wrongful activities, damage was often an important element, but it was not absolutely necessary as a basis for international responsibility. On the other hand, damage was an indispensable element for establishing liability for lawful, but injurious activities. Hence, as Mr. Reuter had remarked, it was to be expected that two parallel studies might reach different conclusions concerning the notion of damage.

13. The study of liability for the risks inherent in lawful activities involved the examination of questions that were complicated not only from the juridical, but also from the interdisciplinary point of view. On the subject of pollution, in particular, international law was developing fast, and it was a moot point whether it was moving towards the prohibition of certain activities or only towards the requirement of guarantees by States. Thus the question arose whether the Commission should undertake the study of liability for risk at once, or whether it should wait.

Draft Articles submitted by the Special Rapporteur

ARTICLE 7

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

Article 7²

Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State

The conduct of any organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federate State, autonomous administration of a dependent territory, etc.) having that status under the internal law of the State and acting in that capacity in the case at issue, is also considered to be an act of the State in international law.

15. Mr. AGO (Special Rapporteur), referring to paragraphs 163-185 of his third report on State responsibility (A/CN.4/246 and Add.1-3),³ said that at its previous session the Commission had confirmed the basic principle of attribution to a State, as a subject of international law, of the conduct of persons who, under its internal legal system, had the status of organs of that State, while specifying that that principle might be neither absolute nor exclusive. The principle would not be absolute if it were found that among the organs of the State there were some whose acts were not attributable to the State as a subject of international law. However, the Commission had not subsequently come to that conclusion, and it had approved the draft of article 6, accord-

² Text as amended by the Special Rapporteur; see next meeting, para. 13.

³ Reproduced in *Yearbook ... 1971*, vol. II, Part One.

ing to which the fact that an organ belonged to one branch of the State power rather than another was no reason for not attributing its conduct to the State. The principle would not be exclusive if it were recognized, as it should be, that certain acts or omissions which did not emanate from an organ of the State having that status under its internal legal order, might nevertheless be attributed to the State under the international legal order and thus engage its international responsibility. It was a fact that such acts or omissions could emanate from two distinct classes of State institution: first, public corporations and other public institutions, which terms covered institutions of very different kinds, separate from the State and carrying on activities relating to specific matters; and secondly, territorial public entities, that was to say, institutions distinguished not by the subject-matter of their competence, but by the territorial area of their activities.

16. Public corporations were characterized by their specific, rather than general, sphere of competence. Their proliferation was characteristic of the contemporary phenomenon of decentralization of certain public functions *ratione materiae*. The diversity of the tasks of common interest which the community itself had to perform in a modern society, the ever increasing number of services which only the community was able to provide, the gradual extension of those services to the most widely different sectors of economic, social and cultural life, the fact that they were often of a technical nature and thus required both autonomy of decision and action and the possession of special qualifications, the need to make procedures more flexible and simplify controls in the interests of efficient service—those, in short, were the main causes of the phenomenon. Thus, side by side with the State, there were being established a number of institutions which, though their functions gave them a distinctly public character, had a separate legal personality under the internal legal order, possessed their own organization distinct from that of the State and were subject, in their activities, to a legal régime *sui generis*. To use a neologism which had also found its way into French public law doctrine, such institutions might be described as “para-State” institutions, that was to say, institutions existing side by side with the State, which were responsible for a certain sector of public functions.

17. Should the acts or omissions of the organs of such institutions be regarded as acts of the State in international law? It was necessary to guard against extending the responsibility of the State too far, and also against not treating all States alike. If the same public function were performed in one State by organs of the State proper and in another by para-State institutions, it would indeed be absurd if the international responsibility of the State were engaged in one case and not in the other. True, it was necessary to take account of the present wide diversity of State organizations, as had been observed in the Sixth Committee. Beside public corporations proper, there were other public institutions separate from the State which must be taken into consideration. For example, a State might be alone in exercising, at the summit of the internal organization, the

function of supreme political direction; but it might also happen that the same function was shared between the State and a particular political party. Did that preclude attribution to a State of the acts or omissions of an organ of an institution which, under the internal order of that State, was separate from it, but in reality performed a function of political guidance which, under other systems, was performed by organs of the State proper?

18. More often than public corporations and the other public institutions he had mentioned, territorial public entities were called upon to carry on activities in which they might be concerned with, and possibly violate, obligations to foreign States. Must a different criterion be applied according to whether the State in question was a unitary State or a decentralized State? One example was the last constitution of the Italian monarchy, based on the Napoleonic unitary system, under which the State alone had been responsible for the administration of Sicily, whereas under the new republican constitution, which gave a very large degree of independence to Sicily, the same functions were largely reserved to the Sicilian regional authorities. A similar situation was to be found in many other modern States which were tending towards wider territorial distribution of the exercise of public functions. Moreover, the very existence of municipalities raised problems of the same order: an internationally wrongful act committed by an officer of the State police would no doubt engage the international responsibility of the State; but should it be concluded that the same act committed by an officer of the municipal police would not have the same consequence?

19. International jurisprudence, practice and doctrine concerning public corporations were illustrated by several examples in paragraphs 167 to 170 of his third report on State responsibility (A/CN.4/246 and Add.1-3). After referring to the opinion expressed by Mr. Gros as agent of the French Government in the *Case of Certain Norwegian Loans*, before the International Court of Justice, to the effect that, from the standpoint of international law public corporations merged with the State, he pointed out that two of the judges of the International Court had stressed the validity of that argument (*ibid.*, para. 167).

20. With regard to the practice of States, he pointed out that, in their replies to the request for information by the Preparatory Committee of the 1930 Codification Conference, some governments had observed that the State was responsible not only for the acts or omissions of bodies exercising public functions of a legislative or administrative character, but also for the acts or omissions of bodies other than those of a local character, in so far as such bodies were also required to exercise public functions. The Preparatory Committee had therefore come to the conclusion that it should refer not only to territorial entities such as communes and provinces, but also to “autonomous institutions” in general, and it had drafted the following basis of discussion: “A State is responsible for damage suffered by a foreigner as a result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or adminis-

trative character". Unfortunately, the Third Committee of the Conference had not had time to consider and adopt that basis of discussion (*ibid.*, para. 168).

21. With regard to political institutions, he referred to the examples from the jurisprudence and practice of States given in paragraph 169 of his third report. In the opinion of most writers, where the function associated with a certain act or omission was a public function, no distinction need be made according to whether that function was exercised by an organ of the State proper or by an organ of an autonomous institution. The principle stressed by writers was that the State must not be able to escape its international responsibility by adopting an international system of decentralization.

22. For territorial entities, the principle in question was still more generally accepted in doctrine and confirmed by an even more abundant practice and jurisprudence. The distinction between the State and territorial entities was indeed a relatively old one, whereas the proliferation of "para-State" institutions was fairly recent. The existence of territorial entities might reflect the application of a system of distribution of functions *ratione loci*, whereas the existence of "para-State" corporations and institutions reflected, rather, a system of distribution *ratione materiae*, but the phenomenon was basically the same. Territorial entities, too, had a legal personality separate from that of the State, and possessed their own machinery and organs. Nevertheless, the attribution to the State, as a subject of international law, of the acts and omissions of organs of those entities was generally accepted, as could be seen from the cases cited in paragraph 172 of his third report. Moreover, all the States which had replied on that point to the questionnaire of the Preparatory Committee of the 1930 Hague Conference, had accepted the principle that the State incurred responsibility for acts or omissions of territorial entities performing public functions of a legislative or administrative character. That principle had also been recognized in all the codification drafts emanating from official or private sources referred to in paragraph 174 of his third report. Finally, all the writers on international law who had dealt with the question agreed in affirming the same principle.

23. With regard to the attribution to a federal State of the acts of organs of its component states, he pointed out that the Government of the United States of America had gradually changed its position (*ibid.*, paras. 176 and 177). After having resisted, in the 19th century, the idea that the principle in question was applicable to the United States of America, it had subsequently adopted a much less categorical position, and had finally accepted the principle in its reply to point X of the request for information by the Preparatory Committee of the 1930 Conference, which had referred to "Responsibility of the State in the case of a subordinate or a protected State, a federal State or other unions of States".

The meeting rose at 12.55 p.m.

1252nd MEETING

Wednesday, 8 May 1974, at 11.45 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, 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. Yasseen.

Organization of work

1. The CHAIRMAN announced that the enlarged Bureau had discussed the organization of the Commission's work for the present session and had reached agreement on certain proposals based on the recommendations made by the General Assembly in operative paragraphs 3 and 4 of resolution 3071 (XXVIII). The Assembly had recommended that at the present session the Commission should complete the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session (item 4 of the Commission's agenda) and continue, on a priority basis, its work on State responsibility (item 3). It had also recommended that the Commission should undertake, at an appropriate time, a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (item 8 (b)).

2. In the light of those recommendations, it was proposed that the Commission should allocate the first three weeks of the present session and a further week later in the session to consideration of the topic of State responsibility. Most of the remainder of the session would be allocated to consideration of the topic of succession of States in respect of treaties. One week would be set aside for consideration of the recommendations that the Commission should begin its work on the law of non-navigational uses of international watercourses and that it should undertake, at an appropriate time, a separate study of the question of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (items 8 (a) and (b) of the agenda), and for certain administrative and organizational matters. A few days would also be devoted to discussion of the Special Rapporteur's third report on the question of treaties concluded between States and international organizations or between two or more international organizations (item 7) and to continuation of the work on succession of States in respect of matters other than treaties (item 5).

3. It was also suggested that the Commission should hold a private meeting, after its next meeting, to consider the question of filling the casual vacancy resulting from the death of Mr. Milan Bartoš; another meeting, the date to be decided after consultations, would be devoted wholly or partly to tributes to his memory.

4. Finally, the enlarged Bureau proposed that the meeting to be held on Monday, 27 May 1974, should be

devoted to the commemoration of the twenty-fifth anniversary of the opening of the Commission's first session (item 2 of the agenda). Invitations to attend that meeting would be sent to the Director-General of the United Nations Office at Geneva and to all former members of the Commission. There would be a limited number of speakers: the Legal Counsel, as representative of the Secretary-General; the President of the International Court of Justice; a former Chairman no longer a member of the Commission; the former Chairmen still members of the Commission and the Chairman of the present session.

5. The Commission's main objective was to complete the second reading of the draft articles on succession of States in respect of treaties and to make as much progress as possible on the topic of State responsibility.

6. If there were no comments, he would take it that the Commission agreed to adopt the proposals of the enlarged Bureau on the organization of work.

The proposals were adopted.

State responsibility

(A/CN.4/246 and Add. 1-3; A/CN.4/264 and Add. 1; A/9010/Rev.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

Draft articles submitted by the Special Rapporteur

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) *(continued)*.

7. Mr. AGO (Special Rapporteur), resuming his introduction of draft article 7, begun at the previous meeting, said that the provision dealt with the case of decentralization within a State of certain public functions which were entrusted to public institutions established or recognized by the internal legal order, whereas draft article 8 dealt with the less frequent case in which a public function was performed *de facto* by one or more private persons. As the representative of the German Democratic Republic had pointed out in the Sixth Committee during the twenty-eighth session of the General Assembly, the internal organization of States could take a great variety of forms, ranging from complete centralization to very advanced decentralization of the exercise of public functions. For the purposes of the international responsibility of the State, however, it mattered little whether public functions were performed by one or more State entities. In international law, the State was regarded as a unity. That had been the situation in England, for example, when the Crown and Parliament had been separate legal entities.

8. As he had pointed out at the previous meeting, public institutions could be decentralized either *ratione materiae* or *ratione loci*. In the former case, according to international jurisprudence, practice and doctrine, the acts and omissions of such institutions were attributable to the State under international law. That principle, being applicable to public institutions with special competence, applied *a fortiori* to institutions which, in a

particular territory, possessed a more general competence, and both international jurisprudence and international doctrine had recognized that it applied to the latter class of public institutions.

9. The practice of States, as reflected in the replies of governments to the request for information by the Preparatory Committee for the 1930 Codification Conference, was summarized in paragraphs 178 and 179 of his third report (A/CN.4/246 and Add. 1-3).¹ Even though the wording of the relevant questions in points VI and X of the questionnaire had been ambiguous, some States, including the United States of America and Switzerland, had accepted the principle that a federal State was answerable for acts or omissions which constituted a failure to fulfil its international obligations, regardless of whether the conduct in question was that of organs of the federated states or of federal organs.

10. Doctrine, however, was not entirely unanimous; for certain writers, probably influenced by the ambiguous wording of the League of Nations questionnaire, had been concerned at one time with a hypothetical case which had become almost a classic: the case in which a component state of a federal State retained a very limited degree of international personality. Those writers had considered whether the responsibility of the federal State would be engaged by acts or omissions of organs of a federated state in the restricted sector in which the federated state was regarded as an autonomous subject of international rights and duties.

11. That question, however, was not related to the case under consideration, in which the only issue was whether the federal State was capable of violating its own international obligations through the acts or omissions of organs of the federated states. That question should undoubtedly be answered in the affirmative. Moreover, the great majority of writers agreed that it should be so answered. It was even more evident that the principle was valid not only for federated states, but also for more limited territorial entities which had never even possessed international personality, such as municipalities, provinces and autonomous regions. The same was true of the organs of the autonomous administration of dependent territories, in so far as any still existed; the metropolitan State would be responsible for the wrongful conduct of the metropolitan organs responsible for administering a dependent territory, even if those organs claimed to enjoy a certain independence from the central authorities.

12. He therefore concluded that the principle of attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State and possessing a specific competence, whether *ratione materiae* or *ratione loci*, appeared to be incontestable.

13. He pointed out that he had slightly amended the text of draft article 7 to take account of the wording of article 5 as approved by the Commission on first reading at its previous session.²

¹ Reproduced in *Yearbook ... 1971*, vol. II, Part One.

² For former text see *Yearbook ... 1971*, vol. II, Part One, p. 262.

14. Mr. CALLE y CALLE said that the Special Rapporteur was to be congratulated on the success of articles 1 to 6 at the General Assembly. Only minor comments and suggestions for slight amendments had been made during the discussion in the Sixth Committee, and it was clear that the provisions embodied in those articles had been found generally acceptable as clear and concise legal rules. That discussion had shown that the Commission was working on the right lines and that it had done well to discard certain obsolete elements which, in the past, had encumbered the work on codification of the rules of State responsibility, and to undertake the formulation of a body of well-balanced rules that met the present needs of international law.

15. With regard to draft article 7, he fully recognized the need to include in the draft a rule under which the acts of organs of public institutions separate from the State would be attributed to the State in international law. It was essentially a matter of the State assuming international responsibility for the acts of entities or bodies which were not State organs.

16. However, a number of questions arose with regard to the text of the article. The first concerned the distinction between the two kinds of body covered: public corporations or other autonomous public institutions, which represented a modern phenomenon in the development of the State structure; and territorial public entities or subdivisions of the State, which were well known to traditional international law. Earlier attempts at codification had dealt mainly with the second kind of body; the first had, as a rule, been dealt with only indirectly or by implication. The two kinds of body had been covered by one article in the draft because the international responsibility of the State was based on the same criterion in both cases, namely, the public character of the functions exercised by all the bodies concerned.

17. That being so, he wished to know whether there was any compelling reason for the order in which the two categories were mentioned in draft article 7. His own feeling was that it would have been preferable to mention first the territorial public entities, which were of a permanent character and, in such cases as the component states or cantons of a federation, had some similarity in structure to the State itself. Besides, such territorial entities were well known to public law, and the codification of the rules of international law governing State responsibility for their acts should normally precede the rules of progressive development relating to the modern problem of public corporations and autonomous institutions.

18. His second question concerned the ascending order in which the various entities had been placed in the passage in parentheses. It would seem more appropriate to adopt a descending order, beginning with the largest entity and ending with the smallest, that was to say the municipality.

19. As to terminology, he was not altogether satisfied with the word "institutions" as used in the title, because it was intended to cover both the classes of entity mentioned in the body of the article. It seemed incongruous

to use the term "institution" to describe a subdivision of the State, such as a member state of a federal State.

20. Lastly, he urged that an effort be made to improve the wording of the Spanish version, in which the ambiguous expression "*o incluso*" was used to render the original French words "*ou encore*".

21. Mr. YASSEEN said that he appreciated the force of the arguments, based on doctrine and international practice, which the Special Rapporteur had put forward in support of the principle stated in article 7; and, for his part, he was convinced of the existence—or at least of the need for the existence—of a rule to that effect. He wished however to emphasize one point, to make a reservation and to comment on a matter of drafting.

22. The Special Rapporteur had rightly emphasized that a State could not allege, in order to escape responsibility, that its constitution did not permit it to control the activities of a particular organ. That rule was fully justified; for although, in certain cases, the constitution of a State did not permit it to control the activities of some of its sub-divisions, the result of that constitutional defect could not be that the State would not be responsible for the acts of those sub-divisions. Thus article 7 also applied to cases in which the constitution of the State deprived it of some degree of control over the activities of some of its organs.

23. He wished, however, to make a reservation regarding federal States. In his opinion it was not incompatible with the federal system that a federated state should be able to incur international responsibility. For it was possible to imagine the existence of a certain degree of federalism under which the federated states could enjoy some international competence. It would then be the federated states themselves which would be internationally responsible, not the federal State. That case might very well arise in the future, and it was important to distinguish it from the other cases considered by the Special Rapporteur. It would be wrong to exclude that eventuality or to underestimate its importance.

24. Lastly, with regard to the drafting, he proposed that the examples given in parentheses should be deleted from the text of the article and put into the commentary.

25. Mr. PINTO said that article 7 was well drafted, complete and clear, and supported by a wealth of precedent. He agreed with the essentially functional approach adopted by the Special Rapporteur. The acts of public corporations should indeed be attributable to the State, though that attribution could also derive from the rule laid down in article 4. Most public corporations were established by, or functioned under, statutes, and it could be assumed that a government was in full control of its legislation and able to amend it at will.

26. An act of a component state of a federal State should also be attributable to the State as a whole. Article 7 might, however, have implications for the "federal clauses" often included in multilateral agreements. For example, in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³ such a clause required a federal State to bring the

³ United Nations, *Treaty Series*, vol. 330, p. 38.

Convention to the notice of all parts of the federation with a suitable recommendation for its implementation. It was evidently considered necessary, in the case of multilateral agreements, to include an express reference to that obligation of federal States. The mere obligation to notify the components of a federation of a multilateral agreement did not, of course, imply that they were not automatically bound by the agreement, but it nevertheless seemed to suggest that their failure to implement the agreement might entail some degree of international responsibility for them.

27. The Special Rapporteur had described in broad terms the nature of the Commission's study of State responsibility for the harmful consequences of unlawful acts, and had raised the question whether it might be useful to conduct a parallel study of State responsibility for the harmful consequences of acts which were not unlawful in themselves. Such a study was worth undertaking and, since it was essentially of a topical nature, warranted some degree of priority. In view of its political aspect and the time it would take, the sooner it was started the better.

28. The Special Rapporteur had drawn a distinction between the primary rules of State responsibility and a certain class of secondary rules whose violation could entail State responsibility. By common consent, the Commission was at present concerned only with the latter, which would nevertheless have to be applied in the context of the primary rules now emerging. New substantive rules entailing State responsibility might, for example, result from the definition of aggression, or from the adoption of the formerly proposed Declaration on Rights and Duties of States⁴ or the Charter of the Economic Rights and Duties of States now being prepared.⁵ Such rules might also have their origin in the Declaration on the Establishment of a New International Economic Order recently adopted without dissent by the special session of the General Assembly.⁶ For example, one of the principles stated in that Declaration was:

The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples.

That principle had been conceived and adopted as a legal right, the infringement of which could engage the responsibility of a State.

29. As the articles drafted by the Special Rapporteur were intended to be universally applicable, some thought might perhaps be given to the rules which would govern the exercise or enforcement of rights of the kind to which he had referred. Such rules would not belong to either category of rules mentioned by the Special Rapporteur—"primary" and "secondary" rules—but would form a category of their own

concerned with the application of both "primary" and "secondary" rules in their social and political context. While infringement of the right he had referred to continued to take place in the modern world, major violations had taken place before the twentieth century, during the era of unbridled colonialism. Some might argue that no such right had existed in that era. While he could not agree with that view, consideration might be given, in the present study of State responsibility, to the question how to give effect to such a right in such a way that justice could be done, while taking into account the practical realities of international politics at the present time.

The meeting rose at 12.55 p.m.

1253rd MEETING

Thursday, 9 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elías, 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. Yasseen.

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) (continued).

1. Mr. TAMMES associated himself with the tributes paid to the Special Rapporteur for his valuable draft article 7 and its lucid commentary. No handbook of international law could give a more concise and learned account of the complexities involved in the attribution of conduct to the monolithic State as an act of that State. He found the text of the article acceptable, as it adequately reflected the present state of international law. By way of a general remark, however, he felt bound to express some uncertainty about the method of codification in which the Commission might gradually become engaged.

2. He was not sure that it was really necessary, in codifying contemporary international law, to dispel all the doubts and settle all the controversies that had arisen in the past, either as disputes before international tribunals or as cases in State practice. There were good reasons for restating, in article 6, the fact that the State

⁴ Yearbook ... 1949, p. 287.

⁵ General Assembly resolution 3037 (XXVII).

⁶ General Assembly resolution 3201 (S-VI).

was responsible even for the acts of the courts, even though they were generally regarded as independent of the authorities in power. Even so, some representatives in the Sixth Committee had considered that those provisions might already be implicit in article 5.

3. In the case of article 7, however, it might not be altogether desirable to reflect, in a modern rule, all the past controversies regarding the impact of internal decentralization on the idea of the unity of the State in international law. The most pertinent of those controversies had arisen from the composition of federal States at a time when the federal State had been much nearer to its origin as an international organization of sovereign States—that was to say, before the integration of historic confederations into federations.

4. It therefore seemed to him that the enumeration of territorial public entities given in brackets in the text of article 7 could well be omitted, not simply as a matter of drafting, but because, since the Commission's adoption of article 5, there could be no doubt that organs of territorial public authorities, regardless of their degree of international autonomy, were State organs "having that status under the internal law of that State". Thus the whole statement on territorial public entities in article 7 was already implicit in article 5.

5. The case of public corporations was somewhat different, because in international law they might or might not have the status of internal organs of the State. In a recent article Mr. Suy, the Legal Counsel, had shown that a public corporation sometimes acted as an agent of the State and sometimes as a private corporation.¹

6. That ambiguity raised the question of the use of the term "organ" in the present draft, sometimes in the sense of a part of the structure of the State, as in article 6, and sometimes in the sense of an agent separate from the State, as in articles 7 and 8. Following the reasoning of Kelsen, it could be said that both were varieties of the same kind of organ, in the sense of "*organon*", namely, an instrument; that instrument could be either a regular and permanent institution of the State, or an *ad hoc*, temporary or *de facto* separate agent, used incidentally by the State for some public function.

7. At some stage in its work on the present topic, the Commission might possibly reach the conclusion that it had better reduce the references to municipal law and reconsider one of the earlier formulas, such as that quoted by the Special Rapporteur in footnote 227 to his third report.² That approach would mean adopting a formula which, instead of the term "organ", would use wording such as "individuals whom, or corporations which, the State entrusts with the performance of public functions" or "which the State employs for the accomplishment of its purposes". To sum up, he believed that part of article 7 was already implied in article 5, and he had some doubts about the inconsistent use of the term "organ".

8. Lastly, he thought he should comment on the question raised by Mr. Pinto regarding damage done in the past to resources which had since come under the sovereignty of new States.³ In that type of situation, of course, no internationally wrongful act had been committed according to the predominant opinion at the time when the acts had been performed. However, a new concept of intertemporal international law was beginning to appear; it had in fact already appeared in the preparatory work on State succession in respect of matters other than treaties, in which consideration had been given to the question of restitution of archives, libraries, regalia and works of art belonging to political and cultural entities that had become sovereign States.⁴ It was not so much a matter of State responsibility and indemnification, as of *in integrum restitutio*, as far as possible, of a pre-existing state of affairs, which corresponded to present-day views and hence would operate with a particular retroactive effect.

9. Mr. KEARNEY agreed with the basic theory underlying article 7, but drew attention to some problems of drafting and definition which had an important substantive aspect. For example, the original text of article 7 (A/CN.4/246 and Add.1-3) spoke of "a person or group of persons having ... the status of an organ of a public corporation", whereas article 5 referred only to the conduct of a State organ, which must nevertheless also be a person or group of persons. If a distinction was intended, he would like to know why. If not, article 7 should perhaps be changed to make it conform with article 5, as the Special Rapporteur suggested. On the other hand, it might be desirable to retain the reference to "a person or group of persons" in order to preserve the antithesis with article 8, where such a reference was essential. Article 9, again, referred to a person or group of persons having "the character of organs", but without specifying whether they were State organs or public corporations or institutions. The organs mentioned in article 10 were apparently abstract entities and not persons or groups of persons. It was, perhaps, time to consider whether the term "organ" should not be defined, if it was to be the basis of distinctions between various types of act.

10. The reference to the internal legal order of a State raised the problem of federal States, and Mr. Pinto had already mentioned the practice of including "federal State clauses" in private law conventions.⁵ The reference might be taken to mean the national legal order of the State as a whole, or the various legal orders of its constituent territorial elements. Mr. Tammes had expressed some doubt about the need for clarification, since the term "organ", as used in article 5, would include any governmental organs within the State. Article 7 mentioned territorial public entities, but as an alternative to public corporations and institutions, and it was not clear whether the public corporations and institutions of the various territorial entities fell within

¹ Erik Suy, "De IBRAMCO-affaire (internationale aspecten)" in *Revue belge de droit international*, vol. X, 1974-1, p. 142 (in Dutch).

² *Yearbook ... 1971*, vol. II, Part One, p. 240.

³ See previous meeting, para. 28.

⁴ *Yearbook ... 1970*, vol. II, pp. 151 *et seq.*

⁵ See previous meeting, para. 26.

article 7. If they did, the applicable internal legal order would be that of the subordinate territorial entity whose law had established their status. There were in fact two types of federal State clauses. One allowed some degree of autonomy to the constituent entities of the federal State with respect to the international undertaking in question; the other provided for cases in which there were secondary internal legal orders as well as the primary one. Such cases were not confined to federal States: in the United Kingdom, for example, the legal order in Scotland was different from that applied in the rest of the country. That point needed to be clarified.

11. He was not sure what was meant by the term "autonomous" when applied to public corporations and institutions. It implied some degree of separateness from the governmental structure, but what degree of autonomy could a corporation or institution have before it ceased to be public? That was no longer a matter of mere definition, but was linked with one of the most difficult problems raised by article 7: what made a corporation or institution public in the sense that its acts engendered State responsibility? Was it ownership by the State, control by the State, provision of capital by the State, special powers conferred by the State, the exercise of powers normally exercised by the State—for example, eminent domain or nationalization of property—or was it a separate act of incorporation by a government unit, or a combination of such attributes? Article 7 left the answer to the internal law of the State. In view of the diversity of internal legislations and the great variety of institutions and corporations, the present draft might well be the only solution possible. It might nevertheless be useful to try to devise some criteria to serve as a guide. They might be based on the following points made by the Special Rapporteur in his commentary: "It seems logical that the decisive criterion here should be the nature of the functions performed and not whether they are performed by an organ of the State machinery proper or by an organ of a separate institution which is merely co-ordinated with the State ... This principle must also lead us to disregard, for the same purposes, the distinction between all the different institutions which, also in a public capacity, provide specific services for the community or perform functions considered to concern the community."⁶

12. That principle might be consolidated into a definition stating that an autonomous public corporation or institution was one which, in a public capacity, provided specific services for the community or performed functions considered to concern the community. The words "in a public capacity" would limit an otherwise broad definition, though the expression "public capacity" would itself be difficult to define. A government airline would be acting in a public capacity, whereas a privately-owned airline would be acting in a private capacity. However, it would be difficult to define the status of an airline operated as a fifty-fifty joint venture between the State and private enterprise, or an airline operated joint-

ly by several States, or operated by a private company on behalf of the State under a management contract. A similar problem would arise in the case of jointly-owned or jointly-operated public utilities. At present there was little guidance on such matters in international law. In the *Oscar Chinn* decision of the Permanent Court of International Justice,⁷ a Belgian Government-controlled shipping company operating on the river Congo, in which there had been substantial private stock holdings, had been held to be a public corporation because it had been operated as a public service. In a libel case against the TASS agency in London in 1948, a United Kingdom court had found that, although TASS had been incorporated as a legal entity separate from the State, it remained a department of the State for purposes of sovereign immunity, since it continued to function as a State organ.⁸

13. In his commentary, the Special Rapporteur had cited the *Case of Certain Norwegian Loans*, when dealing with the question of the possible relation between the principle of sovereign immunity and the problems of State responsibility.⁹ But the main point at issue in that case had been whether a State should be subject to the jurisdiction of the courts of another State as a result of the acts of its public corporations or institutions. Although it might be useful to give some thought to the principle of sovereign immunity, that was unlikely to lead to a practical solution of the quite different problems of State responsibility. The question of sovereign immunity was as complicated as that of State responsibility, and the doctrine of the distinction between *res gestionis* and *res imperii* was still being developed.

14. Although, basically, internal law had to be the starting point for the criteria he had in mind, since corporations and institutions were established under internal law, it might be useful if the Commission prepared some guidelines on what it considered to be crucial factors in distinguishing between public and private institutions. In view of the many disputes that had arisen in the past, some guidelines for courts, which would in most cases be national courts, seemed necessary.

15. Mr. ELIAS said it was difficult to disagree with the principle stated in article 7, which was unassailable from the point of view of doctrine and State practice.

16. He was not sure, however, that the present draft properly expressed that principle. In contemporary international law, it was appropriate to emphasize the unity of the State, but there was also the question of decentralization. The State acted through organs which had a personality separate from that of the State under its internal law, and performed functions and provided services of a public character. The problem was to define what degree of decentralization could be provided for without enabling a State to disclaim responsibility for the internationally wrongful acts of its organs.

17. In view of the enumeration of different types of entities in the text of article 7, the reference to "public

⁷ P.C.I.J. (1934), Series A/B, No 63.

⁸ [1949] All E.R. 274.

⁹ Yearbook ... 1971, vol. II, Part One, p. 255, para. 167.

⁶ Yearbook ... 1971, vol. II, Part One, p. 256, para. 170.

institutions” in the title of the article did not adequately reflect its full content. It might therefore be advisable to have an article 1 defining the scope of the present set of articles, as explained by the Special Rapporteur in his introduction,¹⁰ namely, that they were confined to those consequences of the acts or omissions of State organs which engaged State responsibility. It would then be clear that they were not concerned with liability for the harmful consequences of acts which were not necessarily of an internationally wrongful character, but which nevertheless engaged the primary liability of the State. A second article, entitled “Use of terms”, might define such terms as “public institutions”, “public corporations”, “autonomous public institutions” and “autonomous administrations of dependent territories”. That was a matter of some urgency, since without definitions the list of examples, which was not exhaustive, might be misleading. He was not in favour of omitting the list of entities in brackets or of relegating it to a footnote, since footnotes might be omitted after the adoption of the articles at a Plenipotentiary Conference.

18. He agreed with Mr. Yasseen that the wording of the article should not be too rigid to accommodate certain types of modern federal structure. It would be difficult to consider the various units of a federal State, as distinct from the federal State itself, as being wholly responsible for internationally wrongful acts. Mr. Kearney had mentioned the case of public institutions jointly established by two or more independent States. An example was the East African Commission, jointly established by Kenya, Tanzania and Uganda for the joint operation of airlines, railways and shipping lines. If that Commission was held liable by a court for an internationally wrongful act and had insufficient resources to pay the damages awarded against it, could proceedings be taken against the sponsoring States? Which “internal law” would apply in such a case?

19. He agreed in general with the points made by Mr. Kearney, but thought the article would be unduly complicated if it was to meet them all. It would be better to draft the article as simply as possible and deal with those points in a commentary, together with the explanatory material provided by the Special Rapporteur.

20. Mr. REUTER said that he approved of article 7 as a whole and agreed with the basic ideas set out by the Special Rapporteur in his introduction. He appreciated, however, the complexity of the problems raised by other members of the Commission, so he would confine his remarks to a few cautious considerations of a hypothetical nature.

21. As several members of the Commission had said, article 7 raised drafting problems which were bound up with questions of substance. In his opinion, the article was quite different from article 8 and stated a much more surprising principle; for it showed that in certain *de facto* situations international law made an attribution of responsibility which did not coincide with the attribution made in internal law. That contradiction between

international law and internal law was at the root of a number of misunderstandings.

22. It was obvious that the attribution of responsibility in international law was subject to limitations: should they all be stated expressly, or should it be assumed that some were self-evident and need not be mentioned in the text of the article? For example, where the acts of certain territorial public entities were attributed to the State—a matter which would raise very few difficulties, since the practice was well established and commonly followed—he thought it was unnecessary to specify in the article the *de facto* limitations on the application of the rule. The rule would apply to all wrongful acts involving the violation of a customary or conventional rule which was silent on the problem of attribution. Admittedly, in regard to many conventions federal States made reservations on the attribution of responsibility, invoking the federal clause. But in his opinion that was a different question for which no provision need be made in the article and which it would suffice to mention in the commentary.

23. Article 7 raised another problem, referred to by Mr. Yasseen: that of composite structures which were not States, such as confederations, and the European or African Communities. In his view, that question was not relevant to the article under discussion, and the Commission should not deal with questions relating to international organizations, which were outside the scope of its study and would take it on to uncertain and dangerous ground. It was significant, in that connexion, that third States did not much like dealing with international organizations on questions of responsibility, as was shown by the Convention on International Liability for Damage caused by Space Objects,¹¹ for at the moment States offered better guarantees in that sphere than did international organizations.

24. The expression “*collectivités territoriales*” and its English equivalent (“territorial entities”) were acceptable. The terms used to designate non-territorial entities, on the other hand, raised some difficulties, in particular with regard to entities which performed economic functions, not only in a socialist State, but also in a capitalist State in so far as it accepted socialist structures. Actually, those entities did not raise any problem in practice, for it was obvious that acts imputable to industrial or commercial bodies which were not organs of the State were not attributable to the State. Besides, he did not see how such bodies could commit internationally wrongful acts. For example, if a concern like the *régie Renault* violated a rule in an agreement made between the United States and France, it was obvious that the French State would be directly responsible if the violation took place in France, and that the United States Government would sue the *régie Renault* if the violation took place in the United States. That kind of problem should therefore be excluded.

25. With regard to the problem of immunity mentioned by Mr. Kearney, the question of the immunity of

¹⁰ See 1251st meeting, paras. 3 and 4.

¹¹ General Assembly resolution 2777 (XXVI).

public undertakings had some very controversial aspects, and it would be preferable not to refer to it in the article. On the other hand, the Commission should take a position on the question of principle after considering the basis of the rule it was going to state. The reason why the rule existed was, in his opinion, that for practical reasons international law wished to treat the activity of the State—its essential, not its subsidiary activity—as a unity. Consequently, it was the standpoint of international law, not that of internal law, that had to be defined, and one could speak in terms of “functions” as the Special Rapporteur himself had done. If the text referred to “organs”, it would have to specify that the term meant only certain entities which were not State entities, but had a structure which gave them a public law régime. However, the notions of public law and private law existed only in some systems of law and were meaningless for the Anglo-Saxon countries. The Commission should therefore avoid the term “organ” and any other expression which, like “public corporation”, might suggest that a *renvoi* to internal law was intended. There were, moreover, cases in which a private organ was manifestly concerned, but a private organ which performed State functions—a situation corresponding exactly to the definition of the corporative State. He considered the term “functions” used by the Special Rapporteur acceptable, provided it was explained that it referred to the specific functions of the State.

26. Personally, he would prefer yet another expression to be used, namely, “prerogatives of public power” (*privilèges de puissance publique*). For where an entity that was not a State entity—whatever its status—exercised prerogatives of public power, in other words, where it exercised juridical, legislative, judicial, executive, physical or other compulsion, the State might be said to have split up. Thus he accepted the idea underlying Mr. Kearney’s statement, though he was categorically opposed to any reference to immunities in the article itself. It should be noted that legal acts of a commercial nature, such as acts of exchange or sale, were never attributable to the State, even if carried out by a State body. By contrast, in the case of issuing banks, for example, regardless of their internal status—whether they were private companies or State bodies—the issuing of currency was a regalian privilege, so that in international law the acts of issuing banks in monetary matters could be attributed to the State, as was clear, moreover, from the cases concerning succession of States in monetary matters.

27. In conclusion, he accepted the principle stated in article 7, but would like the drafting to be made more precise. Like Mr. Calle y Calle, he thought it would be preferable to mention the territorial entities first, since they raised the fewest problems.

The meeting rose at 11.50 a.m.

1254th MEETING

Thursday, 9 May 1974, at 12.25 p.m.

Chairman: Mr. Endre USTOR

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

Filling of casual vacancies on the Commission

(A/CN.4/276 and Add.1)

[Item 1 of the agenda]

The CHAIRMAN announced that at a private meeting the Commission, in conformity with its Statute, had elected Mr. Milan Šahović of Yugoslavia, to fill the vacancy caused by the death of Mr. Milan Bartoš. A telegram had been sent to Mr. Šahović inviting him to take part in the Commission’s proceedings.

The meeting rose at 12.30 p.m.

1255th MEETING

Friday, 10 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(resumed from the 1253rd meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) (*continued*).

1. Mr. TSURUOKA said he thought that draft article 7 was useful, even indispensable; he approved of the principle it stated, in particular where territorial public entities were concerned. As to public corporations and other autonomous public institutions, it might perhaps be desirable to specify the criteria by which their public or private character could be judged. That point was certainly of interest to a country such as Japan, where,

in addition to a national railway system that was considered to be public under the internal legal order, there were about a hundred other railway companies.

2. Mr. SETTE CÂMARA said that, having attended the discussions in the Sixth Committee of the General Assembly, he could bear witness to the excellent reception given to the first six articles on State responsibility. The General Assembly's favourable reaction amounted to an endorsement of the fundamental principles that dictated the philosophy of the whole draft and was particularly significant in regard to the Special Rapporteur's approach to the topic, which departed from the tradition of confining it to the treatment of aliens.

3. He approved of the substance of article 7, which was supported by a masterly commentary. The principle of the unity of the State from the international standpoint was universally recognized; whatever a State's internal organization or degree of decentralization of the exercise of power—functional or territorial—the responsibility of the State in international law remained undivided.

4. With regard to the drafting of the article, he supported the Special Rapporteur's suggestion that it should be aligned with the new wording of article 5. As to the doubts expressed by Mr. Calle y Calle about the necessity of maintaining, in article 7, the distinction between two classes of entity, he thought there was some merit in maintaining that distinction: it served to remove all doubt about the kind of public entities to which the article referred—a useful purpose in view of the great proliferation of internal autonomous ramifications of the State. On the other hand, he supported Mr. Yasseen's suggestion that the enumeration, in brackets, of territorial public entities should be deleted. That enumeration should appear in the commentary to the article.

5. Mr. Yasseen's comment on the need to leave the door open for federations whose component states retained some degree of sovereignty in international life deserved careful study.¹ There had been cases in the past in which the responsibility of the Federal State for acts of its federated states had not been recognized; for example, in the *Robert Fulton Cutting case*² between Canada and the United States, Canada had refused to acknowledge responsibility, under the existing rules of international law, for the liabilities of the Province of Quebec. He himself supported the line taken in article 7 in its present form, because it would be very difficult to establish clear-cut limitations on the general rule of the unity of the State for purposes of international responsibility. Any such limitation would dilute the responsibility of the State and introduce an element of uncertainty into international relations. Perhaps the problem could best be solved by expressly excluding from the rule in article 7 cases in which the member states of a federation retained their international sovereignty, or at least a part of it. Modern federations were clearly moving in the opposite direction, towards curtailment of the au-

tonomy of federated states; but some new experiments in federation might revert to the old formula of a loose union or confederation of States.

6. He agreed with Mr. Tammes that the repeated use of the word "organ" could be misleading, since that term usually meant an instrument of the State. Mr. Kearney had made a strong plea for a better definition of public corporations and autonomous public institutions; but it was not easy to find suitable criteria, because of the proliferation of those bodies resulting from the increasingly tentacular role of the State in modern society. Moreover, the growing intromission of the State into realms traditionally belonging to the private sector made it difficult to determine whether a particular entity acted as an organ of the State or not. The problem was still more complex when a corporation was owned partly by the State and partly by private persons, with the State often retaining privileges in regard to the appointment of directors.

7. For those reasons, he was in favour of retaining a general formula in article 7. It was important to remember that the draft dealt with responsibility in international law, where the principle of unity would always prevail. There were two faces to the coin: on one side, the solid, undivided image of the State; on the other, the complicated and intricate fabric of the instruments of action of the modern State. The first side—that of the unity of the State in international law—was sufficient for the purpose of establishing responsibility.

8. He found the substance of the article acceptable and supported Mr. Kearney's suggestion that the Special Rapporteur should try to improve the text in consultation with the other members of the Commission.

9. Mr. MARTÍNEZ MORENO joined in the tributes which had been paid to the Special Rapporteur for the excellent reception of draft articles 1-6 by the General Assembly.

10. He supported the main content of article 7. The principle it followed was consonant with the complexities of the modern State, which had had to become more decentralized in order to respond to the diversity and magnitude of its obligations towards the community. As the Special Rapporteur had pointed out, what mattered was not who performed a particular function, but the nature of the function itself. Responsibility in international law rested on the State because of the nature of the function, even if in fact that function happened to be performed by a body other than a State organ.

11. He had some doubts, however, about the attribution of responsibility for the conduct of component units of certain composite States. Traditionally, writers had drawn a distinction between a federation of states and a mere confederation, based mainly on the fact that, in the former, the conduct of external affairs and national defence were vested in the federal State, whereas in the latter, the international personality of the component units subsisted. Switzerland, despite its official title of "*La Confédération Suisse*", was thus clearly a federation. Doubts could arise, however, in regard to certain composite States which, although not confedera-

¹ See 1252nd meeting, para. 23.

² See G. H. Hackworth, *Digest of International Law*, vol. V, p. 561.

tions in the strict sense of the word, did grant a certain element of international personality to all or some of their component units. Should an internationally wrongful act be committed by such a component unit, the question would arise whether it should be attributed to the composite State or to the component unit. If the latter solution were adopted, it would be necessary to amend the text of article 7 by making specific provision for such exceptions.

12. As to the question of undertaking a separate study of the topic of international liability for injurious consequences of activities other than internationally wrongful acts, he suggested the introduction into the draft of an article on the scope of the draft articles, on the lines of article 1 of the Vienna Convention on the Law of Treaties. The purpose of such an article would be to specify clearly that the draft articles applied only to responsibility arising from internationally wrongful acts. That clarification was essential, because in the past certain drafts, such as the Guerrero report adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law, had specified that "international responsibility can only arise out of a wrongful act, contrary to international law"³—a statement which was obviously no longer valid in contemporary international law. Thus an article on the scope of the present draft would serve to indicate that the draft articles did not cover all cases of international responsibility.

13. Several members had suggested the inclusion of an introductory article on the use of terms. He feared, however, that the task of drafting such an article would prove extremely difficult, and would tax to the utmost the wisdom and sagacity of the Special Rapporteur. He himself shared some of the doubts and criticisms expressed by other members on the subject of terminology, but was obliged to admit that none of the suggestions yet made would solve all the problems and dispel all the doubts that had arisen. For example, the term "organ" had a variety of connotations and did not have exactly the same meaning in different legal systems. The same was true of the term "autonomous public institution", which was not used in certain countries, but which had a very clear meaning in his own country, where it meant an entity set up by the State by legislative or administrative action, with State funds, but having the capacity to assume legal obligations of its own, having a separate board of directors and performing a particular public function. In that sense, a body like the Tennessee Valley Authority would be an example of an autonomous public institution.

14. He agreed with Mr. Kearney on the desirability of laying down guidelines in international law for determining the organs of public entities covered by article 7, so as not to leave the matter to be governed entirely by the internal legal order of the State. But in view of the diversity of such entities and the variety of functions they performed, and having regard to the present state of development of international law, he thought such international guidelines would be extremely difficult to

formulate. His own conclusion, therefore, was that the Special Rapporteur's solution of referring back to the internal legal order of the State, although not ideal, was the only solution possible.

15. Two previous speakers—Mr. Elias and Mr. Reuter—had referred to the important modern phenomenon of common markets and customs unions, which had led to the establishment of certain supranational entities whose international responsibility could in no case be attributed to their member States. He suggested that the Special Rapporteur should make a careful study of that important subject.

16. Mr. BILGE said that article 7 complemented articles 5 and 6, according to which the conduct of any organ of the State, irrespective of its position in the State's organization, was considered as an act of that State in international law. Article 7 added that the acts of organs of public institutions could also be considered to be acts of the State. That rule was completely acceptable, since it expressed the position of States, jurisprudence and doctrine.

17. It should be noted, however, that article 7 did not only complement the two preceding provisions: it provided fuller particulars. As the Special Rapporteur had pointed out, it was in response to different needs that States established public corporations or other autonomous public institutions or territorial public entities. Those various institutions appeared to be separate from the State; they had their own personality and enjoyed a certain freedom of action. On the basis of the concept of the unity of the State as a subject of international law, the Special Rapporteur proposed that the acts of organs of those institutions should be regarded as acts of the State to which they were answerable. Those institutions were separate from the State under internal law so long as the term "State" was construed in its narrow sense; but they were nevertheless attached to the State, in its broad sense, in international law. It was clear from the cases cited by the Special Rapporteur that public institutions were merged with the State, in the broad sense of that term, in international law. That conclusion was particularly striking in regard to territorial public entities, since they had a material link with the territory of the State in the broad sense. Consequently, he could not accept the view that it was because federated states were not subjects of international law and because a subject of international law must be responsible for their wrongful acts or omissions at the international level, that the acts of federated states were considered to be acts of the federal State. If the Commission adopted that view, it would be led to accept other forms of international responsibility.

18. In several passages in his third report (A/CN.4/246 and Add.1-3), the Special Rapporteur implied that the rule laid down in article 7 was a rule of customary law or, at least, that it was already firmly established in practice and "in the conviction of States".⁴ He might usefully clarify his position on that point.

³ See *Yearbook ... 1956*, vol. II, p. 222, conclusion No. 1.

⁴ See *Yearbook ... 1971*, vol. II, Part One, p. 259, para. 179.

19. Several members of the Commission had suggested that an attempt should be made to define "public corporations" and other "autonomous public institutions". There was, indeed, no definition of them in international law, and the definitions found in the different systems of internal law were not consistent. The Special Rapporteur had chosen to leave the matter to internal law. It might be asked, however, whether an objective criterion did not exist, though care must be taken not to deprive States of their freedom to choose their mode of internal organization, by imposing on them a definition of public institutions and corporations. It would be possible, for example, to adopt a definition based on the importance of the public functions performed by public institutions, without imposing it on States. Thus, if a State decided that a certain activity, such as air transport, was a public function under its internal law, it could not subsequently complain because another State did not treat that activity in the same way. It could even happen, as Mr. Kearney had observed, that some of the partners in a joint enterprise considered a certain function to be public, whereas others considered it to be private, relying on their respective systems of internal law. In short, he could not see any better criterion than that referred to in article 7, namely, internal law.

20. As far as the drafting was concerned, the title should be brought more closely into line with the body of the article, and instead of referring to the status of an organ of a public institution under internal law, it might be preferable to speak of the public character of the institution under that law.

21. Mr. USHAKOV said he agreed with the views expressed by the Special Rapporteur regarding the principle governing the draft articles as a whole, in particular the distinction between the causal responsibility of the State and the responsibility of the State for internationally wrongful acts.

22. As to article 7, at least as at present drafted, it seemed to him that it was out of place in the draft. It would seem to be sufficient to lay down the principle, as did articles 1 and 3, that any conduct which constituted a breach of an international obligation of a State under international law engaged that State's responsibility. Chapter II of the draft dealt with the attribution of certain acts to the State, in other words with the finding that, in certain cases, it was the State itself which acted. It seemed to him that it should be possible to cover all that was meant by "conduct of the State" without the aid of the provisions of chapter II.

23. A State was a collective body which could act only through its organs. By its nature, the State was a body invested with a power which it held exclusively: the State power. In that connexion, the expression "public power", which was sometimes used in connexion with public property, and which relied on the notion of ownership, should be avoided. Public property was not under the public power as such. Yet it seemed that the reference to public corporations in article 7 had sometimes been taken to mean corporations owned by the State.

24. While it was true that the organs exercising the State power in the legislative, executive and judicial

branches were organs of the State—were indeed the State itself—it might be asked whether that principle was subject to exceptions. The answer to that question depended on the approach adopted. Where a State delegated its State power to a body, that body could be regarded either as an organ of the State or as a separate body not among those regarded as organs of the State in its Constitution, for example. The bodies in question might then be held to engage the responsibility of the State by reason of their conduct. That point of view might well be reflected in an article of the draft.

25. As it stood, article 7 dealt with two quite different categories of public institutions: territorial public entities, which certainly had the status of organs of the State, and other institutions which did not possess that status at all. It might be thought that territorial public entities should form the subject of a separate article; their organs were undoubtedly organs of the State. For example, the organs of the federated republics and autonomous republics of the Soviet Union were organs of the Soviet Union; and the organs of Sicily were organs of Italy. It mattered little how the State apportioned its power territorially. If any doubt remained on that point, it should be dispelled by article 5 or article 6.

26. Article 7 also dealt with autonomous public institutions, in particular with public corporations: the latter might be regarded either as bodies exercising the State power, in which case they were organs of the State, or as bodies belonging to the State, in which case they were simply endowed with juridical personality in conformity with civil law. In the Soviet Union, where private ownership did not exist, every factory belonged to the State. From the standpoint of ownership it was a public corporation, but from the standpoint of the State power, it did not exercise any delegated authority and did not commit the State by its conduct. If a Soviet factory concluded a contract with a foreign factory, it entered into civil law relations. In the Soviet Union there was a Soviet State Bank whose Director was a member of the Soviet Government, and which committed the Soviet State by its acts. Any other bank, like the Bank for Foreign Trade, was public property, but in no way committed the Soviet Union. Any contracts concluded by that bank with foreign banks were governed by the rules of Soviet civil law or by whatever other law was applicable according to the principles of private international law.

27. Whereas the conduct of the State remained unchanged however it was regarded, the legal characterization of that conduct might differ: an act could be lawful in internal law and wrongful in international law. The expression "conduct of the State" should be understood to mean the conduct of organs of the State properly so called, or of organs in which the State had vested some State power, that was to say, legislative, executive or judicial power. In his opinion the power of the State was one and indivisible, for the State was always a single entity. Hence one could hardly speak of autonomous public institutions, for there was no autonomy of power within the State. Either the institution in question was an organ performing State functions, in which case it belonged to the single entity of the State, or it was an

organ not belonging to the State. The so-called autonomy was in reality no more than a decentralization of the powers of the State, since no State power could exist outside the State: all organs performing State functions existed only within the State and were subject to the State power. The only exception to that rule occurred during certain transitional periods, when two State powers coexisted within the same State, as had happened in Russia between the February Revolution and the October Revolution, when the power of the official Government had coexisted with the power of the Soviets. Autonomous public institutions could not, therefore, be invested with State power or perform State functions.

28. In his commentary to article 7 the Special Rapporteur had cited, as an example of autonomous public institutions whose conduct would engage the responsibility of the State, the single parties which, in various countries, performed particularly important public functions.⁵ But political parties, in the socialist as in other countries, were nothing other than social organizations. The Communist Party of the Soviet Union certainly exerted a very great influence on the policy of the State, for it enjoyed the support of all the people, but that did not mean that it was an organ of the State: it had its own ideology and formulated its own policy. The policy of a party could influence the policy of the State and be reflected in acts of the State and its organs, but those acts constituted the conduct of the State, not of the party itself. In that respect the Communist Party of the Soviet Union did not differ from the political parties of other countries, and its role had often been misunderstood in western countries. Article 126 of the Constitution of the Soviet Union showed that the Soviet Communist Party was only a social organization uniting all the citizens of the Soviet Union; that article appeared in Chapter X of the Constitution of the Soviet Union entitled "Fundamental Rights and Duties of Citizens", which did not deal with the organization of the State at all.

29. There might, admittedly, be bodies which were not State organs properly so called but exercised State powers by delegation, and whose acts engaged the responsibility of the State. That was the idea which ought to be developed in article 7. Could such public corporations engage the responsibility of the State with respect to public property? They could not do so directly by their conduct, because they were not organs of the State, but their conduct might result in a breach of international law and thus engage the responsibility of the State, in so far as the State had done nothing to prevent the wrongful act. The State would then be responsible by reason of an omission. In that sense the State was responsible for the conduct of any entity situated in its territory, whether that entity was an organ of the State or not, for any entity in a State's territory was subject to its power. For determining whether an entity was an organ of the State, the only guide must be the legislation and the legal order of the State concerned. That rule suffered only one exception: the case of persons or groups of persons who carried on their activities abroad and did

not possess the status of organs of the State, but acted on its behalf. Within the territory of the State, nobody could act on behalf of the State unless authorized to do so by the State—except, of course, in the case of a struggle for power, when a *de facto* order preceded the establishment of a new legal order. Hence, the conduct described in article 8 could be that of persons situated abroad, but not of persons in the territory of the State.

30. Mr. TABIBI expressed wholehearted support for the general approach adopted by the Special Rapporteur to the question of State responsibility, especially in chapter I. That chapter would provide a basis in international law for judicial decisions in cases of State responsibility for wrongful acts committed in violation of a principle of international law, whether against a single State or against the community of nations.

31. Chapter II raised certain difficulties. He agreed with earlier speakers that the formulation of the rules, especially article 7, should be as broad and flexible as possible, to leave no loopholes for offenders. It would be wise not to try to list all possible State entities, as that might enable a State with a relatively simple structure to disown wrongful acts of one of its organs by changing the organ's status by decree or legislation, while encouraging it to continue to commit such acts. The only solution in such cases was to have appropriate machinery for settling the dispute between the injured party and the State committing the wrongful act. It was also possible that the entity committing a wrongful act on behalf of a State might not be regarded as a State entity under the proposed rules. For example, in some countries certain transport companies had a semi-official status. If such a company was authorized by the government to deny a land-locked country means of transport, for political or economic reasons, the effect might well be more serious than an act of aggression. The rules should not be so worded as to allow such acts to be committed with impunity. In some instances, not one State, but a community of States might be responsible for a wrongful act.

32. He agreed with Mr. Pinto that the Commission should not forget the great interest shown by the General Assembly in the question of international liability for injurious consequences of activities other than wrongful acts. That was an important subject with a bearing on the peace and economic life of developed and developing countries. Its economic aspect, in particular, should be carefully studied. The Commission should perhaps appoint a Special Rapporteur for that purpose.

Organization of work

33. The CHAIRMAN suggested that the enlarged Bureau should meet on Monday afternoon to consider the General Assembly's recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses (item 8 (a) of the agenda).

It was so agreed.

The meeting rose at 1 p.m.

⁵ See *Yearbook ... 1971*, vol. II, Part One, p. 254, para. 165.

1256th MEETING

Tuesday, 14 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Organization of work

1. The CHAIRMAN announced that, in accordance with the Commission's instructions, the enlarged Bureau had met the previous day to consider the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) and had decided to recommend that the first step in the work on the law of non-navigational uses of international watercourses should be to appoint a five-member sub-committee, consisting of Mr. Kearney, as Chairman, Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi. The sub-committee would consider the matter and report to the Commission.

It was so agreed.

2. Mr. KEARNEY said he thought the Sub-Committee should not be exclusive and that any other members of the Commission interested in the subject should be entitled to attend its meetings.

3. Mr. BEDJAOUÏ noted with satisfaction that, on the proposal of Mr. Yasseen, the Commission had decided to institutionalize the office of Chairman of the Drafting Committee and to elect Mr. Hambro to that office.

4. As he was speaking for the first time during the session, he could not omit to evoke the memory of Mr. Bartoš and to recall his great qualities of heart and mind and his devotion to the cause of international law. Mr. Bartoš, who had been one of the founders of the Commission, had had wide experience, acquired in long practice in international bodies, and had left behind him as a monument his work on special missions. It would be difficult to replace him in the Commission, but Mr. Milan Šahović could certainly do so better than anyone else. Referring to the role played by Mr. Šahović in the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, he welcomed his election to the Commission.

State responsibility

(A/CN.4/246 and Add. 1-3; A/CN.4/264 and Add. 1; A/9010/Rev.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

**DRAFT ARTICLES SUBMITTED BY
THE SPECIAL RAPPORTEUR**

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) (*continued*)

5. Mr. EL-ERIAN noted with satisfaction the favourable reaction of the Sixth Committee of the General Assembly to the Special Rapporteur's conclusions, the criteria and methods he had adopted and the texts of articles 1 to 6. The Committee had accepted the distinction between "primary" and "secondary" rules, and had endorsed the Commission's decision to concentrate on the secondary rules and also to consider the question of responsibility for risk.¹

6. In article 7, the inclusion of dependent territories in the list of territorial entities seemed unwise, for the same reason as had prompted the Commission to omit such a reference from texts it had adopted in the past, especially its draft on the law of treaties: protectorates and dependent territories would soon be a thing of the past and, since the Commission was legislating for the future, explicit provision for such cases was unnecessary. Moreover, a dependent territory was not an integral part of the metropolitan State, which merely assumed responsibility for the territory's international relations. The article should therefore be harmonized, in that respect, with other texts drafted by the Commission. The commentary to the article could include a paragraph explaining that point.

7. The reference to federal States might also raise a problem, because the federations formed in recent years, for example in the Middle East and Africa, were not federations in the traditional sense of the term as understood in international law, since their constituent elements retained their international personality. The classical federal State, for example the United States of America, was a composite State with a single personality in international law. He had no solution to offer, but hoped that the Special Rapporteur would find a way of overcoming that drafting problem.

8. Mr. RAMANGASOAVINA said he thought that article 7 definitely belonged among the articles relating to attribution to the State of the acts of various persons or groups of persons. The Special Rapporteur had submitted a draft article which was perfectly clear in scope and intention and had provided it with an excellent commentary, abundantly illustrated by examples drawn from international practice and the decisions of arbitral commissions and international courts. The article once again stressed the unity of the State for purposes of international responsibility, whatever the nature of the organ in question according to the internal legal order, and whatever the degree of attachment of the entity, political or administrative sub-division or autonomous public institution to the central power. The article did, however, call for some comments, some of which had already been made by other members of the Commission.

¹ See document A/9334, chapter III, section B.

9. First of all, the fact that characterization as an organ of the State was based on the internal law of the State could cause some difficulties, for as other members of the Commission had already pointed out, there were multinational and mixed corporations. In such cases, what criteria could be used to measure the extent of State control over such legal persons? Only internal law could answer that question, but internal law was not always very clear with regard to the constitution of certain corporations. The problem did not arise in the case of very large corporations, such as the *régie Renault*, which could assume their responsibilities, including international responsibilities, if necessary. But it might be asked what would happen if a corporation which was incapable of assuming its responsibilities incurred international responsibility by reason of an act or omission. That question might arise in a case of bankruptcy or, as some members of the Commission had said, with regard to press agencies, airlines or shipping companies. The answer was clear in the case of certain countries—socialist States or new States—where trade was controlled by the State in varying degrees and the State was more or less directly in charge of foreign trade. But in some cases it was a question not of State control pure and simple, but of general guidance or, more precisely, a general framework, as in the case of marketing boards. Commercial transactions were then the acts of private companies. There was also the case of research institutes which worked in foreign countries and did not always have a well-defined status under the internal law of their home State; it was obvious that such institutes were not placed at the disposal of the States in which they were established so that their responsibilities could be imputed to those States.

10. Thus, while accepting the principle and the rule in draft article 7, he thought it would be necessary to seek a better formulation, which would be both broader and more concise. The order of the terms given in brackets did not seem very logical, because the largest territorial entities, such as federated States, came after municipalities, which were only small administrative divisions. It might perhaps be preferable to use only a general designation, such as “political or administrative sub-division”, for there was a danger that some entities might be omitted from a list intended to be exhaustive.

11. Like other members of the Commission, in particular Mr. Pinto and Mr. Martínez Moreno, he thought it might be useful to state more specifically that the articles under consideration related only to acts which were wrongful under international conventions or rules. He was aware that the Special Rapporteur had taken care to make that point clear in his oral introduction, but he thought it should be made clearer from the outset in the draft articles, having regard to the progressive development of international law.

12. Mr. QUENTIN-BAXTER, said that, while welcoming the strong support expressed in the Sixth Committee for the proposed study on responsibility for risk, he shared the uneasiness of some of its members about the separation of that subject from the study on State responsibility already in progress. It was perhaps merely a matter of emphasis, but there seemed to be some

danger in such a dichotomy, which involved certain assumptions. It was not yet known how responsibility for risk should be categorized. In some State practice, the notion of abuse of rights had been used as the equivalent of a wrongful act. Since the concept of a wrongful act was separate from that of fault, it might be found convenient, for purposes of terminology or even of substance, to consider the words “wrong” and “breach” as applicable to the whole field of responsibility. Even if they were not, some of the material already prepared, especially the rules relating to attribution, was just as relevant to a study of responsibility for risk as to the study now in progress.

13. He shared the general feeling that it was time to begin that new, far-reaching study, not only because it was considered desirable by the international community and was intrinsically important, but also because the boundaries between State responsibility and responsibility for risk had not yet been clearly delineated. The light shed by the first stages of the proposed study might help the Commission to order its present work on State responsibility. The present study should be viewed in terms of primary and secondary rules of responsibility—the Commission was for the time being concerned only with the consequences of responsibility, not with the heads, causes and boundaries of responsibility.

14. He had no uneasiness about the use of the undefined term “State”, which followed the wise precedent of the Law of Treaties. Admittedly, in the present more homogeneous international community there might not be many cases of semi-sovereignty, and those would be governed more by functions than by form. For example, there were small associated States whose legislatures were not subject to any other legislature, but which for limited purposes consorted with other sovereign States and might at some stage act at the level of international personality. The articles under discussion, if appropriately drafted, would then apply to them. He saw no solution to the problem posed by organizations of States acting jointly at some supranational level, but thought it would be wise to retain in the present draft the simple, well-understood concept of a State as an actor at the international level with territorial responsibility, in other words as a territorial authority and not as an organization.

15. In the title of article 7 it would be preferable to speak of institutions “distinct” rather than “separate” from the State, as the degree of separation might be minimal or notional. An institution with a separate legal personality under internal law might not be so treated in international law. A fundamental principle of international law was that it should not surrender to internal law the duty of characterizing the situations with which international law was concerned. The United Nations doctrine concerning colonialism and dependent territories was based on that principle, the statement of which was the first and essential purpose of article 7. The second purpose was the bold assertion that all subdivisions within a State carried the same kind of responsibility as the State itself.

16. He did not dissent from the reservations expressed about the kind of enumeration given in brackets in

article 7, but recognized that its purpose was to indicate which entities did not operate at the international level, not to establish a distinction between sub-divisions considered as organs of the State and those considered separate from the State. That was a step towards uniformity and away from the arbitrariness found in previous State practice. All development of law was a matter of moving away from rigidity, from situations in which procedure or formality determined the result, to situations in which a case could be settled on its merits.

17. As Mr. Reuter had rightly pointed out, from the common law point of view, the term "public corporation" probably did not have the meaning intended in article 7. A more general term without strong associations in internal law might have to be found. He agreed with Mr. Calle y Calle that the emphasis should be mainly on territorial entities, and only secondarily on the other entities.

18. Another question implicit in the comments on article 7 was whether the article should be made more specific, in an attempt to give guidance in the difficult cases which arose in practice. He did not think so. There was a strong tendency in law, and in the international community, to move away from the kind of situation in which it became materially important to decide, for example, whether an airline fitted into the definition of a public corporation because it happened to be State-owned, or whether it was a private company in which the State owned all or some of the shares. No airline could operate internationally without the good offices of its Government, which arranged with other governments for it to operate air routes and laid down technical and safety standards. There would be few cases in which responsibility in international law would depend on the degree of State ownership or control of an airline or railway. The fact of ownership should not greatly affect the procedure to be followed in claiming damages. If the claimant was an alien, it must be assumed that he could find remedies in domestic courts and that the rules under discussion would come into play only at the point where internal law proved deficient. If the State organ concerned was not liable under domestic law and there was a procedural bar to actions against the State, more direct representation would have to be made at the international level. However, it would be wise to state the general principle and assume that there was a desire for progressive development of the law in that direction, rather than for detailed codification of State practice.

19. That did not mean that State practice should be disregarded. Mr. Kearney had rightly referred to the vast amount of practice acquired in domestic courts relating to sovereign immunity, which, although on a different subject not necessarily commensurate with State responsibility, would contribute greatly to a study of public and private responsibility and functions. The compilation of a repertoire of State practice and the work of institutions relating to sovereign immunity would be most useful for the study of State responsibility, and was also relevant to the succession of States in matters other than treaties. Those remarks perhaps applied more to article 8 than article 7.

20. In general, article 7 would be acceptable with some minor drafting changes.

21. Mr. HAMBO said he had found the articles prepared by the Special Rapporteur admirable, on the whole, but was rather puzzled by article 7 and the Special Rapporteur's comments on it. His doubts had been strengthened by the discussion. Article 7 should be considered, not in isolation, but in conjunction with articles 6 and 8. Everyone agreed with the principle of the indivisibility of the State for the purposes of international law, as enunciated in article 6, though it did not go far enough, and additional provisions along the lines of article 7 were needed, since many public activities were not covered by the provisions of article 6.

22. The treatment of public corporations and autonomous public institutions as organs of the State, in the first part of article 7, was supported by a wealth of argument and examples, but he was not convinced. For example, he did not entirely agree with the statement in the commentary on the *Case of Certain Norwegian Loans*, cited in the Special Rapporteur's third report,² that some judges of the International Court of Justice had stressed the validity of the French argument. One of the judges mentioned had pointed out that the Norwegian Government, having claimed immunity for one of the banks concerned as an organ of the State in a previous case before a French court, could not subsequently disclaim responsibility in international law on the grounds that the bank had a personality distinct from that of the State. Thus it had in no way been decided whether the banks in question engaged the responsibility of the State. As Mr. Quentin-Baxter had said, claimants for damages against railway companies or airlines normally applied to domestic courts first, and then, if those institutions could not be sued, applied to a Supreme Court or directly to the State concerned. The settlement of such cases should not depend on whether or not the institution was characterized under internal law as a public corporation or an autonomous public institution, or on the manner in which it was organized or operated. However, it would be difficult to imagine that such institutions could, to any appreciable extent, commit illegal acts outside their contractual functions that would entail the kind of State responsibility covered by article 6.

23. The list of territorial entities in article 7 seemed to go too far for the purposes of the article. The reference to municipalities, for example, was unnecessary. The State would clearly not be responsible for any loans contracted by a municipality, but it could not disclaim responsibility for the protection of diplomats, for example, on the grounds that it did not control the municipal police. The State must never be allowed to evade responsibility for wrongful acts by organizing its activities outside its sphere of attribution. The former distinction between State activities *de jure negotii* and *de jure imperii* might perhaps be relevant, but it might not lead to much progress. No matter how a State's activities were organized, international law, not internal law, must

² *Yearbook* . . . 1971, vol. II, Part One, p. 255, para. 167.

decide whether or not they should be characterized as State activities for purposes of international responsibility. The primacy of international law must be explicitly recognized and accepted. That was the substance of article 7, but its formulation was perhaps too general. A more strongly worded text might be worked out for article 6 after articles 7 and 8 had been fully discussed.

24. Mr. BEDJAOUÏ said that the idea expressed in article 7 seemed to be acceptable, though he could not help feeling some uneasiness about the drafting. For while it seemed perfectly legitimate to attribute to the State the conduct of some of its public bodies, he found it difficult to accept exclusive reliance on the internal legal order of the State concerned for determining the character of a dependent territory. For example, in contemporary international law it was not the internal legal order of the State which decided what constituted an autonomous administration of a dependent territory. Beyond the domestic jurisdiction reserved under Article 2, paragraph 7 of the Charter, there was now an international legal order which governed the question of dependent territories. It was therefore necessary to take account of the development of contemporary international law and recognize—as did the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations³—that a non-self-governing territory had “a status separate and distinct from the territory of the State administering it” until it had exercised its “right of self-determination in accordance with the Charter”. That principle had been repeatedly affirmed by the United Nations. The most recent Advisory Opinion of the International Court of Justice had placed Namibia under the responsibility of the United Nations in the light of the decisions of the Security Council.⁴ Consequently, by reason of the continued presence of South Africa in Namibia, the occurrence of a wrongful act in Namibia engaged the responsibility of the Republic of South Africa as a *de facto* authority. In any event, he found it difficult to rely solely on the internal legal order of the State where the autonomous administration of dependent territories was concerned. In that respect, article 7 raised a drafting problem which involved a question of principle.

25. That being so, he understood the difficulties encountered by the Special Rapporteur in defining public corporations and other autonomous public institutions; he himself had met with similar difficulties in his work on succession of States in respect of matters other than treaties. The fact that the Special Rapporteur had found it necessary to give examples in parentheses clearly showed that he was aware of those difficulties and was not fully satisfied with the terminology he had used. In dealing with the case of mixed corporations linked with two or more States, the problem of the joint responsibility of several States should be mentioned.

26. Sir Francis VALLAT said he wished to associate himself with the tributes paid to Mr. Bartoš at the

1250th meeting and with the decision then taken to hold a special meeting to honour his memory.

27. Draft article 7 was particularly important in the structure of the draft on State responsibility and he supported the general principles underlying it. The text, however, raised considerable problems, and since it dealt with two distinct matters—that of territorial entities and that of the bodies described as “public corporations or other autonomous public institutions”—he suggested that it should be divided into two separate articles, or at least two separate paragraphs.

28. With regard to territorial entities, in connexion with which he would prefer not to use the unsuitable term “public”, he urged that the list of entities given in brackets be deleted; it should be replaced by some satisfactory formula. In the commentary, however, an enumeration of that kind would be very valuable.

29. With regard to the other category of entities, he found the English terminology unsatisfactory. The term “public corporation” was much too wide and could be construed as covering a trading firm organized as a public company—which was obviously not what the Special Rapporteur intended. Similarly, the English term “autonomous public institution” could cover Church institutions or even certain clubs and there was clearly no intention to refer to organizations of that kind.

30. He assumed that the form of article 7 would ultimately be brought into line with that of articles 5 and 6 as adopted by the Commission at its previous session (A/9010/Rev. 1, chapter II, section B).⁵

31. Mr. KEARNEY said he supported the suggestion that article 7 should be divided into two articles. Territorial entities within a State or subject to its jurisdiction were in a different legal category from that of public corporations and similar institutions: they always exercised governmental power in greater or less degree, whereas public corporations or institutions did not. The separation would also make it easier to deal with the problems raised by the diversity of State structures.

32. A drafting difficulty arose from fact that the terms “corporation” and “institution” could well have quite different technical meanings under the internal law of States. He would therefore prefer a much more general term, possibly “organization”. As for the term “public”, it was far too vague in English to serve as a basis for the allocation of State responsibility. He suggested that it be replaced by the term “governmental” which, although not perfect, was closer to the intended meaning.

33. With regard to the substance of the matter, his own conclusion was that the internal law which established an organization determined its status. That status could be governmental, non-governmental or “mixed”. International law determined whether the status of the organization was such that the State was responsible for all or part of its acts and, if for only part of them, what those acts were.

³ General Assembly resolution 2625 (XXV), annex.

⁴ *I.C.J. Reports* 1971, p. 16.

⁵ Reproduced in *Yearbook ... 1973*, vol. II.

34. Once internal law had specifically established the status of an organization as a governmental organ, that decision was final and international law should not look behind it. When an organization was not specifically established as a governmental organ by internal law, however, it was for international law to determine whether the State was responsible for a particular act or acts. The principal criterion would be whether the act or acts were performed by the organization in the exercise of either a general delegation of governmental authority or a limited grant of that authority.

35. It remained to determine whether there was a need for a subsidiary rule whereby attribution to the State would take place only if the separate organ failed to meet its obligations arising out of an internationally wrongful act.

36. Mr. USHAKOV emphasized the importance, not only for the draft articles as a whole, but also for article 7 in particular, of the distinction between the responsibility of States for internationally wrongful acts and their objective liability. A State incurred objective liability both for the conduct of its organs and national bodies and for the conduct of its nationals and private bodies. For instance, a State was internationally liable for any damage which a ship flying its flag might cause on the high seas by spilling radioactive substances. Responsibility for an internationally wrongful act, on the other hand, was only generated by the conduct of the State itself, whether it was acting through its organs or through certain institutions exercising State powers by delegation.

37. With regard to immunities, he pointed out that they could sometimes be invoked as indirect evidence that the State itself had acted. That was not always the case, since there were several categories of immunity. Some immunities came under diplomatic law and applied to organs of the State and the persons composing them: for example, diplomatic missions and special missions. Others attached to State property, which was also exempt from the jurisdiction of another State. That category of immunities had no connexion with State responsibility. Thus a State-owned ship in a foreign port, being State property, was not subject to the jurisdiction of the foreign country concerned, but that immunity did not apply to the conduct of its crew. Hence immunities should be considered only as indirect evidence.

38. As to territorial public entities, he considered that their organs were organs of the State and that their conduct engaged the international responsibility of the State. Although that was self-evident, it might be advisable to make it clear in the article under consideration. The principle was subject to exceptions, however. The municipality of Moscow, which was an organ of the Soviet Union and exercised State powers in that capacity, engaged the responsibility of the Soviet Union by its conduct. Nevertheless, when it contracted a foreign loan, it was not exercising any State power—legislative, executive or judicial. It was acting as a legal person in civil law and did not engage the responsibility of the Soviet Union in any way; its contractual relations were subject to Soviet law or, depending on the rules of

private international law, to some foreign law. It was essential that the distinction between the exercise and the non-exercise of State powers should be mentioned in the draft articles.

39. With regard to autonomous administration of dependent territories, Mr. Bedjaoui had said that under contemporary international law it was not the internal legal order of the State that determined what constituted an autonomous administration of a dependent territory. That question came under international law; it was even possible that the metropolitan State might engage its responsibility with respect to the dependent territory. That eventuality must be taken into consideration, bearing in mind that, where succession of States was concerned, the metropolitan State incurred responsibility for the international relations of a territory placed under its administration when it acted on behalf of that territory.

40. The CHAIRMAN, speaking as a member of the Commission, said that he had recently re-read an old article on the work of the Commission, in which the author suggested that it was perhaps fortunate that the Commission's list of topics looked "not unlike the chapter headings of a somewhat old-fashioned textbook", since it was "the basic material of the classical law" that needed working on first. For example, the study of the difficult problems of international economic law could only be undertaken in the light of a clear formulation of the basic principles of State responsibility, which the author described as "that most traditional and yet most elusive, unsettled and intractable problem which lies at the very core of any notion of an international law".⁶

41. Much had already been said about article 7 and he would not go into details. In a general way, he thought that a legal adviser to a ministry of foreign affairs would examine the draft articles with regard to two questions: first, whether they were couched in language such that his Government could be made responsible for acts or omissions of individuals or legal entities under its jurisdiction which—under the internal legal order of his State—did not engage its responsibility; secondly, whether the articles contained the necessary safeguards to prevent other States from escaping responsibility for acts or omissions committed by them against the interests of his country, or for acts or omissions of their organs or of individuals or legal entities for which—under international law—those other States were responsible.

42. Of course, the members of the Commission represented the interests of the whole international community and not those of their own countries, but in the present instance the two viewpoints were perhaps not too far apart; a proper balance had to be struck between what might be called the passive and the active interests of States members of the international community.

⁶ R.Y. Jennings, "Recent developments in the International Law Commission: its relation to the sources of international law" in *The International and Comparative Law Quarterly*, Vol. 13 (1964), p. 385.

43. As far as article 7 was concerned, most of the differences of opinion which had arisen during discussion concerned matters of drafting rather than substance. Furthermore, the drafting difficulties had arisen not so much in regard to the responsibility of the State for acts of its territorial components, as in regard to its responsibility for acts of what had been called "public corporations or other autonomous public institutions". Some members had suggested that a formula should be devised to explain what made a corporation or an institution "public" in character. Others had suggested that any such corporation was public if authorized to exercise one of the main functions of the State—legislative, executive or judicial. If that approach were adopted, the reference to corporations and public institutions could be dropped, because those entrusted with legislative, executive or judicial functions would be covered by the notion of State organs and therefore governed by article 5.

44. In conclusion, he thought the time had come to refer article 7 to the Drafting Committee for consideration in the light of the discussion. He hoped that Committee would find a community-oriented compromise. The study of State responsibility must lead to something more than a set of vague principles: real law-making was required. The task was not an easy one, but the Commission should be able to surmount the difficulties involved, however great.

The meeting rose at 1 p.m.

1257th MEETING

Wednesday, 15 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Elias, 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, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) (*continued*).

1. The CHAIRMAN invited the Special Rapporteur to reply to the comments made by the members of the Commission on draft article 7.

2. Mr. AGO (Special Rapporteur) said that the constructive criticisms to which his draft article had given rise were very useful.

3. Mr. Calle y Calle had said that he agreed with the principle stated in article 7, but thought it would be preferable to mention first the territorial public entities, which were of a permanent character and were better known in public law than the other institutions referred to in the provision.¹ He (the Special Rapporteur) agreed with that view and also with Mr. Calle y Calle's remarks concerning the need for clarity and concision.

4. Mr. Yasseen too had approved of the substance of article 7, and had stressed that it should apply even when a State did not exercise control over the activities of some of its subdivisions.² He fully shared that view; it was, indeed in such cases especially that the principle stated in article 7 took on its full value. For instance, in federal States, labour legislation often fell within the competence of the member states and the federal State could take no action with regard to the way in which they regulated labour. But that did not mean that the federal State could escape its international responsibility when a federated state acted in a manner incompatible with an International Labour Convention to which the federal State was a party.

5. Mr. Yasseen had also asked whether it was not necessary to reserve the case in which a federated state retained its international personality and could itself incur international responsibility. It was true that unions of States could take many different forms, but he had used the expression "territorial public entity" to designate cases in which the member state no longer had any international personality, not cases in which it still possessed a separate international personality. In that context, it was necessary to distinguish between unions of States, which Mr. Yasseen had had in mind, and composite States, whose member states were no longer subjects of international law. In a union of States like the European Economic Community or any other union of that kind which might be established, each State acted independently and incurred its own responsibility for internationally wrongful acts. But article 7 referred to composite States, and in that case one could speak of "territorial public entities", an expression which applied both to municipalities and to the member states of a federal State.

6. Lastly, Mr. Yasseen had proposed that the examples of territorial public entities given in brackets in the text of the draft article should be deleted. Such an enumeration, which was to be found in the bases of discussion drafted by the Preparatory Committee for the 1930 Codification Conference,³ would, of course, be unnecessary if the article under consideration could be drafted sufficiently clearly. As a general rule; moreover, it was preferable to avoid enumerations of that kind, which could always give the impression of being exhaustive, when in fact they were only illustrative.

7. Mr. Pinto had raised the question of the federal clauses which were often included in multilateral agreements and were designed to save the federal State from

¹ See 1252nd meeting, paras. 15-20.

² *Ibid.*, paras. 21-24.

³ See *Yearbook ... 1956*, vol. II, p. 223.

being responsible for acts of its federated states.⁴ The situations which Mr. Pinto had described confirmed the basic rule, which was applicable in the case of breach of an international obligation, but only in the absence of any special rule. If there was a treaty rule under which the federal State was not answerable for the acts of its federated states, that rule must be observed, no matter how unsatisfactory it might be. Mr. Pinto had also referred to the “primary” and “secondary” rules. In that connexion, he (the Special Rapporteur) wished to stress that those terms had never been used except in a purely technical sense, and in no way implied that the rules of responsibility were of secondary importance compared with other rules of international law; the rules of responsibility were “secondary” only in so far as they pre-supposed the existence of other rules, which must have been broken for the responsibility of the State to be engaged. Lastly, Mr. Pinto had raised the question of responsibility for risk, which the Commission should regard as definitely settled for the purposes of the topic under consideration. The Commission should, however, decide whether it was advisable to undertake a study on the guarantee required from the State for damages arising out of activities not prohibited by international law.

8. Mr. Tammes had expressed doubts about the desirability of reflecting in article 7 the notion of the unity of the State in international law, when the characteristic phenomenon of the present time was decentralization.⁵ In his own view, it was precisely because of that phenomenon and of the diversity of State organizations that it was important to state the rule in article 7, so that a State could not evade its international responsibility by excessive decentralization of the activities appertaining to public power. State practice provided many examples of attempts to use that kind of loophole.

9. Like some other members of the Commission, Mr. Tammes had considered that the enumeration appearing in brackets in article 7 was unnecessary; and he had observed that the organs of some territorial entities possessed the status of State organs under internal law, so that article 5 would be applicable to them. That was not his (the Special Rapporteur's) own view, at least with regard to the situations most familiar to him. It was to be feared that a State accused of having violated one of its international obligations, might be able to evade its responsibility, for example, by invoking the fact that the municipality to which the violation was attributable was an organ of an entirely independent entity. So, although a municipality might not be a State organ under the internal legal order, in international law all conduct by a municipality appertaining to the exercise of public power must be capable of being regarded as an act of the State.

10. With regard to public corporations, Mr. Tammes had clearly shown how difficult it was to find a term that covered all the institutions referred to in article 7. The term “*établissement public*”, which was borrowed

from French administrative law, might go both too far and not far enough. For there were acts and omissions by an *établissement public* which were not acts attributable to the State at the international level, and there were acts and omissions by entities that could not be defined as *établissements publics*, which must nonetheless be regarded as acts attributable to the State at the international level. Further difficulties arose when equivalents had to be found in other languages. In English, the term “public corporation” introduced an idea different from that of an *établissement public*. The Commission would have to break away from the terminology used in the codification drafts, by writers or by governments, and find a term that was as neutral as possible and applied to any institution which, although separate from the State under its internal legal order, shared with the State some part of the prerogatives of public power, in the exercise of which it could violate an international obligation of the State.

11. With further reference to Mr. Tammes' comments, he explained that he had purposely spoken of an “organ” of a public corporation or other autonomous institution or of a territorial public entity. Like a State, an institution could act only through organs. That term was indispensable, and he had used it with the same meaning as had been given to it in the case of organs of the State.

12. The principle stated in article 7 had also been supported by Mr. Kearney, who in his first statement, had confined his remarks to questions of drafting and definition.⁶ Article 7 was certainly one of those which would have to be reworded in the light of the new text of article 5. As to the links between articles 7 and 8, they should not be exaggerated. It was true that articles 5 to 9 stated a series of propositions which formed a single whole. Nevertheless, as Mr. Reuter had pointed out, article 7 envisaged a distribution of the exercise of the prerogatives of public power between different entities within the framework of the internal legal order, whereas article 8 dealt with a situation of fact, not of law, which was exceptional: a person or group of persons, who did not possess the character of organs of the State or of a public institution separate from the State, happened to act as if they did possess that character. In his first statement, Mr. Kearney had suggested the use of several terms, which he had defined, but in his second statement⁷ he had rather favoured the use of a single term for the various entities covered. He (the Special Rapporteur) agreed that it would be better to use only one term.

13. In addition, Mr. Kearney had shown by examples the importance of the rule stated in article 7 for territorial public entities other than member states of a federal State. There was a trend towards decentralization in States which had formerly been strictly unitary. As to decentralization *ratione materiae*, in his own opinion—so far as article 7 was concerned—it was not linked with questions of ownership. Thus one should not seek to

⁴ See 1252nd meeting, paras. 26-29.

⁵ See 1253rd meeting, paras. 3-8.

⁶ See 1253rd meeting, paras. 9-14.

⁷ See previous meeting, paras. 31-35.

ascertain whether a public corporation was more or less owned by the State; the important point was whether its activities involved exercising prerogatives of public power. In that connexion, he referred to the example given by Mr. Tsuruoka:⁸ it was most unlikely that the Japanese national railway company could violate an international obligation of Japan; but that company had a police force which was separate from the State police. Consequently, in the event of a bomb alert on one of its trains, if a railway police official searched a diplomat's baggage, the company would clearly be performing a police function which involved the exercise of public power. The Japanese State would then have to accept that that act was attributable to it and could engage its international responsibility. Thus the essential point was not that the company belonged to the State, but that it exercised a part of the prerogatives of public power.

14. Mr. Kearney had shown how the idea of attribution of an internationally wrongful act to the State could be reconciled with that of the immunity of the State from jurisdiction. Subsequently, Mr. Ushakov had reverted to that question,⁹ showing that only immunity from jurisdiction, to the exclusion of the immunity of State property, could enter into the matter. The reason why he (the Special Rapporteur) had cited the *Case of Certain Norwegian Loans*¹⁰ had been to show that when a State claimed that a particular public institution was entitled to immunity from jurisdiction, it could not subsequently claim that an act of that institution was not an act of the State and hence did not engage its international responsibility. However, that was only a piece of evidence that could be used in regard to State responsibility.

15. Mr. Elias had rightly pointed out that the object of article 7 was to prevent a State from being able to disclaim international responsibility by pleading that, under its internal legal order, the organ which had acted was an organ of an institution separate from the State.¹¹ The drafting amendments he had proposed would help the Drafting Committee in its work. As Mr. Elias had also remarked, it would be better to try to find a satisfactory general expression applicable to all types of public institution, than to give several definitions at the risk of ambiguity. Unlike Mr. Elias, he (the Special Rapporteur) thought it by no means surprising that international law should attribute to the State something which was not attributed to it by internal law; for it was as a subject of international law that the State had attributed to it by international law acts for which, as a subject of internal law, it was not responsible in internal law. Mr. Elias agreed with his (the Special Rapporteur's) conclusion that the unity of the State should be emphasized, by contrast with the multiplicity of institutions at the internal level.

16. Mr. Reuter had drawn attention to the close connexion between the substance and the drafting of article

7 and to the fact that articles 7 and 8 were entirely different.¹² Under article 7, international law made an attribution of responsibility which did not correspond to that made by internal law. Mr. Reuter had then raised the question whether the fact that international law could make that attribution of responsibility should be expressly stated. In his (the Special Rapporteur's) opinion, it was necessary to be explicit on that point. The expression "prerogatives of public power" proposed by Mr. Reuter seemed very felicitous, especially as it introduced the notion of public power.

17. The comments made by Mr. Sette Câmara¹³—who approved of article 7 as to substance—were similar to those of Mr. Yasseen¹⁴ on all points concerning federal States. Mr. Sette Câmara was also in favour of one general definition, rather than several definitions.

18. The distinction between a confederation and a composite State, whose component states were no longer subjects of international law, but true territorial public entities, had been very well described by Mr. Martínez Moreno who had also cited an interesting example of an autonomous public institution: the Tennessee Valley Authority.¹⁵

19. Mr. Bilge had first discussed the distinction between the State as a subject of international law and the State as a subject of internal law.¹⁶ He had shown that the notion of the State was narrower in internal than in international law, so that international law attributed to the State acts not attributable to it under internal law. Mr. Bilge had also raised the question whether the rule in article 7 was a rule of customary law. In his (the Special Rapporteur's) opinion, all the rules in the draft were now customary rules, except a few which represented progressive development of international law. It was to be hoped that the Commission's codification work would enable some customary rules to acquire the status of conventional rules, thus gaining in precision and authority.

20. Mr. Ushakov had expressed serious reservations regarding article 7 in his first statement, but subsequently he had so far modified them that he seemed no longer to be in disagreement as to the substance.¹⁷ Moreover, he appeared to have dropped the idea of amending the preceding articles, probably because he realized that they dealt with different aspects of one and the same idea, which must be followed through to the end. Whereas Mr. Reuter had proposed the expression "prerogatives of public power", Mr. Ushakov had suggested the expression "State power". He himself feared that the adjective "State" was not the most appropriate, because the purpose of article 7 was to attribute to the State the conduct of an institution which was not expressly characterized as a "State institution" under the internal legal order; the use of that adjective might

⁸ See 1255th meeting, para. 1.

⁹ *Ibid.*, paras. 23-29.

¹⁰ See *Yearbook ... 1971*, vol. II, Part One, p. 255, para. 167.

¹¹ See 1253rd meeting, paras. 16-19.

¹² *Ibid.*, paras. 21-26.

¹³ See 1255th meeting, paras. 3-8.

¹⁴ See 1252nd meeting, paras. 21-24.

¹⁵ See 1255th meeting, paras. 10-15.

¹⁶ *Ibid.*, paras. 16-20.

¹⁷ See 1255th meeting, paras. 22-29 and 1256th meeting, paras. 36-39.

encourage a State to claim that it was not responsible for an act by an institution which was not a "State" institution.

21. Mr. Ushakov had further urged that it should not be inquired whether the property of the institution was State property, but only whether the institution exercised part of the State power. He had been thinking of the internal organization of his own country, the Soviet Union, and it would be wrong for him to affirm that a territorial entity was not an organ of the State and that its conduct was not attributable to the State, not only from the standpoint of international law, but even from that of the internal legal order. But that was not the situation in other countries, and it would not always be possible to speak of delegated powers. In a federal State like the United States of America, the federated states did not exercise delegated powers; it was rather they which had delegated powers to the federal State. Thus the reality took many forms, and the Commission must take care not to use expressions that were not applicable to all State systems. For the purposes of article 7, it was sufficient that, under the internal legal order, an entity exercised some part of the prerogatives of public power, whether by delegation or not. Finally, Mr. Ushakov considered that territorial entities should form the subject of a separate article.

22. Mr. Tabibi had expressed the view that the wording of article 7 should be flexible, and be consistent with that of article 5. His statement had come very close to that of Mr. Pinto and to Mr. Ushakov's second statement, and he had cited a number of interesting examples.¹⁸

23. The question of dependent territories had been raised by Mr. El-Erian, who had approved of the substance of draft article 7.¹⁹ He (the Special Rapporteur) had never considered that dependent territories formed part of the metropolitan State; what he had in mind was not the dependent State itself, but metropolitan bodies which were sometimes independent of the organs of the metropolitan State. For example, the colonial companies of the United Kingdom and Italy had been largely private; and although they had relied on those companies to administer dependent territories, the States concerned had never been able to escape their international responsibility when one of the companies had violated an international obligation. The Commission should not disregard such situations, although they had become very rare. Above all, a metropolitan State should not be able to escape its responsibility by invoking the silence of the draft articles.

24. As Mr. Ramangasoavina had said, article 7 emphasized the unity of the State irrespective of the position of the organ concerned in the internal legal order.²⁰ Reference had been made, in that connexion, to multinational companies, though in his opinion they were not within the scope of the article under consideration. By their nature, such companies belonged to several States,

and those States could incur responsibility if they failed to prevent or punish harmful activities of the companies, which they had an international obligation not to tolerate. The draft should say more on that point.

25. The distinction between responsibility for internationally wrongful acts and objective responsibility, which Mr. Quentin-Baxter had emphasized,²¹ should be gone into in detail when the Commission had decided whether to study the question of the international responsibility of States for risk. For the moment, it seemed that the problem of the attribution of acts to a State differed according to whether the State's responsibility was engaged for lawful or for wrongful acts. In his other comments, Mr. Quentin-Baxter had drawn attention to several essential elements of the article under discussion.

26. Commenting on a remark made by Mr. Hambro²² he said that although the *Case of Certain Norwegian Loans* was not really relevant to internationally wrongful acts, he had mentioned it in his commentary because it had given rise to statements of position in the International Court of Justice, which went beyond the scope of the case itself. With regard to article 7, Mr. Hambro had stressed that a State should not be able to escape its international responsibility by organizing itself in one particular manner rather than another.

27. As to the comments made by Mr. Bedjaoui concerning dependent territories and possible joint responsibility for acts of companies connected with several States,²³ he had already explained his position on those matters in answer to comments by other members of the Commission.

28. He was not opposed in principle to the suggestion made by Sir Francis Vallat that article 7 should be split into two articles, one relating to territorial public entities and the other to autonomous public institutions.²⁴ There was clearly a fundamental difference between the two classes of entity, but there was also a common element: they reflected two aspects of the same phenomenon of decentralization which, in one case, was *ratione loci* and, in the other, *ratione materiae*. It was because of that common element that he had dealt with both cases in a single article, but he would be prepared to consider the possibility of dealing with them in two separate articles or in two paragraphs of the same article. Like Mr. Calle y Calle and Sir Francis Vallat, he thought that priority could be given to territorial entities, not because they were more important than the other public institutions, but because the probability of their violating an international obligation of the State was much greater; the share of the prerogatives of public power vested in territorial entities was certainly much greater than that vested in the other institutions. So far as the latter were concerned, it had been suggested that reference should be made either to their functions or to State control. In his opinion, the reference should be to

¹⁸ See 1255th meeting, paras. 30-32.

¹⁹ See previous meeting, paras. 5-7.

²⁰ *Ibid.*, para. 8.

²¹ *Ibid.*, paras. 12 and 13.

²² *Ibid.*, para. 22.

²³ *Ibid.*, paras. 24 and 25.

²⁴ *Ibid.*, para. 27.

the functions rather than to the control, for even if the institutions in question were not controlled by the State, international responsibility for their acts should nevertheless be attributed to the State.

29. As Mr. Kearney had pointed out,²⁵ there was no doubt that territorial entities exercised some public power: hence the rule relating to territorial entities would be much easier to formulate than the rule relating to the other institutions. Mr. Kearney had suggested that the latter should be designated by the word "organizations". That, however, was a term already used with a different meaning in international law, so that it might be ambiguous. His own preference was for the term "entities". What he considered most important, however, were the expressions by which that term would be qualified in the text of the article. As Mr. Kearney had also observed, it could happen that internal law and international law coincided. In that case there was no problem: it was when internal and international law differed that the problem arose and article 7 assumed its full importance.

30. Lastly, Mr. Kearney had suggested that it might be advisable to add a subsidiary rule to show that a State could not escape its international responsibility merely by reason of the fact that it had adopted one mode of organization rather than another. He himself did not think it was really essential to state that rule expressly, since it should be the logical consequence of the articles as a whole. In any event, it would be for the Commission to decide, at the appropriate time, whether the rule was necessary or not.

31. He thought Mr. Ushakov had been right in stressing the important distinction between responsibility for a wrongful act and responsibility for risk;²⁶ he agreed with him that that was a question which should be examined separately. Mr. Ushakov had also rightly pointed out that, even in regard to the problem of attribution to the State, which the Commission was now considering, there could be a very appreciable difference between attribution to the State of a wrongful act and attribution to the State of primary liability for injurious activities. He also agreed with what Mr. Ushakov had said on the question of immunity, stressing that it must be understood in the sense of a personal immunity of the organ which acted, not in the sense of an immunity of property. In his opinion, the question of immunity could be linked with the subject under study in so far as immunity might constitute useful evidence, but it was nevertheless a separate question. Lastly, he thought Mr. Ushakov had been right in saying that the main criterion for the purposes of article 7 was the exercise of a public power. That was, in fact, the distinguishing characteristic of what could and what could not be attributed to the State, and it was on that point that the most satisfactory formula would have to be found. So far as the administration of dependent territories was concerned, Mr. Ushakov, too, had stressed that the metropolitan State must not be allowed to evade its

international responsibility, not only *vis-à-vis* the dependent State itself, but also, and above all, *vis-à-vis* third States.

32. To sum up, he believed, like Mr. Ustor, that a certain balance had to be struck between two fundamental requirements:²⁷ a State must not be allowed to make unfounded charges against another State involving its international responsibility, but at the same time a State must not be allowed to escape its international responsibility when such responsibility was incurred.

33. He had the impression that, despite the many comments made, the members of the Commission agreed, on the whole, with the ideas expressed in draft article 7. The only member who had mentioned the possible deletion of the article had done so only to drop the idea. His own view was that the article was indispensable and that its deletion would leave a serious gap in the codification of the international law of State responsibility and enable States to escape their responsibility. He recognized, however, that the text would have to be amended, not only to bring it into line with the new text of article 5 (A/9010/Rev. 1, chapter II, section B), but also to improve its drafting, so as to produce as concise and precise a text as possible. So far as structure was concerned, he was prepared to consider three possible solutions: a single article, two separate articles, or, as he personally would prefer, two provisions in one article.

34. Another point was that priority should be given to the most important case—that of territorial public entities, which ranged all the way from municipalities and communes to federated states. He reiterated, however, that by the latter term he meant states which existed only from the standpoint of internal law, being subjects of internal law which had no separate international personality. To go beyond the limits of that definition meant going beyond the attribution to the State of acts or omissions of organs of the State or of other public entities, and raising the problem of the responsibility of a member State of a union of States or of the possible indirect responsibility of one subject of international law for the act of another subject of international law. Thus it would be preferable to go no further than the case of a composite State whose member states remained within the framework of internal or constitutional law.

35. The question whether to mention administrations of dependent territories would be settled later, as would the question whether to give any examples. Reference had been made to the case of Cyprus, where the administrations of two communities coexisted, which did not correspond exactly to territorial entities because the two communities overlapped. Should cases of that kind be taken into account? His own view was that for the moment the aim should be to settle general rules, and that special cases could be dealt with later. In any case he would prefer the emphasis to be on the exercise of prerogatives of public power, which seemed to him the most important element in the article.

²⁵ *Ibid.*, paras. 31-34.

²⁶ *Ibid.*, paras. 36-39.

²⁷ *Ibid.*, paras. 41 and 42.

36. He hoped that the Drafting Committee would be able to work out a text that would satisfy the members of the Commission.

37. Mr. USHAKOV said he wished to clear up a misunderstanding about the question of delegation of public power by the State. He had never said that the organs of the State acted by delegation of State power, for that was not a matter of delegation, but of organization of the State power or public power. He had said that the State, as a collective body, could, in principle, act only through its organs. But he had recognized that there could be exceptions to that rule and that a body which was not an organ of the State could be invested by the State with public or State power. For example, the Japanese national railway company, to which Mr. Tsuruoka had referred, was not an organ of the State, but the State could delegate public powers to it and it was through that delegation that the company could exercise public powers. Similarly, a private bank granted the privilege of issuing currency exercised public power in so far as the State had delegated that State privilege to it. The case of municipalities, on the other hand, was quite different: they were not bodies to which the State delegated public power, but organs of the State which exercised the State power within the limits of their autonomy. For he believed that municipalities, like all territorial entities, were organs of the State. Nor was it by delegation that a federated state, such as Virginia or the Ukraine, exercised State power, for historically those states had existed before the federal State.

38. He also wished to reiterate that the State constituted one single entity, whether it was regarded from the internal or the external standpoint. It was the internal legal order, not international law, which governed the organization of the State. Hence it was by internal law alone, and not by international law, that it could be determined whether a body exercised public power. The legal characterization of the conduct of that body could differ according to whether the standpoint adopted was that of internal law or of international law, but the conduct remained the same.

39. Mr. EL-ERIAN said he appreciated the reasons which had prompted the Special Rapporteur to include a reference to dependent territories among the territorial public entities enumerated in article 7, but he thought that to group dependent territories together with such territorial entities as municipalities and provinces might give rise to misunderstandings about the status of dependent territories and the question whether they were considered as an integral part of the metropolitan territory or not. He recalled a case in which a person had been sued on the basis of a court ruling that, under Article 22 of the League of Nations Covenant, a class C mandated territory had to be considered as an integral part of the Union of South Africa and of the British Empire. That was the kind of situation he was anxious to avoid. It would therefore be wise, as had been decided in similar cases in the past, not to refer to situations which were obsolescent, or at least to refer to them in a different context from the present one. The enumeration was in any case not exhaustive as it ended

with the words "et cetera". A dependent territory in fact constituted a case of agency, involving a relationship between the territory and a State which had assumed international responsibility, in the sense of competence, for the territory's relationship with other States, but had given the territory internal autonomy.

40. Mr. KEARNEY, speaking of the references made to the governmental structure of the United States, explained that under article 10 of the Bill of Rights, which formed part of the original Constitution of the United States of America, "The powers not delegated to the United States by the Constitution... are reserved to the States respectively, or to the people". Consequently, the powers exercised by the federated states were their own powers and not the powers of the Federal State—the United States of America. However, that merely reflected a particular political philosophy. Mr. Ushakov's argument represented another political philosophy, but the differences between them should not affect the way in which the Commission dealt with the problem of the status of organs for purposes of international responsibility. Everyone agreed that the status of an organ was determined by internal law—which might include the national law and, in federal unions, the law of individual states—but in the light of international law, which regarded the State as a monolithic structure for the purposes of international law.

41. Mr. USHAKOV said that in the USSR the situation was the same as in the United States in that respect. The Republics of the Union, which exercised supreme authority over their own territory, were at the same time organs of the Soviet Union. They were autonomous, but only within their territorial boundaries, though they could conclude treaties at the same time as the Soviet Union itself. That did not mean that organs of the Republics were not organs of the Soviet Union as a whole.

42. The CHAIRMAN suggested that article 7 should be referred to the Drafting Committee for further consideration in the light of the discussion.

*It was so agreed.*²⁸

The meeting rose at 1 p.m.

²⁸ For resumption of the discussion see 1278th meeting, para. 1.

1258th MEETING

Thursday, 16 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce article 8, which read:

Article 8

Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State

The conduct of a person or group of persons who, under the internal legal order, do not formally possess the character of organs of the State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.

2. Mr. AGO (Special Rapporteur) said that article 7 dealt with the problem of the attribution to the State of acts of organs of certain entities which, although separate from the State, had powers, under the internal legal order of the State, which involved the exercise of a portion of public power. Article 8, on the other hand, dealt with the attribution to the State of acts of persons or groups of persons who were not in any way part of the machinery of the State and could not be confused with it, but who, in special circumstances, in fact performed State functions. Thus they were not private persons acting as such. The Commission would later, in article 11, consider the principle that responsibility for the conduct of a private person or group of persons acting as such could not be attributed to the State, and that the State could not incur responsibility by reason of such conduct unless failed to fulfil its own obligation to prevent and punish that conduct.

3. Thus article 8 raised the problem of the situation of "*de facto* officials"—in other words, persons who in principle were not State officials at all, but who in special circumstances, were called upon to perform State functions in fact. That was a complex and many-sided situation, which was likely to become more common. To define the situation of such *de facto* officials, lawyers had recourse to various theories—theories of appearance, of necessity, of *negotiorum gestio*, and so on; but there was no need for the Commission to go into those theories. It should merely take note of a fact, a real situation; for there were cases in which private persons came to act as *de facto* officials. In that connexion, he stressed that the situation in international law must always be distinguished from the situation in internal law and that the Commission should consider only the former situation.

4. It might be that an official properly so called had not yet officially taken up his duties or that he had been suspended from his duties because administrative or criminal proceedings had been brought against him. But whatever the special situation of such an official from the standpoint of internal administrative law; interna-

tional law regarded him as an official and his conduct would be attributed to the State under article 5. The situation contemplated in article 8 could arise in the event of war, when the State authorities had disappeared and had not yet been replaced by new authorities. There was no doubt that the acts of the groups which then exercised power—liberation or other committees—engaged the responsibility of the State if there was a breach of an obligation under international law.

5. The principle stated in article 8 also applied to groups which, though not belonging to the regular army of the State, carried out military activities in time of war. Moreover, article 2 of the Regulations annexed to the Hague Convention (IV) of 1907 granted treatment as belligerents to the population of a town which took up arms to defend that town. Similarly, in the event of a natural disaster, the whole machinery of the State might disappear in a particular region and the local people might have to take over the exercise of some of the prerogatives of public power—police, health services, etc.—as had occurred in some parts of Italy at the time of the Messina earthquake. And sometimes the internal legal order of the State provided that citizens in a situation of that kind not only could, but must perform certain public functions. There was also the case of private persons who exceptionally performed the functions of auxiliaries of the regular armed forces, as the Paris taxi-drivers had done in the First World War during the battle of the Marne. It was quite clear that a State which made use of such auxiliaries must answer for any violations of international law they might commit.

6. There were other kinds of case, like that of missions abroad entrusted by the State to private persons who were not members of its administrative organization. Should the acts of those private persons be attributed to the State and did they engage its international responsibility? In that connexion he referred to the award made in 1925 by an arbitral tribunal in the *D. Earnshaw and Others (Zafiro) case*.¹ The tribunal had concluded that the conduct of the crew of the *Zafiro*—a private merchant ship which, during the Spanish-American war had provisioned American troops during a military operation, acting on the orders of the American Navy—must be attributed to the United States as the State responsible for the violation by that ship of an international obligation.

7. There was also the case of the "volunteers" which certain Powers sent, or allowed to go, to countries where a civil war was in progress. Should it be held, as the representative of Mexico to the League of Nations had done in regard to the Spanish Civil War, that the acts of those "volunteers" engaged the responsibility of their Government? Among the best known examples of acts by private persons which could engage the responsibility of the State were those of certain persons acting abroad on behalf of the State: for example, abductions carried out in foreign territory by private persons acting, in fact, on behalf of the State. One example was the

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 264, para. 192.

case of an Italian political refugee who had been abducted from Lugano by agents of the fascist régime and taken to Italy to be tried; the Swiss Federal Council had taken the view that that action violated the territorial sovereignty and security of Switzerland and was therefore contrary to international law. In the abductions of Eichmann and of Colonel Argoud, the responsibility of the State had finally been recognized in a way in both cases, although the Governments concerned had denied any participation.² Cases of that kind were not always very clearly settled; for example, the case of Colonel Argoud had been regarded as closed after an exchange of letters between the President of the French Republic and the German Chancellor, the contents of which were not known.

8. All those cases rested on the assumption that private persons were acting as *de facto* officials—a situation not to be confused with that of a *de facto* government. A *de facto* government was, after all, a government—even if it had taken power as the result of a *coup d'état* or a revolution and was not recognized by some governments—and any act of a government, whether official or *de facto*, could incur international responsibility. Thus the problem of the legitimacy of a *de facto* government did not arise in article 8, which dealt only with the case of persons having no organic link with the government.

9. As in the case of article 7, the Commission would have to change the drafting of article 8. But whereas article 7 must be brought into line with article 5, article 8 would need a different terminology, for it dealt with private persons whose characteristic was, precisely, that they were not organs of the State and had no connexion with the State or with institutions invested with prerogatives of public power.

10. Mr. KEARNEY, referring to the interrelationship between articles 7 and 8 and the potentially wide range of their effect, said it was not clear what the limits of that effect would be. For example, in certain circumstances private citizens might be entitled to take, on their own initiative, action which would amount to the performance of public functions and which might therefore entail State responsibility under the present provisions of article 8. Those provisions might also bring many essentially private enterprises within the scope of State responsibility, in addition to the public entities which provided a public service and were covered by article 7. The already wide range of possibilities covered by article 8 had been mentioned by the Special Rapporteur in his third report.³ In that respect articles 7 and 8 overlapped.

11. Article 8 also overlapped with article 11. For purposes of application, the distinction between the term “person” in article 8 and the term “private individual” in article 11 might raise problems. Paragraph 2 of article 11, which stated a substantive rule of international law concerning State responsibility, was also related to some of the cases and judicial decisions cited by the Special

Rapporteur in support of his conclusions on the content of article 8. In fact, the combined effect of the definitions in the three overlapping articles was so wide that it would be virtually immaterial, for the purpose of attributing responsibility to the State, whether the person or entity had the status of an organ of the State or not. To avoid that overlapping he submitted the following proposals, the effect of which would be to merge article 8 partly with article 7 and partly with article 11:

Combined text for articles 7 and 8

1. The conduct of an organ of a territorial governmental entity, when acting in that capacity in the case at issue, shall be considered to be an act of the State under international law.
2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity shall be considered to be an act of the State under international law when, under the internal law of the State or the internal law of a territorial governmental entity, the entity is specifically designated as having governmental status and has acted in that capacity in the case at issue or is authorized to exercise elements of the governmental authority of the State or territorial governmental entity and has exercised that authority in the case at issue.
3. The act of any such organ relating to the establishment or fulfilment of a contractual obligation shall be considered as an act of the State under international law only to the extent permitted under the internal law of the State in effect at the date of the entry into force of the contract.

Combined text for articles 8 and 11

1. The conduct of a private person or entity, acting in that capacity, is an act of the State under international law only if such a person or entity performs the conduct pursuant to lawful or apparently lawful orders of an organ of the State or territorial governmental entity or performs public functions or acts on behalf of the State or a territorial governmental entity in situations of crisis or disruption of functioning of the organs of the State.
2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the private person or entity and failed to do so.
12. Paragraph 3 of the combined text for articles 7 and 8 dealt, in broader terms, with the kind of situation mentioned by Mr. Hambro as not entailing State responsibility. In the case of a loan issue by a municipality, for example, the State would only be responsible if it had guaranteed the loan. Similarly, it would be responsible only for contracts which it had underwritten. That responsibility would depend only on internal law, as the essential condition was the express assumption of an obligation by the State.
13. The combined text for articles 8 and 11 covered unusual cases, in which the State's responsibility was engaged because it had derived an advantage from the acts in question or because it ought to have acted to prevent or punish those acts. The original text of paragraph 2 of article 11 had been retained, although some amendments might be necessary.
14. He did not claim that the texts he proposed offered a final solution to the problems of attribution; he merely wished to suggest a possible way of dealing with certain questions of substance arising in connexion with that aspect of State responsibility.

² *Ibid.*, para. 193.

³ *Ibid.*, p. 263, para. 190.

15. Mr. TAMMES said that, whereas article 7 dealt with formal organs of the State which were an integral part of the State's constitutional structure, article 8 was concerned with what might be called *de facto* organs of the State. The Special Rapporteur had himself used the term "*de facto*" to qualify organs or officials in his third report, though he had rightly pointed out the danger of confusion with the concept of a *de facto* government.⁴ Little attention had hitherto been paid to that second category of organs, but the abundance of cases involving them showed convincingly that the proposed article 8 truly reflected the present state of international law and that the treatment of such organs in a separate article was justified.

16. Article 8 distinguished between persons in fact performing public functions and persons in fact acting on behalf of the State. There might be a certain hesitation to include the former category of persons, whose acts would derive their public character from the fact that they were incidental caretakers of some public interest in an emergency. The establishment of State responsibility in such cases would not always be easy in practice and it might be wise, as Mr. Quentin-Baxter had said, to be satisfied with any existing local remedies. For example, during the power failure in the eastern United States some years ago, private persons had taken it upon themselves to regulate traffic in the dark, thereby performing a public function, which, in the event of injury or damage of international relevance, might, under article 8, have entailed the responsibility of the United States. That would clearly be stretching the principle of State responsibility too far.

17. The distinction between the formal organs covered by article 7 and the *de facto* organs, whether self-appointed or State-appointed, covered by article 8, might help to solve the problem of the "autonomous public institutions" referred to in article 7. Such institutions, whether political parties, corporations or organizations, could be considered to be covered, either by article 7, if they were formally and lastingly entrusted with public functions, or by article 8, if they were incidentally so entrusted or assumed such functions on their own initiative in an emergency. Undue reliance on internal law could then be avoided. As had been pointed out, the State was free to choose whether the corporations it used for its purposes should be public or private, and the State's constitution determined whether or not a political party or other organization would function as an association of private citizens. That would not be strictly relevant in the application of international law, unless it could be proved that the party, corporation or organization in question had acted as, or on behalf of, the State. The acts of persons or groups of persons who were sometimes used by the State for its own purposes, but whose position differed according to the legal system and circumstances, could then be dealt with in a separate article. The Special Rapporteur had not objected to a proposal that article 7 be divided into two articles, one dealing with territorial entities, the other

embodying the rest of the content of article 7⁵ and perhaps also dealing with the ambiguous situations he had just mentioned.

18. There would then be three categories of agent whose conduct could engage the State's responsibility. First, the formal State organs which were an integral part of the State; they would be dealt with in article 5, part of article 7 and perhaps in the definition suggested by Mr. Elias.⁶ Secondly, individuals or groups of individuals acting as *de facto* State organs, at present covered by part of article 8, as distinct from individuals for whose conduct the State was indirectly responsible, for example, because of a lack of diligence; they would be dealt with in article 11. Thirdly, organizations established by internal law and sometimes used by the State; they would be dealt with in the present article 7 and partly in article 8, and would perhaps also be defined. The present chapter II could perhaps be arranged in three parts along those lines.

19. Mr. REUTER said he was in favour of retaining article 8 as a separate article; in its broad outline, he approved of the draft submitted by the Special Rapporteur. Being somewhat concerned about the slow progress the Commission was making, he hoped that article 8 would be only very briefly discussed before being referred to the Drafting Committee; for as the Special Rapporteur had stressed with regard to the cases covered by article 8, while States did not always agree on the facts they almost always agreed on the principles, as was shown by the case referred to the Franco-Swiss Conciliation Commission on customs provocations. He did not think the time had come to rearrange articles 7, 8 and 11, as Mr. Kearney had proposed; while the Commission would clearly have to consider the relations between those three articles at some point, it should for the time being confine itself to examining them separately on first reading.

20. With regard to the question of contracts mentioned by Mr. Kearney, contractual liability should be treated as a special case, since the liability arising out of a contract could only in exceptional circumstances be an international responsibility. The question of contractual liability could not be sub-divided, and the Commission should leave its consideration until later.

21. He was in favour of referring draft article 8 to the Drafting Committee at once, though he had a few comments to make. In the first place, the English term "public" seemed inappropriate, for in common law countries it was often applied to private bodies. Secondly, if, as he believed, article 8 was quite different from article 7, it should contain a cross-reference to article 7: the words "do not formally possess the character of organs of the State or of a public institution separate from the State" should be replaced by the words "do not formally possess an organic status rendering article 7 applicable".

22. Lastly, he had reservations about the phrase "in fact perform public functions or in fact act on behalf of

⁴ *Ibid.*, p. 266, para. 196.

⁵ See 1256th meeting, para. 27.

⁶ See 1253rd meeting, para. 17.

the State". The French expression "*fonctions publiques*" seemed ill-chosen, not only because it raised problems of translation into English, but also because it might be thought that in that case, too, the functions in question came within the scope of public power. The use of the conjunction "or", in the phrase "or in fact act on behalf of the State", showed that there were two cases. But was it intended to refer to two separate cases or to two cumulative conditions? He himself was not sure that the two conditions were separate. If, for example, a citizen arrested a malefactor, he was performing an act of public power by acting in lieu of the police and was at the same time acting on behalf of the State. In the case of abductions carried out by secret agents, on the other hand, the situation was not so clear, since such agents were not always acting on behalf of the State.

23. Mr. USHAKOV said he approved of the content of article 8, but had serious reservations about its formulation. In the first place, the expression "public institution separate from the State" could only be used in article 8 if it was retained in article 7. Secondly, the text of article 8 did not make it sufficiently clear that the situations it dealt with were exceptional. As drafted, the article seemed to apply to normal situations, and its exact scope could only be learnt from the explanations and examples given by the Special Rapporteur. Moreover, it was impossible to make provision in a single article for all the cases of international war, civil war or war of liberation that could arise. Quite exceptional and unforeseen situations might arise at any time.

24. Article 8 dealt, first, with persons who "in fact perform public functions" and, secondly, with persons who "in fact act on behalf of the State". Normally, persons or groups of persons who performed public functions—that was to say, who exercised a part of the State power—came within the scope of article 7. They were members of an institution which was not an organ of the State, but which was duly authorized by the State to perform public functions. The contingencies contemplated in article 8, on the other hand, were quite exceptional. Apart from cases of civil war, they occurred when, for example, in the event of a natural disaster the authorities disappeared and some persons in fact acted as organs of the State. Yet article 8 gave no indication that such persons were in an exceptional situation. It simply provided that although, under the internal legal order, they did not formally possess the character of organs of the State, such persons in fact performed public functions, which implied that they were part of *de facto* organs.

25. The other class of persons or groups of persons to which article 8 applied was persons who "in fact act on behalf of the State". Such situations, which were no less exceptional, arose when a person acted on behalf of a State without being duly empowered to do so. If a private person committed an outrage against a foreign ambassador, the international responsibility of the State of that person's nationality was engaged, not by reason of the act itself, but because the State had failed to take measures to prevent the act. It was also possible that the person concerned had acted at the instigation of the State, in which case the act itself was a breach of the

State's international obligations. It would then be necessary to prove that the person concerned had acted on behalf of the State, which was difficult, because such instigation by a State was never overt. In the absence of conclusive evidence, the State was responsible by reason of omission, not by reason of commission.

26. Mr. HAMBRO said he associated himself with the fears expressed by Mr. Reuter at the slow progress being made. To save time, he would not discuss drafting questions, which could safely be left to the Drafting Committee.

27. He agreed with the idea expressed in article 8 and found many of the supporting examples given by the Special Rapporteur quite convincing. He had serious doubts about the wording of the article, however, in particular the reference to the performance of "public functions". He did not believe that there existed in international law any recognized definition of either the nature or the scope of "public functions". Those functions had, therefore, to be defined by internal law; but the definition varied from country to country. For example, railways, shipping, postal, telegraphic and telephone services constituted "public functions" in some States, but not in others. Hence the term could not be used in article 8 for purposes of international law. It was much more than a question of drafting; a genuine problem of substance was involved.

28. Mr. ELIAS said he shared the concern expressed about the Commission's rate of progress. He did not think article 8 required a long discussion; its content seemed quite straightforward, and the cases of *D. Earnshaw and others (Zafiro)*, *Stephens* and *Eichmann* were sufficient to illustrate the problem. Article 8 dealt with the rare situation in which a person or group of persons who, either under the constitutional or administrative law of the State concerned or for any other reason, were not regarded as organs of the State, but were forced to perform certain acts on behalf of the State or purportedly on behalf of the State. The State should then be held responsible for the acts of those persons.

29. Article 11 dealt with a different problem, and he thought that little would be gained by trying to combine it with article 8. He appreciated the reasons underlying the ingenious and interesting proposal put forward by Mr. Kearney, but could not help thinking that the adoption of that proposal would complicate the situation.

30. The purpose of article 8 was to attribute to the State certain acts performed on its behalf, either at the request of the State or because the person concerned had felt the need to perform them. The case was in the nature of the *negotiorum gestio* of Roman law. The functions in question were functions which should normally have been performed by the State, but which the State had failed to perform. An individual then found himself performing them as a matter of necessity—rightly or wrongly.

31. Article 8 should not deal with the question of omissions by private persons. If a private person stood by and allowed certain events to happen, neither his responsibility nor that of the State was engaged, unless

of course the case fell within the exception provided for in article 11, paragraph 2. That provision attributed to the State the omissions of its organs which, in dereliction of duty, allowed an individual to act or not to act in a certain way.

32. He suggested that the Commission should approve article 8 in principle and ask the Drafting Committee to find wording that would cover all the cases contemplated. In the English text the words "public functions" should be replaced by the words "State functions" or, better still, "governmental functions".

33. Mr. TSURUOKA said he shared Mr. Ushakov's view that the situations contemplated in article 8 were quite exceptional. The acts referred to in that provision could, for the most part, be attributed to the State only if the State agreed to such attribution, either before or after the act in question. During the discussion on article 7, some members of the Commission had referred to the notion of "public functions" as meaning prerogatives of the State, and it should certainly be understood in that way in article 8. Referring once again to the Japanese national railway company, he said that that company exercised a part of the State authority by delegation, which was not true of the hundred or so other private railway companies in Japan or of the telecommunication companies, although they were regarded as public. The same applied to the watchmen employed by some big companies, who were often expolicemen; they exercised no police power, although in the performance of their duties they engaged in similar activities. Those cases were outside the scope of article 8, but it would be useful to mention them in the commentary to the article.

34. With regard to disasters, which were not rare in Japan, rescue teams could be formed there immediately after a disaster, could call for mutual assistance and sometimes use constraint. In his opinion it would not be advisable to extend the field of application of article 8 to such spontaneous groups, which were, after all, exceptional.

Organization of work

35. The CHAIRMAN thanked Mr. Reuter and the other speakers who had drawn attention to the need to increase the pace at which the draft articles on State responsibility were being examined. The coming week might well prove to be the last of the present session which the Commission could devote to the first reading of those articles, bearing in mind that absolute priority had to be given to the second reading of the thirty draft articles on succession of States in respect of Treaties. He hoped, therefore, that in the time at its disposal the Commission would press on as far as it could with the first reading of the draft articles on State responsibility.

The meeting rose at 1 p.m.

1259th MEETING

Friday, 17 May 1974, at 10.5 a.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

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

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State) (*continued*).

1. Sir Francis VALLAT said that the essential problem was not the ideas under consideration, on which there was general agreement, but the manner of expressing them.

2. The cases covered by the present set of articles fell into five categories. The first was that of State organs, regarding which opinions were virtually unanimous, though Mr. Ushakov took a somewhat broader view of that concept than he did. The second was the category of subsidiary territorial entities, which was very close to that of State organs. The third was that of institutions which had governmental functions—a term that was closer to the intended meaning than "public functions". The fourth was an entirely different category: that of persons acting on behalf of the State. The case was really one of agency, and totally different from that of institutional capacity. That point was fundamental to the Commission's handling of the matter. It was significant that, as mentioned in the Special Rapporteur's third report, the Argentine Government had maintained in the Eichmann case, that "even if the volunteers had acted without the knowledge of the Government of Israel, the fact remained that that Government had subsequently approved the act...".¹ It was interesting to see implicit in that comment the two classical ideas of authority and subsequent approval in the absence of authority. In the situations contemplated in article 8, either the individual acted with the authority of the State or, where no such authority existed, the State subsequently approved, adopted or ratified the act, thereby becoming responsible for it. That position was quite distinct from institutional competence and also

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 265.

from the fifth category of cases, namely, emergencies or other exceptional circumstances, in which an individual acted on behalf of the State because there was no recognized authority which could do so. In those cases, it would not be possible to establish authority to act or ratification.

3. He believed that if the draft articles dealt with all those five categories of cases, the necessary ground would have been covered. Nevertheless, he was concerned at the attempts apparently being made to arrive at an exhaustive definition. Should the Commission recognize that it was not feasible to be exhaustive, it would be advisable to make it clear in the draft that, while the acts mentioned in the various articles were attributed to the State, there might be other cases of such attribution for which no provision was made.

4. As to the text of article 8, he had some misgivings about the stress being placed on the question of fact. He understood the intention of the text, but the mere fact that an individual had usurped a governmental function was not in itself sufficient to attribute liability to the State. There had to be some other link between the individual and the State concerned and on that point he shared some of the misgivings expressed by Mr. Ushakov. Hence the emphasis he had placed on the concept of authority or approval in regard to the fourth category of cases.

5. Lastly, he was concerned about the relationship between attribution, on the one hand, and the definition of internationally wrongful acts and the question of liability for risk, on the other. It might be wiser to make some reserve regarding the final form of the articles until a later stage, when the Commission had considered the basis of liability more fully.

6. Mr. RAMANGASOAVINA said that the *raison d'être* of the article under discussion was to be found in the concrete cases cited by the Special Rapporteur. It was difficult, however, to set out in a clear and precise formula a principle which derived from exceptional situations of the greatest diversity. The situations covered by articles 6 and 7 were clear; they involved organs of the State, or of public institutions under internal law, acting in that capacity. Article 8, on the other hand, applied to persons who, under the internal legal order, lacked the character of State organs or of a separate public institution. They were regarded as acting on behalf of the State, even though they were not vested with authority to do so. From the standpoint of internal law their acts might be legitimate if, for example, they had acted in the interests of the community by assuming public functions to safeguard the national heritage, but from the standpoint of international law their acts were wrongful.

7. The situations contemplated in article 8 were also very different in another respect from those covered by articles 6 and 7. Whereas under articles 6 and 7 the attribution of the acts to the State was automatic, in the case of article 8 the situation had to be analysed and appraised. The acts referred to in article 8 were in the nature of private initiatives or spontaneous actions. In such a situation an international court would have to

determine whether the person or persons concerned had really acted on behalf of the State whose responsibility was in question, and to do so, the court would have to rule on the internal legal order and its operation, which might be considered as interference in what was called the reserved domain. The court would have to inquire whether the lawful authorities had failed in their duty and whether the acts performed by private persons were of a kind which ought to have been performed by official organs. If those acts were considered void under internal law, the State was not necessarily relieved of responsibility. In that connexion he referred to the theory of putative acts, according to which an act, although void, could produce legal effects, as in the case of manifestly unlawful acts subsequently endorsed by the competent authorities. An example was the abduction, by private individuals, of persons who were subsequently arrested and tried by organs of the State.

8. So far as the scope of article 8 was concerned, he pointed out that, under draft article 13, the acts of an insurrectional movement whose structures subsequently became those of a new State engaged that State's responsibility. If the insurrectional movement failed, but it was subsequently found that some of its acts had been carried out in the interests of the community, then those acts—if internationally wrongful—must engage the State's responsibility under article 8. In view of the continuity of the State, it was possible to attribute to it the internationally wrongful acts of private persons who took the initiative or acted spontaneously on behalf of the State.

9. To emphasize the exceptional nature of the situations covered by article 8 and to show clearly that the State's responsibility was not engaged automatically, it might be advisable to replace the words "is also considered" by the words "may also be considered".

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

10. Mr. MARTÍNEZ MORENO said that the inclusion of article 8 among the rules on State responsibility was justified. In recent decades there had been a remarkable development in international law in that field. The Guerrero Report of 1926,² the Bases of Discussion drawn up by the Preparatory Committee of the 1930 Hague Conference,³ the preliminary draft on Responsibility of States for damage done in their territory to the person or property of foreigners prepared by the Harvard Law School in 1929⁴ and the revised draft prepared in 1961 by Mr. García Amador,⁵ had all adopted a much narrower approach to attribution, imputing to the State only acts of organs, agencies and officials of the State acting within their competence.

11. Article 8 quite rightly went much further, though it dealt with a special category of cases in which private

² See *Yearbook ... 1956*, vol. II, p. 222.

³ *Ibid.*, p. 223.

⁴ Supplement to *The American Journal of International Law*, vol. 23, special number, April 1929, p. 133.

⁵ *Yearbook ... 1961*, vol. II, p. 46.

persons performed public functions in exceptional circumstances, without the formal authority of the State. It should perhaps be made clear that in such cases the responsibility of the State, which was responsibility under civil law, did not exclude the liability under criminal law of the persons performing public functions without authority. Joint responsibility on the part of both the State and the person concerned should therefore be admissible, but only if the person could be held responsible for his act under criminal law.

12. Mr. PINTO said that in article 8 the Special Rapporteur had quite rightly tried to express the idea that in certain circumstances a group of persons, who would normally be characterized as private persons, might act in such a way that their action assumed the character of a governmental act, thereby engaging the responsibility of the State. That thesis, from which there appeared to be little dissent, was amply supported by references to principle and practice. However, some doubts had been expressed about the appropriateness or adequacy of the present wording. He agreed with those who would prefer the article to speak of "governmental functions" or the exercise of "State power", rather than of "public functions", which might be ambiguous and create translation problems.

13. Unlike article 7, article 8 was clearly intended to cover exceptional situations in which the State's responsibility was engaged. Since private persons did not as a rule perform governmental functions, it was necessary to state a principle whereby they might, in certain circumstances, be deemed to perform governmental functions, thereby engaging the responsibility of the State, but at the same time to circumscribe that idea by limiting it to the type of circumstances the provision was intended to cover. Such a limitation was introduced by the reference to persons in fact performing public functions or acting on behalf of the State. That raised the problem of how to determine whether the function performed was a public, or governmental, function and whether the person was acting as an agent of the State. Could some principle of implied agency be recognized, or did the reference apply only to cases in which the State had expressly authorized such action, for example, by proclamation or statute? What was considered a public function in one country might be considered a private function in another. The solution might lie in drafting a body of rules that would provide equitable answers to those questions in a given situation.

14. While wholeheartedly supporting the idea of the primacy of international law and the rule that internal law must conform to it in all material respects, he thought that some role, although not necessarily a decisive one, would have to be assigned to the State's internal law if the principle in article 8 was to be stated satisfactorily and suitably circumscribed. That could perhaps be done by removing the phrase "under the internal legal order" from its present position, where it did not seem necessary for the description of the persons in question, and placing it after the word "but" in the phrase "but in fact perform". Alternatively, the words "in any manner authorized, permitted or approved by the State" might be inserted after the words

"on behalf of the State". The "internal legal order" would in that context mean not merely statute law, but the State's entire regulatory system, which might well indicate, for example, the limits within which a private citizen was entitled to act on his own initiative to safeguard public interests. If the regulations authorized or condoned violence, the State might be responsible for any international consequences of such an act. It therefore seemed wise to limit the acts of private persons attributable to the State to those which were beneficial to the State and were reasonable in the circumstances. The authorization of such acts under the State's internal law would be evidence that the State considered them to be beneficial and reasonable in the circumstances of the particular case, which would generally be of an exceptional nature. To allow internal law such a role need not affect the primacy of international law, as it would still be possible for international law to impose a minimum international standard, to which internal law would have to conform. Reference to such a standard would make it difficult for a State to manipulate its internal law or interpret it in such a way as to escape responsibility in the case of an act attributable to it. Attribution would, of course, depend in each case on the evidence available and the degree to which proof was possible.

15. One of the questions prompted by article 8 was whether the nationality of the persons referred to would be relevant. For example, would the acts of foreign experts performing governmental functions in a developing country, under a United Nations programme, be attributable to the State they were assisting? There was also the question of the attribution of acts by private persons in wars of national liberation, although that question should not perhaps be considered at present, as its political implications would greatly impede the Commission's progress. He agreed with Mr. Reuter that the principles of attribution in cases of responsibility for contractual obligations might best be dealt with separately.

16. Mr. EL-ERIAN said that article 8 usefully supplemented article 7, in so far as it dealt with the difficult situations in which acts committed by *de facto* agents of the State without its formal authority could be attributed to the State. The wording and the underlying principle were entirely acceptable. Attribution was generally based on the exercise of authority and effective control by the State, and he agreed with the Special Rapporteur that, where State organs had been placed at the disposal of another State on a purely formal basis, but had in fact continued to function under the exclusive control of the State to which they belonged, the latter State was responsible for their actions.

17. The Special Rapporteur had also made it clear that article 8 dealt with the responsibility of States and not of international organizations. Cases of responsibility had in fact arisen in connexion with United Nations observers and members of United Nations emergency forces.

18. He had not yet studied Mr. Kearney's proposal, but might wish to comment on it when the Commission took up article 11.

19. Mr. QUENTIN-BAXTER thought the wording of article 8 should make it clear that the article dealt with exceptional situations. Sir Francis Vallat had suggested one way of doing that. There were two types of situation involved: situations in which the State subsequently recognized the person or group of persons as an organ or agent of the State, and which would therefore be covered by article 7; and those exceptional situations which were not covered by other provisions and for which article 8 was necessary. Situations in the latter category might also not be covered by the kind of provision proposed by Mr. Pinto, for in an emergency situation, such as an insurrection or a change of government, there might be no effective internal legal order.

20. He did not agree that the reference to public functions created any special difficulty for common law countries, although the term "public corporation" might well do so. The term "public functions" was in general use and clearly understood. There was a body of case law applying the distinction between private and public acts. The term might create difficulties in cases of sovereign immunity, but was unlikely to do so in the situations under discussion. It did not need a precise definition for the purposes of article 8. In practice, it would generally be unnecessary to refer to the criteria laid down in articles 7 and 8 to determine whether or not the State was responsible. For example, the extent to which the State owned or controlled a railway would not greatly affect the outcome of cases involving international responsibility. The present wording of the articles was reasonably sound and adequate for the limited purpose of attribution. When all the articles had been completed, the apprehension expressed about the broad character of the provisions under discussion might prove to be unfounded.

21. Mr. BILGE said he noted that several members of the Commission doubted whether it was advisable to retain article 8. He himself approved of the principle stated in that provision, which was quite distinct from articles 7 and 11. The attribution to the State of the conduct of persons who "in fact perform public functions" was perfectly acceptable. That contingency, although very exceptional, should be provided for in the draft articles, since the organization of a State could be momentarily paralysed. Article 8 reflected the Special Rapporteur's concern to cover all the acts attributable to the State.

22. As to the case of persons who "in fact act on behalf of the State", he doubted whether it was really distinct from the case of persons who "in fact perform public functions". It would seem that the activities in question were mainly those of secret civilian or military services. Whatever the personnel to whom such secret tasks were entrusted, they were always more or less linked to the State. But the definition of State organs varied within the same legal system, according to the point of view adopted, and for the purposes of responsibility a very broad definition was generally applied. Thus it appeared that all the activities of persons who in fact acted on behalf of the State were really carried out by organs of the State or under the control of the State, whatever the appearances might be. In view of the link

that always existed between those persons and the State, he thought that the notion of an "organ of the State" might be construed as broadly as possible, so that the activities in question would be covered by articles 5 and 6.

Mr. Ustor resumed the Chair.

23. Mr. SETTE CÂMARA said he thought that the phrase "as a subject of international law" could be omitted from the title of article 8, because the word "State" was always used in that sense in the draft articles, without regard to the concept of the State embodied in its own internal law. The reference to persons who "in fact perform public functions" raised a problem. What was a "public function", and could it be performed without some form of authorization by, or the knowledge of, the State? Without resorting to internal law, as in Mr. Kearney's draft,⁶ it was doubtful whether any grounds could be found for attributing to the State the acts of private persons acting as self-appointed organs of the State in certain exceptional circumstances. Some legal nexus must exist between such persons and the State in that particular situation, but if it had been established beforehand under internal or international law, those persons would cease to be private persons and become organs of the State while those circumstances prevailed. They would then be covered by article 5 and a separate article would not be needed.

24. The main purpose of the draft was to establish State responsibility in broad terms and to avoid loopholes which might diminish that responsibility. As Mr. Ushakov had pointed out, the Commission was trying to establish rules for normal situations and not for exceptional circumstances such as natural disasters and war, internal or external. War had its own rules and it had been the Commission's policy not to consider them when dealing with normal relations between nations. The problems arising out of the *de facto* performance of public functions were dealt with by States on the basis of general principles, and he doubted whether the draft should contain an article dealing with *de facto* situations and not specific legal problems. Moreover, a State was unlikely to accept responsibility for the acts of persons who in many cases acted against its interests or threatened its very existence.

25. The cases mentioned in paragraph 189 of the Special Rapporteur's third report⁷ were clearly extreme situations in which authority had collapsed and other authorities had established themselves without regard for constitutional procedures. The case cited in paragraph 190 would be covered by article 7. The *Zafiro* case, mentioned in paragraph 192, did not appear to support an approach to the problem of *de facto* officials along the lines of article 8, since the vessel had been under the command of a naval officer and had undeniably been used for State purposes in naval operations. The statement in paragraph 194, supporting "The attri-

⁶ See previous meeting, para. 11.

⁷ See *Yearbook ... 1971*, vol. II, p. 263.

bution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function)", was indisputable, but article 8 went much further, by including situations in which it would be difficult to prove that a person was acting on behalf of the State or at its instigation.

26. The draft should include some provision dealing with the problem of *de facto* officials, but not in the broad terms of article 8. The Drafting Committee might find a suitable approach by studying the text in conjunction with Mr. Kearney's interesting proposal for rearranging articles 7, 8 and 11 to avoid overlapping. The references in that proposal to internal law were not perhaps in accordance with the Special Rapporteur's approach, though draft article 8 itself referred to the internal legal order. As Mr. Quentin-Baxter had pointed out, it should be remembered that as a rule an international claim would not be submitted before the remedies available under the internal legal order had been exhausted. Most of the cases covered by article 8 were likely to be settled through such remedies.

27. He agreed with Mr. Reuter that the Commission should not, at the present stage, consider the problem of State liability for breach of contractual obligations, which was a vast, complex subject, closely linked with the problems of the law of treaties.

Co-operation with other bodies

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

28. The CHAIRMAN invited Mr. Gómez Robledo, Observer for the Inter-American Juridical Committee, to address the Commission.

29. Mr. GÓMEZ ROBLEDÓ (Observer for the Inter-American Juridical Committee) paid a tribute to the Commission for its important contribution to the codification and progressive development of international law and emphasized the great interest taken in its work on the American continent. He expressed the hope that an observer for the Commission would be able to attend the forthcoming session of the Inter-American Juridical Committee, which was to open on 23 September 1974 at Rio de Janeiro. The opening of that session had been deferred because of the United Nations Conference on the Law of the Sea, which was to be held at Caracas in June 1974.

30. In 1973, the Committee had dealt with a number of matters, including, in particular, the preparatory work for the forthcoming Inter-American Specialized Conference on Private International Law; a resolution and studies on territorial colonialism in America; a report on a régime for the exploration and utilization of the international sea-bed area; and studies on the sub-

ject of conflicts of jurisdiction between the United Nations and the inter-American system.

31. In America, and particularly in Latin America, the codification of private international law—and the unification of the law on certain subjects relevant to international trade—had been pursued as vigorously as the codification of public international law. The Bustamante Code⁸ of 1928 was partly in force, and a large number of treaties concluded at the two South American congresses on private international law, held at Montevideo in 1888 and 1939, were in force in the southern part of the continent. The Inter-American Specialized Conference on Private International Law, to be held at Panama in January 1975, was expected to explore the possibility of bridging the gap between those two systems, although that task was not formally on its agenda, which included such specific items as commercial companies—multinational companies, in particular—international sale of goods, international bills of exchange, international commercial arbitration and shipping. The Inter-American Juridical Committee had prepared draft conventions on most of those topics for submission to the Conference.

32. In a continent dedicated to freedom, like the American continent, it was unthinkable that dependent territories of any kind should continue to exist, and the Committee, anxious to implement the relevant General Assembly resolutions on the elimination of colonialism, in particular resolutions 1514 (XV) and 2621 (XXV), had kept on its agenda for the last few sessions the topic of territorial colonialism in America, both extra-continental and intra-continental. On 18 February 1974, the Committee had adopted, by the unanimous vote of all the Latin American members present, a resolution which expressly referred in its preamble to the cases of Belize, the Falkland Islands and the Canal Zone of Panama. The position in regard to the Canal Zone under the 1903 Treaty between Panama and the United States, as amended in 1936 and 1955, had been recognized by the Committee as fundamentally affecting Panamanian sovereignty. In the operative part of the resolution, the Committee had offered its full co-operation in the study and settlement of that problem and had suggested that the General Assembly of the Organization of American States (OAS) should appoint a special commission urgently to recommend measures which would lead to the abolition within a short time, of all forms of colonialism, neo-colonialism and usurpation of territory by alien States in the American continent.

33. The Committee had closely followed developments in regard to the law of the sea. Although naturally mindful of regional interests, it had always tried to suggest approaches and solutions that were generally acceptable to the international community as a whole. At the twenty-fifth session of the International Law Commission, the Observer for the Committee had explained the position it had taken on that subject in February 1973, with particular reference to the concept

⁸ League of Nations, *Treaty Series*, vol. LXXXVI, p. 254.

of the "patrimonial sea" or "economic zone".⁹ At its session held at the beginning of 1974, the Inter-American Juridical Committee had undertaken the study of the régime of the international sea-bed area. The resolution it had adopted on that subject contained certain novel elements which deserved comment. In the first place, the Committee had reaffirmed its position that the limits of the international sea-bed area should coincide with those of the areas of national jurisdiction, which extended to a maximum distance of 200 nautical miles measured from the baseline of the territorial sea, or with the outer limit of the continental rise, where that limit extended beyond 200 miles. Thus the Committee, following in that respect the Santo Domingo Declaration,¹⁰ had adopted a geomorphological criterion for defining the outer limit of the continental shelf, as opposed to the mixed criterion, combining depth and exploitability, adopted in the 1958 Geneva Convention on the Continental Shelf.¹¹ Another novel feature of the resolution was the inclusion of minerals in suspension in the waters of the high seas as belonging to the international sea-bed area, and hence to the common heritage of mankind.

34. The Committee's resolution went beyond the terms of General Assembly resolution 2749 (XXV), which established separate régimes for the sea-bed and its subsoil, and for the superjacent waters. The Committee was well aware that it was proposing a departure from that resolution, but it had done so because it believed that minerals in suspension were, by their nature, outside the scope of fisheries and that their inclusion in the sea-bed régime conformed with the spirit, if not the letter, of General Assembly resolution 2749 (XXV).

35. The Committee had also dealt with the difficult problem of the authority or institution which would be called upon to administer or manage the international sea-bed area. In view of the very great diversity of proposals at present under consideration by the international community, the Committee had adopted an eclectic approach. It had stressed, however, that, regardless of the régime adopted, the exploration and exploitation of the area must constitute an international public service under the supervision of organs genuinely representing the international community.

36. The Inter-American system was undergoing a process of revision; that was particularly true in regard to the Charter of the Organization of American States¹² and the Inter-American Treaty of Reciprocal Assistance.¹³ In that revision, the question of the co-ordination of the United Nations system with that of the Organization of American States (OAS)—or of conflicts of jurisdiction between the two organizations—had once again come to the fore. After the unduly high regional expectations of the period between 1945 and 1948, and the subsequent disillusionment, the time had perhaps come for an objective and dispassionate reappraisal of

the scope of the jurisdiction of regional organizations in conformity with the Charter of the United Nations, the supremacy of which was expressly recognized by the Charter of the OAS. Because of the manifestly legal character of that question, the Committee had placed it on its agenda and had appointed two rapporteurs, both of whom had submitted reports, which would be considered at the Committee's session in September 1974. As one of those rapporteurs, he had confined himself to a restatement of the abundant existing material, dividing his report into four chapters: (1) pacific settlement of disputes; (2) self-defence; (3) coercive measures, and (4) peace-keeping forces. He had done his best to interpret the United Nations Charter in accordance with the decisions of the General Assembly and the Security Council.

37. In conclusion, he expressed the hope that the increasingly close and fruitful co-operation between the International Law Commission and the Inter-American Juridical Committee would contribute to the establishment of an international order based on peace and justice.

38. The CHAIRMAN thanked the Observer from the Inter-American Juridical Committee for his very interesting statement.

39. Mr. TABIBI also thanked the Observer for the Inter-American Juridical Committee, and said that in Asia, internationalists followed that Committee's work with great interest, bearing in mind, in particular, the long Latin American experience in the development of international law. There was a great similarity between the problems of Latin America and those of Asia and Africa, which led to a similarity in approach. Co-operation among jurists of the two regions was well illustrated by the growing numbers of Latin American jurists who had attended as observers the two most recent sessions of the Asian-African Legal Consultative Committee.

40. With regard to the Latin American position on the law of the sea, he felt bound to express the fears of the land-locked countries—two of them South American—which accounted for nearly half the total number of developing countries. Claims for wide extensions of the territorial sea and the new concept of the "patrimonial sea" would, if successful, place the land-locked countries still further away from the high seas; they would also reduce the area of those seas and the extent of the common heritage of mankind. He earnestly hoped that the forthcoming Conference at Caracas would take that fact sufficiently into account. The African countries, for their part, had acknowledged the right of the land-locked countries among them to an equal share of the living resources of the sea, but the question of the other resources remained to be settled.

41. In conclusion, he stressed the value to the whole world community of exchanges of views between regional bodies engaged in codification work, and between those bodies and the Commission.

42. Mr. HAMBRO thanked the Observer for his very lucid account of the work of the Inter-American Juridical Committee. In Norway, there was a deep appreciation of the important contribution made by Latin American

⁹ See *Yearbook ... 1973*, vol. 1, pp. 129 and 130, paras. 50-58.

¹⁰ *International Legal Materials*, vol. XI, number 4, p. 892.

¹¹ United Nations, *Treaty Series*, vol. 499, p. 312.

¹² *Op. cit.*, vol. 119, p. 48.

¹³ *Op. cit.*, vol. 21, p. 93.

jurists to the work of codification. He personally owed a great debt of gratitude to certain outstanding Latin American jurists: at the International Court of Justice it had been his privilege to work with President Guerrero of El Salvador and with Judge Alvarez of Chile, that great pioneer in the codification and progressive development of international law.

43. Mr. CALLE Y CALLE, speaking also on behalf of the other three Latin American members, Mr. Sette Câmara, Mr. Martínez Moreno and Mr. Castañeda, expressed his gratitude to the Observer for his excellent account of the work of the Inter-American Juridical Committee, which constituted the legal conscience of Latin America. The Committee had undertaken a number of important tasks, including the gigantic task of codifying private international law. It was considering the problem of the survival of colonialism on the American Continent and had approached that problem not from the political angle; but from the standpoint of legal rules and principles. The Observer had done well to emphasize the process of revision which the inter-American system was undergoing. His remarks were especially relevant to the Inter-American Treaty of Reciprocal Assistance, which had been concluded under "cold war" conditions and clearly needed revision in the light of present-day concepts of security.

44. He attached great importance to continued co-operation between the Inter-American Juridical Committee and the Commission, and hoped that the Commission would be represented by an observer at the Committee's forthcoming sessions.

45. Mr. KEARNEY, speaking also on behalf of Sir Francis Vallat and Mr. Quentin-Baxter, congratulated the Observer for his lucid summary of the recent activities of the Inter-American Juridical Committee. He was impressed by the volume of work handled by the Committee—in particular, by the nine treaties on private international law which covered an enormous variety of subjects. That work, however, raised the important question of the relationship between the activities of regional bodies and those of world, or general, organizations. The Inter-American Specialized Conference on Private International Law should examine that question. To give but one example, it was desirable that the efforts to standardize the form of bills of lading should lead to the establishment of a single régime for all such instruments used in world trade.

46. Mr. AGO associated himself with the tributes paid to the Observer for his excellent statement on the work of the Inter-American Juridical Committee. There was not time to comment on all the activities of the Committee, but its work on the law of the sea alone offered ample food for thought: it showed how far the world had moved since the Commission had dealt with that topic less than twenty years previously. It was clear that the development of the law was affected by the development of techniques for the exploration and utilization of the resources of the sea. He had been particularly impressed by the Observer's remarks on minerals in suspension in the waters of the high seas, which he understood to include manganese compounds that had only recently attracted great interest.

47. The distinction between developing and developed countries did not appear to be very relevant to utilization of the resources of the sea-bed, since geography and the degree of development were not related. A highly developed country like Switzerland could be just as land-locked as Afghanistan. As far as Latin America was concerned, in addition to two land-locked countries, it included a number of countries in the Caribbean whose geographical position was quite similar to that of Mediterranean States like Greece and Italy and thus completely different from that of oceanic States such as Argentina or Brazil. The efforts made by the Inter-America Juridical Committee to arrive at balanced solutions satisfactory to all countries would be of great value to the world community as a whole.

48. Mr. ELIAS, speaking on behalf of the five African members of the Commission, thanked the Observer for his very instructive statement. The codification work of the Inter-American Juridical Committee had been followed with admiration in Africa, particularly during the past decade. The papers submitted and the statements made by Latin American observers to the Asian-African Legal Consultative Committee at its 1972 and 1973 sessions had provided evidence of a common approach by Latin American and African jurists to the problems of the law of the sea. The Asian-African Legal Consultative Committee had been at first somewhat hesitant about what was now known as the "patrimonial sea". In time, however, more and more countries had come round to the view that it was necessary to extend the outer limits of their exclusive economic zone. There remained, nevertheless, the question whether fisheries should be subject to the same régime.

49. The topics dealt with by the Inter-American Juridical Committee included several which were also being discussed by the Asian-African Committee. The problem of colonialism, although it existed in Latin America only on a very small scale, provided another link between the two regions.

50. He hoped arrangements would be made to ensure that henceforth the Commission would be represented at the sessions of the Inter-American Juridical Committee, since the exchange of views between regional bodies and the Commission was of very great importance for the work of codification.

51. Mr. USHAKOV thanked the Observer for his very interesting statement and stressed the part played by the American continent in the codification of international law. Speaking also on behalf of Mr. Tsuruoka, he said he hoped that the Inter-American Juridical Committee would continue its work with success and that the Commission would receive documents enabling it to follow the Committee's progress.

52. The CHAIRMAN associated himself with the members' expressions of appreciation of the work of the Inter-American Juridical Committee. The regional and universal bodies engaged in codification had the same aim: the peaceful organization of the world. He expressed the Commission's best wishes for the successful continuation of the Committee's work and assured the Observer that every effort would be made to provide for

representation of the Commission at the Committee's next session.

The meeting rose at 1.10 p.m.

1260th MEETING

Monday, 20 May 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

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

Welcome to Mr. Šahović

1. The CHAIRMAN welcomed Mr. Šahović among the members of the Commission.
2. Mr. ŠAHOVIĆ thanked the members of the Commission for the confidence they had shown in him by electing him to the seat that had been held by Mr. Bartoš. He paid a tribute to his predecessor, who had made an important contribution to the development of contemporary international law, and assured the Commission that he would do his best to discharge his duties.

Appointment of a Drafting Committee

3. The CHAIRMAN said that following consultations held by the Chairman of the Drafting Committee, it was proposed that the Commission should appoint a drafting committee of thirteen members: Mr. Hambro, the Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Elias, Mr. El-Erian, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat and Mr. Thiam, the Commission's Rapporteur.

It was so agreed.

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State) *(continued)*.

4. Mr. BEDJAOUÏ said he accepted the wording of article 8. At first, he had been somewhat hesitant about the place the article should occupy in the draft as a whole and had thought it might be inserted between articles 10 and 11. For articles 5, 6, 7, 9 and 10 related to the conduct of organs of the State or of separate public institutions, whereas article 11, like article 8, related to the conduct of private persons, and he had therefore thought that article 8 might be placed after article 10, so that it would introduce article 11. On further consideration, however, and in view of what the Special Rapporteur had said, he thought the Special Rapporteur had wished to stress the public character of the mission rather than the private character of the agent. Like the Special Rapporteur, he considered that the basic criterion for the application of the article was the public character of the mission, not the legal nexus which could exist between the person who had committed the act and the State itself. The private character of the agent was, indeed, less decisive than the public character of the mission, because one could speak of *de facto* agents or *de facto* officials. It was, however, necessary to agree on the meaning of the public character of the mission: for example, abductions were not carried out by public missions, but by missions that were usually repudiated by the State. In that connexion, he stressed that article 8 covered a very wide range of situations, in particular, the case of chartered companies mentioned by the Special Rapporteur in his third report,¹ which were really private companies that had appropriated attributes of public power for their own advantage.

5. Article 8 raised the problem of the engagement of the responsibility of the State, because that responsibility was limited in internal law. Thus attribution to the State of acts of private persons was subject, in internal law; to certain prior conditions which varied from country to country, such as the exceptional nature of the event which had motivated the act—accident, war, etc.—impossibility of the regular authority acting legally, the existence of exceptional circumstances at the time when the damage was caused, the public character of the act, etc. But the article did not formally refer to internal law for determining the public character of the act.

6. That problem could also arise in connexion with the subversive activities of multinational companies.

7. Another point worth noting was that the Organization of African Unity (OAS) was trying to adopt a code of ethics condemning political crimes committed against opponents of a régime who had taken refuge in foreign territory.

8. Referring to the case of the hijacking of an aircraft which had been carrying Algerian leaders during the Algerian war of independence, he asked whether the Special Rapporteur, who had taken part in the arbitration of that case, considered that it came under article 8 or article 10. If it was considered that the pilot of the aircraft in question was in fact an agent of the French

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 263, footnote 382.

Government, the case came under article 8; but it was considered that the pilot had only carried out the orders of bodies which had exceeded their powers, the case came under article 10.

9. He was grateful to the Special Rapporteur for having raised a very important and complex question in article 8 and for having illustrated it, in his third report, by many interesting examples, although he had not referred to faked aircraft accidents, like those which had caused the deaths of General Leclerc and Dag Hammarskjöld, or to the Mattei case. He also wished to point out that although the Commission had, for the time being, left aside the question of responsibility for risk, that question nevertheless arose in regard to multi-lateral conventions which provided for liability based on the system of risk. Companies which carried out activities relating to outer space or atomic energy, for example, could engage the responsibility of the State if they were working on behalf of the State. He believed that that question was fully covered by article 8, even though the Commission declined to deal with the problem of responsibility for risk for the time being.

10. In connexion with the *Zafiro Case*, to which the Special Rapporteur had referred,² he mentioned the case of the requisition of ships in time of war, or angary, which generated a double responsibility of the State: the State was liable to third parties for damage caused by the requisitioned ship, and it was also liable to the ship's owner for damage to the ship and for loss of earnings resulting from the interruption of its commercial use.

11. Lastly, there was international responsibility relating to the existence of governments in exile or insurrectional movements, though he thought that problem was too complex to be dealt with under article 8.

12. Mr. TABIBI said he agreed with the Special Rapporteur that an article was needed to cover the cases contemplated in article 8. Those cases were quite different from the cases coming under article 7, which concerned the State's responsibility under international law for any act authorized under its internal law. The acts to which article 8 referred were not based on any legal or constitutional authorization; they therefore constituted an exception to the rule stated in article 7. And since the cases covered were not numerous, he suggested that they should be dealt with in a second paragraph of article 7. Merging the two articles into one would have the additional advantage of eliminating the title of article 8, to which Mr. Sette Câmara had objected.³

13. The CHAIRMAN, speaking as a member of the Commission, said that at first sight, article 8 had seemed attractive to him, but after hearing the statements made during the discussion he had some doubts about the difficulties it involved, to which the Special Rapporteur himself had already drawn attention in his third report. Those difficulties related not only to the problem of

stating the rule, but also to that of applying it, however it was stated. It was the practice of the Commission to try to adopt rules which were not too difficult to put into effect.

14. The Special Rapporteur had pointed out that since an act by a person invested with the legal status of a State organ was still not an "act of the State" if that person was acting only in a private capacity, it was also logical that "the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at the international level".⁴ The proposition was indeed logical, but he, for one, had doubts as to whether a rule to that effect would be really workable.

15. To illustrate that point, he referred to the case of the region of pre-1914 Hungary formerly known as the Subcarpathian Ukraine, which had been inhabited by a Ruthenian population belonging to the Ukrainian Orthodox Church and clearly distinct from the Protestant or Catholic Slovak minority. That mountainous region, which had been assigned to Czechoslovakia by the Treaty of Trianon in 1920, had been occupied in 1939 by Hungarian troops, with Nazi encouragement, and declared to be once again part of Hungary. In October 1944, the Red Army had expelled the German and Hungarian forces in a matter of days, had freed the inmates of the concentration camps and had moved on in pursuit of the defeated enemy. In those circumstances, the liberating Red Army had not had time to reorganize the territory and had simply appealed to the population to carry on as usual. A vacuum had thus been created, in which very few of the former Hungarian officials had been able to carry on with the administration; in nearly all the cities, former Czech officials had occupied the town halls without even the knowledge of the Czech Government, then in exile. Subsequently, a referendum had been held and, in accordance with the overwhelming wish of its Ukrainian population, the territory had joined the USSR, thereby exercising its right of self-determination. The question he had in mind was that of responsibility for the acts performed by Czech officials during the interim period before the referendum: had those acts been performed as a public function, or should they be considered as having been performed on behalf of a State, and if so, which State? It was difficult to see which of the various States concerned should be held responsible for the acts.

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

16. Mr. AGO (Special Rapporteur), summing up the discussion, noted that the rule stated in article 8 seemed to have met with the general approval of the members of the Commission. It would, of course, be difficult to apply, as Mr. Tabibi and Mr. Ustor had pointed out, but that was no reason for not formulating the rule. In the case cited by Mr. Ustor, it was uncertain whether

² *Ibid.*, p. 264, para. 192.

³ See previous meeting, para. 23.

⁴ See *Yearbook ... 1971*, vol. II, Part One, p. 264, para. 191.

the former Czech officials who had resumed their functions had been *de facto* officials or real officials of the State, which had intended to go on exercising its authority; on the latter view, the case would come within the scope of article 5 and might raise problems relating to State succession.

17. He noted that it was the drafting of article 8 which had raised the most problems. Some of them were translation problems relating, in particular, to the difficulty of finding English equivalents for French terms; others were structural problems, like that mentioned by Mr. Kearney;⁵ and yet others were drafting problems, like those mentioned by Mr. Reuter.⁶ He thanked all those who had stressed that articles 5 to 13 should be considered in their logical sequence and in the whole context of chapter II. In particular, he thanked Sir Francis Vallat, Mr. Quentin-Baxter, Mr. Bilge and Mr. El-Erian, who had drawn attention to that fundamental aspect.

18. In that connexion, he pointed out that, in its report on the work of its twenty-fifth session, the Commission, in defining the object of chapter II of the draft—dealing with the subjective element of the internationally wrongful act—had distinguished three stages: first, establishing what persons could be the authors of conduct which might be considered as an act of the State according to international law; secondly, deciding, within that general context, whether conduct in all the different categories, in certain particular conditions should or should not be attributed to the State according to international law; thirdly, concluding the analysis on a negative note by stating the rules that indicated the categories of conduct for which attribution to the State was excluded, while examining what might be the international situation of the State in relation to such conduct (A/9010/Rev.1, para. 46). The Commission was now at the first stage, and was proceeding from the general to the particular and from the normal to the exceptional.

19. The most normal case was that stated in article 5, under which the conduct of an organ of a State was attributed to that State and could engage its responsibility. Article 7 dealt with a case that was exceptional as compared with that of article 5; for the position in internal law might be quite different from that in international law, since the acts of the entities in question might not be regarded as acts of the State in internal law, and so might not engage its responsibility in internal law. But the Commission should not concern itself with internal law. The rule on exhaustion of local remedies, the importance of which Mr. Tammes had stressed,⁷ might admittedly be very material, but it was not applicable only to the acts of organs of separate public institutions; it was equally valid for the acts of State organs. The Commission would see later, when dealing with the different aspects of the international delinquency, that the act of a particular organ might not

be internationally wrongful if the object of a certain rule of international law could still be attained through the action of another organ distinct from that which had acted contrary to the rule.

20. Article 8 dealt with a more exceptional case than that covered by article 7, for it concerned the attribution to the State of the acts of *de facto* organs, in other words of persons who, while not State organs in law, had acted in fact as though they were State organs. Mr. Reuter had pointed out that such persons had no organic link with the State, but in fact acted as though such a link existed, and had proposed that they should be defined by a cross reference to article 7.⁸ It would be for the Drafting Committee to decide whether that proposal was acceptable.

21. Article 9 dealt with an even more exceptional case: that of the attribution to the State, as a subject of international law, of acts of organs placed at its disposal by another State or by an international organization. Thus there was a logical sequence from article 5 to article 9.

22. Mr. Kearney had drawn attention to the possible overlapping of articles 7 and 8.⁹ In his (the Special Rapporteur's) opinion the two articles did not really overlap. In practice, of course, there were always borderline cases about which it was difficult to decide whether they came within the scope of one article or another. But it was precisely in cases of that kind that interpretation of the rules of international law became necessary. The American Telephone and Telegraph Company, for example, was not a State entity. Normally, if that company committed on its own account an act harmful to States or foreign individuals, the case would come under article 11: the act was that of a private person acting as such, which was not attributable to the State, though that did not prevent the State's responsibility from being engaged in so far as the State was guilty of an omission because it had not done what it should have done to prevent or punish the conduct in question. But if the State had entrusted the company with the exercise of certain prerogatives of public power, then an act committed in the course of such exercise could be attributed to the State and engage its international responsibility as such, by virtue of the rule in article 7. Lastly, it was not impossible that the company's act could be attributed to the State under article 8, if the necessary conditions were satisfied—action as a *de facto* organ or at the instigation of the State. It was clear that all those eventualities might call for different solutions; but the important point was to establish the principles and formulate them as simply as possible.

23. So far as the position of the article was concerned—a question raised previously by Mr. Kearney, and at the present meeting by Mr. Bedjaoui—the logic of chapter II required that the provisions should first indicate what could be attributed to the State and then what could not. Article 8 dealt with the attribution to the State of the act of a person acting as *de facto*

⁵ See 1258th meeting, paras. 10-14.

⁶ *Ibid.*, paras. 19-22.

⁷ *Ibid.*, para. 16.

⁸ *Ibid.*, para. 21.

⁹ *Ibid.*, paras. 10-14.

organ of the State; hence it was in its proper place after articles 5 and 7. Besides, he thought it preferable first to consider the draft articles in the order proposed; the rule under study could hardly be put in an article which had not yet been considered.

24. Like Mr. Ushakov, he thought that the exceptional nature of the situation contemplated in article 8 should be emphasized. Its exceptional nature was evident merely from the position of the article, however, and had been expressly mentioned in his third report. Furthermore, the cases covered by the article, though exceptional, were not very rare, for even the exceptional could be relatively frequent.

25. He did not think that acts committed during a civil war should be disregarded, as Mr. Ushakov maintained, for that would exclude many cases in which the international responsibility of States was engaged. In his opinion the codification of State responsibility should cover violations of the law of war as well as the law of peace. An article in chapter III should be devoted to defining the most serious international offences; such as war of aggression, massacre of prisoners of war and bombing of civilian objectives. Those cases could not be left out of the draft without indirectly reducing the scope of the rules stated. Besides, it was difficult to define notions like self-defence and reprisals if the law of war was not taken into account. The Commission would have to reflect on that problem.

26. With regard to Mr. Reuter's question whether the two conditions stated in the article were cumulative or separate,¹⁰ the members of the Commission had already answered it by pointing out that there were really two distinct cases. The first case was that of the *de facto* exercise, in an abnormal situation, of a prerogative of public power. Mr. Ramangasoavina had spoken of the spontaneous action of a private person in the event of failure of the machinery of the State.¹¹ In that case there was no connexion between the private person and the State. The private person's action would have to be justified, as Mr. Ramangasoavina had said, by a genuine failure of the authorities to act. In the event of such failure, the action was automatically attributable to the State. The second case was that of a private person who was in reality an agent of the State, as in the cases mentioned by Mr. Bedjaoui, but who was not legally regarded as an organ of the State. In that case there was a connexion between the private person and the State, but not a legal connexion.

27. He did not think it would be advisable to introduce into the article such notions as authorization, approval or ratification, which might provide means of evasion. The only point to be determined must be whether the private person had acted or had not acted on behalf of the State, whatever the State's attitude might be. Hence the real problem was that of evidence, as Mr. Ushakov had pointed out.¹² In the cases cited, States had never challenged the actual principles of at-

tributability to the State and responsibility; but in specific cases they had denied originating the offending act. In that situation it was much more difficult to produce the evidence, for what had to be proved was an act which the State was trying to conceal. The importance of the evidence might perhaps be stressed by stipulating that it must be "established" that the condition laid down in the article was fulfilled.

28. With regard to the contractual liability mentioned by Mr. Kearney,¹³ several members of the Commission had observed that that was a difficult question which had better be held over. He himself considered that it belonged in a different sphere, for contractual obligations did not normally come under international law, but under internal law. Hence, it would be better not to mention that question in the article. Similarly, it would be better not to introduce the question of the criminal liability of individuals into the draft articles, since that question was outside the topic of the international responsibility of States.

29. So far as terminology was concerned, he thought the word "*public*" (*publico*) was very clear in French and Spanish; equivalent terms should therefore be found in English and Russian, for although the English word "*public*" was certainly not synonymous with the French word "*public*", it would be absurd to abandon the use of the word in French and Spanish for that reason.

30. In conclusion he thought the idea expressed in article 8 was clear and should be adopted. He hoped the Drafting Committee would succeed in formulating it satisfactorily.

31. Mr. USHAKOV said he had never suggested that the cases of international war, civil war or war of liberation should be excluded from the draft. He had merely remarked that some situations were very exceptional and should be dealt with separately. Cases of war could hardly be covered by article 8. He had also referred to article 13, which concerned the entirely exceptional case of successful insurrectional movements. As in other drafts prepared by the Commission, cases of war should form the subject of separate provisions.

32. With regard to evidence, he stressed that in the cases contemplated in articles 5, 6 and 7, responsibility must be proved in conformity with internal law, whereas in the case of article 8, proof was also necessary, but without reference to the internal legal order. The need to produce conclusive evidence should be clear from the text of the article.

33. Mr. AGO (Special Rapporteur) pointed out, in reply, that the cases to which Mr. Ushakov appeared to be referring were not those contemplated in article 8; moreover, they were not expressly mentioned in the commentary. As to the requirement of conclusive evidence in the cases covered by article 8, he had proposed that it should be expressly stipulated.

34. The CHAIRMAN suggested that draft article 8 should be referred to the Drafting Committee for con-

¹⁰ *Ibid.*, para. 22.

¹¹ See previous meeting, para. 7.

¹² See 1258th meeting, para. 25.

¹³ *Ibid.*, para. 12.

sideration in the light of the comments and suggestions made by the members of the Commission.

*It was so agreed.*¹⁴

Mr. Ustor resumed the chair:

ARTICLE 9

35. The CHAIRMAN invited the Special Rapporteur to introduce article 9, which read:

Article 9

Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization

The conduct of a person or group of persons having, under the legal order of a State or of an international organization, the character of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions.

36. Mr. AGO (Special Rapporteur) said that draft article 9 served to complete the catalogue of acts attributable to the State and capable of engaging its responsibility. The article dealt with the acts of organs placed at the disposal of a State by another State or by an international organization. It was important to specify at the outset that the organs in question must really have been placed at the disposal of the State. That was not the case, for example, where the organs of a State performed certain functions in foreign territory in their capacity as organs of that State, such as ambassadors, consuls, or armed forces stationed abroad. French writers used the term “*organes prêtés*” (organs lent), whereas English writers used the rather imprecise expression “transferred servants”. The essential point was that the organ lent should be effectively under the control and authority of the State at whose disposal it was placed.

37. In his third report he had given a number of examples of organs placed at the disposal of a State.¹⁵ With the intensification of inter-State relations and the development of bilateral and multilateral assistance programmes, such situations would probably occur more frequently in the future. Obviously, the draft should not deal with cases—obsolete, it was to be hoped—in which a State claimed to place police or other forces “at the disposal” of a State under its domination, which was in fact equivalent to an absorption or a usurpation of functions. It was clear, moreover, that such organs continued to depend on their home State and remained under its control and authority.

38. The jurisprudence and the practice of States which he had quoted in his third report,¹⁶ showed that it was on the basis of the effectiveness of the control and authority exercised by the State to which the organ had been lent that its responsibility had been considered to

be engaged by the internationally wrongful acts of that organ. In that connexion, he referred in particular to the *Nissan Case* of which an account was given in paragraph 208 of his third report.¹⁷

39. Without going into the question of the responsibility of international organizations, he had cited, in his third report, certain cases involving international organizations, in order to show that the principle stated in article 9 was also recognized for the acts of organs placed by States at the disposal of international organizations. Sometimes the organ placed at the disposal of an international organization by a State continued to carry out the instructions of that State and the responsibility of the international organization was not engaged. But the organ might act on the instructions of the international organization, in which case the organization would be responsible. That was what had occurred in the dispute between the Belgian Government and the United Nations, following the intervention of the United Nations force in the Congo in 1961.¹⁸ Another instance worth mentioning was the *Romano-Americana Case*,¹⁹ in which damage had been caused to an American company by the act of an organ of the United Kingdom placed at the disposal of Romania under an agreement between those two countries.

40. Writers were almost unanimous in accepting the principle stated in article 9. Since his third report had appeared, other writers had expressed the same view, in particular in Poland, the Soviet Union and the German Democratic Republic.

41. Mr. REUTER said he approved of draft article 9. He suggested that the cases relating to international organizations which the Special Rapporteur had cited in his third report should also be mentioned in the commentary to the article. Without going into the question of the responsibility of international organizations, he wished to point out that certain judicial decisions had recognized a joint responsibility of the State and the international organization concerned. Those questions had often raised great difficulties, particularly in the European communities.

42. As in the case of the preceding article, he wondered whether the two conditions stated at the end of the text were cumulative. It seemed necessary, first, that the organs lent should be “actually under the authority of the State at whose disposal they have been placed” and secondly, that they should “act in accordance with its instructions”. Perhaps it was going too far, however, to require that they should be acting on instructions. That wording suggested that instructions were necessary, whereas an organ could act spontaneously, act in error or be corrupted, in which cases there were no instructions from the State; moreover, it was difficult to imagine that a State would give instructions to commit a breach of international law. In his opinion it mattered little whether the State alleging the internationally

¹⁴ For resumption of the discussion see 1278th meeting, para. 14.

¹⁵ See *Yearbook ... 1971*, vol. II, Part One, p. 267, para. 200.

¹⁶ *Ibid.*, p. 269, paras. 203 *et seq.*

¹⁷ *Ibid.*, p. 271.

¹⁸ *Ibid.*, p. 273, para. 212.

¹⁹ See G. H. Hackworth, *Digest of International Law*, vol. V, pp. 702-705 and 840-844.

wrongful act could or could not prove that there had been instructions from the State to which the organ had been lent.

43. Mr. TABIBI said he supported the underlying principle of article 9, because the kind of case it applied to was quite common, especially in newly established States, which were often assisted by experts from international organizations or from other States, who might commit acts that were wrongful under international law. There was no machinery for the settlement of disputes arising out of such acts, and it might be difficult to persuade a government to accept responsibility for them. Admittedly, the cases article 9 was intended to cover were not quite the same as those he had in mind, but they might still be difficult to settle without appropriate machinery, as had been demonstrated in the Nisan case, cited by the Special Rapporteur.

44. The circumstances of each wrongful act committed by a person or organ placed at the disposal of a State by another State or by an international organization might be different. For example, United Nations operational, executive and administrative personnel (OPEX) were in a different position from other United Nations experts, because they were generally employed by the recipient States as high-ranking civil servants and were often placed in charge of banks, municipalities or postal services. They were in positions of responsibility and their promotion and salaries were determined by the recipient government, but they were nevertheless answerable only to the United Nations. If they committed a wrongful act, no direct proceedings could be instituted against them and any charges had to be referred to the Secretary-General of the United Nations. It would be useful if article 9 could be made to cover such cases.

45. Sir Francis VALLAT said he supported the proposed text of article 9, subject to one or two points of drafting and his agreement with Mr. Reuter's remarks.

Commemoration of the twenty-fifth anniversary of the opening of the first session

[Item 2 of the agenda]

46. The CHAIRMAN suggested that the Commission's twenty-fifth anniversary commemorative meeting should be held on Monday 27 May, and that statements should be made by Mr. Suy, the Legal Counsel, by the President of the International Court of Justice, or, if he was unable to be present, by a former member of the Commission who was now a judge of the Court, and by the former Chairmen of the Commission who were present.

It was so agreed.

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

[Item 7 of the agenda]

47. Mr. REUTER (Special Rapporteur) said he understood that the Commission intended to devote two or

three meetings during the week of 10-14 June to consideration of his report. In order to save time, and as he thought the report was of secondary importance, he asked members of the Commission to consider departing from the method of work traditionally followed in examining the main reports and to submit their first comments to him in writing during the next three weeks.

The meeting rose at 6.5 p.m.

1261st MEETING

Tuesday, 21 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization) *(continued)*.

1. Mr. ELIAS said that the generally recognized principle underlying article 9, embodied three ideas: that an organ and its services might be transferred or lent to a State by another State or an international organization; that such a transfer or loan carried with it the power to control the organ, bringing it within the authority of the recipient State; and that, to be attributable to the recipient State, an act or omission by such an organ must be within the scope of that State's ostensible authority. The essential considerations were the purpose of the transfer, the degree of authority to be exercised by the recipient State, and whether the organ concerned had carried out its assignment rightly or wrongly under international law. The present formulation of the rule seemed appropriate, subject to the alignment mentioned by the Special Rapporteur and some drafting amendments to make it clear that the recipient State could be held responsible only for acts which fell within its ostensible authority.

2. Mr. YASSEEN said he approved of the rule stated in article 9. Owing to the closer links of co-operation between States, and between States and international organizations, the cases contemplated in article 9 would

probably acquire increasing importance in the future. It should be noted, however, that the organs placed at a State's disposal generally remained partly under the authority of the entity sending them; that was particularly true where they were seconded by an international organization, for example, under a technical assistance programme. They had to observe certain principles governing the performance of their duties, so that they were subject to a mixed authority, which might result in a joint international responsibility of the State or international organization seconding them and the recipient State.

3. The proviso at the end of article 9 should probably be made less categorical. In his opinion, it was essential that the organs in question should be "actually under the authority of the State at whose disposal they have been placed", but it was not necessary that they should in all cases have acted "in accordance with its instructions". In that respect the wording of the article might be slightly amended.

4. Mr. KEARNEY said that he, too, agreed with the substance of the article, though he shared the concern expressed by some speakers about its formulation. The point made by Mr. Yasseen warranted special consideration as it raised the question of the relationship between articles 5 and 9—whether both articles could continue to apply when a State placed an organ at the disposal of another State. In the case of an internationally wrongful act by such an organ, would one State be responsible for all the consequences, or could there be a principle of liability whereby both States would be "jointly and severally" liable? If the act of the organ was not in accordance with its instructions and was therefore outside the scope of the recipients State's ostensible authority, would the State to which the organ belonged be automatically responsible? Those questions were, to some extent, connected with the theory of damages, but they also had a bearing on the problem of attribution, and it might be necessary to add a paragraph to article 9 or draft a separate article to cover such situations.

5. Mr. USHAKOV said that to his great regret he was unable to accept either the draft of article 9 or the accompanying explanations; at the very most, he could agree to one of the applications of the principle laid down in that provision.

6. He did not agree with the statement made by the Special Rapporteur in paragraph 200 of his third report¹ that it was "easy to envisage possible instances of organs being 'lent' by one State to another State or by an international organization to a State". With regard to organs lent by an international organization to a State, article 9 provided that "The conduct of a person or group of persons having, under the legal order... of an international organization, the character of organs" was considered to be an act of the State in international law. What was meant by "the legal order of an international organization"? International organizations were generally composed not of persons or of

groups of persons, but of States. Their organs were, in principle, representatives of States, although they had some organs which consisted either of a number of persons, such as a secretariat, or of a single person, such as the Secretary-General of the United Nations. In his opinion, an international organization could not lend to a State those of its organs which were composed of States. As to the organs consisting of persons, it was obvious that an international organization could not lend its secretariat, whether it consisted of a single person or an entire staff. Armed forces could be regarded as an organ of an international organization and be lent as such to a State, but the fact was that no international organization possessed its own armed forces; hence no such loan was possible. At the most, an international organization could send to the territory of a State some of its secretariat officials, who would not then have the status of organs at all. Moreover, the English term "transferred servants" clearly showed that it was not organs, but officials that were seconded. He thought the third report was somewhat confused on that point. Furthermore, none of the examples cited by the Special Rapporteur concerned an organ lent as such by an international organization to a State.

7. In considering organs lent by one State to another, it was necessary to distinguish between the organs of the legislative, executive, judicial and constituent powers. Obviously, none of those organs, and certainly no parliament, head of State or court could be placed at a State's disposal by another State. If the Special Rapporteur's explanations in paragraph 200 of his third report were to be accepted, not only officials, but technical experts, health, hospital and other services, could be regarded as organs of the State.

8. With regard to persons placed at one State's disposal by another State, rather than organs lent as such, he referred to the *Chevreau Case*, cited in the third report.² In that case, the British Consul, who had been in charge of the administrative affairs of the French Consul, had not acted as an organ, but as a private person placed at the disposal of one State by another. The same applied to other examples cited by the Special Rapporteur.

9. In short, only the armed forces of a State could be regarded as an organ capable of being placed at the disposal of another State. That case might be dealt with in an article of the draft, though it raised some delicate questions. For instance, in time of war it might happen that troops were placed under the command of the State at whose disposal they had been placed, but were not subject to its State authority; that happened when the two countries concerned were fighting a common enemy. At the most, he could accept that police forces, as an organ, could be placed at a State's disposal by another State, but he thought that the usual practice was to second police officers individually.

10. Mr. AGO (Special Rapporteur) said that the questions raised by Mr. Ushakov were so fundamental that they called for an immediate reply. In the first place, the

¹ *Yearbook ... 1971*, vol. II, Part One, p. 267.

² *Ibid.*, p. 269, para. 203.

notion of an international organization's internal or own legal order was widely accepted and had even been discussed in courses at the Hague Academy of International Law.³ Every international organization operated according to rules, which constituted its own legal order.

11. The principal difficulty encountered by Mr. Ushakov seemed to derive from a misunderstanding regarding the term "organ", which had persisted since the previous year. It had certainly not been his (the Special Rapporteur's) intention to deal, in the article under consideration, with the loan by an international organization of organs consisting of States, or the loan by a State of organs such as a parliament or a head of State; nor was there anything in his third report or in his oral introduction to article 9 to suggest that intention.

12. He and the other members of the Commission understood the notion of an "organ" differently from Mr. Ushakov. In their view, the term should not be reserved for the highest institutions of the State or for entities like armed forces; it could be applied to any person who was a member of the administration of a State and even to a member of its armed forces. That was why he had treated as organs all kinds of individuals and groups participating in the public administration of a State, who could be placed at the disposal of another State. In the *Chevreau Case*, for example, the British Consul had been placed at the disposal of France, as an organ, to assume the duties of the French Consul in his absence.

13. It was for the Commission, not the Drafting Committee, to define the meaning to be ascribed to the term "organ". If the Commission were to move towards a conception of an "organ" different from that adopted in the draft articles, he would be unable to deal with the question of the attribution of internationally wrongful acts to the State or to continue his work as Special Rapporteur for the topic of State responsibility.

14. Mr. USHAKOV maintained that a parliament was an organ of the State and could only engage the State's responsibility if it acted collectively. If officials were sent abroad, they could not possess the status of organs outside their country, since they did not possess that status in the internal order of the State that had sent them. That was the position, for example, of experts seconded under technical assistance programmes. It was different where armed forces were concerned. A member of the armed forces might be sent abroad to carry out a mission in that capacity and might, by his conduct, engage the responsibility of the sending State.

15. Mr. YASSEEN observed that the whole discussion was revolving round the definition of the term "organ". Words had, after all, only the meaning attributed to them, particularly in legal terminology. He was not perturbed by anything in the text of article 9, for he understood the term "organ" in the same way as the Special Rapporteur. Mr. Ushakov, on the other hand, understood it differently. The term had been used many times during the consideration of the draft articles, and

most of the members of the Commission had understood it in the same sense as the Special Rapporteur. Like many others, the notion of an "organ" would have to be defined by the Commission at the appropriate time, in order to prevent any misunderstanding.

16. Mr. TSURUOKA agreed that it would be sufficient to define the meaning attached to the term "organ" in the draft. The exchange of views between the Special Rapporteur and Mr. Ushakov had been interesting, but the Commission should leave theory aside and come to an agreement on the meaning to be ascribed to that term.

17. Mr. REUTER said that he, too, had found the discussion very interesting and considered that Mr. Ushakov's view, although subtle, was correct. The cases Mr. Ushakov had in mind were rare, but they could occur. For example, the President of the French Republic was also co-Prince of The Valleys of Andorra. He was co-Prince not as a natural person, but as an organ, which could give rise to delicate problems of French law. When the President signed a legal instrument in his capacity as co-Prince, must French law be applied in addition to the rules of the Principality of Andorra? A similar case was that of personal unions. Sometimes a single person performed the same functions in both entities, sometimes separate organs were responsible for those functions. In 1945 General Koenig, commanding the French troops in Germany, had been a member of the Control Council, which had represented not only the Allied States, but also the German State. It was not as a natural person that he had been "co-prince" of the German State, but as commander-in-chief. Some of the acts performed by General Koenig as commander-in-chief had been attributable to the French State, whereas others had been attributable to the German State.

18. Similar situations could arise in the contemporary world, in particular, in connexion with the execution of technical assistance programmes, when it could be doubtful whether internationally wrongful acts were attributable to the home State, to the international organization or to the beneficiary State. For example, France seconded officials, including teaching staff, which it placed at the disposal of certain countries, under agreements. The persons concerned were agents of the State to which they were seconded, although they maintained links with their home State.

19. Whereas Mr. Ushakov accepted only the case of armed forces and possibly police, he himself thought there were other situations in which it was not the natural person, but the organ as such that was incorporated into the administrative structure of another State. The Commission must determine the situations to which article 9 was to apply.

20. Mr. TABIBI said he thought the problem could be dealt with by a definition. The concern expressed by Mr. Ushakov was reasonable, since confusion might arise in certain cases, but the Commission had to consider the possibility of an act by a natural person constituting an act by an organ of a State. In some countries individual members of an organ could act in the name of that organ. Mr. Ushakov had said that the decision of an

³ See *Recueil des Cours*, 1961-II, vol. 103, pp. 526-530.

organ such as parliament was collective and not the decision of one or more of its members; but in the United States of America, for example, a single judge could act as a judicial organ in some cases.

21. The CHAIRMAN said he thought the problem was perhaps mainly a matter of drafting and it might be possible to work out a generally acceptable definition.

22. Mr. ELIAS said that Mr. Ushakov's notion of an organ, which differed from that of most of the other members of the Commission, was interesting and should be considered; but he doubted whether it could be regarded as invalidating the work done on the preceding articles. He agreed with Mr. Yasseen that the issue should, if possible, be confined to semantics and should not be considered in terms of ideological differences. It was rather confusing at that stage to be told that only a branch of government, or a decentralized section of the government could be regarded as an organ. On the other hand, the notion of an organ should not be considered entirely in terms of the persons composing it, but also in terms of what it represented. The important factor was the nature of the link between the lending State and the recipient State. Mr. Ushakov seemed to doubt that members of the judiciary could be lent to another State, but the Chief Justices of Uganda and Botswana, and the President of the Court of Appeal of the Gambia were all Nigerians lent by the Nigerian Government. Nigeria had also lent senior civil servants to Kenya, Sierra Leone and other countries, one of whom had at one time been head of the recipient State's civil service. Such assignments were sometimes for five years. Were such persons not to be considered organs of a State?

23. Article 9 seemed to be drafted convincingly, in accordance with the normal use of terms in legal practice.

24. Mr. TAMMES said that a provision embodying the idea in article 9 was desirable, in order to prevent any misunderstanding arising in the particular case where the person who had acted happened to be an organ of another State or of an international organization. As the Special Rapporteur himself had pointed out in paragraph 201 of his third report,⁴ it was possible to regard the foreign personnel in question either as a *de facto* organ under article 8 or as a fully integrated organ under article 7, and he understood that Mr. Ushakov might be satisfied with that approach. An analysis of the practice showed, however, that it was useful to have a specific article on the acts of persons of mixed affinity. Otherwise, the draft on State responsibility would be incomplete, at a time when the scope of bilateral and multilateral assistance was constantly widening.

25. That being said, he wished to state his view that article 9, as proposed, could give the impression that the State lending the organ was exonerated from any wrongdoing as soon as the transferred organ had entered the service of the recipient State. That might be true in most situations, but one could imagine less innocent cases in which the international responsibility of

the lending State would continue to be engaged despite the transfer. An illustration was provided by the text of the definition of aggression adopted by consensus by the Special Committee on the Question of Defining Aggression,⁵ which would probably be submitted to the forthcoming session of the General Assembly. Article 3 (f) of that definition stated that "any of the following acts ... shall qualify as an act of aggression: ... (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State". Article 5 of the definition stated that "aggression gives rise to international responsibility". Clearly, in the situation contemplated, if the territory of a State B was placed at the disposal of a State A in such a manner that the armed forces of State B were integrated into those of State A, the international responsibility of both States was engaged, despite the transfer of the forces in question. The fact that the lending State's forces acted under complete control of the recipient State would not relieve the lending State of its concurrent responsibility for actions contrary to the principles of the United Nations Charter.

26. In order to prevent any misunderstanding or apprehension on the part of governments, which would certainly be expressed in their comments, he suggested the insertion in article 9 of a saving clause on the following lines:

The present article is without prejudice to any State responsibility arising from a transfer of organs from one State to another inconsistent with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

That saving clause followed the pattern of the one in article 6 of the Commission's draft articles on succession of States in respect of treaties, adopted at its twenty-fourth session.⁶

27. Mr. HAMBRO said that on the whole he approved of article 9 as drafted; he thought its provisions were necessary. He had some difficulty, however, with some of the expressions used in the article. The reference to "instructions" was not as clear in the English version as it was in the original French. With regard to the term "organ", he suggested that an explanation should be introduced into the commentary to prevent any misunderstanding that might result from the special meaning in which that term was used in the United Nations Charter. There was also the question of the possible difference between "agents" and "organs", and it was significant that the International Court of Justice in its advisory opinion on the question of *Reparation for Injuries Suffered in the Service of the United Nations*⁷ had used the expression "agents of the United Nations".

28. Mr. TSURUOKA said he approved of the principle stated in article 9. That article seemed all the more necessary because the cases it dealt with were becoming

⁴ *Yearbook ... 1971*, vol. II, Part One, pp. 267-268.

⁵ See draft report in documents A/AC.134/L.46 and L.47.

⁶ See document A/8710/Rev.1, chapter II, section C, in *Yearbook ... 1972*, vol. II.

⁷ *I.C.J. Reports*, 1949, p. 174.

increasingly frequent as a result of the development of international cultural, technical and financial co-operation.

29. Like Mr. Yasseen he wondered, however, whether the rule stated was not rather too rigid. To remedy that defect, he proposed that the words "unless otherwise agreed between those States or between the State and the international organization concerned" should be added at the end of the article. In the case of technical assistance experts loaned to a State by a United Nations body, there was in fact always a prior agreement between the international organization and the beneficiary State.

30. He also shared Mr. Reuter's concern and proposed that the present wording at the end of the article should be amended to read "at whose disposal they are placed and act normally in accordance with its instructions".

31. Mr. BEDJAOUÏ noted that the development of co-operation between States, and between States and international organizations, had given rise to situations which came under article 9. He therefore welcomed that article very warmly. The Special Rapporteur had stated in it a certain and acceptable rule derived from practice, and had thus made a contribution to co-operation between States and between States and international organizations. The article did not deal with co-operation by substitution, in other words, with a State which replaced another through the intermediary of organs "lent". In the past, it had often happened that, on the pretext of co-operation, one State had actually taken the place of another in the exercise of certain public responsibilities. He was therefore grateful to the Special Rapporteur for having laid down the two cumulative conditions for attribution to the recipient State of responsibility for a wrongful act committed by the organ lent. In that respect, article 9 merely applied the general rule that a State could not be held responsible for the acts of an organ over which it had no authority. For the responsibility of the recipient State to be engaged, the transferred organs must act like organs of the recipient State itself. That meant that two conditions must be satisfied: the organ must serve the recipient State and must serve it within the exact limits set by that State. Otherwise, the recipient State could not assume responsibility for the acts of the organ.

32. By reason of the very fact that the organ was lent, the consent of the recipient State was necessary—not only its passive consent or acquiescence, but an active request. That ruled out the case of former protectorates based on a legal-political fiction. It also ruled out the case of "unequal treaties", which placed a country or part of the territory of a country under the administration of a foreign State. Above all, it ruled out the case of military occupation. For he considered that the case of military occupation did not come under article 9, since it was quite obvious that the high command of armed occupation forces, could not be called an organ lent with the consent of the State in whose territory it exercised its authority. Even when the organ in question, for example, a supervisory or control commission, performed purely administrative functions for the benefit of the occupied State, he believed that the case did

not come under article 9, because the organ was not lent with the consent of the recipient State.

33. Furthermore, the organ must not only be wanted by the recipient State, but must really be placed at its disposal. That ruled out the case of armed intervention, even when its object was to help a friendly State under a bilateral agreement on mutual military assistance. But in the case referred to by Mr. Tammes, in which a State placed at the disposal of another State an army it kept under its own command, knowing very well that the army was to be used to commit aggression on behalf of the recipient State, the responsibility of the lending State was engaged; it was engaged even if the lending State had placed the army under the command of the recipient State. He therefore considered that the amendment proposed by Mr. Tammes was entirely pertinent.

34. Consequently, for the responsibility of the recipient State to be engaged the organ lent must be effectively under the authority of that State, which exercised control over it and gave it instructions. Those two basic conditions were cumulative. For the degree of allegiance of the organ to the recipient State and to the lending State varied according to circumstances—for example, according to co-operation agreements. Thus responsibility for remuneration of the organ lent was often assumed by the State or international organization lending it, and whoever paid might wish to exercise control. The two conditions were therefore necessary for the responsibility of the recipient State to be clearly engaged. But there were also some borderline cases, to which Mr. Reuter had referred, in which the responsibility of both the lending State and the recipient State were engaged. In his opinion, the second condition laid down in the article did not mean that the recipient State must give instructions amounting to a breach of an international obligation; it meant that it must be within the framework of those instructions or pursuant to them—or even when they were being carried out—that a wrongful act was committed.

35. He did not think that article 9 raised any difficulties where an organ was lent by one State to another State. In the case of the personal union cited by Mr. Reuter when he had referred to the President of France, who was simultaneously co-Prince of Andorra, it could not be said that an organ was lent by one State to another, since the Head of State did not act as an organ on loan. In the case of personal union between two States, it could not be said that the head of State was lent by one of the two States to the other. Hence the hypothetical situation mentioned by Mr. Ushakov was impossible.

36. On the other hand, article 9 seemed to exclude the possibility of a State lending anything other than a State organ, although it could place at the disposal of the recipient State organs of public corporations or of autonomous public institutions, as mentioned in article 7. He therefore regretted that, by appearing to refer only to State organs, the Special Rapporteur had restricted the provision to the situation covered by article 5, whereas article 6 should also be borne in mind. He hoped that the Drafting Committee would find a formu-

la that took account of that problem as well as Mr. Ushakov's objections.

37. Mr. CALLE y CALLE said that during the discussion of article 8, Sir Francis Vallat had drawn attention to the various categories of conduct covered by chapter II.⁸ He himself wished to draw attention to the fact that the whole of chapter II was intended to define the various sources of conduct which gave rise to State responsibility, because the acts in question were considered as acts of the State according to international law. Article 5, which was the first provision of chapter II, dealt with the conduct of organs of the State, understood as the basic elements of the State structure. In the following articles, however, the term "organ" was used in the wider sense of a subsidiary organ. It was in that wider sense that the term had to be construed in article 9.

38. The provisions of article 9 were necessary, to show that responsibility for the acts of transferred organs or servants rested not on the lending State, as would normally be the case, but on the recipient State. The key condition, for the purposes of that attribution, was that the organ should be effectively under the authority of the State at whose disposal it had been placed. The article added the requirement that the organ should have acted "in accordance with" the instructions of the recipient State. He would prefer to use the broader expressions "under the instructions" and "*bajo las órdenes*" in the English and Spanish texts.

39. He could give a practical example in support of article 9, taken from experience in his own country during the disastrous earthquake of 1970. Among other forms of aid, Peru had been lent manned helicopters by the Soviet army and the United States navy, and a battalion of Swedish military engineers, placed at the disposal of the United Nations, had been lent by that Organization, which had borne the cost of certain relief operations. Clearly, if the foreign military personnel in question had committed any internationally wrongful act, the responsibility should have been borne by Peru and not by the lending State concerned.

40. There could be no doubt that article 9 dealt with a practical phenomenon of contemporary international life. With the growth of multilateral and bilateral technical assistance schemes, it was becoming increasingly common for officials, experts and agents of one country to be lent to another. There were also cases in which States placed their agents at the disposal of an international organization, and it was necessary to protect the lending State from having to bear international responsibility for acts performed by such agents when acting on behalf of the organization.

41. In the case of organs lent by an international organization to a State, difficulties could arise from the fact that the international personnel concerned sometimes retained their privileges and immunities, thereby preventing the recipient State from resorting to local remedies. That State might then be held responsible for its inability to apply sanctions for internationally wrongful acts.

⁸ See 1259th meeting, para. 2.

42. He found the provisions of article 9 logical and coherent, and supported their inclusion in the draft.

43. Mr. SETTE CÂMARA supported the proposal to introduce a provision on the use of the term "organ", in order to solve the problem raised by the divergence of views on the subject.

44. Article 9, which dealt with "transferred servants", had its place in the draft and would serve to close any loopholes that might enable a State to escape responsibility. The cases listed in support of the article in the Special Rapporteur's third report⁹ showed that its provisions dealt with realities of present-day international life and not with theoretical or academic hypotheses. He found the contents of the article satisfactory and agreed that it should be sent to the Drafting Committee.

45. As to the drafting, he thought it unnecessary to include the words "as a subject of international law" in the title or the words "in international law" in the text, since the title of chapter II showed that the whole chapter dealt with "The act of the State according to international law". In addition, he suggested that the words "that State" should be replaced by the words "the latter State", in order to remove the ambiguity created by the fact that two different States were previously mentioned. The term "legal order" was usually employed only with reference to a State. In the case of an international organization, it seemed more appropriate to refer to its "constitution", "statute", "constitutive treaty" or "constituent instrument".

46. On a point of substance, it was desirable that the article should cover the lending of autonomous public institutions. For example, in Brazil there was a State company called Petrobras, which had the monopoly of oil prospecting and production and which was a typical "public corporation" of the kind mentioned in article 7. It was quite common for that company to lend its services to other South American countries. Since it was not an organ of the Brazilian State, such loans would not fall within the terms of article 9. He would be glad to know the views of the Special Rapporteur on the possibility of covering that case, and also the case of territorial public entities which might place servants at the disposal of foreign States.

The meeting rose at 1 p.m.

⁹ See *Yearbook ... 1971*, vol. II, Part One, pp. 269-273.

1262nd MEETING

Wednesday, 22 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization) (*continued*).

1. Mr. AGO (Special Rapporteur) said that the substance of the problem should not be neglected. Some members of the Commission had said that article 9 raised a drafting problem, while others had said that there was a problem of terminology. He himself did not think it was only a problem of drafting or terminology, for he was convinced that words had no meaning in themselves, but only the meaning given to them. In his opinion, it mattered little whether one spoke of "organs" or "agents"; the important point was to agree on the reality it was desired to describe.

2. In French terminology, as in Italian and Spanish terminology, the term "organ" did not raise any problems, because it covered both the most important and the least important organs of the State. There were individual organs, such as the President of the Republic, and collective organs, such as parliament; but there were also other organs, within the framework of the executive power and the administration. Mr. Ushakov was right in saying that a member of parliament was not an organ of the State, because a parliament was a collective organ which could only act collectively. But there were other organs which were both collective and composed of individual organs: for example, a government was a collective organ, but each of its members was an organ which could act individually on behalf of the State. Similarly, all the members of the administration, at all levels of the hierarchy, were always organs of the State, and they could act on behalf of the State.

3. With regard to the translation of such terms into other languages, the definition of the term "organ" given in *The Oxford English Dictionary* seemed to confirm that that term was used correctly in the English version of article 9, though there was some doubt in constitutional law, because certain writers preferred the term "agent". Some Russian writers seemed to use the terms "organ" and "official" interchangeably in the cases covered by article 9.

4. It was, however, relatively seldom that the higher organs of a State committed internationally wrongful acts. Of course, the president of a republic or the parliament of a State could decide to wage a war of aggression, but the most frequent wrongful acts were committed by officials, including those of low rank. He therefore proposed that the terminology used should be unambiguous and cover all the possibilities for internationally wrongful acts.

5. Sir Francis VALLAT said that after that very helpful explanatory statement he wished to clarify his own

position on the problem raised by the term "organ". He had not objected to the use of that term; he had simply felt misgivings that English-speaking lawyers might take it to refer more to the juridical concept of the entity than to the individual servant. In that perspective, the act of a minor official was regarded as an act of the State because it constituted the act of an organ—in the sense of an entity—and thereby engaged the responsibility of the State. He was therefore concerned that if too much emphasis was placed on the concept of an "organ", many English-speaking lawyers would not immediately understand that it was intended to include the act of individual agents. That point was particularly relevant to article 9. It was essential that the article should be understood to cover not simply the case of a State placing one of its organs, as a juridical entity, at the disposal of another, but also the more frequent case of a State placing the persons who worked for one of its organs at the disposal of another State. He had been content to leave the matter to the Drafting Committee because he thought the words "who have been placed at the disposal of another State" could very well be taken to mean placing an organ at the disposal of another State through the instrumentality of the individual servant concerned.

6. Mr. PINTO said he agreed with the principle stated in article 9. The article dealt with situations which occurred in practice and had to be covered. For instance, his own country, some two years previously, had borrowed some small military units from friendly Asian States to deal with certain internal defence problems, and those forces had operated under the command of the authorities of the recipient State. He could also cite the example of engineers loaned by the Government of his country to another Asian country; it was expected that, under the agreements being negotiated, those engineers would have the status of civil servants of the recipient State and would act under the direction of its authorities. The provisions of article 9 dealt with that type of situation very aptly.

7. With regard to the use of the term "organ", he himself understood that term in the sense used by the Special Rapporteur. He was grateful to Mr. Ushakov, however, for raising a problem which had led to clarification in the subsequent discussion, and he agreed with Mr. Yasseen that the matter could well be dealt with by a definition.

8. He supported the two concurrent requirements for attributing responsibility to the recipient State, but felt some misgivings about the formulation of the second; he suggested that it should be amended to read: "act within the scope of that State's authorization". That form of words was preferable, because instructions might not be given in a particular case.

9. In the case of a foreign expert on loan to a country, the so-called "hold harmless clause" was often used to protect the expert from claims arising out of his acts which might be brought by third parties. In the classic case, that clause operated in such a way that the recipient State stepped into the shoes of the expert and conducted the suit in his place. The Government of his country had resisted the inclusion of that clause in tech-

nical assistance agreements, largely because it had been found almost impossible to apply under its own procedural laws. Even the "hold harmless clause", however, was not absolute and did not protect the expert from claims arising out of his gross negligence or wilful misconduct. He therefore agreed in principle with Mr. Tsu-ruoka's suggested addition of the saving clause "unless otherwise agreed between those States or between the State and the international organization concerned". A clause of that type would provide for the exceptions in question.

10. He agreed with those members who found that the rule, as drafted in article 9, might be rather too rigid in that it referred only to the responsibility of the recipient State; but he had not read article 9 as excluding the responsibility of any other State or of an international organization. If there was any doubt about the matter, he would favour the inclusion of an additional paragraph on the lines proposed by Mr. Tammes.¹ A provision of that kind would serve to establish the parallel liability of the lending State where it placed the organ at the disposal of the recipient State for a wrongful purpose, such as aggression. The principle should be that, where the purpose for which the organ was lent was wrongful in itself, the lending State and the recipient State were jointly responsible.

11. During the discussion of article 8, he had suggested that in deciding whether or not responsibility should attach to the State for the acts of private persons, the internal law of the State should play a part, though not necessarily a decisive one.² Article 9, in requiring that the act should be in accordance with the recipient State's instructions, followed the practice of giving a role to local law and he agreed with that approach. During the discussion of article 8, however, several members had taken the view that the situation covered by that article was one in which local law was impossible to apply because a real lacuna existed. He wished to place on record his view that, under article 8, internal law must have a role in determining responsibility.

12. Article 8 dealt with certain extraordinary situations in which the normal law-enforcement agencies had temporarily disappeared. It would be wrong, however, to describe the situation as one in which law and order had broken down to the point of being non-existent. The law of the country was still there and it could still play a part in determining international responsibility. In fact, the acts in question, although not specifically required by internal law, were either acts permitted by that law or on which the law was silent, or acts which had been approved or should be deemed to have been approved by the State subsequently. His reason for stressing the role of internal law was that it was the people of a State who ultimately had to pay when the State was held responsible. The question he asked himself was whether, in a given case, the people ought to feel able to accept the responsibility and burden of restitution or performance. He believed that the law

created and enforced by the people should constitute the link between the people and responsibility. Hence a role, though not a decisive role, should be given to internal law.

13. Mr. USHAKOV said he doubted whether the English text of article 9 really corresponded to the French text. In his opinion, the words "actually under the authority of the State" did not have exactly the same meaning as the words "*relève effectivement de l'autorité de l'Etat*".

14. Mr. AGO (Special Rapporteur) said he only assumed responsibility for the French text he had drafted. His knowledge of English did not enable him to see a very definite difference between the two phrases referred to by Mr. Ushakov, but, if there was a difference, the two texts should be brought into line. In his opinion, however, the important point was to render the terms "*autorité*" and "*effectivement*", which, as Mr. Bedjaoui had emphasized at the previous meeting, were the two essential terms in the present context.

15. He also wished to clear up a misunderstanding by defining the meaning of the words "act in accordance with its instructions", to which there had been a number of reactions. He had not meant that the organ which committed the wrongful act must have acted, in the case in question, in accordance with instructions from the recipient State. What he had meant was that the organ must receive instructions from the recipient State only, which ruled out the possibility of its continuing to receive instructions from its home State.

16. Mr. REUTER said that at the previous meeting Mr. Bedjaoui had put a very pertinent question and Mr. Ushakov had expressed some genuine fears which ought to be taken into account. He, too, wished to put a number of questions. In the first place, he wondered whether article 9 related only to cases in which there was an agreement between the two States concerned and whether the expression "placed at the disposal of another State" should be interpreted as referring to such an agreement. If so, that would exclude certain situations which Mr. Ushakov wished to be reserved—in particular coercion and war. In that case the Inter-Allied Control Council in Germany, which had been an organ of the Allied States, but had also represented the German State, would not come within the scope of the proposed provision, since there had been no agreement between the German State and the Allies.

17. If the only situation to be covered was that in which there was an agreement between the two States, then relations between the two States which had signed the agreement must be distinguished from relations with third States. In relations between the two signatory States, it was the agreement which determined how responsibility was to be attributed to one State or the other. But many agreements were silent on the point, so that article 9 would be a residuary rule: its purpose would be to settle points that were not settled by the agreement.

18. As to relations with third States, in principle, the provisions of an agreement between two States could not be invoked against a third State. Hence, the object

¹ See previous meeting, para. 26.

² See 1259th meeting, para. 14.

of article 9 would be to establish an objective criterion with the sole purpose of protecting the third State, which was unaware—and perhaps had a right to be unaware—of the agreement. If that were so, two further questions arose. First, were the factual criteria by which a third State could attribute responsibility to one or other of the two signatory States entirely different from those adopted in a different situation in article 8? Secondly, if the purpose of article 9 was to protect third States, were those States entitled, in a doubtful case, to choose between the two signatory States? Should they not be regarded as jointly responsible? He recognized that the last question was difficult to answer at present, because it involved problems connected with the notion of joint authorship of an offence.

19. Mr. MARTÍNEZ MORENO said that he fully supported article 9, the provisions of which were both logical and well-drafted. He thanked the Special Rapporteur for explaining that the words “in accordance with its instructions” were intended to make it clear that the person or group of persons concerned must not be receiving instructions from the sending State or organization. At one point, he himself had understood those words as intended to exclude objective liability, so that the responsibility of the recipient State would only exist in the event of an actual wrongful act being committed.

20. In the light of Mr. Bedjaoui's comments, he urged that it should be stipulated that the organ must have been placed at the disposal of the recipient State with its consent. There had been cases in which a foreign organ had been imposed on a State. One example was the Hapsburg Emperor Maximilian, of whom it could rightly be said that, notwithstanding the invitation he had ostensibly received from certain circles in Mexico, he had been imposed upon that country as Emperor by Napoleon III.

21. With regard to responsibility for the acts of experts placed at the disposal of a State by an international organization, he suggested that some provision should be made for certain possible exceptions. International experts had been known to make mistakes in their forecasts of a country's food production. Even if such a mistake happened to cause injury to a third State, it would be going too far to allow that State to hold responsible the recipient State which had employed the international expert. Possibly the problem could be solved by stating that the recipient State was responsible “as general rule” for the acts of persons placed at its disposal by an international organization.

22. The CHAIRMAN, speaking as a member of the Commission, said that a case going back to 1603 was cited by Satow, in which the Duc de Sully, who had been sent on a special embassy to King James I by the King of France, had asked the Mayor of London for the services of an executioner to behead a French member of his mission whom he had condemned to death for killing an Englishman in a quarrel. The Mayor had counselled moderation, and the offender, after being surrendered to English justice, had been pardoned by King James I.³ Had the Duc de Sully obtained the

services of the executioner, the latter would have been a “transferred servant”—an organ of the executive power of one State placed at the disposal of another. If the interests of a third State had been affected as a result of the act of that organ, the question would have arisen whether the responsibility rested on the English or on the French Crown.

23. In the light of examples of that kind, he thought that article 9 was perhaps couched in unduly categorical terms. The recipient State was not always solely responsible; if the purpose for which the organ or agent had been lent was itself wrongful, responsibility would be shared by the lending and the recipient States.

24. Mr. QUENTIN-BAXTER said he had himself referred to the lacuna in the law as a particular justification for article 8, but he did not think that such a position was basically at variance with the thesis presented by Mr. Pinto. The test of whether a person in fact performed public functions or acted on behalf of a State must in some sense relate to the law and administration of that State. That principle was embodied in article 7 as well as in article 8. Even in the case of a lacuna, the philosophy of law might justify the contention that, in a certain sense, a State whose temporary inability to discharge its obligations had produced a lacuna should be responsible for what had been done to fill it. However, the text of article 8 might be justified by State practice, if that was found to be sufficiently consistent.

25. The cogency of article 9, even if interpreted in the very narrow sense attributed to it by Mr. Ushakov, could be amply illustrated. There had been a surprising number of cases in which even major organs of a State had acted for another State. For over a century the enactments of the United Kingdom Parliament known as the British North America Acts had in fact been Canada's Constitution, which until quite recently could only be changed by the United Kingdom Parliament, acting in a purely ministerial capacity at the request of the Canadian Government, but exercising no discretion of its own. That legislative action was unquestionably attributable only to Canada. For New Zealand, the highest court of appeals was still, for most purposes, the Judicial Committee of the Privy Council, which in practice, though not by law, met in London, with facilities provided by the United Kingdom Government, and was composed mostly of English and Scottish judges. When it considered an appeal from New Zealand, however, it acted solely as a New Zealand court. The position and functions of that organ had never been questioned.

26. Those might be considered vestigial cases, but in fact similar practices might become more common. In Western Europe, for example, there were international arrangements whereby certain treaty provisions were not only incorporated in the domestic law of the countries subscribing to the arrangements, but tended to be interpreted by an international tribunal, rather than by domestic courts. The parties to such arrangements were obliged to give effect in their own laws and, if appropriate, through the machinery of their own courts, to decisions reached by the international tribunal. For the purposes of article 9, such decisions would have to be

³ Sir Ernest Satow, *A Guide to Diplomatic Practice*, Fourth edition (1957), p. 206.

considered as part of the law of the States at whose disposal the tribunal had been placed.

27. It was sometimes convenient for a very small country with many calls on its educated manpower not to have to provide certain administrative institutions itself. For example, New Zealand's Auditor-General, who was responsible for presenting to the New Zealand Parliament an independent account of all matters of government finance, bore the same responsibility *vis-à-vis* the Government of Western Samoa. When dealing with Western Samoan affairs, the Auditor-General and his officers acted solely under the authority and at the behest of the Western Samoan Government, at whose disposal they had been placed. However, the arrangements made by the New Zealand Government had a bearing on the extent to which they could carry out those duties adequately, in so far as New Zealand law determined the selection of the Auditor-General and his officers and provided for the necessary machinery. Similarly, New Zealand Government agencies were placed at the disposal of the Government of Western Samoa to assist with such matters as technical control and safety standards in civil aviation.

28. The main question raised by Mr. Ushakov, however, was not one of definition or drafting, but whether there was a distinction in principle, which the article should recognize, between a case in which an organ as such was placed at another Government's disposal and one in which only the services of an individual were made available to another Government. The comments made so far suggested that the article should have the wider application. Mr. Tabibi had mentioned the case of United Nations experts sent to fill high-ranking posts in national administrations. If, as the result of an internal upheaval, such an expert came to occupy a position of political importance in the country concerned, the question would arise whether the functions in fact performed were consistent with the terms on which the expert had been recruited and made available by the Organization. Allowance must be made for such situations.

29. The extent to which individual States concluding agreements on the loan of organs could make their own terms should be determined by their obligations under general international law. Mr. Tammes and others had rightly raised the question of overriding loyalty to United Nations principles in such matters. Article 9 did not, therefore, seem too categorical in placing responsibility on the State to which the person or organ was lent. The words "actually under the authority" had considerable effect, indicating the obverse point of view that the State or organization providing an expert or institution did not escape responsibility if it did less than place the person or institution completely under the control of the recipient State.

30. He agreed, on the whole, with the remarks made by Sir Francis Vallat about the wording of article 9. A United Nations expert recruited in one part of the world for an assignment in another part, and linked to the United Nations only by his employment for that purpose, would not be considered an organ in the natural or ordinary meaning of the word as used in English, but

the use of the words was logical in the context of the present draft. Nevertheless, it would be advisable to consider other possibilities.

31. Mr. EL-ERIAN said that he accepted the rule in article 9 and the criteria it specified.

32. With regard to the scope of the article, he noticed that the commentary referred to a number of cases of responsibility arising out of situations of armed conflict. In that connexion, he drew attention to the position taken by the Commission in several of its drafts, and expressed in the following terms in its report on the work of its twenty-third session: "Moreover, and as in the case of previous topics, the Commission did not think it advisable to deal with the possible effects of armed conflict on representation of States in their relations with international organizations. The reasons for this are stated in the commentary on article 79, which relates to non-recognition of States or Governments or absence of diplomatic or consular relations".⁴ If the Commission decided to retain those examples in the commentary, it would be necessary to specify that it did so without prejudice to the responsibility of the lending State. Quite apart from the liability incurred by the recipient State for any specific wrongful act committed by the transferred servant, the lending State would be responsible on a different plane if it had knowingly placed its servants at the disposal of the recipient State for a wrongful purpose; the actual transfer of the services would, in that case, constitute an internationally wrongful act in itself.

33. He also wished to comment on the use of the term "organ" in relation to international organizations. In the Commission's draft articles on the representation of States in their relations with international organizations, paragraph 1 (4) of article 1 defined the term "organ" as meaning

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or sub-group of any such organ, in which States are members.⁵

With that definition of an organ of an international organization, it was difficult to regard a single official as constituting an organ. It was true that the Special Rapporteur in his third report had made it clear that he intended to cover both individual and collective organs,⁶ but article 9 itself did not specify that important fact, and while in the case of a State the term "organ" could cover both collective organs and individuals, the same was not true of international organizations. A technical assistance expert lent to a State by an international organization, for example, could hardly be described as an "organ".

34. Lastly, he would welcome clarification of the concluding words of article 9 "and act in accordance with its instructions". With the wording as it stood, the case of a transferred servant who acted outside his instruc-

⁴ *Yearbook ... 1971*, vol. II, Part One, p. 283, para. 55.

⁵ *Ibid.*, p. 284.

⁶ *Ibid.*, p. 267, para. 199.

tions and, in so doing, committed an internationally wrongful act, would not be covered. The State lending its servant would not be responsible, because he had been acting under the authority of the recipient State, and the latter State could disclaim responsibility because he had been acting outside his instructions.

35. Mr. BILGE said that he approved of the rule on attribution of responsibility laid down in article 9 and was convinced that it would be frequently applied in the future, owing to the increasingly close links being forged between States for purposes of co-operation.

36. The article under consideration seemed to cover two cases: first, the case in which an organ of a State or of an international organization was lent to another State or placed at its exclusive disposal; and secondly, the case in which the organ was simultaneously in the service of the State or international organization to which it belonged and in the service of the recipient State, being used by both for common purposes. The two cases seemed to be combined in article 9, but in his opinion the second did not come within the scope of the article.

37. With regard to the proviso at the end of article 9, according to which the organ must be actually under the authority of the State at whose disposal it was placed, he thought the organ should be genuinely at the disposal of the State, without, of course, being imposed on it. The exclusive loan of an organ, particularly in the technical assistance field, was generally the result of a request by the beneficiary State which gave rise to an agreement. Consequently, the proviso was acceptable where exclusive loans were concerned. On the other hand, when an organ was simultaneously in the service of the two States, it remained under the authority of the home State although it was partly used by the beneficiary State, and in that case the proviso was not acceptable. He therefore suggested that the word "real" (*réelle*) should be inserted before the words "authority of the State".

38. With regard to the "instructions" referred to in article 9, he pointed out that in the *Chevreau Case*⁷ the British Consul had replaced the French Consul in the performance of his consular duties, so that he had not needed to receive any special instructions. On balance, he thought the words "in accordance with its instructions" should be replaced by the words "on its behalf" (*pour le compte de ce dernier*). Whether the loan of the organ was total or partial, it was always placed under the authority of the recipient State and acted on its behalf, so its actions could be attributed to that State.

39. Mr. RAMANGASOAVINA said he would confine his remarks to questions concerning the interpretation of article 9, the provisions of which he found perfectly acceptable. By using the words "the conduct of a person or group of persons having, under the legal order of a State . . . the character of organs" the Special Rapporteur had meant to stress that the agents or organs lent really belonged to the State. The strictness of that wording might cause difficulties, however, since the agents or organs placed at a State's disposal were not

necessarily governed by the legal order of the lending State. That was the situation when they were called upon to perform a very technical mission and the States concerned did not conclude an agreement showing that they possessed the status of organs in the legal order of the lending State. The wording of article 9 should therefore be made more flexible in that respect, so as to cover cases such as those in which members of youth movements or civilian or paramilitary volunteer corps were sent abroad, for example, to fight an epidemic, and did not possess the character of organs in the sending State's legal order.

40. The second condition laid down at the end of article 9, namely, that the organs lent must act in accordance with the instructions of the State at whose disposal they were placed, was intended to make it clear that the organs were attached to the recipient State. That condition was acceptable in so far as the organs in question were actually under the authority of the State at whose disposal they were placed. Owing to the technical nature of their tasks, however, they sometimes acted according to their own rules and even exceeded the instructions given them by the recipient State. In such cases, the principle laid down in article 10 could be applied, namely, that the responsibility of a State could be engaged even if one of its organs exceeded its competence. Consequently, he was unable to accept the final proviso of article 9; for when an organ exceeded the instructions given to it by the recipient State, it was not the lending State which should be held responsible. For example, if a body specializing in submarine prospecting was carrying out drilling on the continental shelf of the State at whose disposal it had been placed and extended its activities to the continental shelf of a neighbouring State, it could not be argued that the responsibility of the recipient State was not engaged because the body in question had exceeded its instructions.

41. Article 9 would be less categorical if the words "and act in accordance with its instructions" were deleted, even though the idea of effective control by the recipient State had to be introduced elsewhere in the article.

42. Mr. USHAKOV said that when an organ of a State was placed at the disposal of another State, the object was to help the latter in the exercise of its State power. The organ lent replaced another organ and acquired the status of an organ in the State at whose disposal it was placed; it was in that capacity that, by its conduct, it could engage the recipient State's responsibility. On the other hand, technical experts or consultants placed at a State's disposal by another State under economic, technical or cultural assistance programmes, were not called upon to exercise public power in the State to which they were sent. No matter whether such persons had previously been officials or ordinary private persons, they were merely under the authority of the State at whose disposal they were placed, but that State was not directly responsible for their conduct. If they committed internationally wrongful acts, the State's responsibility could only be engaged if its own organs ought to have prevented those acts. Such responsibility by reason of omission could be incurred through the

⁷ *Ibid.*, p. 269, para. 203.

conduct of any private person present in a State's territory and had nothing to do with the article under consideration. It should be noted, in that connexion, that all persons present in a State's territory were "actually under the authority" of that State, but their conduct need not necessarily be regarded as the conduct of the State.

43. Turning to the examples cited by the Special Rapporteur and by other members of the Commission, he said that all the cases not concerned with the loan of armed forces were irrelevant for the purposes of article 9. If a State sent military personnel to help a State which had suffered an earthquake, that personnel came under the authority of the State at whose disposal it was placed, but did not directly engage that State's international responsibility by its conduct. If a State did not have among its nationals a judge qualified to act as president of the supreme court and asked another State to place a person having the required qualifications at its disposal, it was not an "organ" that was lent to it, but an ordinary private person. In the *Chevreau Case*, the British Consul had been appointed as a natural person, not as an "organ", to replace the French Consul. If a State applied to another State for the services of an executioner, he would not be sent as an "organ", and he could not perform his duties until he had been appointed by the requesting State. As to persons placed at the disposal of a State to organize its judiciary, they would merely be acting as consultants, without exercising any part of the recipient State's public power.

44. It thus appeared that, with the exception of armed forces, no State organ could be placed at the disposal of another State. Nor could international organizations place at the disposal of a State any natural or legal person who could exercise a part of its State power. If such organizations seconded experts or officials, they were ordinary private persons in the recipient State and did not possess the status of organs of the international organization in any way.

45. The example given by Mr. Quentin-Baxter, which related to organs that were held to be simultaneously organs of New Zealand and of the United Kingdom, and to exercise public powers in both countries, was not a case of organs lent, but of State organs proper, within the meaning of draft articles 5 and 6.

The meeting rose at 1.05 p.m.

1263rd MEETING

Thursday, 23 May 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

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

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization) (continued).

1. Mr. AGO (Special Rapporteur), replying to the comments made on draft article 9, said that that provision covered only persons or groups of persons who, though placed at the disposal of a particular State, were, and continued to be, organs of the State or international organization which had sent them. In that respect, paragraph 200 of his third report¹ might perhaps require clarification. There were some situations which did not come under the article in question: for example, when a person who had the character of an organ in a State lost that character when he was placed at the disposal of another State, in which he acquired the character of an organ of that other State. In such a case, internationally wrongful acts committed by that person were attributable to the recipient State in accordance with article 5. Thus, if the President of the Supreme Court of a State resigned his office and agreed to go and carry out similar duties in another State, he lost the character of an organ in his home State and acquired that character in the recipient State. It was also necessary to rule out the case in which a State or an international organization sent to another State an expert who did not have the character of an organ; such an expert could carry out his mission either as a private person or as an organ of the recipient State, but not as an organ of one State lent to another. Article 9 covered only cases in which an organ of a State or an international organization was placed at the disposal of another State and did not lose the character of an organ of the sending State or international organization.

2. There were then various possibilities within the framework of the recipient State. It could make the necessary arrangements for the foreign organ placed at its disposal also to become its own organ in its internal legal system; the person or group of persons concerned would then have the character of organs in both States. If the recipient State did not make such arrangements, it was also possible that the persons or groups of persons concerned might be *de jure* organs in the lending State and *de facto* organs in the recipient State. On the other hand, it was clear that cases of co-operation by substitution, which occurred when a State substituted its own organs for the organs of another State, should be excluded from the scope of article 9, as Mr. Bedjaoui had said.²

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 267.

² See 1261st meeting, para. 31.

3. The main criterion for deciding to attribute an act to one State rather than to another, and for determining a State's responsibility, was that of effective control. The idea of instructions, which was also employed in the draft article, should not lead to confusion. By using that idea, he had meant to indicate that an organ was not really placed at the disposal of another State when it continued, even in the performance of its duties in the service of the recipient State, to order its conduct according to instructions it received from the lending State. Whatever the wording finally used, that situation should be excluded from the scope of article 9. On the other hand, the responsibility of the lending State was not engaged when the organ lent simply exceeded the instructions it received from the beneficiary State. In the *Nissan Case*,³ the United Kingdom forces which had requisitioned a hotel in Cyprus had not been under the authority of that country, but had acted under British command, so that it had not been possible to attribute their internationally wrongful acts to Cyprus. The essential point was, therefore, that the acts of the organ lent should take place under the authority of the recipient State or, as Mr. Elias had said, "within the scope of that State's ostensible authority".⁴

4. Moreover, as Mr. Kearney had pointed out, the general rule stated in article 5 must be kept in mind, since the rule in article 9 covered only exceptional cases.

5. With regard to shared responsibility, that complex question was related both to the problem of attribution and to the problem of the offence, that was to say the objective element, which would have to be considered later. In that connexion, it should be noted that if the international legal obligation violated derived from a customary rule valid for all States, it could engage the responsibility of several States; but if it derived from a bilateral treaty, which bound only one of the two States concerned, only the international responsibility of that State would be engaged by reason of the treaty.

6. With regard to the additional clause proposed by Mr. El-Erian, reserving the responsibility of the State lending the organ,⁵ he feared that it might introduce problems unrelated to the article under consideration, especially as the main rule was stated in article 5.

7. Several members of the Commission had considered that article 9 should apply not only to loans of organs of a State, but also to loans of organs of the separate public institutions referred to in article 7. For it might happen that when a town suffered a disaster, a town in another country placed its fire service at its disposal for a certain time; or a town might come to the assistance of a foreign town having difficulties with planning, by placing at its disposal its entire town-planning department. In both cases, it was not impossible that, in the performance of their duties, the persons thus lent might injure foreign interests.

8. Many members of the Commission had remarked that the situations covered by article 9 would probably

arise more frequently in the future, particularly in the context of technical, economic and cultural assistance programmes. Often, it was not State organs, but experts or private persons who were seconded for assistance purposes. Such persons sometimes acquired the status of organs of the beneficiary State, but of course they did not come within the scope of the cases covered by article 9.

9. No member of the Commission had denied that the loan of armed forces could come within the scope of the article. It might be said that that case could be more common, but it was by no means the only one. Besides, the troops of one State might be placed at the disposal of another, not for military purposes, but to help in rescue or police operations.

10. Among the other cases covered by article 9, was that of an international organization which sent a complete service to the territory of a State. At one time the International Labour Organisation had sent to Latin America a complete unit to set up a regional development plan in co-operation with the World Health Organization and the United Nations Educational, Scientific and Cultural Organization.

11. In the *Chevreau Case*, the British Consul had not been placed at the disposal of France in his personal capacity; he had been asked to act simultaneously as British Consul and as French Consul.

12. It was precisely when there were special relations between two countries, like those between New Zealand and the United Kingdom, that the loan of organs could take place most easily. It was conceivable that when Algeria had become independent, it might have concluded with France an agreement under which Algerians could, for a certain time, have appealed to the French *Conseil d'Etat*, which would have applied Algerian law and thus acted as an organ of the Algerian State pending the formation of an Algerian *Conseil d'Etat*.

13. Thus article 9 could apply to many situations. Practice would show the real scope of the provision.

14. If two States had concluded a special agreement governing their respective international responsibilities, that agreement was not binding on third States, which were not obliged to apply to one of those States rather than to the other. In such cases, the general principle of the draft was applicable. In the *Romano-Americana Case*,⁶ British officers acting under the authority and control of the Romanian State had destroyed oil wells in Romania, lest they fall into the hands of the German troops. Since those officers, though remaining organs of the United Kingdom, had acted under the control and authority of Romania, that country had admitted that its international responsibility was engaged by their acts. Similarly, a bilateral treaty could regulate both the question of the international responsibility of the signatory States and the question of their share of the reparation due by reason of that responsibility. In the *Romano-Americana Case*, there had been an arrangement whereby Romania had admitted that its international

³ See *Yearbook ... 1971*, vol. II, p. 271, para. 208.

⁴ See 1261st meeting, para. 1.

⁵ See previous meeting, para. 32.

⁶ See G.H. Hackworth, *Digest of International Law*, vol. V, pp. 702-705 and 840-844.

responsibility was engaged and the United Kingdom had agreed to pay compensation to Romania.

15. The case of an organ placed unlawfully at the disposal of a State had been mentioned by Mr. Tammes.⁷ That very exceptional case might occur if a State placed troops at the disposal of another State when that action was specially prohibited by a treaty. Reference had also been made to the case in which a State placed its territory at the disposal of another State, allowing it to station its armed forces there for the purpose of committing aggression against a third State. But so long as no act of aggression occurred, there was no breach of an international obligation, unless a peace treaty provided, for example, that the stationing of foreign troops in the territory was prohibited. In his opinion it was not necessary to make express provision for that situation, which seemed to come within the scope of article 5.

16. It would be for the Drafting Committee to find suitable wording to cover exactly the situations to which article 9 was applicable.

17. Mr. BILGE thought it would be inadvisable to introduce into article 9 the notion of "public institutions separate from the State", which was the subject of article 7. Such institutions had a separate personality only in internal law. If a town placed its town-planning department at the disposal of a foreign town, special relations were established between the two countries concerned, not between the two towns; the arrangement would override internal distinctions.

18. Mr. USHAKOV said that most of the examples given during the discussion were imaginary, and it would be better to keep to existing cases. When private persons were sent abroad under an economic or cultural assistance programme, or to carry out relief operations, they did not exercise any State power of the beneficiary State. But article 9 was concerned with the exercise of State power, that was to say, essentially with the case of the loan of armed forces. He hoped that the Drafting Committee would find an adequate formula.

19. Mr. SETTE CÂMARA said that the objection raised by Mr. Bilge would also apply to article 7. If it was considered that, for purposes of international law, only the relations between States were significant, and that the differences between organs, public corporations and territorial public entities were unimportant except in internal law, then article 7 might not be necessary. The suggestions made regarding article 9 seemed reasonable, however, and if article 7 was to be retained with a specific reference to the kind of situations covered, the same should be done in the case of article 9.

20. Mr. AGO (Special Rapporteur) said there were two possible courses: to explain in the commentary that article 9 could apply to "organs of public institutions separate from the State", or to amend the text of the article accordingly.

21. In reply to Mr. Ushakov's last comment, he pointed out that there could indeed be an exercise of preroga-

tives of State power in cases other than those of the loan of armed forces or police. For example, when health services were sent abroad during an epidemic, their first step was sometimes to restrict freedom of movement in a particular area; such action might also affect the freedom of movement of foreign diplomats.

22. The CHAIRMAN suggested that draft article 9 should be referred to the Drafting Committee for further consideration.

*It was so agreed.*⁸

The meeting rose at 11.20 a.m.

⁸ For resumption of the discussion see 1278th meeting, para. 19.

1264th MEETING

Friday, 24 May, 1974, at 10.05 a.m.

Chairman: Mr. Endre USTOR

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

Tenth session of the Seminar on International Law

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

2. Mr. RATON (Secretariat) said that Monday, 27 May, would be the date not only of the meeting commemorating the Commission's twenty-fifth anniversary, but also of the opening of the tenth session of the Seminar on International Law. In order to associate the Seminar with the tributes paid to the memory of Mr. Milan Bartoš, who had participated as a lecturer in all its sessions, the tenth session would be called the Milan Bartoš session.

3. He thanked those members of the Commission who, at the twenty-eighth session of the General Assembly, had made complimentary references to the organizers of the Seminar. On the present occasion there would be 24 participants, 13 of whom had received fellowships. Seven Governments granted fellowships ranging from 3,600 to 12,000 Swiss francs and having a total value of about 50,000 Swiss francs, which enabled nationals of developing countries to participate in the Seminar. Unfortunately, owing to the fall in the value of the dollar, the increased cost of living in Switzerland and the high cost of air travel, that sum had become insufficient, and the Secretariat had been forced to reduce by two the number of participants in the current session. He therefore appealed to other Governments to grant fellowships.

⁷ See 1261st meeting, para. 25.

4. Another problem affecting the Seminar was that of interpretation. The International Law Commission and the Seminar were entitled to only one team of interpreters. The Seminar did not usually meet at the same time as the Commission, but there might be difficulties when the Drafting Committee had to hold two meetings on the same day. Of course, the Commission and its Drafting Committee had priority, but it should not be forgotten that the Seminar was held at the request of the General Assembly, that it received financial support from a number of Governments and that most of the participants came from distant countries. It would therefore be helpful if, on days when the Seminar had to meet at the same time as the Drafting Committee, the latter could start an hour later—say, at 4 p.m. instead of 3 p.m.—so that at least the lecture opening the Seminar meeting could be interpreted.

Succession of States in respect of treaties

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

[Item 4 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

5. The CHAIRMAN invited the Special Rapporteur to introduce his first report on succession of States in respect of treaties (A/CN.4/278 and addenda).

6. Sir Francis VALLAT (Special Rapporteur) said that his report only took account of the comments received from Governments by 1 March 1974 (A/CN.4/275), since for obvious practical reasons a deadline had had to be set. Comments had been received after that date from the Governments of the Netherlands (A/CN.4/275/Add.1) and Kenya (A/CN.4/275/Add.2) and he would take them fully into account in his oral introductions. He would not need to refer at that stage to the comments of Kenya, but would have to refer to those of the Netherlands because they related to matters discussed in the introductory part of his report. With regard to the discussions in the Sixth Committee of the General Assembly, he had, in general, considered it unnecessary, in that part of his report, to make specific reference to the views expressed by individual delegations, and had analysed them on the basis of the reports of the Sixth Committee at the General Assembly's twenty-seventh and twenty-eighth sessions.¹

7. The basis of his own work and that of the Commission on the present topic was chapter II of the Commission's 1972 report, on the work of its twenty-fourth session (A/8710/Rev.1).² He had, of course, also relied on the reports of the former Special Rapporteur, especially his third,³ fourth,⁴ and fifth⁵ reports, and on the records of the discussions at the Commission's twenty-

fourth session.⁶ In addition, the 1969 Vienna Convention on the Law of Treaties⁷ had to be kept in mind at all stages of the Commission's work on the present topic. Lastly, he had made good use of the valuable documents prepared by the Secretariat under the title "Materials on Succession of States".⁸

8. The main working documents before the Commission would thus be the draft articles and commentaries, as set out in the Commission's 1972 report, and his own report, consisting of an introduction, observations on the draft articles as a whole in the light of government comments and observations on specific provisions of the draft articles; those on articles 1 to 12 had already been issued and the remainder would follow in subsequent addenda.

9. His primary objective in drafting his report had been to ensure that the second reading of the draft articles could be completed at the present session. He had accordingly endeavoured to present government comments in a manageable form, to focus attention on the points raised and to make suggestions that might help the Commission to reach final decisions quickly. He wished to stress that not all his suggestions were intended for adoption; in some cases, they were put forward simply in order to help the Commission to take a decision one way or the other on a particular point.

10. That being said, he wished to sound a note of warning: the Commission should not be lulled into a false sense of security if it happened to make rapid progress on the early articles; some of the later ones involved difficult problems. And the Commission might also have to consider the introduction of new articles in addition to those adopted on first reading. Moreover, he proposed to submit a further chapter on the problem of procedures for the settlement of disputes concerning the interpretation and application of a convention based on the draft articles. That was an important question, which would call for thorough discussion by the Commission.

11. It would perhaps be desirable for the Commission to begin with a short general debate so that its work could proceed on the basis of a common understanding on certain points. In chapter II of his report he had submitted observations on a number of matters which related to the Commission's general approach to the topic and which had been raised by Governments in their oral or written comments. He was not inviting discussion of all the points mentioned in that chapter, but only of those on which he thought the Commission should take a stand in order to avoid having to revert to them later when it came to discuss specific articles.

12. In the first place, he believed that the importance of the draft articles should be neither exaggerated nor underestimated; that was particularly true of the articles designed for the future. The Commission had been

¹ A/8892 and A/9334.

² Reproduced in *Yearbook ... 1972*, vol. II.

³ *Yearbook ... 1970*, vol. II, pp. 25-60.

⁴ *Yearbook ... 1971*, vol. II, Part One, pp. 143-156.

⁵ *Yearbook ... 1972*, vol. II, pp. 1-59.

⁶ *Yearbook ... 1972*, vol. I.

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. 289.

⁸ ST/LEG/SER.B/14 and A/CN.4/263.

criticized for the length of part III (articles 11 to 25) of the draft articles, dealing with newly independent States, and the view had been expressed that it was perhaps excessive to devote fifteen articles to a problem that was of diminishing or even vanishing importance. He did not believe that that criticism was valid. The international community was small, consisting as it did of some 150 States, but the number of individuals affected was very large. Even if a satisfactory solution could be found for only one case, an important task would have been performed in international relations. That remark was especially applicable to the case of newly independent States; the process of decolonization was unfortunately not yet complete, so that the articles relating to those States were of great material importance. Moreover, if the Commission decided to adhere to the solutions adopted in articles 11 to 25 of the 1972 draft, those provisions would be pertinent to the problem of a new State formed by separation of part of a State (article 28).

13. In its comments, the Swedish Government had criticized the so-called "clean slate" doctrine whereby a newly independent State was not bound to maintain in force, or to become party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States related; that Government had suggested that the Commission should prepare an alternative set of draft articles based on the opposite assumption, namely, that "the new State inherits the treaties of the predecessor", subject to some possible exceptions and to a limited right of denunciation. Although that was an interesting suggestion, quite apart from any other considerations, the Commission would not have time to prepare an alternative text for draft articles 11 to 25. His own recommendation on that point was that the Commission should not adopt any such approach, which would in any case run counter to the wishes of the large majority of Member States (A/CN.4/278, para. 15).

14. It was important to stress at the very outset of the Commission's work that the concept of State succession was the keystone of the whole draft. At the twenty-seventh session of the General Assembly, the Sixth Committee had endorsed the Commission's view that analogies drawn from municipal law should be avoided and that, for the purpose of the draft articles, the expression "succession of States" should denote simply the fact of the replacement of one State by another, thus excluding all questions of rights and obligations as a legal incident of that change.⁹

15. With regard to the relationship between the present topic and the general law of treaties, it was clear that the provisions of the Vienna Convention on the Law of Treaties should be taken as the essential framework for the law relating to succession of States in respect of treaties. Because of the nature of State succession, however, there were points on which it was neces-

sary to depart from the solutions adopted in that Convention. A case in point was the right, set forth in draft article 15, paragraph 2, of a newly independent State to formulate new reservations on notifying its succession to a multilateral treaty. That right was not provided for in the Vienna Convention and, in a sense, might even be considered as contrary to the terms of that Convention. A more flexible approach was necessary in the present draft articles, however, because of the particular requirements of their subject-matter.

16. He did not believe that there was any need for further discussion of the clean slate doctrine. The Commission had endorsed that doctrine, but in doing so had not ignored the essential continuity of multilateral treaty provisions. In that connexion, he drew attention to the provisions of article 12 (Participation in treaties in force) and article 13 (Participation in treaties not yet in force), which established machinery for ensuring such continuity. He would be tempted to say that while the "clean slate" metaphor was appropriate in relation to the provisions of article 11 (Position in respect of the predecessor State's treaties), the following two articles embodied a "magic cloth" formula, which made it possible to revise essential treaty links.

17. As to the form of the draft, there was clearly only one possible course open to the Commission, namely, to frame it so that it could serve as a basis for a convention. In that connexion, the Danish Government, in its written comments, had suggested that an optional clause on retroactivity relative to new States should be inserted in the prospective convention. That suggestion would raise considerable problems, as he had pointed out in paragraph 40 of his report. At a later stage, he would consider whether the draft should contain an article providing for retroactive effect of the prospective convention where a newly independent State became a party to it after the date of succession. He would welcome the views of members on that idea and especially on the last sentence of paragraph 41 of his report.

18. With regard to the scope of the draft, the interesting suggestion had been made by the Netherlands delegation in the Sixth Committee that the draft should be extended to cover cases of hybrid unions such as Customs unions, and he had dwelt at some length on that proposal in his report (paras. 44 to 48). It was true that in some cases international organizations could be given a measure of treaty-making capacity by their member States, but that question was outside the topic of State succession in the sense of the replacement of one State by another. He noted, moreover, that in its written comments, the Netherlands Government had not reverted to the matter, and it could be assumed that it need not be taken any further. It was desirable, however, that the Commission should reach a clear understanding on that point at the present state.

19. On the question of categories of succession of States, the difficult problem of revolutions had been mentioned by a number of Governments and he had discussed the matter in chapter II, section H of his report. It was his impression that any attempt to deal with that problem would immensely complicate the Commission's work. There were many different kinds of

⁹ *Official Records of the General Assembly, Twenty-seventh Session, Annexes, agenda item 85, document A/8892, para. 35.*

revolution and any effort to distinguish between them would meet with serious difficulties. His own view, which was probably shared by the majority of members, was that the problem should be regarded as one of succession of governments rather than succession of States.

20. With regard to categories of treaties and the distinction between "restricted" and "general" multilateral treaties, he suggested that it would be desirable to postpone consideration of the matter until a later stage, for example, when article 12 was under discussion.

21. His report contained a section on the problem of recognition, which was a subject of considerable intrinsic interest. His own view was that the Commission should follow its consistent practice of not dealing with that problem piecemeal in any of its drafts. He hoped that it would endorse his recommendation that it should not embark on particular aspects of that problem, but state in its report that it had decided to leave them for future consideration in an appropriate context.

22. With regard to the interrelation between the present draft articles and the draft articles on succession of States in respect of matters other than treaties, dealt with in chapter II, section J of his report, he thought that the parallelism of the two topics should be borne constantly in mind, but that the Commission should not allow it to distort its view on any particular article. Work on the topic of State succession in respect of matters other than treaties had not been carried far enough to indicate any impact on specific articles.

23. Lastly, the Commission should always bear in mind that both the written comments of governments and the discussion in the Sixth Committee had reflected a very general approval of the provisions contained in the draft articles, an approval which he found most encouraging in his work as Special Rapporteur.

24. He urged members to comment on the various points to which he had referred, so that the Commission could move on quickly to the consideration of specific draft articles, with every prospect of fulfilling the General Assembly's wish that the second reading should be completed at the present session.

GENERAL DEBATE

25. The CHAIRMAN thanked the Special Rapporteur for his lucid introduction and suggested that the Commission should proceed to a general debate. In the interests of brevity, he suggested that members should confine their remarks to points on which they were in disagreement with the Special Rapporteur's conclusions.

26. Mr. TSURUOKA said he wholeheartedly supported that procedural suggestion. He himself need only say that he fully agreed with the Special Rapporteur's views on the various general points he had mentioned.

27. Mr. TAMMES said that he had no objections to make, but only a reservation about the Special Rapporteur's conclusion that it would be appropriate to prepare the draft articles in a form suitable for incorporation in a convention. He endorsed that conclusion and the reasons given for it, but there remained the paradox,

which Governments had mentioned in their comments, of a convention starting with the clean slate rule in favour of newly independent States and ending by considering itself *ipso jure* applicable to new States. If the convention was not so applicable, it would not be effective. The Special Rapporteur considered that problem to be theoretical, at least from the point of view of deciding whether to have a convention or a code, but the paradox had some very practical implications. After much discussion, the Commission had concluded that newly independent States and those created by separation or secession should be given a clean slate, but not States resulting from union or dissolution. *Ipso jure* continuity of treaty obligations in the latter cases represented a new rule hardly supported by practice. New States in that category, from the time of their creation, would automatically, and perhaps against their will, be bound by the treaty obligations previously in force in their territory, until a denunciation clause, if any, came into effect. Meanwhile, the practical consequences might be considerable in such matters as extradition and air transport. The only other means of escape for a new State would be to withdraw from the succession convention as soon as possible with retroactive effect. It might have that option if the Danish Government's suggestions were adopted, though the Commission had not intended to provide for such an option to terminate.

28. The problem had not been satisfactorily solved in the introduction to the draft in the Commission's 1972 report, paragraph 41 of which stated that the future convention would establish a rule "as the accepted customary law on the matter". That was too much like begging the question. A better solution might be a clear statement by the Commission that it considered the convention as being in a special category among multilateral treaties. The Special Rapporteur had referred to that possibility, but was not in favour of complicating the simple distinction made in the Vienna Convention between bilateral and multilateral treaties. The proposed convention, however, had a "temporal" dimension, which could not play a dominant role in the Vienna Convention. It would therefore be more satisfactory if the Commission, in addition to its reference to custom in paragraph 41 of its 1972 report, were to state in some form, for confirmation by the General Assembly and the diplomatic conference adopting the proposed convention, that that instrument would fall into the category of multilateral treaties "the object and purpose of which are of interest to the international community as a whole"—the wording used in the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties.¹⁰ If certain conventions could be qualified by the General Assembly or a future diplomatic conference as being subject to a régime of world-wide applicability and continuity—applicability *erga omnes* in space and time—the Netherlands Government, as it had stated in its written observations, would consider that a step towards reconciliation in the clean slate *versus* con-

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. 285.

tinuity controversy. He would revert to the subject when article 11 was discussed. For the time being, the Commission might consider the *erga omnes* status of the proposed convention separately from the question of presumption of continuity.

29. Mr. TABIBI said that the topic of succession of States in respect of treaties was an extremely complex one and it was essential to point out that the régimes applicable were of a very pragmatic character. It was not uncommon for one and the same country to adopt different standpoints, and even diametrically opposed views, on the same issue in relation to different individual cases. The conclusion to be drawn from that fact was that there were no rules on State succession in respect of treaties which were equally applicable in all cases.

30. That applied particularly to the Vienna Convention on the Law of Treaties, which had been taken as the framework for the present draft. As the Special Rapporteur himself had recognized, in many instances it was necessary to depart from the solutions adopted in the Vienna Convention in order to take the special requirements of the present topic into account. To give just one example, the law of treaties regarded a treaty as being negotiated and finalized by the parties to it. In matters of State succession, however, the situation was much more complex; it was necessary to consider, first, the predecessor State, secondly, the successor State and, thirdly, the third party or parties involved. A third party in that situation, however, was not an outsider, but a contracting party to the original treaty.

31. He also wished to stress an important general point relating to government comments. Only a small number of States had submitted written comments, and nearly all of them were European States. Few, if any comments on the substance of the articles had been received from Asian or African countries. It was simply not realistic to expect those countries to submit comments so soon. In many cases, it was necessary to translate the text of the draft articles into the national language. Moreover, the articles dealt with complex and delicate questions, which required careful consideration before a final position could be taken. In the circumstances, he suggested that a letter of reminder should be sent by the Secretariat to those Governments which had not yet submitted comments.

32. For the same reasons, special importance should be attached to the oral statements made in the Sixth Committee of the General Assembly. It was not sufficient to rely on the Sixth Committee's reports, to which the Special Rapporteur had referred in his introductory statement; the form in which those reports were drafted made them unsuitable for the purpose of ascertaining the views of individual delegations. It was necessary at least to consult the summary records of the discussions, although even those records did not always suffice because, in the interests of economy, they were made too brief. In that connexion, he drew attention to the announcement made by the Commission's outgoing Chairman at the opening meeting of the present session, that he had circulated to all members the full text of his own statement to the Sixth Committee so as to give a

more complete picture of that Committee's debate on the work of the Commission.¹¹ It was significant that in the ensuing discussion, the Special Rapporteur on State responsibility—the main topic dealt with in the Commission's 1973 report—had stressed that it would be useful to be able to read the verbatim text of the statements made in the Sixth Committee.¹²

33. The Commission was fortunate in that its Special Rapporteur brought to the study of the difficult topic of succession of States in respect of treaties a wealth of practical experience; as legal adviser to the ministry of foreign affairs of a great country, he had dealt with many cases of State succession. That special knowledge of State practice would, he trusted, ensure that the various situations contemplated in the draft articles were examined in the light of contemporary realities. In considering each article, the Commission would have to pay due regard to the reactions of delegations in the General Assembly and to the views, policies and interests of States.

34. He fully agreed with the Special Rapporteur on the need for the Commission to bear in mind that it was making decisions which would affect not merely 150 States, but thousands of millions of human beings. Modern international law attached the greatest importance to the rights of peoples, and the Charter of the United Nations repeatedly stressed the principle of self-determination. Where treaties were concerned, it was the wishes and rights of peoples that should prevail, not nineteenth-century doctrines inherited from the colonial era.

35. Sir Francis VALLAT (Special Rapporteur) said he could assure Mr. Tabibi that for the oral comments made by delegations during the Sixth Committee's discussions, he had not relied solely on that Committee's reports. As could be seen from his commentaries to the individual articles, he had made full use of the summary records of the proceedings, which he had quoted at length wherever appropriate.

36. Mr. USHAKOV congratulated the Special Rapporteur on his report and his excellent introductory statement. By and large, he shared his views on the general approach to be adopted to the draft articles.

37. The suggestion by Mr. Tammes that so-called universal treaties, that was to say, those applicable *erga omnes*, should be distinguished from other treaties was very attractive. The Special Rapporteur should consider it, bearing in mind two cases: first, that in which a dependent territory had become bound by a universal treaty through the administering Power before it had attained independence; and secondly, that in which it had not become bound by such a treaty. In the latter case the treaty could not become binding on the new State by the operation of the rules of succession.

38. Mr. CALLE Y CALLE expressed his full approval of the Special Rapporteur's report and comments.

39. The CHAIRMAN, speaking as a member of the Commission, also endorsed the Special Rapporteur's

¹¹ See 1250th meeting, para. 12.

¹² *Ibid.*, para. 22.

approach and his balanced presentation of the comments of Governments, which would provide an excellent basis for the Commission's work. In his introductory remarks, the Special Rapporteur had mentioned the possibility of dealing with the question of the settlement of disputes, but in view of the number of draft articles the Commission had to consider, he doubted whether it would have time to take up what was in fact a separate and quite substantial subject, which at present was touched upon only in Article 33 of the United Nations Charter.

40. Mr. MARTÍNEZ MORENO said he shared Mr. Ustor's views on the question of the settlement of disputes. The experience of Latin American countries had shown that it presented many difficulties, in spite of a very comprehensive inter-American agreement on the subject. The Commission should at present confine itself to the second reading of the articles it had already adopted.

41. Sir FRANCIS VALLAT (Special Rapporteur) said he had no intention of trying to persuade the Commission to adopt articles on the settlement of disputes, which would involve a considerable amount of work; but some Governments had raised the question, which in fact had a bearing on some of the draft articles before the Commission. He would discuss it in an addendum to his report, and the Commission should perhaps mention it in its report to the General Assembly. It would be desirable to devote at least one meeting to discussion of the subject.

42. He agreed with Mr. Tammes that the status of conventions establishing a general law which should continue to apply *erga omnes* was a very real problem. Before commenting on it, he wished to consult other members of the Commission to see if it was possible to draft a generally acceptable provision for inclusion in the draft articles.

43. The CHAIRMAN said that the general debate was concluded. He invited the Commission to begin its second reading of the draft articles on succession of States in respect of treaties.

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 1

Article 1

Scope of the present articles

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

44. Sir Francis VALLAT (Special Rapporteur) said he thought that article 1 could be referred to the Drafting Committee. In paragraphs 96 and 97 of his report he had drawn attention to a drafting change suggested by the Government of Pakistan. The absence of comments on the question of hybrid unions suggested that it could be dealt with by mentioning the views of Governments in the Commission's report and that it would not be necessary to include a provision on that question in the draft articles.

45. The CHAIRMAN, speaking as a member of the Commission, expressed his approval of article 1 as drafted, and his agreement with the Special Rapporteur regarding hybrid unions. Participation in hybrid unions did not affect the treaty obligations of a State and all such unions were based on that premise. He suggested that article 1 should be provisionally approved and referred to the Drafting Committee for further consideration.

*It was so agreed.*¹³

ARTICLE 2 (Use of terms)

46. Mr. ELIAS suggested that the consideration of definitions should take place at a later stage.

47. Mr. KEARNEY said it might be unwise to postpone consideration of the definitions until the end, as some of them would affect the wording of articles, which might then have to be reconsidered.

48. Sir Francis VALLAT (Special Rapporteur) said that the definitions would ultimately have to be made to accord with the substantive decisions on the articles themselves, which might in any case have to be revised subsequently. The definitions would then be useful for any redrafting. The Commission could therefore proceed provisionally on the basis of the existing definitions; any comments and suggestions made on them during the consideration of the articles would facilitate preparation of the final version of article 2.

49. The CHAIRMAN agreed that it was customary for the discussion of definitions to be deferred until the last stage of the work, and suggested that article 2 should be provisionally adopted and referred to the Drafting Committee.

*It was so agreed.*¹⁴

The meeting rose at 12.50 p.m.

¹³ For resumption of the discussion see 1285th meeting, para. 3.

¹⁴ For resumption of the discussion see 1296th meeting; para. 46.

1265th MEETING

Monday, 27 May 1974, at 3.15 p.m.

Chairman: Mr. Endre USTOR

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

Commemoration of the twenty-fifth anniversary of the opening of the first session

[Item 2 of the agenda]

1. The CHAIRMAN declared open the 1265th meeting of the Commission, held to commemorate the twenty-

fifth anniversary of the opening of its first session. He warmly welcomed the representatives of the host country—Mr. Bindschedler, the Legal Adviser to the Swiss Federal Political Department, Mr. Schneeberger, of the Permanent Mission of Switzerland, and Mr. Buensod, Vice-President of the Administrative Council of the City of Geneva—and high United Nations officials including Mr. Winspeare Guicciardi, Director-General of the United Nations Office at Geneva and Prince Sadruddin Aga Khan, United Nations High Commissioner for Refugees.

2. He extended a special welcome to Sir Humphrey Waldock, a former member of the Commission, representing the International Court of Justice; to Mr. Vyzner, the Chairman of the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space and to the representatives of States members of that Committee; to the Legal Advisers and other officials of the specialized agencies and other inter-governmental organizations based at Geneva; to the representative of the International Committee of the Red Cross; to Mr. Dominicé, Dean of the Faculty of Laws of Geneva University and to the Professors of that Faculty and of the Graduate Institute of International Studies.

3. He was glad to see that Mr. Eustathiades, a former member of the Commission was among those present; the Commission had received a number of congratulatory letters and telegrams from other former members who were unable to attend. He welcomed the participants in the Seminar on International Law and the Senior Legal Officer in charge of the Seminar. It was a pleasure to note the presence of the observer for one of the regional legal bodies with which the Commission co-operated; good wishes had been received from the others.

4. The Commission greatly appreciated the presence of Mr. Erik Suy, the Legal Counsel of the United Nations. Before giving him the floor he wished, however, to recall the names of the deceased members of the Commission who, in their lifetime, had shared in its noble tasks and dedicated themselves so wholeheartedly to the cause of the codification of international law and its progressive development: Gonzalo Alcívar, Ricardo J. Alfaro, Gilberto Amado, Milan Bartoš, James L. Briery, Roberto Córdova, Douglas L. Edmonds, Faris El-Khoury, Manley O. Hudson, Sergei B. Krylov, Sir Hersch Lauterpacht, Antonio de Luna, Ahmed Matine-Daftary, Radhabinod Pal, Sir Benegal N. Rau, A.E.F. Sandström, Georges Scelle, Jean Spiropoulos and Jesús María Yepes.

5. Mr. SUY (Legal Counsel of the United Nations) said that at its twenty-eight session the General Assembly had already paid a resounding tribute to the work accomplished by the Commission over the past quarter of a century. All internationalists would no doubt wish to join in that tribute, though it was now tinged with sadness because of the great loss the Commission had suffered by the death of Mr. Milan Bartoš.

6. Jurists appreciated the Commission's work all the more because they were well aware of its difficulties,

which were thrown into relief by the fate of former attempts at codification. They had at all times tried to codify custom, that was to say, they had been concerned not with the mere statement of existing law, but with its arrangement, reform, amendment and adaptation or, to use the language of the United Nations Charter, its progressive development.

7. The earliest systematic attempts to codify international law dated back to the end of the eighteenth century. Since then, there had been many more attempts, but most of them had remained without official approval throughout the nineteenth century and up to the end of the Second World War. Undoubtedly, the codifications attempted by well-known authorities on international law, either individually or within learned societies, had been of great scientific value, but their private character had necessarily limited their practical effect. As to official codification by States, governments had been very reserved before the establishment of the United Nations. It was true that just before the Second World War several topics of international law had been regulated by multilateral conventions, the most important of which had been those of the International Labour Organisation and the Hague Conferences of 1899 and 1907; but those conventions had dealt with only a few particular aspects of international law. When the League of Nations had tried to codify larger topics it had failed.

8. In 1925, a committee of experts appointed by the League of Nations Council had drawn up an initial list of eleven subjects suitable for codification by convention, some of which had later been codified by the International Law Commission. In 1930, a Codification Conference had been convened by the League Assembly to consider three specific subjects: nationality, territorial waters and the responsibility of States. No draft convention had been prepared beforehand to provide a basis for the work of the Conference. The Conference had made some progress on nationality: it had adopted a convention, three protocols and several recommendations. With regard to territorial waters, on the other hand, it had confined itself to making a few recommendations, and on State responsibility it had failed completely. No further codification conferences had been convened by the League of Nations.

9. The question arose whether the failure of the codification work begun by the League of Nations had been due to the very nature of any codification undertaken by States or to lack of adequate preparation for the Hague Conference. Shortly after the Second World War, the *Institut de droit international* had called in question the very principle of official codification and had stated its preference for "scientific research designed to ascertain precisely the present state of international law". On the other hand, when the Hague Conference had reviewed the reasons for its failure, it had stressed the need for the most detailed preparation for every codification conference. Its final act had contained recommendations for future codification conferences; it had urged the need to consult States on the selection of topics for codification and to prepare in advance, on each topic, a draft convention with comments by governments.

10. On the International Law Commission had devolved the task of finding, within the framework of its Statute, a method combining scientific codification with official codification, and taking further account of the lessons to be learned from the failure of the 1930 Hague Conference. Three stages could be distinguished in the Commission's usual method of work: the choice of the topic to be codified, the preparation of provisional draft articles and the preparation of a final draft. The choice of topics for codification and the priorities to be adopted rested with States, acting through the General Assembly. Nevertheless—and it was there that the scientific side came in—the Assembly usually acted on the Commission's recommendation.

11. As early as its first session, the Commission had concluded that codification of the whole of international law was the ultimate aim, but that obviously it must be carried out in stages. On the basis of a comprehensive survey of international law, it had drawn up an initial list of fourteen topics for codification.¹ On seven of them, it had already produced final drafts in accordance with the General Assembly's recommendations. Two further topics were being dealt with in drafts in course of preparation, and the Commission had also prepared several drafts on subjects which had not been on the original list, but had subsequently been referred to it by the General Assembly.

12. In 1970 the Commission had expressed a wish to review the original list of topics, and had asked the Secretariat to submit a further working document to help it select topics for its long-term programme of work. In compliance with that request, the Secretariat had submitted to the Commission in 1971 a working document entitled *Survey of International Law*.² With regard to the choice of topics for codification, it was to be regretted that the Commission had not been asked to prepare draft articles for the forthcoming Conference on the Law of the Sea.

13. The second stage in the Commission's usual method of work was to prepare provisional draft articles. At that stage it was the scientific side of the method that was dominant, whether in the work of a special rapporteur, the consideration of his reports or the drafting of articles by the Commission or by its Drafting Committee. The views of States were not overlooked, however, since the Commission always paid the greatest attention to the opinions expressed by their representatives in the Sixth Committee.

14. The third and last stage was the preparation of final draft articles. That, too, was scientific work; but States played an essential part in it, since the final draft articles were prepared in the light of their comments on the provisional draft.

15. At all those stages the Commission had always been assisted by the Codification Division set up within the United Nations Legal Office to do the work which fell to the Secretariat in the codification and progressive

development of international law. The Codification Division supplied the Commission's secretariat and assisted it throughout its annual session. It was also continuously engaged on a research programme, the main purpose of which was to give the Commission and its special rapporteurs easier access to documentation on the questions of international law on the Commission's work programme. Lastly, the Codification Division tried to make the work of the Commission and the spirit in which that work was undertaken better understood in the other forums called upon to participate in the process of codification, namely, the Sixth Committee, plenipotentiary conferences and the special committees set up by the General Assembly. In accordance with the wish expressed by the Commission in 1968, the level of the Division of Codification would be maintained as far as possible and its staff would be strengthened so that it could give the Commission even greater assistance, in particular, because codification had become a far more complex and delicate task than when the Commission had first been set up.

16. The success of the Commission's method of work was undoubtedly characterized by the continuous interaction of scientific expertise and governmental responsibility throughout the preparation of a codification draft. That interaction required much time, but the fate of codifications attempted in the nineteenth century and the first half of the twentieth century clearly showed that it was the only way to achieve practical results. Today, the choice was no longer between slow codification and quick codification, but between slow codification and no codification at all. Other United Nations organs had had to devote considerable time to codifying quite well delimited areas of international law.

17. The codification of a given subject did not, however, end with the Commission's adoption of final draft articles. States still had to complete an international instrument based on the draft. So far, the instrument considered most appropriate was the convention. Thus ten conventions, some of them with optional protocols, had been concluded on the basis of drafts prepared by the Commission. Two of them dealt with topics of limited scope: the Convention on the Reduction of Statelessness and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Six of the other eight Conventions had come into force after intervals of varying length. Two of them, the Convention on the Law of Treaties and the Convention on Special Missions, were not yet in force; although they had been adopted by 79 votes to 1 with 19 abstentions and 98 votes to none with 1 abstention, respectively, on 1 May 1974 they had still required a further seventeen instruments of ratification or accession to bring them into force.

18. With regard to the non-ratification of codification conventions adopted by large majorities, it was true, as the Commission had observed, that adoption, from a strictly logical point of view, did not concern the substance, but was confined to settling the form of a convention. There was no denying, however, that in the great majority of cases States meant to express an

¹ See *Yearbook* ... 1949, pp. 279-281.

² Reproduced in *Yearbook* ... 1971, vol. II, Part Two (document A/CN.4/245).

opinion on the substance of a convention by their vote on its adoption. So why was it that, very often, the vote of a State for the adoption of a codification convention was not followed within a reasonable time by the deposit of an instrument of ratification or accession? Referring to an opinion given by Mr. Ago and Mr. Eustathiades, he stressed that in most cases it was for reasons inherent in the heaviness of the political and administrative machinery of the modern State, and not because of opposition in principle or on a particular point, that a State was late in sending in the instrument formally establishing its consent.

19. It might therefore be asked whether a convention was always the most appropriate instrument for codification undertaken within the United Nations. It was worth noting that the General Assembly had adopted unopposed, or by very large majorities, several resolutions embodying important provisions designed to codify certain aspects of international law, both in the strict sense of that term and in the sense of progressive development of law. The best known was probably resolution 2625 (XXV) approving the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, but there were many others. At its very first session, in resolution 95 (I), the General Assembly had confirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and by the judgment of that Tribunal. The Commission seemed to have considered that that resolution had ended the controversy over the conformity of the Nuremberg principles with international law, and its task had subsequently been confined to formulating those principles. Other examples of resolutions containing provisions which codified or developed particular aspects of international law were resolutions 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, and 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

20. The legal value of resolutions of general scope adopted by the General Assembly and, in particular, of those containing declarations of a legal character, was a complex question on which much had been written. In paragraph 52 of its advisory opinion of 21 June 1971 on Namibia,³ the International Court of Justice had gone into the matter very thoroughly. The practice of adopting such declarations by consensus complicated the question still further. If many States maintained their negative attitude with regard to ratification or accession, the Commission might wish to study the possibility of recommending the General Assembly to codify certain particular drafts, not by a convention, but by a declaratory resolution. That possibility, which, incidentally, appeared to be provided for by article 23, paragraph 1 (b) of the Commission's Statute, would in no way affect the form of the Commission's drafts, which could, as in the past, consist of articles capable of serving as a basis for either a convention or a declaration.

21. Several recent developments tended to increase the Commission's problems. There was the universal character which the United Nations had gradually acquired thanks to decolonization; the development of new legal concepts; and the need to formulate rules of law to give effect to the great political and economic declarations recently adopted by conferences, such as the Algiers Conference of 1973, and by the sixth special session of the General Assembly, which were designed to institute a new international economic and, hence, legal order, with a view to organizing North-South co-operation on a more just and equitable basis. Those new tasks would dominate the future work of the United Nations and be reflected in the Commission's deliberations. It was, indeed, necessary to have the courage to look beyond classical international law. International law could not be progressively developed without taking account of the opinions and practice of the great majority of new States and of the profound transformation of the international community which had taken place since the Commission had been established.

22. Both on behalf of the Secretary-General and speaking for himself, he expressed his best wishes for the Commission's success in its task, which was the noblest of all those that jurists could be called upon to perform. He had no doubt that the Commission would bring its work to a successful conclusion, thanks to the support it had always received from the Sixth Committee and the regional intergovernmental organizations with which it had established close relations, and, above all, thanks to the learning and ability of its members and to their spirit of idealism and self-sacrifice.

23. The CHAIRMAN invited Sir Humphrey Waldock, Judge of the International Court of Justice, to address the Commission.

24. Sir Humphrey WALDOCK said that he was discharging a very pleasant duty in conveying, on behalf of the whole Court, its warmest congratulations to the Commission on the celebration of its silver jubilee. He had also been entrusted with a particular message of greeting and friendship from the seven judges of the Court who were former members of the Commission and one of whom, Mr. Lachs, was the President of the Court. In all, some fifteen members of the Commission had become judges of the Court, but the present number of seven could be called a high-water mark.

25. At the Vienna Conference on the Law of Treaties he had heard it said that the Commission appeared to have an iron in every fire. Members of the Commission had held the offices of President of the Conference, Chairman of the Committee of the Whole, Chairman of the Drafting Committee, Rapporteur of the Committee of the Whole and Expert Consultant. Every autumn, members and former members of the Commission attended the meetings of the Sixth Committee of the General Assembly when the Commission's report came before it. And at the present meeting, where he was appearing on behalf of the International Court of Justice at the kind invitation of the Commission, he had the feeling, as a former member, of having come home. Those many manifestations of the Commission were an index of its success and of the place which it had won

³ *I.C.J. Reports*, 1971, p. 31.

for itself in contemporary international law. Even ten years ago, Professor Jennings of Cambridge had already felt compelled to write of the work of the Commission: "This whole procedure that has developed under Article 13, paragraph 1.a of the Charter now seriously rivals the International Court of Justice in its importance for international law". He felt certain that none of his colleagues on the Court would quarrel with that appreciation, except perhaps for the word "rivals", because it was not a question of rivalry.

26. The Commission and the Court served the same grand design: the furtherance of the rule of law in the international community. But the roles of the two bodies and the context in which they worked were different. The Court could only deal with the cases put before it and its treatment of the law was dominated and limited by the concrete case it had to decide. Despite that, its contribution to the determination and development of the law in some fields had generally been considered remarkable. The Commission's contribution, in its different way, had been no less remarkable; it was fortunate in the large freedom it had to choose both the subject of its work and the manner of treating it. Its difficulty was rather to avoid being submerged by the number of important subjects awaiting its attention, and it had been wise in not allowing the length of its agenda to distract it from the thorough scientific study and sharp analysis of each subject which had been the very essence of its success.

27. The Court's judgments, although strictly speaking they were binding only upon the parties to the case, at once carried such authority as everywhere attached to judicial decisions. The Commission's work, on the other hand, was but one stage, although a very important one, in the whole process of clarifying and developing the law—a process in which a diplomatic conference, or the General Assembly, had the final say as to whether the seal of legal authority was to be set upon the Commission's conclusions. If, therefore, the Commission's work had come to have its own measure of authority in its own right, it was because of the sheer quality of that work.

28. The number and importance of the international instruments which had resulted from the Commission's drafts during its first twenty-five years was truly impressive, especially in the field of diplomatic law, in the law of the sea and in the law of treaties. But its success was not to be measured simply by those instruments. The Commission's work exercised an important influence on the formation of legal opinion throughout the international community: not merely in the offices of legal advisers to governments, but in the writings of jurists and in universities and all institutions where international law was studied. By its representative character, by the large measure of general consensus which it achieved and by the high distinction of its work, the Commission, in the long term, would surely prove a potent force in the development and strengthening of international law.

29. The Court itself had recently begun to feel the impact of the Commission's work. In the cases submitted to it, counsel often found support of their arguments

in the Commission's drafts and commentaries, and one or two individual judges had referred to the Commission's reports. But it was in the *North Sea Continental Shelf Cases*⁴ in 1969, that the Commission's work had for the first time been a central feature of the proceedings and had helped to guide the Court to its conclusions. Since then, the Vienna Convention on the Law of Treaties, although not yet in force, had begun to figure prominently in the Courts' decisions, as was shown by its 1971 advisory opinion on Namibia,⁵ its 1972 judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council*⁶ and its 1973 judgment in the *Fisheries Jurisdiction (United Kingdom v. Iceland) case*.⁷

30. Scarcely a case came before the Court which did not turn upon the interpretation and application of a treaty, and he ventured to prophesy that the Commission's handiwork—the Vienna Convention on the Law of Treaties—was destined to play an increasingly frequent role in the proceedings and decisions of the Court. He would add that the topic of State responsibility, which was on the Commission's agenda for the present session, had similar potentialities for the work of the Court. Few contentious cases came before the Court which did not, to a greater or lesser degree, raise some aspect of State responsibility, and he was convinced that the Commission's work on that topic would also have a large and continuing interest for the Court.

31. He wished to take that opportunity of paying a tribute to the contribution made by the Secretariat to the work of the Commission. The Codification Division of the Office of Legal Affairs had prepared, over the years, a long series of excellent papers on the topics appearing on the Commission's agenda. Those papers showed evidence of a high standard of scholarship and formed a significant element in the contribution made by the work of the Commission to the development of international law.

32. In conclusion, he expressed the regret of the President of the Court that the calls of his work had prevented him from accepting the Commission's invitation to address it. He hoped, however, that his own words had sufficed to assure the Commission of the high esteem in which it was held by the Court. He also hoped that he had been able to convey something of the warm feeling of friendship which the judges of the Court had for the members of the Commission who were, in truth, their brothers in the law within the family of the United Nations.

33. The CHAIRMAN thanked Sir Humphrey Waldock for his address and asked him to transmit to the former members of the Commission who served on the International Court of Justice, and to the whole Court, the Commission's warm greetings. He then called on Mr. Ago.

34. Mr. AGO, pointing out that he was now the senior member of the Commission, referred individually to the

⁴ I.C.J. Reports, 1969, p. 3.

⁵ I.C.J. Reports, 1971, p. 16.

⁶ I.C.J. Reports, 1972, p. 6.

⁷ I.C.J. Reports, 1973, p. 3.

members who had welcomed him in 1957, to those who had joined the Commission at the same time as himself, to those who had joined later and to those he had seen leave. He noted that the best internationalists had taken part in the Commission's work.

35. The year 1957 had been a turning point in the history of the codification of international law. Until then, and even when the Commission had been established in 1949, codification had been regarded as something of a luxury; perhaps there had not even been much faith in its usefulness. After 1957, the Commission's task of codification had appeared more necessary and urgent. In both internal and international law, codification was always linked with a social revolution. In the middle of the 1950s an important social revolution had begun in the international community, which had brought the different peoples of two great continents onto the world scene, making them subjects of international law in great numbers and thus necessitating a revision of the fundamental rules applicable to relations between States, to adapt them to the new situation.

36. The Commission had then just completed its first major work of codification of international law, which was to result in the adoption of the four Geneva Conventions on the law of the sea. In 1958, after preparing model rules on arbitral procedure, the Commission had begun the second main stage of its work, devoted to diplomatic law. A number of subjects had been successively dealt with in draft articles: diplomatic relations, consular relations, special missions, relations between States and international organizations and, lastly, the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.

37. The third stage, which overlapped the second, had been the codification of the law of treaties, which had been on the Commission's programme of work for a long time. Just as in its time, the Swiss Confederation had taken pride in the adoption of its Code of Obligations, the international community would be able to take pride in the codification of the very important topic of the law of treaties. A succession of Special Rapporteurs had brought that task to a successful conclusion. At first, the Commission had considered drafting model rules; then, in 1961, it had decided to prepare draft articles, which in 1969, had led to the adoption of the Convention on the Law of Treaties.

38. The Commission had then taken up a question linked with the law of treaties: succession of States in respect of treaties, for which Sir Humphrey Waldock, the author of the final report on the law of treaties, had been appointed Special Rapporteur. After his election as a judge of the International Court of Justice, he had been succeeded by Sir Francis Vallat. The related topic of treaties concluded between States and international organizations or between two or more international organizations had been entrusted to Mr. Reuter, while the present Chairman of the Commission had been appointed Special Rapporteur for the most-favoured-nation clause. When those subjects had been disposed of, the whole of the law of international obligations would have been codified.

39. At the same time, the Commission was now working on other subjects: succession of States in respect of matters other than treaties, for which Mr. Bedjaoui had been appointed Special Rapporteur, and State responsibility, a topic which had been on the Commission's agenda since its establishment and which he himself, as Special Rapporteur, was endeavouring to bring to a successful conclusion. In view of the failure of the 1930 Hague Conference, at which the latter topic had been examined, the Commission had decided to approach it from a new angle, no longer linking it with the treatment to be accorded by States in their territory to the person and property of aliens, but detaching the question of State responsibility from the substantive rules of international law. The subject was certainly a difficult one, but he hoped the Commission would master it thanks to the endurance and dedication of its members and the prevailing spirit, which made them understand each other better when they disagreed and overcome their differences to achieve a common success.

40. The Commission still had to decide how to deal with the questions of the responsibility of States for risk and the law of non-navigational uses of international watercourses. Other subjects could also be considered; they were listed in the remarkable *Survey of International Law* prepared by the Secretariat to whose competence and valuable collaboration he drew attention.

41. Referring to the statement by the Legal Counsel, he said that he shared his views on the various courses open to the Commission, but doubted whether the main topics of international law could be codified otherwise than by conventions. In those matters, clarity and certainty were essential, and it was often because of its uncertainty that the law was not respected. It was, moreover, that uncertainty which explained the distrust of international judicial settlements shown by many members of the international community.

42. The activities of the International Law Commission were less spectacular than those of other United Nations organs, but there was reason to believe that in the long term its work would not be the least important. Just as the battle of Austerlitz was only a historical memory, whereas the *Code Napoléon* was still a reality, the world would perhaps one day forget the successes and failures of the United Nations in those spheres which today were the centre of attention, the better to remember the contribution made by the great international organization to the codification of the law of nations.

43. Mr. YASSEEN said that the establishment of the International Law Commission had marked the institutionalization of a new system of codification and progressive development of international law. That system, which suited an era characterized by world progress and the democratization of the international community, made it possible to follow such progress closely and to reflect the realities of international life. Written law was, indeed, the most appropriate means to that end, for the process of formation of custom was generally slow. Consequently, as Mr. Ago had said, the Commission's main task was to draft conventions.

44. It was true that in a time of change like the present, custom could be formed quickly. At a seminar of the *Société française pour le droit international*, Professor Jean Dupuy had referred to a "wild" custom, to emphasize its rapidity and strength. Perhaps it would be possible to speak of a revolutionary custom. Nevertheless, the customary process could hardly reflect rapid progress and meet all the needs for change and adjustment in a systematic and harmonious fashion.

45. Moreover, the International Law Commission was the instrument accepted by the new international community—a quasi-universal community which had been created by the United Nations Charter and was the best organized and most democratic community the world had ever known. For although the system of dependence in all its forms had not yet completely disappeared, it was on the point of doing so. Relations between the States which formed the international community today were based on the principle of sovereign equality; the exploitation of some peoples by others and the monopoly of common resources held by certain nations were condemned and must give place to fruitful co-operation.

46. The body of international rules inherited from the nineteenth and early twentieth centuries was the work of a small international community and could not reflect the new international life in its entirety or meet its needs. Hence it was necessary to proceed to adaptation, revision and even innovation, but in a democratic manner, without allowing international legal rules to be imposed by the hegemony of certain Powers.

47. In its declaratory role, which consisted in stating existing rules, and in its creative role, which consisted in proposing new rules, the International Law Commission, thanks to its method of work, drew on all the opinions expressed by States and all the practices they followed. If it had been able to do useful work, that was because its work was the result of "continuous interaction, throughout the development of a codification draft, between professional expertise and governmental responsibility, between independent vision and the realities of international life".⁸ The object was, indeed, to ensure possible progress by preparing acceptable drafts.

48. The Commission's method of work placed it in continual contact with international life by enabling it to ascertain the opinions of States on all its proposals. Thus the Commission had always endeavoured to establish what represented the common interest or a balance of conflicting interests, whether in codification proper or in the progressive development of international law. That method ensured the widest possible participation in the development of international law, which was, without doubt, a guarantee of efficiency. All States were associated with the development of international law, for each of them was able to follow the whole process of preparing a draft and to express its opinion on every provision. Thus the development of international law had become a really international undertaking, thanks

to the present system of codification, in which the Commission played an important part.

49. In the 25 years which had elapsed since its establishment, the International Law Commission had well understood its task. It had done much in the past, but could do still more in the future, to which it looked forward with more experience and, hence, more confidence. It was called upon to write the new chapters in the international legal order that were being introduced by ever-increasing progress and international relations in continual development.

50. Mr. USHAKOV said that the work of the Commission had played a prominent part in the history of international relations and international law, and that part would continue to grow. The codification and progressive development of international law were assuming increasing importance, as they provided a basis for peaceful and friendly relations between all States, especially in the present-day world of States with different social systems. The Commission was carrying out the work of codification and progressive development for the United Nations successfully, because it was composed of eminent experts in international law working in a personal capacity, but was at the same time under the authority of the international community. It worked in close co-operation with States, taking careful account of the opinions expressed by them in the Sixth Committee and in the United Nations as a whole.

51. The Commission's success was also due to the excellent arrangements made by the United Nations and its Secretariat, for which he thanked the Secretary-General, the Legal Counsel and the staff of the Codification Division of the Office of Legal Affairs.

52. The Commission had rightly decided to concentrate on the preparation of draft articles, appointing a Special Rapporteur for each topic. That method had proved its worth in practice. He paid a tribute to all the past and present special rapporteurs for the diligence with which they had performed their difficult and often thankless tasks. The friendly atmosphere in the Commission had helped it to work as a team. A great contribution to the success of the Commission's work had been made by the Drafting Committee, to past and present members of which he expressed his appreciation.

53. The progressive development of international law was in fact primarily the responsibility of other bodies, composed of representatives of States, but the specialized task of codification associated with that development devolved mainly on the Commission, as a permanent substantive body of the United Nations and a subsidiary body of the General Assembly. There were still many branches of international law in which codification and progressive development were necessary, and he trusted that the Commission would continue to carry out that work with increasing success. It had been criticized for making slow progress and might consider ways of speeding up its work, but it could be proud of the high quality of the work it had done. With very few exceptions, the texts it had drafted had been adopted at diplomatic conferences by very large majorities. He

⁸ Yearbook . . . 1973, vol. II, document A/9010/Rev.1, para. 166.

commended all past and present members of the Commission for their contribution to that work.

54. Mr. ELIAS paid a tribute to all the Commission's members, past and present, for their individual and collective contribution to the codification and progressive development of international law over the past 25 years.

55. The impressive list of major international conventions completed or being drafted by the Commission clearly made it the *de facto* principal legal organ of the United Nations, although the latter seemed reluctant to recognize it as such. The Commission was in fact regarded as one of the subsidiary organs of the United Nations coming under Article 7, paragraph 2, of the Charter; that status was not commensurate with the great importance of its services to the Organization. Like the members of the International Court of Justice, members of the Commission were elected by the General Assembly and were required, under the Commission's Statute, to be persons of recognized competence in international law. Unlike the members of the Court, however, the Commission's members received only the allowances payable to members of subsidiary committees of the General Assembly. Those allowances were insufficient to cover members' living expenses during the annual sessions at Geneva.

56. Moreover, the Commission had no permanent accommodation at the Palais des Nations and had frequently been displaced by more transient sub-committees of the General Assembly. The Fifth Committee was often parsimonious in its appropriations for the Commission to an extent which was not conducive to the proper discharge of the Commission's functions. The Sixth Committee was more often than not censorious in its comments on the Commission's reports. The only redeeming feature of the situation was that the Commission had an excellent secretariat and enjoyed the support of the Legal Counsel.

57. The present stage in the Commission's development, and in that of the United Nations itself, perhaps called for a review of the stated objectives of the Commission's founders, and of its proper place in the United Nations in the light of the present-day realities of international law. The Commission's enlargement had enabled it to draft more generally acceptable rules of international law, and its services were of the highest legal importance. To meet the often unjustified criticism of the Fifth and Sixth Committees concerning the pace of its work, however, the Commission might take the present anniversary as an opportunity to review its future programme of work and working methods. It might, for example, try to limit the number and length of members' statements, which should, if possible, concentrate on principles and techniques of presentation of articles. The debates could then be more business-like. Fundamental principles could, of course, always be discussed at a length considered appropriate by the Commission itself.

58. He suggested that the Commission should establish a working group to review the programme of work and make recommendations along those lines without

delay. Every effort should nevertheless be made to maintain the present excellent *esprit de corps* and cordial—indeed congenial—atmosphere, which made the Commission's debates so rewarding.

59. Mr. TSURUOKA paid a tribute to the International Law Commission for the excellent and abundant work it had accomplished during its first quarter of a century. He also expressed his gratitude to the Swiss Confederation and the city of Geneva, which had been host to the Commission for so many years, and thanked the Secretariat for its assistance.

60. He could not, on that occasion, refrain from evoking the memory of his former colleagues, their great ability and their devotion to the cause of the progressive development of international law and its codification. Some of them, like Sir Humphrey Waldock, had left the Commission for the International Court of Justice. Others had resumed their academic, administrative, judicial or diplomatic careers. Others, again, whose names had been read out by the Chairman, had died. He wished to pay a tribute to their memory and thought that the Chairman could perhaps convey the Commission's thanks to their families.

61. Without expatiating on the work accomplished by the Commission, the merits of which had been described by previous speakers, he would merely draw attention to the fact that the Commission consisted of 25 members, of high competence in the field of international law, who represented the main legal systems of the world and were recruited from among jurists—judges, professors, ambassadors, and so on—who by reason of their professions were in constant contact with international life. Their varied experience provided the Commission with a source of exceptional quality embracing the various legal trends—revolutionary, progressive, conservative—the synthesis of which had shaped the Commission's work. The spirit animating that work was both realistic and idealistic and took account of the interests of all countries of the world. That explained the success of the draft articles prepared by the Commission in such fields as the law of the sea, the law of treaties and special missions.

62. In the new world, where the birth of a great number of States had created a new diplomatic, political, economic and cultural climate, the Commission was called upon to play an increasingly important part, meeting the new needs and aspirations and taking account of all the trends of ideas and legitimate interests of all peoples.

63. Mr. KEARNEY said that everywhere in the world there were injustices, quarrels, conflicts and killings, which could be remedied or prevented by world law, but the world was unaware of its need for law. The Commission was the only body specifically entrusted with the immense task of drafting rules that might serve as the foundation for a world at peace, governed by law. The obstacles of excessive nationalism, competing governmental, social and economic philosophies, and the collapse of confidence in the utility of international organization might well make the establishment of a world law seem less attainable than 25 years ago, when

the Commission had held its first meeting. Few law-making treaties drafted by the Commission were in force, but they were proof that universality of legal concept was not unattainable. They did not, however, provide even a partial skeleton around which a living body of world law could be constructed.

64. In its task of filling the structural gaps, the Commission must move with the degree of deliberate speed demanded by the needs of world society. Its basic structure should not be changed in an effort to accelerate the codification of international law, which could best be achieved through the interplay of minds trained in different legal systems and different cultures, and through the harmonization of a wide range of experiences—those of the cabinet minister, the judge, the diplomat, the professor, the foreign office legal adviser and the specialist in international organizations. Any substantial change in the organization or functioning of the Commission would destroy that delicate balance.

65. The Commission must nevertheless continually balance the preservation of that diversity against the demands of its imperative objectives. It should constantly experiment in seeking ways of eliminating unnecessary restraints on progress in codification. A combination of minor obstacles could sometimes cause considerable delay. For example, much time might be spent on the discussion of issues which appeared to be substantive, but eventually proved to be difficulties of translation. Long debates sometimes took place when there was no concept in one legal system to express a concept in another with reasonable exactitude. The selection of reasonable equivalents in such circumstances was an important element in international codification, but it was basically a technical matter which could perhaps be settled without a full debate in the Commission.

66. Practice had shown that to deal effectively with a group of draft articles the Commission needed to gather momentum, which could easily be lost if the work was interrupted for a substantial period. Once that momentum was lost, the short duration of the sessions rarely permitted the Commission to regain the cohesive determination to finish the job that was essential in joint efforts. It was painfully clear that ten-week sessions were quite inadequate to meet the world need for law. He was not in favour of the suggested division of the Commission into committees dealing with separate topics, or of the replacement of the Special Rapporteurs by experts working full time on the preparation of reports, draft articles and commentaries. Such suggestions should, however, be studied, together with other possibilities, such as an annual session of 15 or 16 weeks, or two sessions of 8 weeks. The study should include an analysis of the limited time which members, including special rapporteurs, could devote to the Commission's work, in order to determine what was feasible in the light of their other commitments.

67. The Commission should perhaps give some attention to its own organization. He agreed with the remarks made by Mr. Elias, and proposed that the Commission should set up a standing committee which, at each session, would examine the functioning of the Commission; consider proposals for improvements;

decide, in consultation with the Special Rapporteurs, on the organization of work for the subsequent session and on a longer-term basis; and review, with the Secretariat, the Commission's executive, administrative and financial problems. The standing committee, which would serve as the Commission's management and planning body, could also prepare each year, for consideration by the Commission, a memorandum reviewing the problems it had studied and making recommendations for their solution. That memorandum would form part of the Commission's report to the General Assembly.

68. The CHAIRMAN said that it was perhaps not for him to recount once more the accomplishments of the Commission, a body of which it had been said, at the last session of the General Assembly, that it was the most silent Commission of the United Nations. Indeed, it was both silent and productive—two characteristics that usually went together.

69. In celebrating its silver jubilee, the Commission was celebrating not only its performance, but also the realization of an old dream. It was difficult to trace the original source of the idea of codification of international law, which brought to mind such names as Bentham, Abbé Grégoire, Bluntschli, Mancini and Katchenovskiy. He would not dwell on the history of codification, but wished to refer to a work by a little-known Austrian jurist, Alfons von Domin-Petrushévecz. In his book *Précis d'un code de droit international*, published in 1861, that writer had suggested the establishment of an international commission of jurists to codify the law of nations, and had even clearly indicated that the codification should be embodied in international conventions. It had taken more than eighty years for the international commission he had dreamt of to become a reality, and the moral to be drawn was that it was worth while contemplating such possibilities because sometimes the wildest dreams came true.

70. Thanks to the decisions of Governments, the United Nations and, very soon afterwards, the International Law Commission, had been born. Those events had marked a moment in world history when traditional distrust had given way to a co-operative spirit, and when the fear that the codification of international law might be dangerous for sovereign States had been allayed by the expectations accompanying the establishment of a new, universal international organization.

71. Looking back on the past twenty-five years, it was clear that the setting up of an elaborate procedure based on Article 13, paragraph 1.a, of the Charter had been both timely and useful. One writer had pointed out that the United Nations thus had at hand, and actually working, a procedure which, within its limits, was a law-making procedure. That writer had also said, as Sir Humphrey Waldock had mentioned in his address, that the whole procedure which had developed under Article 13 of the Charter seriously rivalled the International Court of Justice in its importance for international law.

72. It was interesting to note that Domin-Petrushévecz, writing in 1861, had stressed the fact that, with the growth of international relations, national legislation was no longer sufficient and new measures would need to be taken for the satisfactory organization of the

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

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

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

The meeting rose at 5.35 p.m.

1266th MEETING

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

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(resumed from the 1264th meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 3

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

Article 3

Cases not within the scope of the present articles

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

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

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

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

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

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

5. The CHAIRMAN assured him that it would.

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

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

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

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

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

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

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

*It was so agreed.*²

11. ARTICLE 4

Article 4

Treaties constituting international organizations and treaties adopted within an international organization

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*³

18. ARTICLE 5

Article 5

Obligations imposed by international law independently of a treaty

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

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

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

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

20. Mr. YASSEEN agreed with the Special Rapporteur.

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

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

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

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

It was so agreed.⁴

25. ARTICLE 6

Article 6

Cases of succession of States covered by the present articles

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

26. Sir Francis VALLAT (Special Rapporteur) said that opposite views had been expressed about article 6,

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

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

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

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

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

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

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

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

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

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

34. The Polish Government had rightly insisted that article 6 should apply only to cases of succession which

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵ See document A/CN.4/267, article 2.

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

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

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

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

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

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

situations consonant with contemporary international law and the Charter of the United Nations, but also to limit the scope of its application in time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*⁶

The meeting rose at 12.55 p.m.

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

1267th MEETING

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

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 7

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

Article 7

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

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

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

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

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

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

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

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 294.

6. The comments by those two Governments raised the general issue of the relationship between the present draft and the principles of the Vienna Convention on the Law of Treaties. On that point, his philosophy—which, he believed, accorded with that of the Commission—was that, basically, the present draft articles were concerned with the effects of succession of States, but were not concerned with the law of treaties as such. That point had to be kept clearly in mind. The Commission could not rewrite the law of treaties in the present context; that would be an immense task and the results would probably be unsatisfactory. The relationship between draft article 7 and articles 35 to 37 of the Vienna Convention could be dealt with in the commentary.

7. If, as he believed, a devolution agreement was a treaty, the rules of the general law of treaties should apply to it except in so far as might be otherwise agreed. Since succession of States involved something not covered by those rules, a definite procedure for dealing with its effects was provided for in the draft articles, in the form of notification in the case of multilateral treaties and agreement in the case of bilateral treaties.

8. He drew attention to the redraft he had prepared, combining paragraphs 1 and 2 of article 7 (A/CN.4/278/Add.2, para. 184), which read:

Notwithstanding the conclusion of an agreement between a predecessor and a successor State providing that the obligations or rights under treaties in force in respect of a territory at the date of the succession of States shall devolve upon the successor State, the effects of the succession of States on those treaties shall be governed by the present articles.

A text on those lines would meet the wishes of the United States Government for a simplification of the article. It would not, however, affect the substance of the article, because, in a sense, the present paragraphs 1 and 2 said the same thing in different ways.

9. In conclusion, he suggested that the Drafting Committee should consider the possibility of condensing article 7, bearing in mind that the Commission had at times been criticized for the length of some of its draft articles.

10. Mr. SETTE CÂMARA said that the present wording of article 7 was the result of long discussion at the 1972 session, when it had been generally accepted that devolution agreements were little more than solemn statements of intention concerning the future maintenance in force of pre-existing treaties concluded by the predecessor State. A new manifestation of will on the part of the successor State would always be necessary; that was confirmed by the practice of the Secretary-General and other depositaries in recent years. A mere declaration of intention was nevertheless useful, because it opened the way for the negotiation and conclusion of such treaties as the newly independent State considered it advisable to enter into.

11. The present formulation of article 7 was well-balanced: paragraph 1 stated the negative rule that there was no automatic novation of rights and obligations as a result of succession; paragraph 2 established the primacy of the present articles over devolution agreements.

12. Government comments had not revealed any major objections to the article. The reservations by Kenya and Zambia related only to the degree of emphasis to be given to the rules in articles 7 and 8; a unilateral declaration constituted a better expression of the free will of the State than a devolution agreement, on which the shadow of possible coercion was always present to some extent.

13. He did not favour the adoption of the United States suggestion that paragraphs 1 and 2 should be combined, or the Special Rapporteur's redraft putting that suggestion into effect. As it stood, the article appropriately placed greater emphasis on the negative rule, and proclaimed the real nature of devolution agreements in clear and unmistakable terms. But since no change of substance was involved, he would not object to the redraft if the Commission decided to adopt it.

14. He would not object to the inclusion in the commentary of a reference to the relationship of article 7 with articles 35 to 37 of the Vienna Convention on the Law of Treaties, though he believed that there was no contradiction between those articles and the present draft. Under articles 35 to 37 of the Vienna Convention, the effects of treaties with regard to third States were always subject to the element of assent, which was also the keynote of the present draft article 7.

15. Mr. YASSEEN said that the rule laid down in article 7 was an exception to the general principles of the law of treaties, but was justified by the circumstances of international life. If the rules of the law of treaties were applied strictly, devolution agreements would produce all their legal effects immediately. In matters of State succession, however, it had been considered preferable to stipulate that such agreements produced their effects only if they were subsequently confirmed by the successor State. The intention had been to protect the successor State and give it time for reflection. A devolution agreement concluded between the predecessor and the successor State must not commit the successor State's future or limit its freedom of action.

16. The reason why the rules relating to treaties and, in particular, to third States should not be applied in the present case, was that succession of States was a special field calling for special rules. He therefore approved of article 7.

17. It had been suggested that a distinction should be made between devolution agreements and unilateral declarations by successor States; he was not in favour of such a distinction. The Commission had, indeed, decided that neither devolution agreements nor unilateral declarations produced any direct effects. One of those manifestations of will might be better than the other, but it would be difficult now to distinguish between their legal effects. As the Special Rapporteur had suggested, the question might simply be mentioned in the commentary.

18. It did not appear to be desirable either to merge articles 7 and 8—since a devolution agreement was technically different from a unilateral declaration—or to

combine the two paragraphs of each of those articles. The present wording of article 7 was satisfactory, and it would be preferable for the Drafting Committee not to change it.

19. Mr. TABIBI expressed general support for article 7, the provisions of which would be useful to ensure the continuity of treaty rights and obligations, especially in the case of multilateral treaties. The article did, however, create some difficulties in regard to bilateral treaties.

20. Devolution agreements were important because of the emergence of so many new States in recent years and the increasing number of multilateral conventions. The correct rule of international law on the subject was that stated in paragraph 1 of article 7, which embodied the clean slate doctrine and was in conformity with the principle of self-determination. The practice of concluding devolution agreements was growing in the United Nations family, and those agreements worked satisfactorily provided that they were not contrary to the object and purpose of the treaties in question and did not conflict with the constituent instrument of the organization concerned.

21. He agreed with Mr. Yasseen that there were great differences between articles 7 and 8. A devolution agreement was concluded between the predecessor and the successor State; a unilateral declaration was an act of the successor State alone. There was also the important point that successor States were afraid of entering into devolution agreements because such agreements often constituted the price of independence.

22. On the question of the relationship between draft article 7 and the articles on third States in the Vienna Convention on the Law of Treaties, he supported the Special Rapporteur's position. That applied particularly to bilateral treaties; the rights of a third State which was an original party to the treaty, should be taken into account in article 7 and also in article 8.

23. Mr. ELIAS pointed out that the redrafts of articles 7 and 8 in the Special Rapporteur's report (A/CN.4/278/Add.2, paras. 184 and 188) had been put forward mainly to enable the Commission to consider the questions raised in certain government comments.

24. As he saw it, the suggestions by the United States Government were only intended to clarify and simplify the statement of the rules embodied in articles 7 and 8. He strongly advised against any attempt to change the structure of those articles, which had been adopted in 1972 after a long and thorough debate. In the Sixth Committee, despite some initial criticism, the articles had ultimately been almost universally accepted. The reasonable character of their provisions was shown by the fact that no serious objections had been made by either the United Kingdom or France which, as former colonial Powers, had had experience of devolution agreements equal to that of the Netherlands.

25. He believed that any attempt to introduce provisions on the lines of articles 35 and 36 of the Vienna Convention would create serious difficulties and might even discourage States from participating in a diplomatic conference to adopt a convention based on the draft articles.

26. If the Commission or the Drafting Committee wished to simplify the text of article 7, he suggested that their efforts should be directed to paragraph 1 and paragraph 2 separately; any attempt to combine the two paragraphs might destroy the whole effect of the article. Paragraph 1 was a clear statement of the clean slate principle, which was the basis of the whole draft. Paragraph 2 was useful in emphasizing, to the extent necessary, the positive aspects of devolution agreements. Article 7 was, of course, so completely different from article 8 that it was quite out of the question to combine the two.

27. Lastly, he urged that the points raised by the United States and Netherlands Governments, as well as those raised by the Governments of Kenya and Zambia, should be dealt with in the commentary.

28. Mr. TAMMES said he agreed with previous speakers that the cases of article 7 and article 8 should be kept apart. Those articles reflected different and often contradictory practices of the past, and the Commission had wished to pronounce on each of those practices separately.

29. With regard to article 7, he favoured the Special Rapporteur's redraft, which expressed better than the 1972 text the pre-eminence of the draft articles over the contents of a devolution agreement. The inclusion of that principle implied that the Commission believed that the future convention would have all the advantages of devolution agreements without any of their disadvantages.

30. Part III of the draft (A/8710/Rev.1, chapter II, section C) allowed a newly independent State to declare freely its willingness to participate in treaties in force and also in treaties not yet in force; it thus covered all the possibilities that old devolution agreements were designed to bring about. Those agreements had, however, the disadvantage of imposing a one-sided burden of continuance on the newly independent State, in the form of a promise to the predecessor State. It was true that such agreements served to prepare the future government for its responsibilities in treaty matters, but the metropolitan government had a natural duty of assistance in any case. Moreover, preparation for future responsibilities was largely achieved in cases in which, for a long time, the applicability of treaties had never been extended to the territory of the future independent State without its consent.

31. Mr. KEARNEY said that article 7 expressed a sound principle, but its present drafting had potentialities for future difficulties which the Commission should make every effort to avoid.

32. Those difficulties were due to the statement in paragraph 1 that the predecessor State's treaty obligations and rights did not become those of the successor State "in consequence only of the fact" that a devolution agreement had been concluded. The use of that formula suggested that there might be some other facts, or other law, which had some such effect.

33. As far as the law was concerned, there was article 36 of the Vienna Convention on the Law of Treaties, which specified in the first sentence of paragraph 1 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... and the third State assents thereto". The second sentence of the paragraph added that "Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides".

34. As article 7 was now worded, it envisaged the possibility of a devolution agreement by which the successor State accepted the treaty rights and obligations of the predecessor State. If, therefore, a third State party to the treaty gave its assent, article 37, paragraph 1 of the Vienna Convention on the Law of Treaties would come into play and the third State's rights could no longer be revoked without its consent.

35. It was true that paragraph 2 of draft article 7 stated clearly that, notwithstanding the devolution agreement, the effects of a succession of States on treaties were governed by the present draft articles. Paragraph 1 of article 7, however, was also part of the present draft articles, so that paragraph 2 did not eliminate the ambiguity created by paragraph 1. Hence it was necessary to recast article 7 so as to avoid any differences of opinion which might arise out of a conflict in the interpretation of paragraphs 1 and 2, as well as other articles.

36. He was in favour of the Special Rapporteur's redraft, which expressed in clearer and more precise terms the pre-eminence, for that purpose, of the principles of succession of States over the principles derived from the law of treaties. He did not share the fear that that text would weaken support of the draft articles by governments. All that was necessary was to explain the reasons for simplifying article 7 by combining its two paragraphs.

37. Mr. RAMANGASOAVINA stressed the importance of article 7 which, like article 8, related to a specific moment in the life of the successor State. At that stage, the State could choose between several attitudes, in particular, those dealt with in articles 7 and 8. Very often, the successor State entered into a devolution agreement with the predecessor State, but at that time it was generally elated and rather confused, for it could not yet assess the effects of the treaties concluded in its name before its attainment of independence. Article 7 thus constituted a safeguard clause which was needed in that particular case.

38. The situations to which articles 7 and 8 applied were quite distinct. In the case covered by article 8, the successor State made a unilateral declaration in full knowledge of the facts. Its position was rather better than in the case contemplated by article 7, in which it was often ill-prepared to face its new political life, and the devolution agreement it concluded was frequently accompanied by co-operation or defence agreements and might be in the nature of a counterpart arrangement that infringed the principle of autonomy of will. Article 8 was justified, however, by the fact that, even if a unilateral declaration was not made until some time had elapsed, young States often lacked adequate staff and archives to provide them with proper knowledge of the treaties concluded in regard to them by their prede-

cessor States. Even in that case a safeguard clause was necessary.

39. It was not surprising some young States had welcomed articles 7 and 8, even though one of them had expressed the opinion that devolution agreements and unilateral declarations should not be placed on the same footing. It should be noted, however, that the second paragraphs of the two articles were drafted slightly differently: whereas paragraph 2 of article 7 began with the word "Notwithstanding", paragraph 2 of article 8 began with the words "In such a case"—a difference which seemed to reflect the distinction some would like to introduce. Article 7 and 8 should not be merged, even though they were based on the same philosophy.

40. He was unable to support the redraft proposed by the Special Rapporteur in the light of the suggestion made by the Government of the United States of America. True, it did not greatly change the substance of article 7, but it might have an inhibiting effect on young States, for it implied that, no matter what position the successor State adopted, the provisions of the draft would always prevail. Young States might therefore refrain from stating their position by means of a devolution agreement or unilateral declaration, on the grounds that in any event the rules of the draft would apply.

41. Mr. USHAKOV noted that it was not so much the substance as the drafting of article 7 which was at issue. Several versions of the text had been proposed, but they might change the meaning of the provision. He could not, for example, agree to any formulation under which the rights or obligations arising out of treaties would be suspended, whereas the effects of the succession would be governed by the draft. Article 7 in fact provided that certain obligations or rights of the predecessor State under treaties in force with respect to the successor State did not become the obligations or rights of the successor State in consequence only of the fact that the two States had concluded a devolution agreement. The words "in consequence only of the fact" meant that the devolution agreement had legal effects, but that they were not sufficient.

42. That point was even clearer in the case of article 8. A unilateral declaration by the successor State also had legal effects, which were not, however, sufficient. In both article 7 and article 8, paragraph 2 specified that the draft articles would govern the effects of a succession of States on treaties which, at the date of that succession, were in force in respect of the successor State. To avoid any distortion of the meaning of articles 7 and 8, it would be preferable not to change the drafting.

43. Mr. QUENTIN-BAXTER said he shared the view that it was necessary to retain articles 7 and 8 as separate provisions to deal with different situations. He also agreed with the majority of members that there was a great advantage in maintaining the two separate paragraphs of article 7.

44. From his own experience in New Zealand, he had the highest regard for the positive value of devolution agreements and therefore greatly sympathized with the

views put forward by the Netherlands Government in its comments and by Mr. Tammes during the present discussion. It might well be that New Zealand had had very special experience, in that it had grown slowly and gradually to independent status. Nevertheless, a very important part of its inheritance as a State had been the fact that it could claim the benefit—subject, of course, to fulfilling the obligations—of a vast mass of treaties which had been concluded by the United Kingdom over a period of many years and applied to the territory of New Zealand.

45. It was perhaps true to say that all States were born naked of treaty obligations, but it was equally true to say that they very soon needed clothing. On a number of occasions, New Zealand had found it very convenient to rely on an old United Kingdom treaty concluded before it had come into existence as a State. In all those cases, the other State party to the bilateral treaty had accepted the New Zealand view. His own conclusion from that experience was that the area was one in which States were most adaptable and invariably well disposed. For those reasons, he shared the view that devolution agreements could be of great value and that it was the duty of a predecessor State to give the successor State a list of treaties to which it could succeed.

46. With regard to the text of article 7, he thought it should not be lightly altered since it was the result of a considerable effort of drafting.

47. On the question of the respective merits of devolution agreements and unilateral declarations, he appreciated the comments of certain Governments, but believed that the Commission's draft articles kept a proper balance. The qualitative difference between the two kinds of instrument was suitably reflected in the subtle and deliberate difference between the texts of article 7, paragraph 2 and article 8, paragraph 2.

48. Moreover, article 7 dealt with devolution agreements in order to set them aside; those agreements were not mentioned any more in subsequent articles of the draft. But article 8 dealt with unilateral declarations in order to introduce them in subsequent articles, which contained provisions on declarations and notifications that constituted unilateral action. Those differences in the treatment of devolution agreements and unilateral declarations should go a long way to meet the wishes expressed by the Governments of Kenya and Zambia in their comments.

49. Mr. TSURUOKA said he was in favour of the principle of *res inter alios acta* underlying article 7, by virtue of which a devolution agreement did not bind the other parties to the treaty. Article 7 was intended to help new States, and he was therefore in favour of retaining it. In practice, however, other States were often led to believe in good faith what was stipulated in a devolution agreement. He therefore thought that, in the interests of the continuity of treaties and the stability of treaty relations, that side of the matter should be brought out in the commentary.

50. Mr. MARTÍNEZ MORENO said he fully approved of the present content, form and structure of article 7. The drafting could perhaps be improved to

make it clear that the "territory" referred to was one which subsequently became part of the successor State.

51. He had carefully considered the comments of Mr. Kearney and the Special Rapporteur on the structure of the article, but still believed that paragraphs 1 and 2 should be kept separate. If the two paragraphs were merged as suggested, the article might lose an essential element—its explicit recognition of the *tabula rasa* principle.

52. Articles 7 and 8 should also be kept separate, since there were fundamental differences between devolution agreements and unilateral declarations. The juridical consequences of devolution agreements were recognized in legal doctrine, but unilateral declarations did not have the same status in international law. He shared the views expressed by Mr. Ushakov on that subject.

53. Mr. PINTO said that articles 7 and 8, although expressed in general terms, were to a large extent concerned with the changes that occurred with the transition from a colonial régime to independent Statehood. He agreed with the principle embodied in those articles that a new State was entitled, but not bound, to assume the rights and obligations of the predecessor State vis-à-vis third parties under treaties contracted by that State. That was the only equitable principle to apply.

54. In article 7 there was a delicate balance between paragraphs 1 and 2. In paragraph 1, the phrase beginning with the words "in consequence only of the fact that..." was perhaps ambiguous, but it left room for the interplay of other forces—political, legal or factual—which would decide the ultimate fate of the treaties. Paragraph 1 rightly adopted that approach, and was logically followed, in paragraph 2, by the statement that the effects of succession on treaties would be governed by the present articles notwithstanding devolution agreements. Thus effect was given to the principle he had mentioned. Consequently, he was not in favour of any major drafting change, or of the combination of paragraphs 1 and 2.

55. He appreciated the point made by Mr. Martínez Moreno about the phrase "in respect of a territory" in paragraph 1. He understood it to mean that certain obligations undertaken by the predecessor State were somehow related to the territory which subsequently became the territory of the new State. The phrase might, however, be taken to mean that the provision concerned only rights and obligations in respect of a particular land area, to the exclusion of other kinds of rights and obligations. Such a provision would be unduly restrictive. The Drafting Committee might consider whether the idea could be expressed more clearly, or whether the phrase could be omitted. In fact he was not sure that the whole tenor of article 7 did not cloud the issue of rights and obligations under a devolution agreement. It would be undesirable to exclude certain rights and obligations by adopting provisions that might be interpreted too restrictively, unless, of course, the agreements in question had been concluded under coercion, in which case the Vienna Convention on the Law of Treaties would apply.

56. He agreed, up to a point, with the comments of Kenya and Zambia on the relationship between articles 7 and 8. But a unilateral declaration made soon after independence would not be very different in effect from a devolution agreement, as it would still have been made in the context of the continuing influence of the colonial Power on the new State's government. The two situations were nevertheless legally different and should be dealt with differently. Admittedly, devolution agreements were not always clearly drafted and sometimes left considerable scope for interpretation. For example, they could often be interpreted as covering only treaties which in fact applied to the successor State. That was the right approach. Devolution agreements were useful, and he agreed with Mr. Quentin-Baxter that it was important for a new State to be able to take advantage of certain rights and fulfil certain obligations soon after independence.

57. Mr. HAMBRO expressed his agreement with the Special Rapporteur and his support for the present draft of article 7. Since the draft articles had already been adopted once, they should not, in his opinion, be changed unless subsequent debates and Governments' comments warranted such changes. On that basis he saw no reason to change either article 7 or article 8.

58. Mr. AGO said he well understood why the present wording of article 7, particularly paragraph 1, had given rise to some uncertainty and to suggestions that its terms should be made more precise. The new wording proposed by the Special Rapporteur did not seem entirely satisfactory, however, for it would be unfair to make a sweeping judgment of devolution agreements and assume that they had all been concluded solely in the interests of the former colonial Power. The situation was sometimes very different, for new States often sought the support of the former metropolitan Power to strengthen their position vis-à-vis third States. Hence devolution agreements should not be regarded as null and void; it should only be stated, as in the present paragraph 1, that a devolution agreement between a former metropolitan Power and a new State did not in itself suffice to create rights and obligations for other States.

59. It should not be forgotten that a devolution agreement was an agreement between two States—the former colonial Power and the new State—which undoubtedly created rights and obligations between those two States. As to third States, it was obvious that such an agreement had no real value in the case of multilateral treaties; but in the case of bilateral treaties it might be asked whether the fact that a new State had signed a devolution agreement was not equivalent to a kind of unilateral declaration or declaration of intent on its part vis-à-vis other States, concerning succession to the treaty. He was sure those who had suggested merging paragraphs 1 and 2, had not intended to rule out that conclusion.

60. The new wording proposed did, however, give the impression that the Commission had meant to eliminate devolution agreements entirely, by treating them as null and void, which would be most unfortunate, not only from the legal, but also from the political point of view.

While he recognized that the present text needed revising, he did not think the proposed solution could lead to satisfactory results. As the Special Rapporteur had stressed, it was an extremely delicate matter, and the language used might have considerable legal and extra-legal consequences.

61. Mr. USHAKOV stressed that article 7 had absolutely nothing in common with the clean slate principle to which some members of the Commission had alluded and which was stated in article 11. Article 7 stated a general principle which did not apply only to newly independent States.

62. Mr. CALLE y CALLE said that article 7 was correctly drafted and appropriately expressed the idea embodied in it; he preferred the present text. Paragraph 1 indicated that devolution agreements were not entirely adequate and needed to be supplemented by other treaties later, although they served as a point of departure. The article made no reference to third parties, but it should be borne in mind that there were also rights and obligations of the predecessor and successor States vis-à-vis third States. A predecessor State might decide to transmit its obligations towards a third State to the successor State. Moreover, as Mr. Ushakov had pointed out, the article did not apply only to newly independent States and there were other cases—for example, where territory was ceded—which involved the devolution of rights and obligations.

63. Mr. ŠAHOVIĆ said he agreed with all the members of the Commission who had urged that the present text of article 7 should be retained. In his opinion the article was very important for the structure of the whole draft. For paragraph 1 stated a general rule expressing the substance of the obligation towards third States arising from devolution agreements, and unless that point was well brought out, the article would not indicate the real nature of devolution agreements and of the rights of the successor State.

64. The proposal that the two paragraphs should be merged raised a number of problems, without removing the ambiguities the Commission was trying to eliminate. He was therefore in favour of keeping the article in its present form.

65. Mr. EL-ERIAN said that in principle he was in favour of the text which the Commission had already adopted for article 7. He was nevertheless prepared to accept the arguments adduced by the Special Rapporteur in support of the draft he had suggested, especially as it had the advantage of simplicity.

66. The CHAIRMAN said that several points raised during the discussion would have to be added to the commentary. As Mr. Ushakov had pointed out, articles 7 and 8 did not apply only to cases of succession in which the successor was a newly independent State. It would be useful to say that the phrase "in consequence only of the fact that the predecessor and successor States have concluded an agreement" should be interpreted as meaning that the situation would still be the same, even if a third party to a treaty had agreed to the devolution of rights and obligations under that treaty. The relevance of article 73 of the Vienna Convention on

the Law of Treaties, under which the rules relating to succession would have priority in the interpretation of article 7 of the present draft, might also be mentioned.

67. He suggested that, in view of the similarity of articles 7 and 8 and the fact that most speakers had dealt with both articles in their comments, the discussion on both articles should be regarded as concluded and that the Special Rapporteur should be invited to sum up.

It was so agreed.

68. Sir Francis VALLAT (Special Rapporteur) said the discussion had shown that there was general support for keeping articles 7 and 8 as separate articles, and for retaining the principles stated in them. A large majority of members were also in favour of keeping the two paragraphs in each of those articles separate. He appreciated the reasons for that preference in so far as they were based on points of presentation, but points of law and interpretation had also been invoked. He nevertheless remained unconvinced. Nothing in the draft he had proposed suggested that a devolution agreement was to be considered void or invalid on any grounds whatsoever. On the contrary, the reference to an agreement meant *prima facie* a valid agreement. That criticism therefore seemed unjustified.

69. On the other hand, some risks would be incurred in adopting the present text. Articles 7 and 8 now formed part of an entire draft and should be read in relation to the rest of that draft. Paragraph 1 excluded certain consequences of devolution agreements, indicating that they did not in themselves affect the legal effects of a succession of States. Paragraph 2 made the slightly different, complementary point that the effects of the succession would be governed by the present articles; that was the principle the article was intended to establish. Paragraph 2 was therefore the effective paragraph.

70. Some speakers had advocated a special reference to devolution agreements and their consequences, but if paragraphs 1 and 2 were read in the context of the rest of the draft, some doubts arose about the relationship of paragraph 1 to article 11, for example. The "provisions of the present articles" mentioned in article 11 included paragraph 1 of article 7, so if that paragraph was retained as well as paragraph 2, there would be doubts about the interpretation of article 11 in relation to article 7. Some articles dealing with multilateral treaties provided for notification of succession—a procedure which would have to be followed whether there was devolution agreement or not. Again, the phrase "in consequence only of the fact that..." in paragraph 1, might be taken to imply that devolution agreements would play a part in such cases. In the case of article 19, which was concerned with bilateral treaties, devolution agreements might have a role to play, not by virtue of paragraph 1 of article 7, but by virtue of paragraph 2 of that article and the provisions in paragraph 1 of article 19.

71. Consequently, from the point of view of the draft as a whole, article 7 would be a clearer and more satisfactory provision, not casting any doubt on the

validity of devolution agreements, if the two paragraphs were combined, as he had suggested. However, no harm would be done by keeping them separate. The suggestion in paragraph 184 of his report had been made, not merely for drafting reasons, but with the general acceptability of the draft articles as a whole in mind.

72. The CHAIRMAN suggested that articles 7 and 8 should be referred to the Drafting Committee for further consideration in the light of the comments made.

*It was so agreed.*²

The meeting rose at 1 p.m.

² For resumption of the discussion see 1286th meeting, paras. 27 and 33.

1268th MEETING

Thursday, 30 May 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 9

1. The CHAIRMAN invited the Special Rapporteur to introduce article 9, which read:

Article 9

Treaties providing for the participation of a successor State

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

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

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

2. Sir Francis VALLAT (Special Rapporteur) said it might be advisable to make paragraph 2 more flexible

by not requiring acceptance in writing, but permitting tacit consent, as suggested in the comments of the Governments of the United Kingdom and Venezuela (A/CN.4/278/Add.2, paras. 191 and 192). In some cases it might be difficult for a Government to declare its acceptance in writing. Paragraph 2 might therefore be amended, as he had suggested in paragraph 196 of his report, to read "... only if it is established that it was the intention of the successor State to be so considered".

3. Mr. TSURUOKA said that he was in favour of the change proposed by the Special Rapporteur. The important point was that it should be well established that the successor State agreed to be bound by the treaty. As Mr. Tabibi had already observed, new States often experienced considerable delays and difficulties in the procedure for succession to treaties. He himself had found it very difficult to get the new States in Africa, which had succeeded France and the United Kingdom to declare in writing that they did not intend to invoke article 35 of the General Agreement on Tariffs and Trade against Japan, though they actually had no intention whatever of doing so. He was therefore in favour of making the procedure more flexible.

4. Mr. USHAKOV said he was not in favour of amending article 9, paragraph 2 by adapting the terms of article 37, paragraph 1, of the Vienna Convention on the Law of Treaties,¹ as the Special Rapporteur had suggested. That article of the Vienna Convention applied to third States, which were not parties to the treaty and, consequently, could give their consent tacitly, without a formal act. Draft article 9, however, dealt with States wishing to become parties to a treaty, whose intention must, consequently, be expressed in an official act. He therefore preferred the original text.

5. Mr. CALLE Y CALLE said he was opposed to making the provision more flexible; he reminded the Commission that Sir Humphrey Waldock, in his third report, had advocated express consent in writing in such cases.² The article provided for two situations, one in which the successor State had, under a treaty, the option of considering itself a party to that treaty, and the other in which the obligations under the treaty passed automatically to the successor State. In such cases, acceptance of participation must be in writing and tacit consent would not be sufficient, especially where the treaty dealt with matters of particular importance to the parties.

6. Mr. PINTO said he approved of paragraphs 1 and 2 and of the principle of express consent, preferably in writing in all cases. The article should not leave acceptance of participation in treaties to be inferred from the successor State's conduct, or permit acceptance by tacit consent. Even for newly independent States the requirement of written consent should not prove unduly burdensome, as it would often be a simple formality.

7. Under paragraph 3 of the article, difficulties might arise if the successor State was not in a position to fulfil

its obligations under the treaty between the date of succession and the date of notification of succession or of acceptance. The successor State should perhaps be considered a party from the date of notification under paragraph 1, or the date of acceptance in writing under paragraph 2, unless the treaty provided otherwise. Continuity of obligations on succession could not be presumed.

8. Mr. ELIAS said that article 9 should be retained in its present form and that the element of flexibility suggested by the United Kingdom and Venezuela should not be introduced. The successor State should be left to overcome any difficulty it might have in complying with the requirement of express acceptance in writing. The principle embodied in articles 11 and 35 of the Vienna Convention on the Law of Treaties, that express consent was fundamental where a party would be bound by a treaty, should be retained in the present articles. The arguments advanced in the Special Rapporteur's own commentary seemed to indicate that the suggested amendment should not be adopted.

9. There was danger in always equating the position of the successor State to that of a third State under the general law of treaties, but in the present instance those positions were identical. If there was a devolution agreement between the predecessor and the successor State, or a unilateral declaration to which a State affected by it was not a party, it was essential to provide for express written consent on the part of the successor State. If the successor State's conduct indicated continuance of the treaty, a third State could always ask the successor State to confirm its acceptance of the treaty. Constitutional and other problems did not seem important enough to prevent that. What really mattered was that the successor State should be free to decide whether it wished to be considered a party. The present draft met all the requirements.

10. Mr. ŠAHOVIĆ said he preferred the present text of article 9, paragraph 2, because acceptance in writing was necessary in the case to which it applied. In his opinion, it was only by an express notification in writing that a successor State could express its will to remain a party to a treaty.

11. Mr. RAMANGASOAVINA observed that the discussion was turning on the way in which a successor State should express its consent to remain bound by a treaty. The Venezuelan delegation, in its oral comments, had indicated that in practice such consent could be given either in the act of signature itself or by the execution by the successor State of acts which clearly showed its intention of continuing to be bound by the treaty (A/CN.4/278/Add.2, para. 191). But he thought that if the successor State was able thus to express its will to continue to remain bound by the treaty, there was no reason why it should not do so by a notification in writing sent to the depositary of the treaty and subsequently transmitted to the parties. It was true that that procedure sometimes met with difficulties, as Mr. Tsuruoka had observed. But it was better that the successor State's consent should be expressed explicitly, which in his opinion could only be done in writing.

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 294.

² See *Yearbook* . . . 1970, vol. II, p. 29, article 5, para. 2.

12. Mr. YASSEEN said he agreed with Mr. Elias that the case covered by article 9, paragraph 2 was identical with that covered by article 35 of the Vienna Convention on the Law of Treaties, which the Commission must take into consideration. For succession to a treaty not only conferred rights, but also imposed obligations, and the Vienna Convention provided that consent to be bound by a provision creating an obligation must be expressed in writing. That had not been the Commission's initial position; the Vienna Conference had adopted the provision in an amendment. States had been unwilling to treat the acceptance of rights and the acceptance of obligations in the same way, and had expressed their will to make a distinction by requiring written consent in the latter case. He himself did not see any difference between the case covered by article 9, paragraph 2, and that covered by article 35 of the Vienna Convention.

13. He considered that article 9 should be retained as it stood.

14. Mr. SETTE CÂMARA said he agreed with most of the previous speakers that there was no special reason to change the text of article 9. The written form was of the essence in treaties. Accession to treaties was an important matter for new States and the draft covered all cases which might depart from the clean slate principle. The article should therefore remain unchanged.

15. Mr. BILGE said he thought the Special Rapporteur should place more emphasis on the possible difference between article 9 and articles 35 and 36 of the Vienna Convention.

16. The CHAIRMAN said that the majority of members seemed to be in favour of retaining the present text of article 9. Under the Vienna Convention on the Law of Treaties any new treaty relations established between the successor State and other States had to be agreed in writing, and it was logical to require acceptance in writing in the present case.

17. That logic applied to the whole draft. Article 17, which dealt with the related question of notification of succession, required notification of succession in respect of a multilateral treaty to be in writing. The definition of "notification of succession" given in article 2, paragraph 1 (g), however, did not specify that it must be in writing. And article 19, which dealt with bilateral treaties, did not specify acceptance in writing. It might therefore be necessary, at some stage, to reconsider the relevant articles in order to ensure that they were consistent in specifying written form in all cases where succession was established.

18. Mr. ELIAS agreed that the matter should be clarified if that appeared necessary. The present text seemed clear, however. Paragraph 1 of article 9 could not be interpreted without reference to article 17, a general provision defining the nature of notification, which should govern all preceding and subsequent articles referring to notification.

19. Sir Francis VALLAT (Special Rapporteur) thought that the point raised by the Chairman related more to the definition of notification and to article 17 than to article 9.

20. Replying to Mr. Pinto, he said that the question of continuity in the cases to which article 9 applied had been discussed in the Commission and in the Drafting Committee. The Committee had intended paragraph 3 to ensure continuity of application of the treaty by providing that, as a general rule, the successor State, if it consented to be considered a party, would be so considered from the date of succession.³ The Commission had thus concluded that continuity of the treaty would be appropriate in such cases.

21. There was a slight difference between the position of a successor State under article 9 and that of a third State. Since provision for succession by a successor State, in a treaty made by the predecessor State, implied that the treaty had some reference to the territory of the successor State, there was an element of succession and an element of legal nexus. Consequently, in view of the nature of the provisions under consideration, it was reasonable to make the treaty continuous in every respect from the date of the succession, subject to the consent of the successor State. He was therefore in favour of retaining the present text of paragraph 3.

22. Mr. YASSEEN said he agreed that paragraph 3 should be retained in its present form. It contained a rule which was in accordance with the principles of the law of treaties and should be clearly stated in the article.

23. The CHAIRMAN suggested that article 9 should be referred to the Drafting Committee for further consideration.

*It was so agreed.*⁴

24. Sir Francis VALLAT (Special Rapporteur) asked members whether they wished to suggest any additional articles for inclusion in part I, which at present consisted of articles 1 to 9. The point he had raised about the relationship between the articles and the law of treaties had perhaps been adequately dealt with in the discussion at the previous meeting; it would be reflected in the commentary, which would have to explain the Commission's views on the relationship of the draft articles to article 73 of the Vienna Convention on the Law of Treaties, in particular.

25. The CHAIRMAN agreed that that question should be dealt with at least in the commentary and that the Commission should not exclude the possibility of adopting an article on the lines of article 73 of the Vienna Convention on the Law of Treaties, defining the relationship between the present articles and that Convention.

26. Mr. USHAKOV said he intended to submit a text based on article 4 of the Vienna Convention, to supplement draft article 6.

27. Mr. ELIAS said he thought that an additional article on the lines suggested by the Chairman might be necessary, but that it would be unwise to try to draft it, or decide what form it should take, at that stage. As its number indicated, article 73 of the Vienna Convention on the Law of Treaties had been drafted towards the

³ See *Yearbook* . . . 1972, vol. I, pp. 182-183, para. 57.

⁴ For resumption of the discussion see 1286th meeting, para. 35.

end of the Commission's work on that Convention. He suggested that the Commission should take note of the point raised by the Special Rapporteur and consider at a later stage what kind of provision was needed, and whether it should be included in part I or in some residual article at the end of the draft.

28. Mr. YASSEEN observed that when the Vienna Conference had adopted article 73 of the Vienna Convention on the Law of Treaties, it had not known what the provisions on succession of States in respect of treaties would be. The article was, in fact, a saving clause. He therefore agreed with Mr. Elias that the Commission should wait until it had completed its work before taking a decision on the problem of the relationship between the draft articles and the Vienna Convention.

ARTICLE 10

29. The CHAIRMAN invited the Special Rapporteur to introduce article 10, which read:

Article 10

Transfer of territory

When territory under the sovereignty or administration of a State becomes part of another State:

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

(b) treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

30. Sir Francis VALLAT (Special Rapporteur) drew attention to three points raised by Governments (A/CN.4/278/Add.2, paras. 197 and 198). He was inclined to agree with the suggestion that the words "subject to the provisions of the present articles" should be inserted at the beginning of article 10, as that would indicate that it should not be considered in isolation, but was related to other provisions. However, that was perhaps a matter for the Drafting Committee to consider.

31. The proposed deletion of the words "or administration" raised the problem of the definition of a "successor State" and "succession of States", and the question whether the test of responsibility for international relations or a sovereignty test should be applied. The Commission seemed to be in favour of the responsibility test, because to rely on sovereignty as a test would be unsatisfactory and would narrow the scope of the draft articles. The use of the word "administration", however, was not entirely appropriate in the present context. The point raised by the United States Government should perhaps be treated largely as a drafting problem, applying the definition of succession of States when one had been decided on. He had suggested, in paragraph 205 of his report, that the introductory words of the article should read: "Subject to the provisions of the present articles, when a succession of States occurs by a transfer of territory from the predecessor State to the successor State". That wording would be appropriate whatever definition was ultimately adopted and would also be in accordance with the drafting technique used in other articles.

32. Lastly, there was the question whether a test more flexible than that of incompatibility should be adopted from other articles, for example, article 25, as suggested by the Spanish Government. That suggestion was worth considering. The transfer of territory had similarities with the separation of part of a State, and a transfer might well create a situation which, although not necessarily incompatible with the object and purpose of the treaty, would radically change the conditions for its operation. The phrase "or would radically change the conditions for the operation of the treaty" might therefore be added, as well as the introductory phrase he had suggested.

33. He was not in favour of the United Kingdom suggestion that the compatibility test should be replaced by one based on the restricted territorial scope of the treaty, impossibility of performance and fundamental change of circumstances. That was precisely the kind of test he thought should be avoided in the draft articles, as it would involve incorporating part of the law of treaties in them, which would create confusion.

34. Mr. TAMMES said article 10 was meant to cover two different cases: that in which a territory passed from State A to State B and both States continued to exist after the transfer; and that in which the transferred territory was identical with State A, which was then incorporated in State B and disappeared as a subject of international law. The latter situation was often called "total succession". If both cases were to be covered, the present introductory phrase of the article seemed more appropriate than the one suggested by the Special Rapporteur. The word "transfer" could hardly be applied to the second case, where one State was incorporated in another. However, the addition of the words "Subject to the provisions of the present articles" would improve the present text.

35. The distinction between transfer of territory and total succession also had certain practical consequences. In cases of transfer there was no doubt about the applicability of the moving-treaty-frontiers rule, but such a doubt did arise where one State was incorporated in another. For example, the admission of Texas into the United States of America had, after some hesitation, been recognized in international practice as a case for application of the moving-treaty-frontiers rule. But the applicability of that rule had not been clear in the case of the extension of Sardinian treaties to Italy, which, as the successor State, had had to conclude a number of new commercial treaties with third States. Article 10 would have applied in the first case and article 26 in the second—under paragraph 2 of article 26 the treaty-frontier would not move. Hence it would not always be clear whether article 10 would be subject to the provisions of article 26 or vice versa. But that would not detract from the usefulness of the words "Subject to the provisions of the present articles" in regard to other provisions, particularly those on boundary régimes.

36. There was some merit in the idea put forward in paragraph 211 of the Special Rapporteur's report, that an article on fundamental change of circumstances might be included in the general provisions. Admittedly, article 62 of the Vienna Convention on the Law of

Treaties applied to all treaties, including those which had been the object of succession, but from the text of that article and the Commission's commentary on it,⁵ it was clear that the article had not been written for the exceptional kind of fundamental change that succession might entail for treaty relations. As doubts on that point might arise in the context of other draft articles, the Commission might have to consider the possibility of including a general article on fundamental change of circumstances at a later stage, when the need for it became apparent. Article 73 of the Vienna Convention on the Law of Treaties was almost an invitation to do so.

37. Mr. TABIBI said that his former doubts about article 10 had been largely dispelled by the wording adopted in 1972.

38. His first concern was that the article should conform with the spirit and the real purpose of the United Nations Charter, with its emphasis on the sovereignty and territorial integrity of Member States. Conditions had greatly changed as a result of the entry into force of the Charter. There were now very few cases of transfer of territory, and the importance of territory itself took second place to that of the people inhabiting it.

39. Viewed in that light, the title of article 10 was misleading. It was not so much the "transfer of territory" that was in question as the fate of the people who lived in it. The purposes and principles of the United Nations required that prior consideration be given to the wishes, intentions and views of those people.

40. His second concern was with the statement in paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C) that article 10 "concerns cases which do not involve a union of States or merger of one State in another, and equally do not involve the emergence of a newly independent State". Article 10 clearly dealt with borderline cases, and it was difficult to draw the line separating them from the cases it was intended to exclude.

41. He was not altogether satisfied with some of the examples set out in paragraph (5) of the commentary. For instance, the absorption into India of certain former Portuguese possessions had been a clear case of the exercise of the right of self-determination by the inhabitants of the territories concerned. As to the example of Eritrea in 1952, when it had become an autonomous unit federated with Ethiopia, in the Special Political Committee of the General Assembly he had supported the idea of the federation as being mutually advantageous to the Eritreans and the Ethiopians. In that case, too, it was essential to think first of the people concerned and to remember that the main effect of the process of federation had been that Eritreans had become Ethiopian nationals.

42. With regard to the wording of article 10, the only change he favoured was the deletion of the words "or administration". Those words give a wrong impression; if, for example, a State was entrusted by the United

Nations with the administration of a territory, it would be wrong to suggest that part of the territory could be transferred to another State otherwise than by its own inhabitants in the exercise of their right of self-determination.

43. With that change, and on the understanding that article 10, like all the articles of the draft, had to be read in the light of the provisions of article 6, he was prepared to accept the 1972 text. The provisions of article 6 provided a vital safeguard by making it clear that article 10 would only apply to lawful transfers of territory, that was to say, those made in accordance with the right of self-determination, possibly under United Nations auspices.

44. Mr. USHAKOV said that only one of the three proposed changes to article 10 was acceptable, namely, the addition, at the end of the article, of the words "or would radically change the conditions for the operation of the treaty".

45. To add the words "Subject to the provisions of the present articles" at the beginning of the article would be rather absurd, since all the draft articles were implicitly subject to that proviso. He thought the real purpose of the proposed addition was to reserve the general provisions in part I and articles 29 and 30 in part V. If that were so, the proviso should be attached to each of those articles.

46. The introductory phrase of article 10, in the wording adopted by the Commission at its twenty-fourth session, referred to two cases of transfer of territory: the transfer of territory belonging to a State, in other words under its sovereignty, which was the most frequent case; and the transfer of a "dependent territory", in the meaning with which those words were used in the definition of the term "newly independent State" in article 2, paragraph 1 (f). Although such a territory did not belong to the administering Power, it could be transferred to an existing State, as was shown by the examples given by the previous Special Rapporteur, Sir Humphrey Waldock. It was essential that article 10 should cover that case, no matter what term was substituted for the word "administration". The proposed new wording evaded the case, and it might also give the impression that a dependent territory was under the sovereignty of the metropolitan State, which was quite unacceptable. It was important not to alter the meaning of the article by a change in drafting.

47. Sir Francis VALLAT (Special Rapporteur) explained that there would be no need to insert the opening proviso "Subject to the provisions of the present articles" if it were only a matter of applying to article 10 the general provisions of part I. The proviso was necessary because of the absolute terms in which article 10 was cast; without it, article 10 might be interpreted as excluding some of the later articles.

48. He would have no objection to the proviso being placed in square brackets until the Commission discussed those later articles. With or without square brackets, however, the proviso was a perfectly reasonable one, bearing in mind the absolute rule in article 10 on the change of treaty régime and the fact that later

⁵ See *Yearbook* . . . 1966, vol. II, pp. 256 *et seq.*

articles of the draft clearly established a different treatment.

49. The use of the words "or administration" had been explained in paragraph (6) of the commentary (A/8710/Rev.1, chapter II, section C). He understood the intention of the Commission to be that the articles on State succession should apply to all cases of "the replacement of one State by another in the responsibility for the international relations of territory", to use the wording of the definition in article 2, paragraph 1(b). Accordingly, article 10 should cover cases in which the territory transferred was not under the sovereignty of the predecessor State, but only under its administration, which, of course, made that State responsible "for the international relations" of the territory. That idea would have to be retained, and it might be advisable to adjust the drafting of article 10 and the definition in article 2, paragraph 1(b) accordingly.

50. Mr. USHAKOV said that there were some articles which might be reserved, but, except for the general provisions, the other articles of the draft, in particular those relating to unions of States or newly independent States, had nothing in common with article 10.

51. Sir Francis VALLAT (Special Rapporteur) explained that he had in mind in any case articles 29 and 30, which did have an impact on the situation envisaged in article 10. He suggested that the Commission should not embark on the discussion of a controversial question at the present stage; the words "Subject to the provisions of the present articles" should be left in square brackets and it could be decided later which particular articles to specify.

52. Mr. ELIAS said that, for the reasons given by other speakers, in particular Mr. Tammes, he was in favour of retaining article 10 without any of the changes suggested by the Special Rapporteur.

53. For the reasons stated by Mr. Ushakov, he did not favour the inclusion of the proposed opening proviso "Subject to the provisions of the present articles", even if it were placed in square brackets. The only article in the draft which included such a proviso was article 11, and when the Commission came to consider that article he would raise the question whether the proviso should be retained.

54. He appreciated the point made by the Special Rapporteur regarding the relevance of articles 29 and 30. If the Commission reached the conclusion that reference should be made to those articles in article 10, he would be prepared to consider a formula such as "Subject to articles 29 and 30...". But if the Commission was unable to decide which articles were relevant, the best course would be not to include the proviso.

55. He was not in favour of deleting the words "or administration". The purpose of using the formula "under the sovereignty or administration" had been to express two ideas. The first was that of the transfer of territory from the sovereignty of one State to that of another; the second was that of a dependent territory, including under that term not only colonies, but also territories under the administration of a metropolitan Power. With the new wording put forward by the

Special Rapporteur those two ideas would become blurred.

56. As to the suggested addition, at the end of the article, of the words "or would radically change the conditions for the operation of the treaty", he thought that cogent reasons for rejecting it had been given by the Special Rapporteur himself in his report (A/CN.278/Add.2, para. 211). Clearly, if there was any doubt on the questions of impossibility of performance and fundamental change of circumstances, they should be dealt with in one or more new articles. The suggested addition to article 10 would not solve the problem adequately; it should be discussed at a later stage, when the Commission could consider whether a general provision on the subject should be included.

57. Mr. KEARNEY said that the previous speaker's last point raised the basic question of the relationship of succession to treaties to the general rules which governed treaties under the 1969 Vienna Convention. If the suggested final proviso was to be rejected on the ground that elements of the Vienna Convention should not be imported into the draft, it would also be necessary to eliminate the test of compatibility with the object and purpose of the treaty from such provisions as article 27, paragraph 2(b).

58. An even more fundamental problem arose from the suggestion by the United Kingdom Government that provisions should be included on impossibility of performance and fundamental change of circumstances—concepts which were also taken from the Vienna Convention on the Law of Treaties. Should one or both of those concepts be introduced into the present draft, there would appear to be no reason to exclude others.

59. For those reasons he was inclined to believe that it was necessary to include a general article dealing with the relationship between the Vienna Convention on the Law of Treaties and the present draft articles.

60. With regard to the proposed opening proviso "Subject to the provisions of the present articles", he thought that some proviso of that kind would be needed to deal with the relationship between article 10 and some of the other articles of the draft. The problem was that of determining primacy among articles for the purposes of a particular situation. There were rules of interpretation on the subject, but they were far from clear. Hence, it was highly desirable to specify that a certain article had primacy over another—in the present case article 10—in a particular situation. The wording best calculated to achieve that purpose would have to be considered.

61. The question whether to retain the words "or administration" or to rely on some adjustment of the definition of succession of the States in article 2, paragraph 1(b), raised a major psychological problem. He himself still had the same doubts, which he had expressed when the Commission had discussed the article in 1972.⁶ The concept of "administration" was totally

⁶ See *Yearbook* . . . 1972, vol. I, p. 157, para. 40 and p. 182, para. 46.

unsuitable in the context of State succession. Some types of withdrawal by a State from certain administrative activities did not measure up to the standards of State succession. The retention of the words “or administration” would unduly broaden the scope of State succession. He was therefore in favour of using the language of article 2, paragraph 1(b).

62. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 10, said that different views had been expressed on the suggestion that the words “or would radically change the conditions for the operation of the treaty” should be added at the end of the article, and it was difficult to assess the measure of support for that suggestion. But since it was basically a matter of drafting, he thought it could safely be left to the Drafting Committee.

63. As to the proposed opening proviso, he suggested that it should be left in square brackets and that the Commission should reach a conclusion when it had settled the contents of the relevant articles.

64. He was still concerned about the use of the word “administration”, which was not a technical term and was not used in the Commission’s other draft articles. An effort should be made to find a more suitable expression.

65. He realized that, in his rewording of the opening sentence of article 10, he might have excluded the case of total absorption. It had to be admitted, however, that the title of the article, “Transfer of territory”, did not at all suggest that total absorption would be covered by its provisions; he was working on the assumption that it would not. That problem, too, should be left to the Drafting Committee.

66. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 10 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁷

The meeting rose at 12.55 p.m.

⁷ For resumption of the discussion see 1290th meeting, para. 26.

1269th MEETING

Friday, 31 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 11

1. The CHAIRMAN invited the Special Rapporteur to introduce article 11, which read:

Article 11

Position in respect of the predecessor State's treaties

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

2. Sir Francis VALLAT (Special Rapporteur) said that article 11 was the keystone of the whole structure of part III of the draft articles, on newly independent States. The question of the impact of the principle of self-determination on those provisions was discussed in the general commentary preceding the draft articles in the Commission’s 1972 report (A/8710/Rev.1, paras. 35 to 38). It had also been discussed at length in the Sixth Committee and he himself had dwelt on it in chapter II of his first report (A/CN.4/278, paras. 24 to 30 and 88 to 92).

3. In view of the strong support it had received, he did not think it was necessary to discuss the clean slate principle underlying article 11.

4. In his report he had summarized the comments of the Government of Tonga, although Tonga was not a Member of the United Nations; he believed that he had answered the arguments of that Government adequately in paragraph 216. The views of the Government of Tonga were contrary to those of the great majority of States and appeared to be coloured by that Government’s own assessment of Tonga’s special position as a former “protected State”. It should be noted that the question of protected States had been considered at length by the Commission in its earlier discussions.

5. Of the Members of the United Nations, Sweden seemed to be the only one to have criticized the clean slate principle. In his own introductory remarks at the present session he had discussed the Swedish Government’s proposal for an alternative set of draft articles and had given his reasons for not supporting it.¹

6. The United Kingdom Government, in its comments (A/CN.4/275), had expressed some doubts about the clean slate principle, but had not proposed any alternative.

7. In the Netherlands comments (A/CN.4/275/Add.1), which had arrived after the preparation of his report, it was stated that the Netherlands Government had come to support article 11, in the form in which the Commission had adopted it in 1972, as striking an adequate balance between the principle of self-determination and the fact of the “legal nexus” between the treaty régime and the territory of the new State prior to its independence.

¹ See 1264th meeting, para. 13.

8. It was thus clear that the text of article 11 should be acceptable to the Commission.

9. Mr. USHAKOV said that, as he had pointed out at the previous meeting in connexion with article 10, the words "Subject to the provisions of the present articles" were inappropriate. In the case of article 11, they might be replaced by the words "Subject to the provisions of the other articles in this part", or by a reference to specific articles.

10. Mr. ELIAS said that whatever the arguments which had led to the adoption, in 1972, of the compromise text of article 11 with the opening words "Subject to the provisions of the present articles", the Commission should now adopt the article without that proviso. He was strongly of the opinion that the proviso was not justified, and that it would only weaken the force of the principle stated in article 11, which was generally accepted.

11. Mr. YASSEEN said that the article under consideration was an important one, since it expressed the Commission's view of the position of newly independent States. The Commission had opted for the clean slate principle, while recognizing that it might be subject to qualification in certain cases. The Commission would have to consider, in succession, all the situations which might justify a relaxation of the clean slate principle, taking international considerations into account. Those situations must be clearly defined, so that States would not be able to depart from the principle in other cases.

12. Mr. MARTÍNEZ MORENO said that the records of the discussion in 1972² showed the legal reasoning that had led the members of the Commission to accept the clean slate rule stated in article 11, which was the cornerstone of the system of participation of newly independent States in multilateral treaties. The first consideration had been the principle of self-determination, which was one of the essential principles of the United Nations Charter, ranking equally with the sovereign equality of States and the other principles set out in Article 2 of the Charter.

13. An interesting legal argument had been put forward in support of that principle during the 1972 debate by Mr. Ruda, then a member of the Commission, who had said that according to the definition adopted, a new State "constituted a new legal person in international law and should be treated as a third State in relation to its predecessor's treaties. The general rule *pacta tertiis nec nocent nec prosunt* would therefore apply and it followed that no obligations could be imposed on a third State, whether old or new, without its consent.³ Mr. Ruda had gone on to say that article 35 of the Vienna Convention on the Law of Treaties⁴ even provided that no obligation could arise for a third State unless it "expressly accepts that obligation in writing".

14. The clean slate rule adequately reflected the trend of State practice, which was not, however, absolutely unanimous. For example, he understood that Bangladesh had made a declaration accepting the totality, not only of the internal legislation, but also of the international treaty obligations, formerly applicable to its territory as part of Pakistan. It was also worth noting that, on attaining independence early in the nineteenth century, the majority of the Latin American States had adopted the rule of continuity with regard to colonial legislation and treaties. Nevertheless, the clean slate principle, as reflected in article 11, was now generally accepted.

15. As to the opening proviso, he agreed that it detracted from the force of article 11, which was a fundamental article. He suggested that the Commission should try to identify the articles, such as articles 29 and 30, which should be specified in a proviso of that kind in order to allow for exceptions to the rule.

16. Lastly, he urged that the Drafting Committee should be asked to clarify the phrase "by reason only of the fact". He realised that those words had been carefully chosen, but he still thought they could be taken to imply that other facts might exist by reason of which a newly independent State could be under an obligation to maintain in force, or to become a party to, a treaty which had been in force in respect of its territory at the date of the succession.

17. Mr. TSURUOKA said that article 11, which confirmed the right of peoples to self-government, should be retained in its entirety.

18. It was possible, however, that strict application of the clean slate principle might lead to contradictory results, and that point should be dealt with in the commentary, so as to prevent wrong interpretations of the article. For example, on 6 February 1974, Australia and Japan had concluded an Agreement for the protection of migratory birds and birds in danger of extinction, and their environment. The Australian Government had stated that, under the present relationship between Australia and Papua New Guinea, it was incumbent on the Australian Government to consult the Papua New Guinea Government and to obtain its concurrence before concluding an international agreement applicable to that territory. The Australian Government had consequently requested that the Agreement should become applicable to Papua New Guinea only from the day when the concurrence of the Papua New Guinea Government had been notified to the Japanese Government by the Australian Government. It would thus appear to have been agreed between Australia and Papua New Guinea that the territory already enjoyed a certain degree of autonomy.

19. In such a case, article 11 could not be applied literally, for there was not "only" the fact of a treaty having been in force: there was also an agreement between Australia and Papua New Guinea relating to the degree of self-government already possessed by the territory. Care should be taken not to apply article 11 in a contradictory manner which in fact denied the self-government enjoyed by such a territory prior to full

² See *Yearbook* ... 1972, vol. I, pp. 69-76.

³ *Ibid.*, p. 73, para. 6.

⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 294.

independence, and some explanations on that point should be included in the commentary.

20. Mr. ŠAHOVIĆ said it was logical that the Commission should have incorporated in the draft a rule which derived directly from the right of self-determination.

21. The introductory phrase "Subject to the provisions of the present articles" had a twofold purpose, as could be seen from the commentary to article 11, paragraph (19) of which stated that: "First, it sets out to safeguard the newly independent State's position with regard to its participation in multilateral treaties by a notification of succession, and to obtaining the continuance in force of bilateral treaties by agreement. Secondly, the proviso preserves the position of any interested State with regard to the so-called 'localized', 'territorial', or 'dispositive' treaties dealt with in articles 29 and 30 of the present draft." (A/8710/Rev.1, chapter II, section C). The first reason was scarcely convincing, since it referred to cases in which the newly independent State's position appeared to be sufficiently safeguarded by the wording of article 11. The second reason was more convincing, but he still doubted whether the introductory proviso should be retained in article 11, since the draft as a whole provided for judicious application of the clean slate principle.

22. The Commission would be able to decide whether to retain the proviso when it had considered the nature of the rights and obligations devolving on the successor State under the rule stated in article 11. It might perhaps be better to postpone a decision on that point until other articles in the draft had been considered.

23. Mr. TABIBI expressed his full support for article 11, which embodied the well-known clean slate doctrine. State practice supported that doctrine, although there were some writers who considered that new States were bound to observe certain general multilateral treaties containing rules of general international law.

24. With regard to the question whether articles 29 and 30 constituted exceptions to the rule in article 11, he thought those articles contained safeguards of the same kind as that in article 62, paragraph 2(a), of the Vienna Convention on the Law of Treaties. It should be remembered that the rights of a third State were always subject to the principles embodied in articles 46 to 53 of the Vienna Convention, which dealt with invalidity of treaties. A treaty which was void under article 46 of that Convention because it had been concluded in violation of a provision of internal law regarding competence to conclude treaties, or was void under article 51 or article 52 because it had been imposed by coercion, could not become binding upon a third State in any circumstances.

25. Similarly, the articles of the present draft were governed by the important provisions of article 6, which ruled out the possibility of succession in cases of violation of international law and, in particular, of any principle of international law embodied in the Charter of the United Nations.

26. Mr. RAMANGASOAVINA said that the Commission had been in agreement for a long time past on

the principle stated in article 11. That principle might appear to be too rigid, especially in view of the title of the article, which might give the impression that there was a complete break with any treaties the predecessor State might have concluded on behalf of the territory to which the succession related. Nevertheless, article 11 had been cautiously drafted: it provided that a newly independent State was not bound to maintain a treaty in force or to become a party to it; in other words it could, for instance, conclude a devolution agreement or make a unilateral declaration.

27. Moreover, article 11 should be considered in the general context of the draft, which contained articles calculated to provide the necessary flexibility in the application of that provision.

28. He therefore considered the opening words of article 11 to be unnecessary.

29. The CHAIRMAN, speaking as a member of the Commission, said that he supported article 11 with the necessary drafting amendments, particularly those relating to the opening words.

30. Sir Francis VALLAT (Special Rapporteur) said that the question whether the opening words should be deleted, retained in their present form or perhaps amended so as to refer to particular articles, was a typical drafting problem of a kind that frequently arose when articles were being drafted with a view to the conclusion of a Convention.

31. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 11 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁵

ARTICLE 12

32.

Article 12

Participation in treaties in force

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

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

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

33. Sir Francis VALLAT (Special Rapporteur), introducing article 12, said that it constituted the main counterbalance to the principle embodied in article 11; it provided for continuity of participation in multilateral treaties from the date of the succession of States or from a later date specified in the notification.

⁵ For resumption of the discussion see 1290th meeting, para. 42.

34. Article 12 was an important article, with important consequences. The application of its provisions, combined with those of articles 17 and 18, meant that it would not be possible to say, at the date of the succession, what, if any, date would be chosen for the effective application of the treaty in relation to the newly independent State. There was always a possibility of delay in making the notification under article 17 and of a consequent delay in the operation of the retroactive effect of succession. Those two factors had affected the views on article 12 expressed by Governments.

35. Government comments dealt with two main points. The first was the possible classification of multilateral treaties, and particularly the recognition of a class of "law-making treaties". The second was the problem of setting some reasonable time-limit for making the notification of succession.

36. As a matter of doctrine and principle, and in the light of the Commission's discussions at earlier sessions, the idea of establishing any new category of law-making treaties did not appear to be a practical proposition in the context of the present draft articles. As to the suggested time-limit, it was a matter of policy which was not so much for the Commission as for Governments to decide in due course. Hardship would undoubtedly result for the other parties to a multilateral treaty in the event of delay by the newly independent State in making a notification of succession which, when made, had retroactive effect. He saw great difficulty in trying to alleviate that hardship by means of a provision which would place an interim obligation upon the newly independent State. The only protection which seemed feasible was to set some time-limit.

37. In his report, for convenience of presentation, he had grouped the government comments under six main headings (A/CN.4/278/Add.2, para. 220). The first was that of law-making treaties, in regard of which he drew attention to the comments of the Netherlands Government, which had suggested the possibility that "certain general multilateral conventions of world-wide applicability, embodying important rules of international law, would escape the application of the clean slate rule" (A/CN.4/275/Add.1, para. 4). The Netherlands Government had added that, in the case of those conventions, there should be a presumption of continuity together with the possibility, for the newly independent State, of opting out.

38. The idea of giving separate treatment to law-making treaties was an attractive one, but he did not see how those treaties could be identified on the basis of any principle. The expression "law-making" was itself misleading. No treaty was purely of a law-making character. Even codification conventions, which in any case contained elements of progressive development, included material of a non-legislative character. His conclusion, therefore, was that no attempt should be made to introduce the proposed new category of treaties.

39. As to the question of time-limits, he thought the Commission might well adopt a more positive attitude. The records of its earlier discussions showed that that

question had been more or less set aside with the idea of reverting to it if necessary. No firm decision appeared to have been taken one way or the other.

40. It was difficult to deal with the problem of time-limits without examining article 18. From the point of view of drafting, however, it was easier to provide for a time-limit by inserting, after the words "notification of succession" in paragraph 1 of article 12, some such wording as "made within . . . years of the succession of States". Such an amendment deserved serious consideration.

41. In that connexion, the United States Government had raised an extremely difficult point, which he had discussed in his report (A/CN.4/278/Add.2, paras. 235 to 238). That point could be illustrated by imagining a case in which a court pronounced judgement in the territory of another State party to the treaty, on the assumption that the treaty was not in force in relation to the newly independent State. Subsequently, a notification of succession was made by the latter State with retroactive effect; under article 18, the treaty would enter into force as from the date of succession. As a result, the judgement pronounced earlier would come to be based on a false assumption.

42. Situations of that kind could result in hardship, not only for the other States parties, but also for individuals, and it was the duty of the Commission to do whatever it could to improve the position. If provision were made for a fixed time-limit the position would be easier; in case of doubt, the court could postpone its decision until the expiry of the time-limit.

43. The question of the interim régime was dealt with in paragraphs 239 to 242 of his report. The Polish Government had pointed out that, as a result of the operation of the provisions of articles 12 and 18, there would be an interim period during which the position of the newly independent State in relation to other States parties to the treaty was not clear. In those circumstances, the idea had been put forward of making provision for some form of good faith obligation on the lines of article 18 of the Vienna Convention on the Law of Treaties, under which it would be incumbent on the newly independent State and the other parties to the treaty to refrain from certain acts pending the notification of succession.

44. He believed that an obligation of good faith of that kind would exist in any case, and that to introduce a specific provision on the subject would only create confusion. Still less would it be advisable to provide that the other parties were required to regard the treaty as provisionally in force during the interim period; a provision to that effect would run counter to the whole basis of the draft.

45. Clearly, the best the Commission could do to solve that problem was to include a time-limit, which would reduce the hardship for the other States parties. He himself fully supported the idea of freedom of action for the newly independent State, but he thought that States parties other than the predecessor State deserved equitable consideration. It should be remembered that the other States parties were wholly innocent of the exercise

of any pressure on, or control over, the newly independent State.

46. With regard to the grounds for excluding the application of paragraph 1 of article 12, which were set out in paragraph 2 of the same article, there had been suggestions by the Belgian delegation in the Sixth Committee, by the United States Government, by the Spanish delegation in the Sixth Committee and by the United Kingdom Government. In paragraphs 243 to 246 of his report he explained his reasons for not submitting any proposals pursuant to those suggestions.

47. The question of the effect of an objection to a notification of succession had been raised by a number of Governments, whose comments were discussed in paragraphs 247 to 253 of the report. The Netherlands Government's subsequent comments also raised that question. That Government had suggested that, in accordance with the principle of equality of all parties to a treaty, which was acknowledged in a number of articles of the draft, each "other State party" should be given the right to refuse to establish treaty relations with a particular successor State (A/CN.4/275/Add.1, para. 8).

48. He was strongly opposed to that Netherlands proposal. It would be deplorable to introduce a system of objections into the present draft articles. It was quite appropriate to admit objections in the case of reservations, since a State making a reservation was departing from the provisions of the treaty. In the present context, however, the newly independent State would be continuing the application of the treaty and there was no reason whatsoever for introducing an objections mechanism.

49. Lastly, there was the isolated suggestion by the Polish Government that there should be explicit regulation of problems arising from the termination, suspension or amendment of a multilateral treaty before notification of succession. He thought it was open to doubt whether such provisions were really required and he had explained, in paragraph 255 of his report, his reasons for not submitting any proposal for an amendment to meet that suggestion. An explanation of that point should be introduced into the commentary.

50. Mr. ELIAS said he shared the Special Rapporteur's view that there was no need to make any alteration to article 12. There appeared to be nothing in the government comments that had not been discussed during the Commission's earlier consideration of the present draft.

51. That applied even to the suggested time-limit. For his part, he did not favour that suggestion and did not see on what basis a particular period of years could be selected. It was necessary to have regard to the circumstances in which the original treaties had been concluded and also to the availability of the texts of the treaties which the newly independent State was supposed to be inheriting. He suggested that the matter should be left to be adjusted by the competent court.

52. Mr. HAMBRO said he entirely agreed with the Special Rapporteur that it would be unwise to introduce the suggested distinction between law-making treaties and other multilateral treaties.

53. He had listened with interest to the arguments put forward by the previous speaker, but thought, nevertheless, that the Commission should consider introducing a time-limit.

54. Mr. KEARNEY said that the Special Rapporteur should be congratulated on his excellent treatment of the very difficult problems raised by article 12. He agreed that it was not feasible to make a distinction between law-making treaties and other general conventions, and that any attempt to do so would raise considerable difficulties. The International Law Association, which largely supported the thesis that law-making treaties should be given continuity, had seemed unable to work out a viable distinction. The Commission's position on that point was the correct one and should be maintained.

55. The answer to the problem of time-limits, which should be considered in conjunction with that of the interim régime, was not as simple as Mr. Elias had suggested. It was complicated by the increasing number of multilateral treaties dealing with areas of private law, and particularly with the unification of legal procedures. That trend had to be taken into account in dealing with succession, because the decisions already taken by the Commission on the effect of article 12 and the consequential article on retroactivity could substantially affect private rights under such treaties.

56. For example, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,⁶ which was rapidly gaining adherents, provided a simplified method of ensuring the delivery of judicial documents in a foreign country. Evidence of such delivery was a basis for initiating legal proceedings in the knowledge that the defendant had in fact been notified of the suit, thereby eliminating one of the grounds for voiding the judgement. Under article 16 of that Convention, in the case of default judgements, a defendant who had not been notified of the suit was, under certain conditions, entitled, within one year of discovering that a default judgement had been rendered against him, to contest that judgement in the court which had rendered it. If the court was in a successor State which had delayed notification of its succession to the Convention for several years, and the period had elapsed within which a defendant who had not received proper notice of the suit was entitled to contest the judgement, the defendant would be harmed by the retroactive application proposed under the draft articles.

57. Similar problems would arise if the draft Convention on Prescription (Limitation) in the International Sale of Goods⁷ was adopted. Under the present terms of that Convention, a claim for breach of certain sales contracts for example would have to be brought within four years. In a case of succession, if the four years had expired before the successor State had given notification of succession to the Convention with retroactive effect,

⁶ *International Legal Materials* (1965), vol.IV, p.341.

⁷ See *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)* p.8.

a court could not rectify the situation because retroactive application of the time-limit would bar the action, even though the claimant might have been relying on general internal law which afforded a longer period.

58. The Special Rapporteur's conclusion that it was not possible to deal specifically with the problem raised by the effect of retroactivity on statutes of limitation in the present draft was debatable, but the Commission might not be able to deal with that problem in the time available. Nevertheless, from the point of view of protecting private rights, the provisions could result in inequitable situations if the Commission ignored the question of a time-limit for notification of succession. A balance would have to be struck between the difficulties which accession to treaties raised for newly independent States and the protection of private individuals in their legal relationships under the law of a successor State, whose courts would often not be in a position to redress inequities.

59. The Commission should therefore consider the possibility of applying some reasonable time-limit for the notification of succession if it maintained the retroactive effect of such notification.

60. He agreed with the Special Rapporteur that it would be deplorable to institute a system that would enable States to raise objections to notifications of succession to treaties, but the present draft did not appear to exclude such a system. Paragraph 2 of article 12 seemed to imply that any State party to a multilateral treaty had the right to object on the grounds that succession of the successor State to the treaty was incompatible with its object and purpose. If that was true, what would be the effect of such an objection? Treaties concluded within international organizations might have a set of rules that would help to determine the effect of paragraph 2, but in many multilateral treaties there were no such rules.

61. In limiting the right to notify succession in the present articles, the Commission would have to consider the consequences of the limitation in terms of the treaty in question. The issue could not be ignored, as the present draft would lead to disputes for whose settlement there were at present no rules. It was necessary to give special study to the subject.

62. Mr. SETTE CÂMARA said that after carefully considering the Special Rapporteur's excellent summary of the problems raised by article 12, he would hesitate to make any substantial changes in the present wording of the article, which seemed sound and well balanced.

63. Several Governments were in favour of considering newly independent States as being automatically bound by so-called law-making treaties on the basis of an "opting-out" provision, instead of the present "opting-in" provision. He strongly supported the retention of the present provision, which was in accordance with the fundamental clean slate principle and at the same time would enable newly independent States to notify succession to a treaty. Their right to choose freely was clearly stated. An "opting-out" provision would raise difficulties and in some cases could not be reconciled with the clean slate principle.

64. It was clearly difficult to define "law-making treaties", and even the Governments in favour of making such treaties automatically binding on a successor State defined them in different ways. A strong argument against such an approach was that no State was considered to be automatically bound by a treaty whatever its purpose; every member of the international community had the right to choose whether to become a party or not. Automatic participation could not be imposed on successor States, even if they had the right to opt out. Such a right would in fact be a burden for a newly independent State, which would have to decide hastily whether or not to participate in the treaty, without time for proper reflection.

65. On the question of a time-limit for the notification of succession, he agreed with the Special Rapporteur that the objections raised by some Governments were well founded. In the absence of a time-limit, undue delay in notifying succession could create international problems due to the retroactive effect of the notification. States dealing with a newly independent State would be in doubt as to its rights and obligations. He was therefore in favour of considering a time-limit, perhaps somewhere between the seven years suggested by Poland and the three years suggested by the United States; that would be fair to the successor State and would protect the interests of the international community. The wording proposed by the Special Rapporteur in paragraph 234 of his report would be acceptable.

66. He agreed with the Special Rapporteur that the Commission should not undertake the difficult task of establishing rules for the suspension of periods of prescription. Mr. Kearney's remarks had confirmed his belief that the problems involved would be very difficult to solve. He also doubted whether the question of the interim régime should be discussed in the present context. The "opting-out" system would solve some problems, but would create many others.

67. He was in full agreement with the Special Rapporteur's conclusions on the other matters he had listed in paragraph 220 of his report.

68. Mr. TAMMES said that the discussion in progress was in fact concerned with the application of the clean slate principle, in different degrees, to multilateral conventions. The draft articles could not lay down that conventions of a universal character, open to all States, would be subject to a régime of automatic continuity, though the proposed convention on succession would itself, perhaps, be in that category. On the contrary, the consent of the successor State was always required.

69. The main point at issue was that there might be a presumption of consent in the case of certain kinds of treaty, subject to subsequent repudiation by the successor State—the "opting-out" system, as opposed to the "opting-in" system provided for in the present draft of article 12. The Special Rapporteur, after inviting the Commission, in paragraph 224 of his report, to consider whether, on balance, it would be more satisfactory to provide for the right to opt out, had indicated that such an approach would avoid long delays in the notification of succession, would not impose an unacceptable bur-

den on newly independent States because of the nature of the treaties involved, and would promote continuity and stability in treaty relations. He had then mentioned two possible objections: first, such an option would involve treaty obligations for a newly independent State before it had had an opportunity to examine their implications, and secondly, it was difficult to identify and define "law-making" multilateral treaties.

70. The Special Rapporteur's conclusion that the balance of considerations in favour of the "opting-out" approach did not justify its adoption in article 12 was a little surprising. However, the comments and arguments in the report seemed to provide a basis for solving the definition problem in a way that would enable the Commission to decide between the two approaches.

71. To overcome the technical difficulties, the Commission might first recommend that future diplomatic conferences, when preparing or revising general conventions, should indicate their nature for the purposes of succession. That could be done on the basis of the Nigerian suggestion that an exception to the clean slate principle should be made in the case of law-making treaties concluded under the auspices of the United Nations, since they had not been made by foreign Powers, but were acts of the world community intended to regulate international relations (A/CN.4/278/Add.2, para. 218). Secondly, the Commission might consider the possibility of making the "opting-out" system applicable to all multilateral treaties not falling within the scope of article 12, paragraph 3. Thirdly, the General Assembly might be invited to legislate along the lines suggested by the Netherlands Government (*ibid.*), perhaps taking the number of parties to a treaty as a criterion. At all events, it should not be beyond the capacity of the legal mind to find solutions to such technical problems in order to meet the overwhelming need for continuity and stability in treaty relations.

72. On the other aspects of article 12 he entirely agreed with the observations and proposals of the Special Rapporteur.

73. Mr. USHAKOV said he thought that if the Commission decided to provide for a time-limit, the best solution would be to stipulate a "reasonable" period and to leave it to international practice to establish what was meant by "reasonable".

74. With regard to law-making treaties, he would prefer to speak of "treaties of a universal character". Under the principle of presumed participation referred to by Mr. Tammes, the successor State would be considered to be a party to the treaty until its non-participation had been notified. A solution of that kind would ensure the treaty's continuity and at the same time safeguard the clean slate principle.

75. Mr. TSURUOKA said he was in general agreement with the comments made by the Special Rapporteur in his report and with his verbal explanations, but wished to stress the importance of establishing a time-limit within which newly independent States must exercise their right to notification of succession. It was right to protect the interests of new States, but the interests of other parties must not be injured in the process, so he

thought it would be better to lay down a precise time-limit to safeguard the rights of all concerned. For instance, a time-limit of 20 years could be prescribed, since it was obvious that after 20 years a State could no longer be regarded as "newly independent".

76. On the subject of law-making treaties, he fully agreed with Mr. Ushakov.

77. Mr. YASSEEN said that on the subject of law-making treaties, which the Commission had discussed at length two years previously, his convictions remained unchanged. He still believed that it was impossible to impose such treaties, whether they were declaratory or whether they embodied progressive development of international law. He was convinced, however, that under the United Nations system of progressive development and codification, new States would have no difficulty in acceding to those treaties.

78. As to the question of a time-limit, he understood the reasons of certain Governments and some members of the Commission who wished to avoid difficulties in bringing treaties into effect. But he thought it difficult to fix a figure, because the length of the time-limit would depend on the nature of the treaty and on practical considerations relating to the newly independent State. Some treaties needed a longer period of reflection than others. Mr. Elias had rightly emphasized the difficulty of choosing a specific period; like him, he thought that the problem could be left to the courts and international practice. To provide a basis for judicial interpretation, the article might perhaps stipulate a "reasonable" time-limit, as Mr. Ushakov had suggested.

79. The CHAIRMAN drew attention to the suggestion that a law-making or universal treaty should be presumed to be binding on a newly independent successor State until it had notified its acceptance. Did that mean that in the case of other kinds of treaty there would be a presumption of non-continuity? The Special Rapporteur might wish to consider that point.

The meeting rose at 1 p.m.

1270th MEETING

Tuesday, 4 June 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND
READING

ARTICLE 12 (Participation in treaties in force) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 12.

2. Mr. MARTÍNEZ MORENO said he did not agree that an exception to the clean slate principle should be made in the case of universal law-making treaties. It would be unfair to expect a newly independent State to accept rules of international law which many other States had not yet accepted. The Vienna Convention on the Law of Treaties,¹ for example, was not yet in force, because it had not been ratified by the requisite number of States. Moreover, some law-making treaties contained contractual provisions as well as general rules of international law. A provision which made such treaties automatically binding on successor States would be discriminatory. It was, of course, desirable to obtain the widest possible participation in treaties codifying principles of international law, but States might themselves set an example by ratifying those treaties. *Jus cogens* rules were mandatory *per se* for all countries and there was no need to depart from the clean slate principle to ensure their observance.

3. The concern expressed about the legal uncertainty that might result if no time-limit was fixed for notification of acceptance by the successor State was justified in some cases, and the situation was complicated by the retroactive effect of the notification. In practice that should not be a problem in the case of universal treaties, since they were open to all countries, which could accede at any time. Treaties constituting international organizations or adopted within an international organization were covered by article 4. In the case of treaties concluded by a limited number of States for geographical, economic or other reasons, the important question was whether or not the treaty could be applied to the new State, not whether that State would exercise its right to accede, although the retroactive effect of notification might create problems. Such cases could perhaps be covered by a specific provision and it might then be desirable to fix a time-limit. He would prefer a reference to a "reasonable time", as suggested by Mr. Ushakov, or, as suggested by the United States (A/CN.4/275), to a period long enough for the successor State to review possibly applicable multilateral treaties, but not so long that the rights of other parties would be seriously impaired by the retroactive effect of notification.

4. The Polish Government's concern about the interim régime (A/CN.4/275) was reasonable, and it might be wise to draft an article providing that States parties to a multilateral treaty would not be held responsible for not applying the provisions of the treaty to a newly independent State, except in regard to general rules of international law and humanitarian principles, until that State had notified its acceptance. He preferred that approach

to a presumption of continuity, as it would be more in keeping with the clean slate principle.

5. He agreed with the exceptions to the general rule stated in paragraphs 2 and 3 of article 12 and in article 4.

6. The drafting of the article could probably be improved. Paragraph 1 should state only the general principle, omitting the words "Subject to paragraphs 2 and 3", and paragraph 2 might begin with the words "Nevertheless, the provisions of paragraph 1 shall not apply to the following cases...". The term "negotiating States" in paragraph 3 should perhaps be changed to "States parties", as other States might subsequently have acceded to the treaty. For example, a recent agreement concerning the central banks of certain Central American countries, which provided for the establishment of a monetary clearing-house as part of the Central American Common Market, had been negotiated by only five States, but a number of other States had subsequently become parties to it and more were expected to accede in the future. Under paragraph 3 of the present draft article 12, Belize, on attaining independence, could be denied the right to participate in that agreement. The Drafting Committee should find more satisfactory wording.

7. Mr. TABIBI said he supported the Special Rapporteur's conclusion that the present text of article 12 should be retained. It was not only necessary as a counterbalance to article 11, but also safeguarded the interests of newly independent States and of the other parties to treaties. The provision might save a newly independent State the embarrassment of notifying its succession to a treaty whose object and purpose were incompatible with its participation.

8. He agreed that it was difficult to define law-making treaties and to draw a line of demarcation between them and other types of treaty; he was inclined to support the views expressed by the Special Rapporteur on that matter in paragraphs 221 to 229 of his report (A/CN.4/278/Add.2).

9. The question of a time-limit for notification had an important bearing on the element of continuity in international affairs and on the role of new States in the international community. A time-limit would help to eliminate uncertainty in regard to treaty rights and obligations, but it must be long enough to allow newly independent States to translate and study the texts of treaties and to decide which of the many treaties and conventions to accede to. Newly independent States needed time to familiarize themselves with the language of treaties and to reflect on their political implications. Moreover, their governments and parliaments were primarily concerned with internal political, economic and social problems. They were, however, often quick to participate in treaties that were important to them, and he therefore agreed that it would be better to refer to a "reasonable time" than to lay down a specific time-limit. Otherwise the matter might be left open for decision by the future plenipotentiary conference adopting the draft articles. Notification of acceptance by newly independent States could be speeded up if they

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.

were provided with relevant information and summaries of treaties and conventions in their own languages. A fund might be established for the provision of such documentation.

10. The question of objections was adequately dealt with in the Special Rapporteur's report (A/CN.4/278/Add.2, paras. 247-253); paragraphs 2 and 3 of article 12 covered that point. The views expressed by the Governments of Australia and Spain on objections in the case of bilateral treaties were, however, quite correct. Such problems rarely arose in the case of multilateral treaties and might perhaps be considered more fully when the articles on bilateral treaties were discussed.

11. Mr. ELIAS said he was opposed to express provision for a time-limit for notification, as suggested by the Polish and United States Governments. The difficulties raised for newly independent States by devolution agreements did not seem to be appreciated. Such agreements generally took the form of an exchange of notes or letters, accompanied by a list of the treaties in question, but not by the texts of those treaties. In some cases, accession to one multilateral treaty entailed acceptance of another incorporated in it by reference. If the predecessor State, or, for that matter, the Secretary-General of the United Nations, as the depositary, were required to provide the successor State with copies of the treaties in question within a certain time, it might be reasonable to fix a time-limit for notification of acceptance by the successor State after it had received the texts. Some successor States which had been independent for many years were still trying to obtain copies of treaties in order to decide what position to adopt with regard to them.

12. Predecessor States could perhaps be called upon to request third-party States to help successor States to make their decision. For example, the Netherlands and the United States had submitted lists of multilateral treaties which they considered important to certain African countries, requesting them to state their position on those treaties; in some cases facilities had been provided for obtaining the texts of the treaties. With such assistance, successor States were able to deal with the matter more expeditiously.

13. A solution to the problem of notification could perhaps be found by simplifying some of the present provisions, or by stipulating that notification should be within a reasonable time, as suggested by Mr. Ushakov. It was nevertheless important to link any decision on the question of a time-limit with the provisions of article 18.

14. Mr. ŠAHOVIĆ said that he concluded from the Special Rapporteur's analysis and the comments by Governments that States attached special importance to multilateral treaties and recognized their usefulness as a formal source of general international law. While he appreciated the reasons for the comments made by Governments, he thought the Commission should not be too hasty in accepting them and amending the text of article 12; for in his opinion the article was well drafted and reflected a concept clearly established in the draft. Moreover, the Special Rapporteur had well understood

the nature of the comments and had only proposed a few slight changes.

15. With regard to the classification of multilateral treaties—a question much dwelt on by States—he agreed with the Special Rapporteur that it was very difficult to define law-making multilateral treaties and that the answers to the questions raised during the discussion were to be found in practice. He therefore thought it preferable not to make any such classification.

16. On the question of the period for notification, he thought the Commission had been right not to set any time-limit in the text of the article adopted on first reading. Although the arguments in favour of a time-limit put forward by certain Governments were logical and based on real situations, in view of the nature of the article and of the purpose of devolution agreements, he did not think it was necessary to refer to time-limits in the strict sense of that term. The Special Rapporteur had made it quite clear in his commentary that a distinction should be made between the law of treaties and the principle of State succession, and that the draft articles dealt with State succession. A time-limit could be justified only if there was an option to withdraw; but in fact there was a positive option to participate. It might also be indicated that the general law of treaties did not prescribe any time-limits for the acceptance of multilateral treaties. The Commission had therefore been right not to specify a time-limit in the text of article 12.

17. Mr. BILGE observed that the rule in article 12 made the clean slate rule stated in article 11 less rigorous, and thus ensured some continuity in the international legal order.

18. He was opposed to the setting of a time-limit, which would create many difficulties, not only for newly independent States, but also for old-established States. Turkey, for instance, had not yet acceded to the Vienna Convention on Diplomatic Relations, which it approved of in principle, owing to the difficulties caused by the lengthy procedure necessary for ratifying that Convention. He did not think it would be possible even to speak of a "reasonable time", since article 12 did not place an obligation on new States, but gave them an option which they were free to use or not to use, as they saw fit. He understood the difficulties referred to by Mr. Elias and considered that the legal nature of the article did not require the introduction of any notion of time limitation.

19. As to the distinction to be made between law-making and other multilateral treaties, he appreciated that the international legal order must be preserved so far as possible; but the Commission was now dealing with the problems which arose on the birth of a newly independent State, not with the obligations that State would have to assume later. Consequently, even if the definition of law-making treaties did not raise any difficulties, he would not be in favour of making an exception for those treaties.

20. Lastly, he had some reservations about paragraph 2. He did not see how the object and purpose of

the treaty could be incompatible with the participation of the successor State in that treaty when, under the terms of paragraph 1, the treaty had already been in force in respect of the territory at the date of the succession.

21. Mr. EL-ERIAN said that the successor State's option in regard to general multilateral law-making treaties should be regarded, not as a granted right, but as the inherent right of a State which had long been denied a role in the international community and in the formulation of general international law. Article 12 proclaimed that right, while providing for a few clearly-defined exceptions; little could be added to improve the draft. He accepted the conclusions of the Special Rapporteur, who, he understood, proposed to deal in the commentary with the point raised by the Polish Government. The issue might perhaps become clearer when article 18 was taken up. It was in any case a matter for the Drafting Committee and the Special Rapporteur to decide.

22. When discussing the question of a time-limit, speakers had mentioned the practical difficulties facing newly independent States; but those which had attained independence very recently were perhaps more fortunate than some others. Egypt, for example, as a vassal State in the Ottoman Empire from 1841 to 1914, had retained its international personality in so far as it was expressly allowed to conclude international agreements of a non-political character. It was therefore difficult to decide whether Egypt should be considered a party, for instance, to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. He nevertheless agreed with Mr. Elias that it was often difficult for a newly independent State lacking qualified personnel and the requisite documentary material to decide what position to adopt in regard to a multilateral treaty. Consequently, he doubted whether it would be wise to fix a time-limit, which seemed contrary to the principle of the universality of multilateral law-making treaties and might defeat their purpose.

23. Mr. BEDJAOUI said he shared the Special Rapporteur's views on article 12, which stated a rule that was generally followed in international practice. He hoped the text would be altered as little as possible, as it seemed to him to be well balanced; its three paragraphs complemented one another and covered all the possible situations.

24. The Commission had started from a firm foundation, namely, the link created between the territory and the treaty in force; and that link had led it to believe that a newly independent State had an objective right to participate in the treaty. He was afraid that if the Commission made that option subject to a time-limit, it would fail to achieve the purpose it had set itself. The States favouring a fixed time-limit had a dual objective: they wished to end uncertainty about the continued application of the treaty in the territory and to enlarge the area of international co-operation between States as far as possible. But he feared that in imposing a time-limit on newly independent States, which very often were not in a position to take an immediate decision, the Commission might be acting counter to the second

of those objectives, since such States might be prevented from participating in the treaties in question, at least by the simplified and convenient procedure of notification of succession.

25. He recognized that uncertainty about the application of certain treaties to former colonial territories was genuine and difficult to remove. For under the system of "particularity of treaties" that formed part of their internal legal order, certain former colonial Powers had not automatically extended the application of a treaty to all their colonies, but had proceeded case by case, according to the type of treaty, the varying status and development of the colony, and even according to circumstances or convenience, not to mention the cases in which the colonial Power had been silent about the applicability of the treaty to the then dependent territory. There had also been cases in which the predecessor State had not taken the trouble to specify its intentions *ne varietur*. And when it was also remembered that, for a single predecessor State, there has been wide differences in legal status between one dependent territory and another, the amount of uncertainty that could be created was readily apparent. But that uncertainty could not always be removed by communicating the texts or the list of treaties to the successor State.

26. He therefore considered that the imposition of a time-limit would run counter to the object in view and would create an obstacle for newly independent States, which might not be able to take advantage of the option open to them. As Mr. Šahović had pointed out, the Commission's intention in article 12 had not been to provide a right to "opt out", based on a presumption of continuity—which would have been contrary to the clean slate principle and could have been accompanied by a time-limit—but a right to participate. He did not see how that choice could be accompanied by a provision reflecting the anxieties—however honourable—of those States which wished to make the application of article 12 subject to a time-limit imposed on the successor State.

27. Mr. RAMANGASOAVINA said that he, too, wished to emphasize the value of article 12, which was the counterpart of the clean slate principle set out in article 11. In his view, a newly independent State must be allowed to declare, by a notification of succession, its will to be bound by a treaty. In spite of the many comments on that principle made by Governments and by their representatives in the Sixth Committee of the General Assembly, article 12 seemed to him to require very little change, for it was the result of a thorough examination of the difficulties caused by practical application of the principle of succession to multilateral treaties.

28. Some members of the Commission had rightly stressed that it was difficult to differentiate between general multilateral treaties and law-making treaties. Clearly, a State achieving sovereignty and joining the international community must be able to accede quickly to certain treaties or arrangements that were essential to international life; yet it was difficult to make distinctions between law-making treaties.

29. In that connexion the Special Rapporteur had referred to the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Treaty on the Non-Proliferation of Nuclear Weapons and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; but those treaties were certainly not all of equal interest to newly independent States. Diplomatic and consular relations were of vital importance to them, and no newly independent State would wish to avoid the application of the Conventions regulating those relations. The same applied to the International Telecommunication Convention and the Chicago Convention on International Civil Aviation, which laid down rules that were already part of international life. On the other hand, a new State would be less interested in the limitation of weapons of mass destruction and the principles governing the exploration and use of outer space, than in international liability for damage caused by space objects or radio-active fall-out. Thus there were certain treaties which were not of immediate interest to new States and it was natural that they should be in no hurry to accede to them.

30. In some cases, however, States had to take a decision fairly quickly, so as not to embarrass the other States parties or cause confusion in international life. But since the international community had no supranational power and could not impose rules, the best that could be hoped for was a strengthening of the role of the Secretary-General, who could guide the new States directly by communicating a list of treaties of immediate interest to them.

31. He thought it would be difficult to impose a time-limit. A limit of two or four years would only be useful as a guide, since it would be impossible to declare that States which failed to announce their intentions in time were barred from doing so. It would be possible to follow Mr. Ushakov's suggestion and refer to "a reasonable time". That would not be an ultimatum, but a recommendation to young States, designed to make them understand as quickly as possible how important it was that they should participate in certain treaties. In his opinion, the Commission should not lay down a specific time-limit.

32. It was obvious that the other States parties to the treaty might have difficulties, since for an indeterminate period, being unaware of the new State's intentions, they would not know what attitude to adopt. The Special Rapporteur had considered whether those difficulties could not be overcome by establishing a right to "opt out". He (Mr. Ramangasoavina) thought that such a right would be contrary to the clean slate principle which the Commission had taken as its starting point, and would confuse matters still further. Consequently, he was in favour of keeping article 12 as it stood, subject to a few small drafting changes that could be made by the Drafting Committee.

33. Mr. QUENTIN-BAXTER said he agreed that newly independent States needed time to discover where they stood in relation to treaties. The present draft was in accordance with the spirit of State practice in such

matters and the Commission should be very cautious about trying to provide for a time-limit.

34. The principle enunciated in the article was the concomitant of the Commission's general agreement on the clean slate approach. It had been traditional practice to stress the benefits of succession rather than the duties it might impose, and to ensure that new States should not be deprived of those benefits by some arbitrary rule. It had been found possible to give new States the right to participate in general multilateral treaties. There would seldom be any reason for denying a new State the right to participate, except perhaps in the case of certain constitutive treaties, those making special provision, or those concluded by a small number of States. In the case of most treaties, it would not be a question of reciprocity so much as general international benefit from the widest possible acceptance of the rules.

35. He could not support the idea of reversing the onus by setting a new State a time-limit within which to opt out. That would be contrary to State practice and to international interests. In the case of some treaties, there might be inequalities between the parties, or it might be important for the parties to know whether the new State would accede, or the parties might not allow such accession to have retroactive effect. However, such cases might appropriately be considered in the more limited context of article 18.

36. The CHAIRMAN, speaking as a member of the Commission, said that some of the points listed in paragraph 220 of the Special Rapporteur's report (A/CN.4/278/Add.2), such as time-limits, the interim régime and objections to a notification of succession, were more closely related to articles 17 and 18 than to article 12.

37. The main issues which had arisen during the discussion were the adoption of an "opting in" system in article 12 and the making of a distinction between "law-making" treaties and other treaties. The Special Rapporteur had pointed out that since other States were not bound to become parties to law-making treaties, it would not be fair to impose such an obligation on newly independent States. That had been precisely the view of the Commission at its 1972 session, and he had the impression that its view had not changed since.

38. He drew attention to the provisions of article 5, on obligations imposed by international law independently of a treaty. A new State was bound by the rules of general international law and, in particular, by the rules of customary law generally recognized by the family of nations. With the expansion of the international community, the rules in question were no longer limited to the traditional rules recognized by European States, but covered a much wider area, including, in particular, the material now partly embodied in the great codification conventions.

39. On the question of the classification of treaties, he drew attention to the third report submitted by the Special Rapporteur on the topic of treaties concluded between States and international organizations or between two or more international organizations. A well-balanced passage in that report pointed out that the

International Law Commission, after its lengthy debates on the law of treaties, had finally avoided "any *systematic* reference to classifications, confining itself in some articles to drawing, in terms as simple and precise as possible, distinctions whose purpose is always limited to that of the article in question".² That passage was particularly relevant to the present discussion; the argument for avoiding any classification of treaties for the purposes of draft article 12 was overwhelming.

40. Reference had been made during the discussion to the need to bear in mind the interests of the other States parties to a multilateral treaty; it was important for those States to know what position the newly independent State would take with respect to the treaty. If the Commission adopted Mr. Ushakov's suggestion and stipulated for notification within "a reasonable time", the matter would be settled by diplomatic correspondence. The other States parties could draw the attention of the newly independent State to a particular treaty and request it to clarify its position within a reasonable time.

41. From his own practical experience, he could say that a notification of succession by a newly independent State was not always sufficient. When an old State like Hungary received such a notification in respect of a treaty which it had previously concluded with, say, France or the United Kingdom, as the State previously responsible for the international relations of a territory, it often found it necessary to clarify certain details later. For example, in the case of treaties on legal assistance, the newly independent State had to specify, by diplomatic correspondence, what authority would be responsible for certain functions designated in the original treaty. There again, the stipulation of "a reasonable time" would help States to obtain the necessary clarification.

42. With regard to the newly independent State's difficulty in obtaining the texts of treaties, which had been mentioned by Mr. Elias, he thought the best way to deal with that point was by a passage in the commentary drawing attention to the possibilities of technical assistance.

43. Sir Francis VALLAT (Special Rapporteur) expressed his appreciation for the encouraging statements made by members with regard to the commentary, in which he had done his best to present the issues arising in connexion with article 12. He did not propose to take a definitive view on the many interesting points which had been raised during the discussion. It would be wiser to reflect on them, particularly as several related also to article 18 and it would be appropriate to revert to them when that article was discussed.

44. On the question of a time-limit, an interesting proposal had been made by Mr. Ushakov, calling for the introduction of a flexible formula that would not specify any fixed time. That proposal deserved careful consideration.

45. The discussion had shown that there was strong opposition to making any further distinctions between

treaties, beyond that made between bilateral and multilateral treaties, subject to such exceptions as were stated in the draft—for example, in paragraph 3 of article 12.

46. The idea had also been put forward that the position of third States might be alleviated by restricting the retroactive effect of notification of succession in certain cases, so that a third State would not be held responsible for a breach. Despite the attractions of that suggestion, he did not favour it, because it would go a long way towards destroying the effect of article 18. The Commission could revert to the matter, if necessary, when discussing that article.

47. He would advise caution in regard to the suggestion that the reference to "the negotiating States", in paragraph 3, should be replaced by a reference to "States parties". The term "negotiating States" had been used because the question whether the treaty was or was not of the kind indicated had to be determined at the time when the treaty was concluded; and indeed, that was really the basis of the corresponding provision in the Vienna Convention on the Law of Treaties.³

48. He knew from his own experience the great importance attached by new States to the texts of the treaties and to other information regarding treaties. Such material was necessary to enable a newly independent State to consider its position. He did not believe, however, that it was possible to make provision for that need in the draft articles, except as an element of the proposal to introduce a "reasonable" time-limit; the question whether the newly independent State had the information it needed would be relevant in that regard. It was more a matter for the commentary than for the article itself.

49. The adoption of a reference to "a reasonable time" would not, of course, solve the problem mentioned by the United States Government, which related to the difficult technical questions that could arise in internal court proceedings. Questions of that kind could only be settled by clarification through diplomatic correspondence.

50. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 12 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

ARTICLE 13

51.

Article 13

Participation in treaties not yet in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates, if before that date the predecessor State had become a contracting State.

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

² A/CN.4/279, para. (7) of the commentary to article 1.

³ Article 20, para. 2.

⁴ For resumption of the discussion see 1290th meeting, para. 46.

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

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

52. Sir Francis VALLAT (Special Rapporteur), introducing article 13, said that the points made during the debate on article 12 should be taken into account with regard to the important questions of principle that arose in respect of both articles, especially in regard to the time factor.

53. In the light of the comments by Governments, he had proposed an amendment to paragraph 1 of article 13, introducing a reference to "a period of [3] years from the date of the succession of States", within which notification would have to be made (A/CN.4/278/Add.3, para. 263).

54. Mr. USHAKOV said that in spite of their similarities, articles 12 and 13 dealt with quite different situations: one concerned treaties in force, and the other treaties not yet in force. Whereas no time-limit was prescribed in article 12, the Special Rapporteur was proposing to introduce one in article 13. But the idea of a time-limit was implicit in article 13, because the article could only apply until the date on which a particular treaty came into force. That time-limit ran from the date of the succession of States until the date on which the treaty entered into force, and there was no need to introduce another specific time-limit into the article.

55. The other proposals for amending article 13 were largely drafting points. In paragraph 1, the phrase "a multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates" was probably clear enough, and there was no need to specify that the predecessor State must have become a contracting State "in respect of that territory".

56. Mr. HAMBRO said he could accept the amendment proposed by the Special Rapporteur to paragraph 1.

57. With regard to Mr. Ushakov's remarks, since the time lag between the conclusion of a treaty and its entry into force could be very long, would it not be just as natural to introduce a time-limit in article 13 as in article 12?

58. Mr. USHAKOV said he appreciated that a long time might elapse, especially in the case of codification treaties, before a treaty obtained the number of ratifications or accessions needed to bring it into force. In such cases, newly independent States and other States were in the same situation.

59. Mr. ELIAS suggested that the Commission should not adopt the amendment introducing a time-limit into paragraph 1. He urged that article 13 should be adopted as it stood. The period which would elapse between the date of succession and the date of entry into force of the

treaty would provide a natural time-limit to cover the situation mentioned in the Special Rapporteur's commentary.

60. The Special Rapporteur's suggestion introducing a time-limit into article 13 was in line with his similar suggestion regarding article 12. Hence the reasons for opposing a time-limit in article 12 applied with equal force to article 13. He did not think the amendment proposed by the Swedish Government (A/CN.4/275) was justified.

61. Sir Francis VALLAT (Special Rapporteur) pointed out that entry into force could take place only a short time after succession. In that case, the question arose how the situation in article 12 was to be distinguished from that in article 13.

62. Mr. USHAKOV stressed the fact that article 13 referred to status as a contracting State. Once a treaty came into force, there was no question of the newly independent State establishing its status as a contracting State and article 13 was no longer applicable. It was not possible to provide in the article for every situation that might arise in practice, such as a treaty coming into force immediately after a succession of States.

63. Sir Francis VALLAT (Special Rapporteur) said it was important to clear up the point raised by Mr. Ushakov, which affected the relationship between article 12 and article 13. Article 12 dealt with treaties in force at the date of the succession of States in respect of the territory to which the succession related. Article 13 dealt with treaties not yet in force on that date. In both articles, the position was crystallized at the date of the succession of States.

64. The CHAIRMAN, speaking as a member of the Commission, said that article 13 dealt with the case in which the newly independent State could establish its status as a contracting State; it really envisaged a situation in which the treaty was not in force at the time of the notification. If the treaty was in force at that time, the notification would be for the purpose of making the newly independent State a party to the treaty.

65. Mr. ELIAS said that the situation contemplated in article 13 would be governed by article 24 of the Vienna Convention on the Law of Treaties.

66. The CHAIRMAN, speaking as a member of the Commission, said that when a treaty was open for ratification, accession or acceptance, a newly independent State would be in the same situation as any other State. He saw no reason why there should be a time-limit for newly independent States which did not exist for other States.

67. Sir Francis VALLAT (Special Rapporteur) said the discussion had shown that there was a lacuna in the draft. There appeared to be no way in which, by a notification of succession, a new State could become a party to a treaty not yet in force at the time of the succession, if the treaty happened to enter into force before the date of the notification. In that situation, neither the provisions of article 12 nor those of article 13 would apply.

68. Mr. USHAKOV observed that notification of succession was not the only procedure by which a newly

independent State could become a party to a treaty. It could comply with the procedure for accession prescribed in the treaty itself or in the law of treaties, so it was not essential to fill any lacuna that might exist in article 13.

The meeting rose at 6.5 p.m.

1271st MEETING

Wednesday, 5 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Co-operation with other bodies

[Item 10 of the agenda]

1. The CHAIRMAN said that the next session of the European Committee on Legal Co-operation was to be held at Strasbourg, from 22 to 24 June 1974, and the Commission had been invited to send an observer. The enlarged Bureau had discussed the matter and proposed that the First Vice-Chairman, Mr. José Sette Câmara, should act as the Commission's observer. If there were no objections, he would take it that the Commission agreed to that proposal.

It was so agreed.

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 13 (Participation in treaties not yet in force) *(continued)*

2. The CHAIRMAN invited the Commission to resume consideration of draft article 13.

3. Sir Francis VALLAT (Special Rapporteur) said that at the end of the previous meeting the discussion had centred on the question whether the right of a newly independent State, under paragraph 1 of article 13, to establish its status as a contracting State ceased, or did not cease, when the treaty entered into force. His own reading of article 13 was that the right continued even after the entry into force of the treaty. One argument in favour of that interpretation was the

statement in paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C) that article 13 "parallels article 12", which presumably meant that it was parallel to article 12 in all respects. Another argument was that the term "contracting State" was defined in article 2 as meaning "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". If the term "contracting State" was understood in that sense, it really included a party to the treaty. He understood the term "contracting State" in the same way in the Vienna Convention on the Law of Treaties, which contained the same definition.

4. From the point of view of substance, there would be a lacuna in the draft if the provisions of article 13 were taken as ceasing to apply on the entry into force of a multilateral treaty; for if the treaty happened to enter into force very soon after the succession of States, the newly independent State would be totally deprived of its right to become a contracting State or a party to the treaty. It should be noted that article 14 of the draft would not cover the situation, because it dealt only with the case in which the predecessor State had signed the treaty but not ratified it.

5. If article 13 was not clear, it should be redrafted so as to state its intended meaning unequivocally.

6. Mr. USHAKOV said he was not entirely satisfied by the Special Rapporteur's explanations. It was not only newly independent States that were concerned: no State whatever could become a contracting State to a multilateral treaty once it had come into force. All States were therefore in the same position, and the Commission should not try to make it possible for a newly independent State to establish its status as a contracting State in those circumstances. For instance, when the Soviet Union had ratified the two International Covenants on Human Rights, it had acquired the status of a contracting State because the Covenants were not yet in force, the necessary number of ratifications or accessions not having been received. If the Covenants had already been in force, the Soviet Union could not have become a contracting State; it would have become a party to the Covenants, in accordance with the definition of that term given in article 2, paragraph 1 (g) of the Vienna Convention on the Law of Treaties.¹

7. Mr. CALLE Y CALLE said that articles 12 and 13 were completely parallel. Article 12 conferred upon the newly independent State a faculty in its own right to replace the predecessor State, by way of succession, in the status of party to a multilateral treaty. The treaty in question was doubly in force: it had the number of ratifications necessary for general entry into force and it was in force for the predecessor State.

8. The case contemplated in article 13 was that of a multilateral treaty which was not yet in force for any State, because it did not have the necessary number of ratifications. The right conferred upon the newly inde-

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.

pendent State by article 13 was an option to notify its succession, whereby it would step into the place of the predecessor State.

9. The newly independent State thus had a clear choice between two courses. The first was to avail itself of article 13 and benefit from the status which the predecessor State had enjoyed in relation to the treaty; the second was to accede to, or accept, the treaty in the ordinary way and thus independently become a party to it.

10. It should be noted that there could be contracting States to a treaty, even if it was already in force. The definition of that term in article 2, paragraph 1 (*f*) of the Vienna Convention on the Law of Treaties, with its concluding words “whether or not the treaty has entered into force”, was quite clear on that point.

11. He was not satisfied with the formulation of the rule in article 13. In the draft articles proposed by the former Special Rapporteur in his third report, article 7 (Right of a new State to notify its succession in respect of multilateral treaties) specified that a new State was “entitled to notify the parties that it considers itself a party to the treaty in its own right ...”.² Article 8 (Multilateral treaties not in force) specified that a new State “may on its own behalf establish its consent to be bound by a multilateral treaty...”.³ The emphasis thus placed on the notion of “consent to be bound” had disappeared in the version adopted by the Commission in 1972. Article 13, paragraph 1, now provided that a newly independent State might, by a notification of succession, “establish its status as a contracting State to a multilateral treaty”. That wording was unsatisfactory, particularly in the Spanish version; it seemed to suggest that there existed a “status as a contracting State” and that notification merely served to evidence that status.

12. Another difficulty arose from the opening proviso of paragraph 1. The words “Subject to paragraphs 2 and 3...” introduced the provision in paragraph 1 not as a general and principal rule, but as a residual rule; they stressed the idea of safeguarding the rules in paragraphs 2 and 3. He suggested, for the consideration of the Drafting Committee, that the opening proviso should be reworded, possibly to read: “Except in the cases mentioned in paragraphs 2 and 3...”.

13. Mr. ŠAHOVIĆ said he thought that the question raised by Mr. Ushakov was one for the Drafting Committee, and that some explanation should be given in the commentary.

14. Articles 12 and 13 dealt with quite different situations. Article 12 concerned acceptance by the successor State of a multilateral treaty that was already in force, whereas article 13 concerned acquisition of the status of a contracting State. According to the Vienna Convention on the Law of Treaties, the expression “contracting State” meant “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”. Consequently, he thought it would be better not

to change the wording of articles 12 and 13 approved by the Commission on first reading.

15. Mr. SETTE CÂMARA said he fully agreed with Mr. Ushakov. Article 13 dealt with treaties that were not yet in force, and when a treaty had entered into force, he failed to see what interest a successor State would have in becoming a contracting State rather than a party to it. There appeared to be some misunderstanding about the definitions of a “contracting State” and a “party” in the Vienna Convention on the Law of Treaties.

16. He therefore suggested that the text of article 13 should be kept as it stood for the time being and that the Drafting Committee should be requested to study the point raised by Mr. Ushakov.

17. Mr. MARTÍNEZ MORENO said that from his reading of the draft articles submitted by the former Special Rapporteur and of the commentary to the present article appearing in the Commission’s 1972 report (A/8710/Rev.1), he had the impression that the intention had been to deal with cases in which the treaty was not in force at all. Paragraph 1 of article 13, however, stated the treaty was one which “was not in force in respect of the territory to which that succession of States relates”, thereby suggesting that the treaty might be in force for other States and territories.

18. If that interpretation was correct, the Drafting Committee should consider rewording paragraph 1 so as to make it clear that article 13 dealt with the case of a multilateral treaty which was not yet in force for any State, but which the predecessor State had intended to apply to the territory in question.

19. Mr. KEARNEY said that, like the previous speaker, he was concerned that article 13 should make its territorial coverage clearer. He thought the Swedish drafting proposal (A/CN.4/275) deserved consideration from that point of view. The formula proposed by the Special Rapporteur (A/CN.4/278/Add.3, para. 263) would clarify the territorial aspect.

20. Paragraph 2 of article 13 raised the same difficulty as paragraph 2 of article 12, namely, that of determining the real effect of incompatibility and finding a solution to the problem it raised. As he saw it, the only way to deal with that question was to introduce some scheme for the settlement of disputes, since there would be no system of objections and he agreed with the Special Rapporteur on the undesirability of such a system.

21. The CHAIRMAN, speaking as a member of the Commission, said that articles 12, 13 and 14 dealt with three separate cases.

22. In the case covered by article 12, a multilateral treaty was in force to which the predecessor State was a party, and that State had extended its application to the territory that was later to become a newly independent State.

23. Article 13 dealt with the case in which the predecessor State had ratified a multilateral treaty which had not yet come into force, but the ratification had taken place also in respect of the territory in question. The article provided that the successor State could step into

² See *Yearbook* ... 1970, vol. II, p. 37.

³ *Ibid.*, p. 43.

the place of the predecessor State by means of a notification. By that notification, it became a contracting State and would be counted among the number of ratifications for purposes of entry into force. The idea underlying article 13 was that the decisive date was the date of the succession. If the treaty was not in force at that date, the successor State would have the option of notifying at any time, before or after entry into force, that it wished to be treated as if it had ratified the treaty at the date of succession.

24. Article 14 dealt with another case altogether; that in which the predecessor State had signed the treaty, but not ratified it. It gave the successor State the faculty of ratifying the treaty.

25. If there were any doubts about the wording of those articles, the Drafting Committee should ensure that the Commission's intentions were clearly expressed. All three articles presupposed that the treaty had been signed on behalf of the territory which was later to become the newly independent State.

26. Mr. BEDJAOUÏ said he had no objection to article 13, which he understood to refer to treaties that were not yet in force for any State, not only not in force for the newly independent State. That was clear from paragraph 4.

27. Article 14 dealt with quite a different situation: that in which the predecessor State had only signed a multilateral treaty, which was consequently not yet in force for the territory in question.

28. As to the setting of a time-limit, he thought it was even less justified in article 13, than in article 12.

29. With regard to the question raised by Mr. Ushakov, he did not see why article 13 should not make it possible for the successor State to become a contracting State or a State party, as the case might be.

30. Mr. USHAKOV reiterated that a State could not become a contracting State to a treaty that was in force. Article 14, paragraph 1, provided that a successor State could establish its status as a party or as a contracting State; but it was not a matter of choice. If the treaty was already in force, the successor State could only become a party; if the treaty was not in force, it could only become a contracting State. Article 13 related to treaties that were not yet in force, not only at the date of the succession, but also at the date of the notification; otherwise the successor State would no longer be able to establish its status as a contracting State.

31. With regard to article 13, paragraph 4, it should be noted that where a treaty provided that it would enter into force only when a specified number of States had become parties, and the notification of succession by which a successor State established its status as a contracting State was decisive for the treaty's entry into force, that State acquired simultaneously both the status of a contracting State and that of a party. That situation was difficult to understand on the basis of the definition of a "contracting State" given in the Vienna Convention on the Law of Treaties, according to which it was possible to become a contracting State without becoming a party to a treaty. That happened when a State

signed a treaty but did not ratify it; it retained its status as a contracting State even when the treaty entered into force.

32. Mr. RAMANGASOAVINA said he was not sure what was the exact effect of article 13. Very few cases seemed to be covered by paragraph 1. The predecessor State might, for instance, have become a contracting State to a treaty it had intended to extend to a dependent territory, which had subsequently become independent. It was by the process called "promulgation" that metropolitan States had usually made international treaties applicable to a particular territory under their rule.

33. Paragraph 1 of article 13 therefore seemed to apply to that intermediate period during which a multilateral treaty might be in force for the predecessor State before the date of the succession, but not in force for the successor State, which could indicate by a notification of succession that it wished to be bound by the treaty.

34. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 13, said he remained unconvinced by Mr. Ushakov's arguments. The definition in the Vienna Convention on the Law of Treaties had been cast wide enough to cover both States parties and States not parties. The matter was essentially one for the Drafting Committee, to which it could now be left.

35. The discussion had been useful in clarifying the issues. If the effect of article 13 would be to deprive a newly independent State of the right to become a party to a multilateral treaty simply because the treaty had come into force one or two days after independence, he believed it was contrary to the whole philosophy of articles 12 and 13.

36. Another point which needed to be clarified was whether the words "was not in force" referred to the entry into force of the treaty in general or only in respect of a particular territory.

37. The attitude to be adopted on the question of a time-limit depended on the scope of article 13. If article 13 was to have an effect parallel to that of article 12, the case for some kind of time-limit would be just as strong as it was in regard to article 12. But if article 13 only applied until a treaty came into force generally, it would have a built-in time-limit.

38. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 13 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.⁴

ARTICLE 14

39. The CHAIRMAN invited the Special Rapporteur to introduce article 14, which read:

Article 14

Ratification, acceptance or approval of a treaty signed by the predecessor State

⁴ For resumption of the discussion see 1290th meeting, para. 62.

1. If before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the successor State may ratify the treaty and thereby establish its status:

(a) as a party, subject to the provisions of article 12, paragraphs 2 and 3;

(b) as a contracting State, subject to the provisions of article 13, paragraphs 2, 3 and 4.

2. A successor State may establish its status as a party or, as the case may be, contracting State to a multilateral treaty by acceptance or approval under conditions similar to those which apply to ratification.

40. Sir Francis VALLAT (Special Rapporteur) said that article 14 raised a number of difficulties. It could be argued, as a matter of principle, that there was not a sufficient legal nexus between the newly independent State and the treaty to justify giving that State the right to ratify a multilateral treaty which had been signed by the predecessor State. The question was a very open one and he had discussed the problems involved at some length in his report (A/CN.4/278/Add.3, paras. 269 to 274). His conclusion was that article 14 should be deleted. There might, however, be something to be said for retaining the article, so that the problem it raised would not be overlooked later; retaining the text in the draft would give States an opportunity of pronouncing on the question.

41. If the article was retained, however, it should be amended so as to cover certain cases other than that of signature followed by ratification, acceptance or approval. The treaty might, for example, be initialled instead of being signed, consent to be bound being expressed by subsequent signature; there was also the possibility of signature *ad referendum* and subsequent confirmation expressing consent to be bound. The article should cover all cases in which a treaty had been authenticated, but consent to be bound had not yet been given.

42. Mr. YASSEEN said he thought article 14 should be retained, even if it did not reflect practice; it was not dangerous in any way and it contributed to the progressive development of international law. There was no reason why the successor State should not be able to continue the process initiated by the predecessor State when the latter had signed a multilateral treaty and expressed its intention of extending it to the territory to which the succession related. Clearly, the obligation to act in good faith provided for in article 18 of the Vienna Convention on the Law of Treaties could not be applied by analogy to the successor State, since that State had not itself signed the treaty.

43. He was not convinced by the objections made by some Governments. A succession of States quite often took place at a time when the predecessor State had signed a multilateral treaty subject to ratification. The intention of the predecessor State that the treaty should extend to the territory to which the succession related should not be difficult to establish in each case by reference to objective circumstances.

44. Mr. SETTE CÂMARA said that his doubts about the inclusion of article 14 in the draft had been con-

firmed by the discussion. The signature referred to in the article was not that referred to in article 12 of the Vienna Convention on the Law of Treaties: it did not establish the predecessor State's consent to be bound, but was merely a first gesture towards future participation in the treaty. There could be no question of permitting the new State to succeed to the formality of signature.

45. Another point to be considered was that if article 14 was to be retained, it would also have to cover the cases of initialling, signature *ad referendum* and possibly some other cases.

46. The best way to avoid all those complications would be to drop the article.

47. Mr. HAMBRO said he was inclined to favour the idea of deleting article 14 as being unnecessary. There were, however, not only learned writers who believed it was worth retaining, but also Governments. It might therefore be kept in the draft, but only so that a future diplomatic conference could decide the matter.

48. He could accordingly accept the inclusion of article 14 provided it was explained in the commentary that very serious doubts had been expressed in the Commission, but that the article had been retained in order to give States an opportunity of discussing it.

49. Mr. USHAKOV said he found article 14 rather strange; it seemed to break away from the two preceding articles, which dealt with participation in a treaty through notification. He therefore supported the Special Rapporteur's suggestion that the article should be deleted, and suggested that it be explained that the Commission had been mistaken in including it.

50. Mr. BEDJAOUI said he was in favour of retaining article 14; in his view, the Commission's first idea had been the right one. Moreover, Governments had not made many comments on the article; they had expressed doubts about the need for it, but not fears that it would be dangerous. The fact that the predecessor State had signed the treaty was a first step towards execution and the solution proposed in article 14 was an entirely acceptable innovation. Moreover, as the commentary pointed out, it was the solution most favourable both to successor States and to the effectiveness of multilateral treaties—in other words to international co-operation.

51. Mr. ELIAS said he was in favour of retaining article 14, at least for the time being. The Commission had had good reasons for including that compromise provision, which seemed necessary for the symmetry of the idea it wished to embody in the draft articles. If articles 12 and 13 could be deemed to be complete, the need for article 14 might be questioned; but in fact paragraph 1 of article 12 and paragraph 1 of article 13 were not entirely satisfactory, as their substance went beyond the scope of the present wording and was taken up in article 14.

52. The four main objections to the article, mentioned in paragraphs 269 to 272 of the Special Rapporteur's report (A/CN.4/278/Add.3), were certainly valid, especially the problem of determining the intention of the predecessor State at signature; but they did not, in his

opinion, justify its deletion. In paragraph 267 of his report, the Special Rapporteur presented a good case for retaining article 14, which would establish a legal nexus between the successor State and the treaty. That link might otherwise be in doubt. There was no reason why a newly independent State should not be entitled, as a successor State, to ratify, accept or approve a treaty on its own behalf. That was sufficient justification for retaining the article on the basis of the principle underlying articles 12 and 13.

53. He was inclined to agree with Mr. Hambro that if the Commission found it difficult to deal with the problems raised by article 14 it should nevertheless retain the article, if only to show that it had considered the underlying issue and decided to draft a provision covering it. The Drafting Committee might reconsider the article in the light of the comments made by Mr. Ushakov and in the context of articles 12 and 13, to see if the wording could be made clearer. A plenipotentiary conference might well decide to delete the article, but meanwhile the Commission should carefully consider the possibility of retaining it, perhaps in a slightly modified form.

54. Mr. KEARNEY said that some of the problems mentioned were perhaps not as substantial as they appeared to be. With regard to the point raised by Mr. Ushakov, the present wording of the provision—"the successor State may ratify the treaty and thereby establish its status"—had been used because, in cases in which the predecessor State had not ratified the treaty, notification of succession would be meaningless, as the predecessor State would not have been a party at the time of the succession. It might therefore be more appropriate to have a provision requiring the successor State to do whatever was required under the treaty to become a party to it.

55. He agreed with the Special Rapporteur that it might be very difficult in practice to apply the test of the signatory State's intention at signature. In many cases that State would have signed the treaty without deciding whether it should apply to the territory to which the succession subsequently related. Where a dependent territory had been given a measure of local self-government, it was customary for the State to consult the local authorities of that territory before deciding to arrange for the application of a multilateral treaty to be extended to the territory. As the decision was normally taken between the time of signature and the time of ratification, such an intention at the times of signature could not be proved. If the article was to be retained, that problem would be difficult to solve unless the fact of signature was deemed sufficient to permit the successor State to become a party to the treaty without any additional requirement. He would prefer that solution to reliance on a test which in most cases would lead to argument and confusion.

56. He was inclined to agree with Mr. Sette Câmara that the act of signature had a political and moral effect rather than a legal effect, in so far as it indicated the signatory's intention to take action through its internal legal system to give effect to the treaty. At least that was the usual intention of the United States Government

when it signed a treaty. He saw no serious danger in considering signature of a treaty by a predecessor State as establishing the right of the successor State to ratify that treaty. There were safeguards in paragraphs 2 and 3 of article 12. He would be in favour of broadening the effect of article 14 along those lines rather than deleting it.

57. Mr. REUTER observed that according to judicial decisions and the Vienna Convention, signature had a legal effect. A signatory State which had not ratified a treaty had a legal right to object to reservations made by another State or to accept them. So if a signatory State had exercised that right and the successor State later ratified the treaty under article 14, would not the successor State also be bound by the position which the predecessor State had taken with regard to the reservations? If the answer was in the negative, article 14 was bad law; if it was in the affirmative, the article assumed its full significance.

58. Mr. CALLE Y CALLE said that the comments made so far on article 14 did not show sufficient grounds for deleting it. Admittedly, the article raised certain problems and dealt with a matter that was not strictly part of the subject of succession. Under its provisions the status of the successor State in regard to a treaty was established, not by notification of the succession but, rather obviously, by the act of ratification. The article made ratification the expression of final acceptance of a treaty, while regarding signature as a mere indication of the signatory State's intention. It should be borne in mind that there were other formal acts by which a State expressed its acceptance or approval of a treaty.

59. He agreed with Mr. Elias that the draft would be incomplete without a provision on the lines of article 14, which was necessary for the symmetry of the idea the Commission wished to embody in the draft. The articles should cover the whole range of possible cases of succession in respect of treaties. He was therefore in favour of retaining article 14, but with certain drafting changes. For example, in paragraph 1, sub-paragraphs (a) and (b), it would be more appropriate to refer to articles 12 and 13, respectively, as integral rules of succession, not to individual paragraphs of those articles.

60. Mr. MARTÍNEZ MORENO said he had some misgivings about article 14, but had concluded that there was no real reason for deleting it. As there had been very few comments by Governments expressing definite opinions on the article, it should be retained until the views of other Governments had been heard, perhaps at a diplomatic conference.

61. He agreed with Mr. Kearney that it would be difficult to determine the intention of the predecessor State at the time of signature. It might be appropriate, however, to allow the presumption that in signing a treaty the signatory State intended it to apply to all territory under its authority. The Drafting Committee might consider the possibility of amending the provision along those lines.

62. Mr. QUENTIN-BAXTER said he thought that article 14 was of marginal importance, but there was

sufficient support for its retention to make deletion inadvisable at the present stage. As had already been pointed out, the article was necessary for the symmetry and logic of the theme developed in the draft as a whole, although it had no basis in State practice. It was not, in fact, a matter of succession, as the thing succeeded to was only inchoate. The Commission did not have to take a final decision on the article, however, and he agreed with Mr. Hambro that Governments should be given an opportunity to consider the proposition after the Commission had improved the drafting as much as possible. If the drafting problems proved to be insuperable and the difficulties raised by the provision were out of proportion to its practical value, the international community would be in a position to decide whether to delete it.

63. The question of a time-limit would have to be decided in relation to the more important article 12, and if that decision had implications for article 14, they could be considered in the context of article 12.

64. He did not share the concern expressed about the possibility of inequality resulting from the application of article 14. Where granting a slightly privileged position to newly independent States involved some embarrassment or uncertainty for other States until the intentions of the former States were clarified, it had been the Commission's policy to keep such consequences within bounds. Article 14, which did not create firm obligations, did not seem likely to upset that balance.

65. He shared the apprehensions of Mr. Kearney and others about determining the intention of a predecessor State at signature. There was no way of determining that intention. A signatory State would normally expect to decide whether or not the treaty should apply to a dependent territory at the time of the treaty's ratification, acceptance or approval, but not before. An attempt to apply the test of intention would, in most cases, mean attributing to a predecessor State an intention it had not had. Mr. Kearney's suggestion that the reference to intention should be omitted was not unacceptable.

66. One reason for retaining article 14, at least for the present, was to cover the exceptional case in which a dependency approaching self-government was represented at a plenipotentiary conference in the delegation of the predecessor State. When that dependency became a State, it might consider itself to be identified with the signature given on behalf of the predecessor State, but not yet reaffirmed by ratification, acceptance or approval of the treaty. The difficulties which might arise where procedures other than signature were used in regard to treaties were unlikely to be serious, as in most cases they related to such matters as the authentication of texts rather than the expression of commitments.

67. He was in favour of retaining article 14 and asking the Drafting Committee to try to eliminate the one real stumbling-block—the reference to the intention of the predecessor State.

68. Mr. USHAKOV reiterated his conviction that article 14 had little connexion with succession of States. The article did not say that a successor State retained

the predecessor State's signature by notification of succession. The successor State did not in fact retain the signature, but performed an additional act. Hence it was not, strictly speaking, a matter of succession. In his view, therefore, article 14 ought to be deleted. He could agree to its retention in the draft, however, provided that certain points were explained in the commentary for the benefit of the States which would later take part in drafting the convention.

69. If the article was retained, it would have to be supplemented by stating, as in article 18, the date from which the successor State was considered to be a party to the treaty or a contracting State, as the case might be. For article 18 dealt only with the situations provided for in articles 12 and 13, not with the situation contemplated in article 14.

70. Mr. TSURUOKA said that he was in favour of deleting article 14. The article had very little connexion with succession in the strict sense and was not complete, since it did not cover all the cases that might arise in the situation contemplated. He had also been much impressed by Mr. Reuter's comment.

71. Sir Francis VALLAT (Special Rapporteur) said the discussion had shown that members of the Commission were divided as to whether article 14 should be retained or not, though the majority seemed to think that, whichever course was adopted, the article should be reconsidered by the Drafting Committee. The Commission might therefore adopt the usual procedure of approving the article provisionally and referring it to the Drafting Committee. He still considered it out of place in the present draft, but if, after its reconsideration in the Drafting Committee, opinions were still divided, it should perhaps be retained and the arguments for and against retention fully stated in the commentary for the guidance of Governments. The question could then be left for States to decide at a diplomatic conference.

72. In referring to the relationship between article 14 and the corresponding provisions of the Vienna Convention on the Law of Treaties, members had tended to assume that the normal case would always occur and to think in terms of multilateral conventions adopted at United Nations conferences. But the draft was intended to deal with all kinds of multilateral treaties not excluded by the exceptions it specified. Such treaties were sometimes adopted at *ad hoc* conferences by procedures which differed from those followed at United Nations conferences. In some cases the text of the treaty was, for good reasons, initialled but not signed at the conference, and consent to be bound by the treaty was indicated subsequently by signature. Hence, if article 14 was retained, it should be made to cover all possible cases, not only the usual cases in which signature was followed by ratification. The Drafting Committee might consider how to ensure such coverage.

73. There was also a tendency to assume that, if the procedure of ratification, acceptance or approval was not open to a successor State, the procedure of accession would be open to it. That was not always so, as not all multilateral treaties open to ratification were also

open to accession. That aspect of article 14 should be considered if the draft articles were to be made as universal as possible; unusual cases should also be borne in mind.

74. The main, but not necessarily insuperable, problem in article 14 was the impossibility of establishing, by any objective test, the intention of a signatory State at the time of signature. There was, in fact, a precedent in article 29 of the Vienna Convention on the Law of Treaties. Although it dealt only with treaties in force and binding on the parties, and not with the question of the scope of signature, he thought there should be no difficulty in providing for a presumption as to the scope of signature based on the precedent of that article. That was a matter which the Drafting Committee might consider.

75. The question of the time from which article 14 would operate also arose in connexion with articles 12, 13 and 18 and might be considered later, as the relationship between those articles would have to be examined in some detail. Time would indeed be a major feature of the Commission's discussions at its present session.

76. He doubted whether a provision was needed to deal with the question of reservations. If the doctrine of the Vienna Convention on the Law of Treaties was applied, a ratifying State would be entitled to maintain or withdraw reservations at the time of ratification. It might in fact be desirable for a newly independent State to make its position clear, but there seemed to be no basic problem which could not be solved by applying the law of treaties. However, if a newly independent State failed to indicate its attitude towards any reservations made by the predecessor State at the time of signature, a difficulty might arise. That point should perhaps be considered by the Drafting Committee with a view to clarifying the text of article 14.

77. The CHAIRMAN suggested that article 14 should be approved provisionally and referred to the Drafting Committee for further consideration with a view to working out a compromise text.

*It was so agreed.*⁵

The meeting rose at 1 p.m.

⁵ For resumption of the discussion see 1290th meeting, para. 71.

1272nd MEETING

Thursday, 6 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

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

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

1. The CHAIRMAN said it had been the Commission's practice in the past to annex to its report to the General Assembly the observations submitted by Governments. He therefore suggested that the observations of Governments on the provisional draft articles on succession of States in respect of treaties, circulated as document A/CN.4/275 and Add.1 and 2, should be annexed to the Commission's report on the work of its twenty-sixth session. It would be helpful if a decision to that effect could be taken at once, so that the Secretariat could put the necessary work in hand.

It was so decided.

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 15

2. The CHAIRMAN invited the Special Rapporteur to introduce article 15, which read:

Article 15

Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States unless:

(a) in notifying its succession to the treaty, it expresses a contrary intention or formulates a new reservation which relates to the same subject-matter and is incompatible with the said reservation; or

(b) the said reservation must be considered as applicable only in relation to the predecessor State.

2. When establishing its status as a party or a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a new reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3. (a) When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply.

(b) However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

3. Sir Francis VALLAT (Special Rapporteur) said that the most important point of substance raised by Governments in their comments was the suggestion—by Australia, Belgium, Canada and Poland—that the presumption, in paragraph 1, of the continuity of reservations should be reversed. The Netherlands had made the

same suggestion in regard to multilateral law-making treaties. The arguments adduced in support of that suggestion were presented in paragraphs 280 to 282 of his report (A/CN.4/278/Add.3). He did not agree that the presumption of the continuity of reservations in the case of newly independent States was in some way inconsistent with the clean slate principle. That principle, as elaborated in articles 11, 12 and 13, provided for continuity of the treaty if the newly independent State wished it to continue. Logic would seem to require that a newly independent State should inherit a treaty in the form in which it had applied to the predecessor State, and hence as modified by any reservations. On that basis the presumption in paragraph 1 was correct and should be maintained.

4. For practical purposes that point was linked with the question whether a newly independent State should or should not be entitled to formulate a new reservation when notifying its succession. It seemed reasonable to allow a newly independent State to benefit from any existing reservations from the outset and to make new reservations if it wished, thus placing it in the most favourable position on notification of its succession. That went beyond the provisions of the Vienna Convention on the Law of Treaties,¹ but article 73 of that Convention provided that its provisions "shall not pre-judge any question that may arise in regard to a treaty from a succession of States" and the present case seemed to warrant a departure from the framework of the Vienna Convention.

5. The question of the maintenance of objections to reservations, dealt with in paragraph 289 of his report, did not appear to raise any serious problems that could not be solved under the law of treaties, as he had pointed out in his reply to Mr. Reuter at the previous meeting.² In most cases the objection would not be expressed as preventing the treaty's entry into force and would therefore have little significant effect; but where it was so expressed it would, in fact, prevent succession.

6. The remaining points raised by Governments were essentially of a drafting nature. The United States had made it clear that new reservations formulated under paragraphs 2 and 3 of article 15 should not have retroactive effect. As some provisions of the draft allowed retroactivity in other matters, it might be well to clarify that point by inserting a provision on the lines suggested in paragraph 298 of his report. Paragraph 287 dealt with the more difficult question of the implied withdrawal of an existing reservation if a newly independent State entered a new reservation on the same subject. Paragraph 1(a) provided for the test of incompatibility, but the rule might be easier to apply if it clearly specified that the formulation of a new reservation by a newly independent State would imply the withdrawal of any existing reservation on the same subject.

7. In general he was opposed to the practice of legislation by reference, as it nearly always led to drafting difficulties. The Commission had, however, enquired whether the adoption of that method in paragraph 3(a) would be acceptable, and Governments had not objected. It might therefore be appropriate to use the same method in paragraph 2, instead of repeating the corresponding provisions of the Vienna Convention on the Law of Treaties.

8. Mr. TSURUOKA said he was in favour of reversing the presumption in paragraph 1 of article 15 and providing, in accordance with the clean slate principle, that a new State wishing to maintain reservations made by its predecessor must renew them. Silence on the part of the successor State would then be interpreted as non-acceptance of the reservations made by the predecessor State. That presumption would be more in accordance with the general interest of the international community, which required a treaty to be accepted as a whole.

9. With regard to paragraph 1(a), he agreed with the Special Rapporteur that if the successor State formulated a new reservation which related to the same subject-matter as the reservation formulated by the predecessor State and was incompatible with it, only the new reservation would be valid.

10. Mr. RAMANGASOAVINA said that the question of reservations dealt with in article 15 could be reduced to a few very simple points. First, with regard to the date on which the notification of succession took effect, it was obvious that when a State wished to succeed to a treaty, either as a contracting State or as a party, it declared, clearly and with full knowledge of the facts, the position it wished to take and stated its point of view. Consequently, when a State merely made a notification of succession, unaccompanied by new reservations, the treaty in question, with the reservations formulated by the predecessor State, would naturally form part of the inheritance of the successor State. But when a successor State formulated new reservations or tried to withdraw reservations previously formulated by the predecessor State, the date on which the notification took effect would naturally be that of the notification of succession, whereas when a successor State accepted the treaty as a whole, with the reservations formulated by the predecessor State, the effective date could only be the date on which the succession took place.

11. He thought it would be difficult to reverse the clean slate principle adopted by the Commission without causing some confusion. In his view, when a newly independent State made a notification of succession, it accepted the treaty at the outset with the reservations already formulated, it being understood that, subsequently, its acceptance could always be accompanied by other reservations, which might amount to withdrawal of the reservations previously formulated. The subject-matter of the succession was, in fact, the whole set of rights and obligations of the predecessor State provided for in the treaty at the time of the succession. Those rights and obligations might represent advantages or disadvantages for the successor State, and it was at that point that it would be able to exercise its right to make a judicious choice between possible reser-

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

² Para. 76.

vations, including those formulated by the predecessor State. The successor State could express its point of view on those reservations, which would not necessarily be the same as that of the predecessor State. It could withdraw some reservations and add others.

12. According to the new draft of paragraph 1 proposed by the Special Rapporteur in paragraph 290 of his report (A/CN.4/278/Add.3), the successor State was assumed to accept the treaty as a whole, with the reservations made by the predecessor State, but it could always formulate new reservations. Article 19 of the Vienna Convention, referred to in the new draft of paragraph 2 proposed by the Special Rapporteur (*ibid.*, para. 296), provided that a State might formulate a reservation "when signing, ratifying, accepting, approving or acceding to a treaty". Thus notification of succession was not expressly mentioned among the cases provided for in article 19 of the Vienna Convention, but the situation of the newly independent State did correspond to one or other of those cases.

13. He therefore believed that the clean slate principle adopted by the Commission ought to be maintained, but that the successor State should be enabled, in so far as the context of the treaty allowed—for there were incompatible reservations—to make a judicious choice on the basis of the treaty as a whole, including the reservations formulated by the predecessor State. Newly formulated reservations should not have retroactive effect, since they could only take effect from the date of the notification of succession.

14. Mr. MARTÍNEZ MORENO expressed his support for the present draft of article 15, with the changes suggested by the Special Rapporteur. He could not agree to the proposed reversal of the presumption concerning reservations in paragraph 1. Any reservations formulated by the predecessor State should be presumed to be maintained on succession, in order to enable the newly independent State to give the matter due consideration before deciding whether or not to withdraw the reservations. The provision should not oblige a newly independent State to make a hasty decision. Paragraphs 1 and 2 accurately reflected the Commission's intention in regard to reservations. Paragraph 3 harmonized the article with other parts of the draft and with the relevant provisions of the Vienna Convention on the Law of Treaties.

15. There were valid arguments for and against legislation by reference in the present case. Reproduction of provisions of the Vienna Convention might make the text cumbersome, whereas a reference to those provisions would show that different international instruments were in agreement. Foreign ministries might not always be familiar with, or have access to, the international instruments referred to, however, and there might be uncertainty and misunderstandings; besides, the State concerned might not be a party to those instruments. It might therefore be wise to reproduce the relevant provisions of the Vienna Convention. Whichever drafting method was adopted, it should be used consistently in paragraphs 2 and 3.

16. Much of the draft now under consideration was based on the Secretary-General's practice. The Secretary-

General had been criticized by some Governments, which considered that he had acted outside his competence in the matter of reservations. He himself believed that the Secretary-General had acted correctly and had not exceeded his powers as a depositary; his practice had made a valuable contribution to the development of international law and had provided a basis for the Commission's work on a most useful convention.

17. Mr. ELIAS said that the Special Rapporteur's comments and suggestions were well founded. The Commission should accept article 15, with some drafting changes on the lines proposed by the Special Rapporteur in paragraphs 290 and 296 of his report. The additional provision suggested in paragraph 298 seemed unnecessary.

18. The presumption in favour of the maintenance of reservations in paragraph 1 was not contrary to the clean slate principle, but an affirmation of it. In his opinion, that principle would not be observed if the successor State did not inherit the treaty as modified by the reservations formulated in accordance with article 21 of the Vienna Convention on the Law of Treaties and in effect at the time of the succession. The requirement of renewal might indeed strengthen multilateral treaties, but it might also discourage newly independent States from notifying succession. The consequences of reversing the present presumption were uncertain, and the Commission should retain the approach it had decided upon after carefully considering the same arguments. If the argument in favour of deleting paragraph 2 was valid, and the deletion would obviate the need for applying the test of compatibility, there was perhaps something to be said for deleting sub-paragraph (b) of paragraph 1.

19. The Polish Government's argument concerning objections to reservations (A/CN.4/275) did not appear to be well founded. The reasoning which supported the present presumption in favour of the maintenance of reservations would seem to support a similar presumption in the case of objections to reservations. There was no need, however, to complicate further an already complicated article by introducing the notion of objections.

20. He saw no inconsistency between paragraphs 1 and 2, and the arguments adduced by Australia, the United Kingdom and the United States seemed sufficient reason for maintaining paragraph 2, which was a logical extension of the principle stated in paragraph 1: a newly independent State was given an opportunity of making its position clear in order to establish its status in regard to the treaty.

21. Little would be gained by deleting paragraph 2 or changing paragraph 1 to reverse the principle of the maintenance of reservations and objections. The reference in the proposed new text to article 19 of the Vienna Convention on the Law of Treaties was quite valid, however, since that article allowed a State to formulate a reservation only when signing, ratifying, accepting, approving or acceding to a treaty, not when notifying its succession to a treaty. Nevertheless, notification of succession was so clearly analogous to the acts listed in article 19 of the Vienna Convention that there should be

little difficulty in accepting paragraph 2 of article 15. The United Kingdom's suggestion that the method of reference should be used in paragraph 2, as it was in paragraph 3, was logical and would make the draft more elegant without changing its substance.

22. Mr. SETTE CÂMARA said that the clean slate principle was a corollary to self-determination. The present draft was intended to preserve the right of a newly independent State to choose freely whether or not it would be bound by a treaty concluded by the predecessor State. A State formulated reservations with very specific motives to suit its own needs, and the clean slate principle would not be observed if the successor State was required to adopt those reservations. The Special Rapporteur seemed to suggest, in paragraph 283 of his report (A/CN.4/278/Add.3) that the maintenance of existing reservations would benefit the successor State, but that might not always be the case. There was no reason why reservations should be considered as being permanently attached to a treaty. He therefore believed that the presumption in favour of the maintenance of reservations in paragraph 1 should be reserved. If that reversal was acceptable, the Polish Government's suggestion concerning objections to reservations was equally valid; for the reasons why objections should not devolve upon newly independent States were even stronger.

23. The Austrian and Swedish Governments had expressed the view that newly independent States should not be entitled to make new reservations when notifying succession to a treaty. The Special Rapporteur, in paragraph 292 of his report, described that view as well founded in principle, in the light of article 19 of the Vienna Convention on the Law of Treaties, which did not include notification of succession among the occasions when a State was permitted to formulate reservations. For the purposes of the present draft article, however, notification of succession was the time when consent to be bound by the treaty was given, so it was the equivalent of the occasions on which the Vienna Convention permitted reservations to be formulated.

24. Legislation by reference was often misleading and dangerous and should be avoided if possible, but sometimes its avoidance complicated drafting. The drafting methods adopted should be consistent, however. If provisions from article 19 of the Vienna Convention were to be reproduced in paragraph 2, the relevant provisions should also be reproduced in paragraph 3, not merely referred to.

25. Mr. HAMBRO said he fully approved of the way in which the Special Rapporteur had presented his comments, and of his proposals.

26. Mr. AGO said he supported the Special Rapporteur's thesis, but could not agree with Mr. Sette Câmara. One should not be enslaved by a metaphor and believe that if the clean slate principle applied to a treaty, it must also apply to reservations. Reservations did not exist separately from a treaty: they were only a means of limiting the scope of the treaty itself in the relations between certain States parties to it. It would therefore be a serious error to believe that the clean

slate principle could be applied to reservations in order to preserve the independence of new States. The freedom of the newly independent State was fully respected when it was laid down that the successor State was at liberty not to maintain the predecessor State's reservations and to formulate new reservations.

27. What the Commission was trying to establish in article 15 was a certain presumption of succession to a treaty, which represented a set of rights and obligations. But it was impossible to succeed to rights and obligations which did not exist, and it was perfectly clear that, of the rights and obligations deriving from a treaty, only those that were not the subject of reservations existed. Hence one could not speak of succession to a treaty that was not in force for the territory in respect of certain rights and obligations to which reservations applied. That would be illogical, and he fully agreed with the Special Rapporteur, who had grasped that point and given it prominence. According to the Special Rapporteur, the principle of succession could apply only to rights and obligations which had been in force for the territory at the time of the succession. By virtue of the freedom granted to it, the newly independent State could extend those rights and obligations by withdrawing certain reservations, or further restrict them by adding new reservations, or it could change the whole system by withdrawing some reservations and replacing them by others. But to reverse the presumption established in paragraph 1 would be a mistake which the Commission must not make.

28. He could accept the Special Rapporteur's method of referring to the Vienna Convention on the Law of Treaties without repeating the content of the relevant articles. Nevertheless, he had doubts about the soundness of that method, for what would happen if some States ratified the convention on succession of States in respect of treaties without having ratified the Vienna Convention?

29. He noted that, although paragraph 2 provided that a newly independent State could only formulate new reservations if they were compatible with the provisions of the Vienna Convention, it contained no provision about the right of other States to make objections to such reservations and, consequently, not to be bound by new reservations formulated by the successor State. He was not sure that article 15 provided sufficient safeguards on that point.

30. Mr. USHAKOV said he had some doubts about the soundness of the proposals put forward by Governments and by the Special Rapporteur. Changing the wording of an article sometimes changed its meaning, and that applied to the redrafts proposed in paragraphs 290 and 296 of the report (A/CN.4/278/Add.3).

31. He was firmly opposed to drafting by reference to another convention, such as the Vienna Convention on the Law of Treaties. That procedure seemed all the more dangerous because the Vienna Convention was not yet in force. It might well be asked what would happen if a State which was not a party to the Vienna Convention became a party to the convention on succession of States in respect of treaties. Moreover, there

was a danger that drafting by reference would lead to the omission of essential elements. There was also a risk of referring to articles which had nothing to do with the situation in question. For instance, in the new paragraph 2 proposed in paragraph 296 of his report, the Special Rapporteur, instead of expressly stating the provisions to be observed, referred to article 19 of the Vienna Convention, which had nothing to do with notification of succession. Again, paragraph 3 of article 15 referred to article 23 of the Vienna Convention, which also had nothing to do with notification of succession, whereas it should refer to article 17 of that Convention.

32. With regard to the new paragraph 4 which the Special Rapporteur proposed to add, he was prepared to accept the principle of the non-retroactivity of reservations. The significant date, however, was not the date of the notification of succession, but the date on which the reservation was accepted by the other States parties.

33. Mr. BILGE said that in his opinion the presumption stated in article 15, paragraph 1 should not be reversed. The effect of that presumption was not very great; its sole purpose was to make the position clear by specifying that reservations were maintained unless a successor State expressed a contrary intention. It had been suggested that such a presumption was not consistent with the clean slate rule, which was the basis of article 11. As the Special Rapporteur had so rightly stressed, the effect of that rule should not be exaggerated; its purpose was merely to leave a new State free to claim to be, or to become, a party to treaties concluded by the predecessor State in respect of its territory. The rule was not absolute, and the presumption stated in article 15, paragraph 1 was certainly in line with succession. It should be noted, too, that the presumption did not confer any new right on the newly dependent State.

34. The right of the new State to make new reservations was an innovation, since no provision had been made for it in the Vienna Convention on the Law of Treaties. Where succession was concerned, however, that right was justified by considerations of equity and it should certainly be included in the draft.

35. The method of making reference to the Vienna Convention on the Law of Treaties might cause difficulties for States which were not parties to that Convention. That applied to Turkey, which could not accept that disputes relating to rules of *jus cogens* should not be submitted to an international court for compulsory settlement, and was consequently not prepared to become a party.

36. Mr. CALLE y CALLE said that he favoured the positive presumption in paragraph 1. The successor State inherited the treaty régime as it had existed for the predecessor State, that was to say, as restricted by any reservations made by that State. It was, of course, open to the successor State to withdraw any such reservations.

37. The principle was that the newly independent State had all the elements of treaty-making capacity. It there-

fore had the right to formulate any further reservations of its own at the first opportunity available to it, namely, when notifying its succession to the treaty. He supported that approach, which gave the newly independent State the widest possible freedom in regard to reservations. That departure from the former restrictive practices regarding reservations was a comparatively recent development, but he believed that newly independent States should get the full benefit of the contemporary freedom to make reservations. As he saw it, a newly independent State had always been a State, but one which had been deprived by another State of the exercise of its sovereign rights.

38. As a matter of drafting, he was not altogether satisfied with the expression "a new reservation", as used in paragraphs 2 and 3(a). It was appropriate in paragraph 1(a), but in paragraphs 2 and 3(a) the reference was rather to a reservation of its own made by the newly independent State.

39. On the question of legislation by reference, he was in favour of keeping paragraphs 2 and 3(a) as they stood. In paragraph 2, it was appropriate to state the actual rule, rather than simply refer to provisions of the Vienna Convention; the paragraph contained substantive rules on succession of States in respect of treaties and those rules should be explicitly stated.

40. Paragraph 3(a), on the other hand, merely dealt with the machinery for making and withdrawing reservations and objections. In that context, it was quite sufficient to refer to the appropriate articles of the Vienna Convention. In the case of article 23 of that Convention, however, he was not satisfied with the reference to paragraphs 1 and 4 only; paragraph 2 might be applicable in certain circumstances, bearing in mind, in particular, draft article 14, which the Commission had referred to the Drafting Committee at its previous meeting. He therefore suggested that in paragraph 3 of article 15 the words "article 23, paragraphs 1 and 4" should be replaced by the words "the relevant provisions of article 23".

41. Lastly, the Special Rapporteur's proposed additional paragraph 4 (A/CN.4/278/Add.3, para. 298) on non-retroactivity seemed to him to be self-evident. Clearly, a reservation could not have any effect before being made in connexion with the notification of succession.

42. Mr. AGO said he thought the new paragraph 4 proposed by the Special Rapporteur might be of some use if doubts arose about situations prior to the notification of succession. In its present form, however, the provision was not entirely satisfactory, at least in the French version, for it was not a matter of determining the date on which a new reservation took effect, but what consequences it might have for previous situations.

43. The CHAIRMAN, speaking as a member of the Commission, said that on all matters of substance he agreed with the Special Rapporteur's proposals. He saw no need for the proposed additional paragraph 4, however, because its contents were self-evident. It would be sufficient to explain the matter in the commentary.

44. Like other members, he preferred to avoid drafting by reference; occasionally, however, exceptions had to be made to that rule. In the present instance, he thought the matter could safely be left to the Drafting Committee.

45. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 15, said that all the interesting points made had been carefully noted and would be borne in mind by the Drafting Committee.

46. Strong reasons had been given for maintaining the presumption in paragraph 1. A number of drafting points had also emerged from the debate, particularly with regard to the time when reservations had to be formulated. The need for clarification of those points would be taken into account by the Drafting Committee.

47. As he had already said, he did not favour the method of legislation by reference; but it could be justified in certain circumstances. The reproduction of a whole series of provisions could be quite out of proportion to the importance of the issue involved. It should also be borne in mind that the present articles had been drafted within the essential framework of the Vienna Convention on the Law of Treaties, so it was not unreasonable to rely in some instances on the articles of that Convention, particularly where the main purpose was to provide a mechanical structure to make the provisions workable.

48. As to the reference to article 23 of the Vienna Convention, he believed it correct to restrict that reference to paragraphs 1 and 4. Paragraph 2 dealt with a reservation formulated when signing a treaty subject to ratification, acceptance or approval, and specified that the reservation "must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty". The situation contemplated in the present draft article 15 was quite different: the article dealt with reservations formulated in connexion with a notification of succession.

49. Similarly, there was no reason to refer to paragraph 3 of article 23 of the Vienna Convention, since that paragraph dealt with an "express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation" and specified that such express acceptance or objection did not itself require confirmation. The case referred to in that paragraph simply did not arise under the present draft articles.

50. He did not believe that the operation of article 14 would give rise to any real difficulty. That article departed from the procedure of notification of succession and, where a treaty had been signed by the predecessor State, allowed the newly independent State to step directly into the shoes of the predecessor State. It might well be that, in that context, a provision on the lines of article 23, paragraph 2 of the Vienna Convention might be required. That question, however, was outside the scope of draft article 15, which dealt with reservations in connexion with notification made under draft articles 12 and 13. It would be for the Drafting Committee to examine that point and see whether article 14 was really complete.

51. Mr. AGO had raised the question whether objections could be made to a reservation formulated by the newly independent State. He would like to reflect on that question, but his tentative reply was in the affirmative. The matter appeared to be adequately covered by the reference in paragraph 3(a) of draft article 15 to articles 21, 22 and 23 of the Vienna Convention, which contained detailed provisions on the subject of objections. Those provisions would apply to a reservation made on the notification of a succession. That point, incidentally, illustrated very well the problems which arose from legislation by reference.

52. The question raised by Mr. Calle y Calle on the use of the adjective "new" before the word "reservation" in paragraphs 2 and 3 was essentially a drafting point. That adjective was the most convenient one to use for distinguishing a reservation made by the newly independent State from one made by the predecessor State.

53. With regard to the proposed additional paragraph 4, he realized how difficult it was to draft short provisions to deal with the problem of retroactive effects. Texts on non-retroactivity usually spoke of the application of provisions to events, facts or situations occurring before a certain date. He had endeavoured to deal with that question in a short text, which was of course open to improvement by the Drafting Committee. At the same time, he did not think it would be enough to deal with the problem in the commentary. The additional paragraph 4 could have been safely dispensed with if the draft articles had not contained any provisions on retroactivity. In point of fact, however, certain provisions of the draft, such as article 18 (Effects of a notification of succession) did provide for retroactive effects. In the circumstances, it was desirable to include in article 15 a provision on the lines of the proposed paragraph 4, to indicate that no retroactive effect existed in the situations contemplated in the article.

54. In conclusion, he understood the general sense of the Commission to be that the presumption in paragraph 1 of article 15 should be maintained as it stood and that it was not necessary to deal with the question of objections by the predecessor State, whatever provision might be considered necessary for the newly independent State's own objections.

55. Mr. USHAKOV reiterated his opposition to the method of drafting by reference. A newly independent State which became a party to the convention now being prepared, but was not a party to the Vienna Convention on the Law of Treaties, would find itself bound, through article 15, by certain provisions of the Vienna Convention.

56. Mr. YASSEEN said he approved of the content of article 15. There was nothing anomalous about the method of drafting by reference. International law formed a single whole, and the Commission, which was called upon to draft conventions codifying international law, should not hesitate to legislate by reference, since that method brought out the unity of international law and of the Commission's work.

57. The CHAIRMAN suggested that draft article 15 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³

ARTICLE 16

58. The CHAIRMAN invited the Special Rapporteur to introduce article 16, which read:

Article 16

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

1. Except as provided in paragraphs 2 and 3, when a newly independent State establishes its status as a party or contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining the predecessor State's:

(a) consent, in conformity with the treaty, to be bound only by part of its provisions; or

(b) choice, in conformity with the treaty, between differing provisions.

2. When so establishing its status as a party or contracting State, a newly independent State may, however, declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

3. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any such choice.

59. Sir Francis VALLAT (Special Rapporteur) said that there had been few comments by Governments on article 16, a fact which perhaps reflected an absence of intrinsic difficulties.

60. The presumption embodied in paragraph 1 of the article was similar to that in paragraph 1 of article 15 and, broadly speaking, the same considerations applied to both. Paragraph 2 made it clear that where a newly independent State made a choice of its own, that choice only operated from the date of the notification of succession. In paragraph 3, he would favour replacing the concluding words "any such choice" by the words "any such consent or choice". That drafting change would bring the paragraph into line with paragraphs 1 and 2, which referred to consent as well as to choice.

61. Mr. KEARNEY proposed that article 16 should be referred to the Drafting Committee.

62. Mr. TSURUOKA said that the reasons adduced for maintaining the presumption in article 15 had not convinced him. He proposed that the presumption in article 16 should be reversed, for the same reasons as he had given in connexion with article 15.

63. Mr. USHAKOV said that, in principle, he approved of the clause proposed by the Special Rapporteur for addition to paragraph 2 (A/CN.4/278/Add.3, para. 304). The Drafting Committee should reword it, however, in the light of article 17, paragraph 3 (b) and (c); for it was not, strictly speaking, the date of the notification that was concerned, but the dates mentioned in those two sub-paragraphs.

64. Mr. SETTE CÂMARA said that he supported Mr. Tsuruoka's proposal.

65. Mr. CALLE y CALLE said he had some misgivings about the proposed drafting change at the end of paragraph 3. If a reference to "consent" were introduced, the question would arise whether it meant the consent of the successor State or the consent of the predecessor State. For his part, he could not see how it would be possible to modify the consent given by the predecessor State. He urged the Commission to retain the formula "any such choice", which would cover both the case of a treaty divided into parts and that of a treaty which offered an option between differing provisions.

66. Mr. TSURUOKA urged that the Commission should take due account of the fact that when a predecessor State decided what provisions of a treaty it intended to accept, its choice was not necessarily dictated by the interests of the territories under its rule.

67. The CHAIRMAN, speaking as a member of the Commission, said he saw no difficulty in embodying in article 16 a presumption similar to that in article 15; the successor State inherited the treaty in the form in which it stood for the predecessor State. If the successor State was not satisfied with the predecessor State's choice or with the consent given by it to only part of the provisions of the treaty, the successor State was completely free to change the situation simply by making a notification.

68. The question raised by Mr. Ushakov involved more than a mere drafting point. He himself believed that, when the successor State changed the position taken by the predecessor State with regard to consent or choice, that change in position could only have effect from the time when the change was made. The Special Rapporteur had referred to that question of non-retroactivity in paragraph 304 of his report.

69. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 16, said that the resumption in paragraph 1 had been accepted by the Commission, subject to the reservations of two members.

70. The wording of article 16 had also proved generally acceptable, with the possible addition of a clarification regarding non-retroactive effect. In his own redraft of paragraph 2, he had relied on the structure of article 17 of the Vienna Convention on the Law of Treaties.

71. There was room for doubt about the interesting point raised by Mr. Calle y Calle concerning the concluding words of paragraph 3. He would reflect on the matter and the Drafting Committee would deal with it.

72. The CHAIRMAN suggested that article 16 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

The meeting rose at 12.55 p.m.

³ For resumption of the discussion see 1293rd meeting, para. 2.

⁴ For resumption of the discussion see 1293rd meeting, para. 15.

1273rd MEETING

Friday, 7 June 1974, at 10.5 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 17

1. The CHAIRMAN invited the Special Rapporteur to introduce article 17, which read:

Article 17

Notification of succession

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

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

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

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

2. Sir Francis VALLAT (Special Rapporteur) said that article 17, which dealt with the mechanics of notification of succession, had not attracted any comments by Governments and appeared to be satisfactory and complete. He had no special remarks to make on the article.

3. The CHAIRMAN said that the question had been raised, in connexion with article 12, whether the definition of "notification of succession" in article 2 should not be expanded to specify that the notification must be made in writing.

4. Sir Francis VALLAT (Special Rapporteur) replied that in his view the appropriate place to deal with that point was in article 17, which stated, in paragraph 1, that the notification "must be made in writing". The definition of "notification of succession" in article 2 ought, if anything, to be shortened.

5. Mr. MARTÍNEZ MORENO said that article 17 was fully acceptable to him, but he wished to raise an important matter, which was dealt with in the commentary (A/8710/Rev.1, chapter II, section C) but should, in his view, be dealt with in the article itself.

6. Paragraph (6) of the commentary mentioned certain cases in which the notification of succession had been made not by the newly independent State itself, but by the predecessor State. In paragraph (7) the conclusion was reached that a notification of succession, in order to be effective, must emanate from the competent authorities of the newly independent State. It would be contrary to the principle of self-determination to take any other position, and he suggested that the matter should be made clear in the text of article 18, although the reference to articles 12 and 13 in paragraph 1 of article 17 already implied that the notification should emanate from the newly independent State.

7. Mr. RAMANGASOAVINA said he thought it was normal for a notification of succession to be made in writing. With regard to paragraph 2 of article 17, under which the representative of the State communicating the notification might be called upon to produce full powers if the notification was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, it might perhaps be simpler to provide that in such a case he must produce full powers.

8. Sir Francis VALLAT (Special Rapporteur) said he would reflect on the points raised by the two previous speakers and, if necessary, make suggestions to the Drafting Committee.

9. The CHAIRMAN suggested that article 17 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹

ARTICLE 18

10. The CHAIRMAN invited the Special Rapporteur to introduce article 18, which read:

Article 18

Effects of a notification of succession

1. Unless a treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 12 or 13 shall be considered a party or, as the case may be, contracting State to the treaty:

(a) on its receipt by the depositary; or

(b) if there is no depositary, on its receipt by the parties or, as the case may be, contracting States.

2. When under paragraph 1 a newly independent State is considered a party to a treaty which was in force at the date of the succession of States, the treaty is considered as being in force in respect of that State from the date of the succession of States unless:

(a) the treaty otherwise provides;

(b) in the case of a treaty which falls under article 12, paragraph 3, a later date is agreed by all the parties;

(c) in the case of other treaties, the notification of succession specifies a later date.

3. When under paragraph 1 a newly independent State is considered a contracting State to a treaty which was not in force at the date

¹ For resumption of the discussion see 1293rd meeting, para. 25.

of the succession of States, the treaty enters into force in respect of that State on the date provided by the treaty for its entry into force.

11. Sir Francis VALLAT (Special Rapporteur) said that the question of a time-limit and the effect of retroactivity under article 18 had caused him much difficulty. After long reflexion, however, he had come to the conclusion that the article should be kept substantially unchanged and that any explanations needed should be given in the commentary.

12. In the oral and written comments by Governments, there had been no criticism of the basic principle of continuity of the legal nexus underlying the concept of retroactivity applied in article 18. That principle, as explained in paragraph (11) of the commentary (A/8710/Rev.1, chapter II, section C), was sustained by the Secretary-General's practice as a depositary. It was true that, as a depositary, the Secretary-General could not bind the parties, but since there had not been any objection to his consistent practice in the matter it could be said that, in effect, it constituted the practice of States. Any different approach would undermine much of the work the Commission had accomplished by building on the practice of the Secretary-General.

13. The effects of the operation of article 18 raised two related problems: first, that of the time element, since a newly independent State might delay making a notification of succession for a long time; and secondly, the practical difficulties resulting from retroactivity for the other States parties to the treaty. It was necessary to determine the nature and scope of the legal obligations of those other States during the period between the date of succession and the date of notification. The draft articles did not give an express answer to that question. The articles on provisional application seemed to indicate that during the interim period the treaty would not be binding on the other States parties; otherwise, there would appear to be no reason to require their consent for the purpose of provisional application.

14. On further reflexion, however, he had concluded that provisional application and the operation of article 18 constituted two different legal situations. When a notification was made, it would have the effects stated in article 18; that being so, the other States parties would be aware of the possibility of a notification being made with retroactive effect by the newly independent State, and it would be open to them to approach that State and urge it to make its position known. In the light of the reply received, or of the absence of a reply, the other States parties could either seek an arrangement by way of provisional application or continue to press the newly independent State to take a decision about the treaty; another State party could even ultimately inform the newly independent State that it assumed that it would not be participating in the treaty.

15. Those considerations showed that the Commission had been moving in the right direction when it had discussed the possibility of introducing the idea of a reasonable time-limit into article 12. The failure of the newly independent State to act within a reasonable time should deprive it of the benefit of retroactivity under article 18. Otherwise, if the newly independent State

adopted an unco-operative attitude, another State party would be placed in an embarrassing position: if it wished to take action contrary to the terms of a treaty, it would have no other course open to it but to commit a breach of the treaty and await the reaction of the newly independent State.

16. For those reasons, he thought that the appropriate course was to keep article 18 basically as it stood, but to make provision for some satisfactory time-limit in article 12 and possibly also in article 13. In that connexion, he drew attention to the comments by the Netherlands Government, which favoured a time-limit that was both specific and short (A/CN.4/275/Add.1, para. 14). In fact, the one-year time-limit it proposed was the shortest period so far suggested.

17. The Swedish Government had, in effect, proposed the deletion of sub-paragraph (c) from paragraph 3. He thought that proposal should be rejected. As explained in his report (A/CN.4/278/Add.3, para. 317), the faculty conferred upon the newly independent State by that sub-paragraph was a reasonable one and there was no reason why it should be taken away. Besides, the draft articles should not be visualized as operating in a vacuum, but in the context of normal diplomatic relations. The faculty in question would normally be a convenience to all concerned.

18. As to the United Kingdom Government's suggestion regarding sub-paragraph (b) of paragraph 2, he believed it was based on some misunderstanding of the purpose of that sub-paragraph, as he had explained in his report (*ibid.*, para. 318). Sub-paragraph (b) had to restrict the option of the newly independent State, because of the provisions on "restricted" multilateral treaties contained in paragraph 3 of article 12. As to so-called "general" multilateral treaties, it was unnecessary to state the obvious fact that the date could be varied by agreement of all the parties to the treaty.

19. Mr. USHAKOV said he wished to draw attention to a contradiction between articles 17 and 18 and to a contradiction within article 18.

20. Paragraph 1(a) of article 18 provided that a newly independent State would "be considered a party" to the treaty on the "receipt by the depositary" of the notification of succession. Paragraph 3(c) of article 17, however, specified that the notification, if transmitted to a depositary, would be considered as received by the State for which it was intended "only when the latter State has been informed by the depositary". It was necessary to remove the apparent conflict between those two provisions.

21. The contradiction within article 18 was much more serious. Paragraph 1(a) provided that the newly independent State would "be considered a party" to the treaty on the "receipt by the depositary" of the notification of succession. In other words, the treaty was in force for that State as from the date of receipt of the notification by the depositary. Paragraph 2, on the other hand, provided that the treaty was "considered as being in force" in respect of the newly independent State "from the date of succession of States". Thus, according to paragraph 2, the newly independent State became a

party from the date of succession and not from the date specified in paragraph 1(a). It was essential to remove that contradiction as well.

22. Mr. AGO said he thought article 18 raised almost insuperable difficulties. Apart from the possible contradiction between article 18, paragraph 1 and article 17, it should be noted that article 18, paragraph 2, reflected concern to ensure the continuity of treaties in a succession. Succession, if it really was a succession, should be automatic, but in the system of the draft articles it was made subject to a declaration of will by the newly independent State, which was justified on several grounds. In the absence of a notification of succession by that State, the treaties in question were deemed to be no longer in force. When a notification of succession was made, they were regarded, under article 18, as being in force from the date of the succession. It was important, however, to consider the other States concerned.

23. From the point of view of State responsibility for an internationally wrongful act, a newly independent State which, after the date of the succession, acted in a manner contrary to the provisions of a particular treaty, would not be in danger of incurring international responsibility; it need only refrain from making a notification of succession to that particular treaty. Other States parties to the treaty which acted in a similar manner would incur no international responsibility so long as no notification of succession had been made, but they could be held responsible retroactively for internationally wrongful acts as soon as a notification had been made.

24. The Special Rapporteur had tried to remedy that unacceptable situation by proposing the introduction of a reasonable time-limit for notification. In his (Mr. Ago's) view, that solution would nevertheless endanger the principle of the equality of States. It would be better to consider the application of the treaties as being suspended during the interim period.

25. Mr. YASSEEN said that the intertemporal law was very complicated. The main purpose of article 18 was to safeguard the interests of newly independent States. It was right that a State in that position should enjoy some freedom to choose the appropriate moment for making a notification of succession. At the same time, the difficulties that might be encountered by other States should not be ignored.

26. The solution suggested by the Special Rapporteur was hardly acceptable, because it would oblige newly independent States to take a decision within a fixed period, and that would constitute a sometimes unjustified limitation of their freedom. It would be better to provide that the date of entry into force of the treaty should be either the date on which the succession was notified to the depositary or to the other States, or some other date agreed by the States concerned.

27. Mr. KEARNEY said that the intertemporal question always raised serious problems. Article 18 was a very difficult article, especially in regard to its interconnection with other articles.

28. The basic proposition embodied in the article was sound, namely, that the notification of succession con-

stituted an affirmation of a pre-existing nexus, so it was logical that the treaty should be considered as having been in effect as from the date of succession. But while it was appropriate to accept that logical consequence of a succession of States, it would be wrong to ignore the practical effects of the period of uncertainty following a succession, which continued until the newly independent State made its notification.

29. In practice, few serious problems appeared to have arisen, though some instances could be quoted from the application of treaties on extradition and taxation. A possible reason for the rarity of actual cases was that the treaty provisions were often incorporated in the internal law of the territory to which succession of States related, and thus remained in effect during the interim period. Despite the lack of sufficient material on which to form a sound opinion, however, the Commission should bear in mind certain situations seriously affecting the rights of individuals which could occur in private law and could be affected by multilateral treaties. It was not possible to meet those situations simply by requiring the newly independent State to act within a reasonable time. Such a provision would simply introduce a further element of uncertainty, because of the difficulty of interpreting the word "reasonable".

30. He therefore suggested that the problem should be approached from a different angle, by introducing a provision on the following lines: "The treaty shall be considered as being in force from the date of notification of succession in respect of particular cases or situations which, under the internal law of any party or of the successor State, have been determined on the basis that the treaty was not in effect."

31. With a provision of that kind, a judgement rendered in a domestic court during the interim period would not be affected by a subsequent notification of succession, despite the retroactive effect of article 18. The same would apply to any financial or economic decision, such as decisions in matters of taxation, which relied on the assumption that the treaty was not in force. It would create extraordinary confusion if such judgements and decisions could be upset because several years later a notification of succession had been made.

32. Mr. ELIAS said that the Special Rapporteur had been right to suggest that article 18 should be left very much as it stood. He did not, however, support the Special Rapporteur's proposal that not only article 12, but also article 13 should be amended to provide for a time-limit on the period within which a notification of succession could be made (A/CN.4/278/Add.3, para. 319). It was with considerable hesitation that he had agreed, during the discussion on article 12, that the Drafting Committee should consider that idea; the proposal to extend it to article 13 as well would require further thought, not just by the Drafting Committee, but by the Commission itself. In any case, as a number of other speakers had pointed out, the difficult intertemporal question could not be settled either completely or satisfactorily by any such provision for a "reasonable" time-limit.

33. With regard to the apparent contradiction between paragraph 3(c) of article 17 and paragraph 1(a) of

article 18, he pointed out that the terms of the latter provision followed logically upon those of sub-paragraph (b) of article 78 of the Vienna Convention on the Law of Treaties.² He did not think there was any real contradiction, but the Drafting Committee could study the point.

34. He agreed with the Special Rapporteur that the United Kingdom suggestion regarding paragraph 2(b) of article 18 was based on some misunderstanding of the provision in question and should not be entertained. He also agreed with the Special Rapporteur that the Swedish proposal to delete sub-paragraph (c) of paragraph 2 should be rejected.

35. In conclusion, he supported the adoption of article 18 subject to any improvements in wording that might be introduced by the Drafting Committee and on the understanding that no provision for a time-limit would be included in it; that matter should be considered in connexion with article 12 alone.

36. Mr. MARTÍNEZ MORENO said that the idea of a specific time-limit had not been generally accepted as a possible remedy for the difficulties involved in article 18, though there appeared to be considerable support for the idea of a "reasonable time", which might at least help to reduce those difficulties. It would certainly be extremely difficult to find a comprehensive solution, but in the interests of fairness it was necessary to alleviate the difficulties which might arise for other States parties to a multilateral treaty if the newly independent State delayed making its notification of succession.

37. He therefore suggested that the other States parties should be exonerated from international responsibility for any failure to apply a treaty which they did not believe to be in force, but which later became retroactively effective as a result of a notification of succession.

38. The concern expressed by Mr. Ushakov was well founded. The provisions of paragraphs 1 and 2 of article 18 appeared to be seriously in conflict unless paragraph 1 was intended to refer to the date and not to the effects of the notification, in which case it should have been placed in article 17.

39. Mr. QUENTIN-BAXTER said that, since the Commission was trying to produce texts that would be acceptable to all and not merely to a majority of States, it would have to bear in mind the traditional attitudes even of minorities of States. The concept of continuing obligation or inheritance, for example, was traditional in the South Pacific. The notion of a reasonable time-limit would never have occurred to the States in that region, as they would believe that a legal solution could be found. In the vast majority of cases, when such a solution was found the other State or States concerned readily agreed to it. A time-limit was not found necessary and was indeed contrary to that tradition.

40. He had no reservations about the clean slate principle—the central principle adopted by the Commis-

sion—because it was basically consistent with world practice. The draft articles rightly embodied both the concept of continuing inheritance and that of the new State's freedom of choice. The inheritance concept was just as important to those who supported the clean slate principle as it was to others; it was valuable because of its world-wide acceptance in law-making and other general treaties.

41. As Mr. Kearney had said, although, notionally, treaties stopped for new States, those States inherited a framework of domestic law which, by and large, gave effect to many of the international obligations by which they had been bound before they had become States. If they had strong views about those obligations, they would change their law and abandon them, but in the vast majority of cases they would continue to use and build upon the framework as they had inherited it.

42. In the preceding articles, the notions of inheritance and choice had sometimes operated together. In the case of reservations, for example, most members believed that the successor State should be presumed to inherit its predecessor's reservations as well as participation in the treaty, but that it should at the same time be free to abandon those reservations or make new reservations to replace them. Most members did not believe that if the concept of choice was introduced, that of inheritance should be abandoned—that if a State was allowed to make new reservations, it must be presumed not to have inherited its predecessor's reservations.

43. The situation was somewhat similar under article 18, which allowed a new State to make a notification that had the true effect of succession and hence of continuity, or to specify that its notification would take effect from the time when it was received. The newly independent State would often choose the latter course, because it knew that in the interval it had not complied with the provisions of the treaty, perhaps for internal reasons. In most cases, however, no one would wish to question the claim of a new State to regard itself as a party to an international convention, even if its practice had at times fallen below the standard required by the convention.

44. Nevertheless, the Commission could not wholly ignore the practical problems which arose for other States parties to a treaty through uncertainty, particularly where private rights were affected or court judgements depended on the assumption that the treaty was not in force. A court could not suspend its judgement on the grounds that it could not ascertain whether a treaty was in force or not. It had to assume that the treaty was not in force unless there had been a notification to the contrary and that fact had been reflected in domestic law. The Commission should therefore amend the provision on notification. He was inclined to agree with those who believed that the problem could not be solved by merely introducing the test of reasonableness or by any general imposition of time-limits. That would not be in the tradition of many States.

45. For practical purposes, the Commission should try to provide for two types of situation. First, there was the case in which the practice of the new State was

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. 300.

obviously inconsistent with the idea that it regarded itself as having succeeded to the treaty and had kept it in force from the time of succession. If a multilateral treaty depended on a framework of domestic law in each State party to it, and if the new State abrogated that law and continued for some time not to give effect to the treaty, other States observing the treaty obligations in their own domestic law would ordinarily regard such conduct by the new State as proof that it did not consider the treaty to be in force for it for the time being.

46. Secondly, there was the case in which the new State was unable to decide whether or not to succeed to the treaty and delayed its notification. The other States parties might then be allowed to take the initiative by asking the new State to declare its position in respect of the treaty. If the new State was still unable to do so, its succession would be regarded as taking effect from the date of notification, and would not have retroactive effect.

47. The Commission might consider amending article 18 along those lines. The new State would then be free to decide whether its notification should take effect only from the time when it was made or from a previous time, while other States parties would be entitled to object to the retroactive effect of notification in the cases he had mentioned. Some provision should be made for dealing with difficult cases. Third States would, and should, agree to considerable inequality in order to bring the present articles into force, but he thought the limits of their tolerance in regard to notification of succession had been reached.

48. Mr. TSURUOKA said he shared the Commission's desire to establish a fair balance between the interests of the newly independent State and those of the other States parties to a treaty. With regard to the idea of a "reasonable time", he favoured a specific period, as he had already said in connexion with articles 12 and 13.

49. As to paragraph 2(c) of article 18, which dealt with the case in which the notification of succession specified a later date than the date of succession for the entry into force of the treaty, he suggested that that provision should be redrafted on the lines of article 19, paragraph 2. Admittedly, that would not cover all possible cases, but it would certainly reduce the difficulties that might arise during the interim period.

50. Mr. USHAKOV compared article 18 with article 22, on the provisional application of multilateral treaties. According to article 22, the provisional application of a multilateral treaty between the successor State and another State party to the treaty required a notification by the successor State and the agreement of the other State party, whereas under article 18 that agreement was not required for retroactive application. Furthermore, whether the newly independent State applied a multilateral treaty provisionally or not, its situation was ultimately the same, once it had made a notification of succession; for the retroactivity provided for in article 18, paragraph 2, could take effect when the treaty had been applied provisionally in accordance with arti-

cle 22. In such a case *de facto* retroactivity became *de jure* retroactivity.

51. Sir Francis VALLAT (Special Rapporteur) said the discussion seemed to suggest that the Commission should regard the principle of continuity as underlying article 18, without unduly stressing the principle of retroactivity. That would help to place the article in the context of State succession and recall the reason why paragraph 2 might have retroactive effect. There was nothing in the comments of Governments to discourage the Commission from adopting the doctrine of continuity as reflected in article 18.

52. The most difficult problem raised by the article was the hardship which doubts about succession might create for the other parties to a multilateral treaty, particularly in what had been called the "private law sector". Mr. Ushakov had suggested that the retroactive effect which followed from paragraph 2 of article 18 might be limited to cases in which a multilateral treaty was provisionally applied by virtue of article 22. Mr. Ago and Mr. Martinez Moreno, following a similar line of reasoning, had suggested limiting the responsibility of the other States parties to the treaty until notification of succession had been given by the newly independent State. The only direct objection to the retroactive effect of paragraph 2 had been raised by Mr. Yasseen, who was in favour of making the treaty take effect from the date of notification of succession.

53. Another solution suggested was some form of time-limit for notification. The majority of members were clearly not in favour of a fixed time-limit, but a requirement that notification should be given within a reasonable time in accordance with the provisions of articles 12 and 13 might ease the situation.

54. On the whole there had been little criticism of paragraph 2 in the quite extensive comments received from Governments or expressed in the Sixth Committee, and there was a tendency to consider that the hardship involved for the other parties to a treaty might be avoided by providing for some kind of time-limit.

55. The solution suggested by Mr. Quentin-Baxter for cases in which the behaviour of the newly independent State was obviously inconsistent with the maintenance of the treaty in force was attractive in principle, but would be very difficult to incorporate in article 18. His other suggestion was that unduly delayed notification of succession should not have retroactive effect. Some form of over-all time-limit seemed preferable to such half measures.

56. The CHAIRMAN, speaking as a member of the Commission, said he thought that the contradiction between paragraphs 1 and 2 of article 18 mentioned by Mr. Ushakov was only apparent. He agreed, however, that in article 17, sub-paragraph (c) of paragraph 3, which was based on article 78 of the Vienna Convention on the Law of Treaties, was different in character from sub-paragraphs (a) and (b). It might therefore be clearer if sub-paragraph (c) was not incorporated in paragraph 3, but made into a separate paragraph 4.

57. Sir Francis VALLAT (Special Rapporteur) said he thought the point raised by Mr. Ushakov about para-

graph 3(c) of article 17 had been adequately dealt with by Mr. Elias. The contradiction between paragraphs 1 and 2 of article 18 was indeed more apparent than real. The notion that a State might become a party to a treaty which could have retroactive effect was inherent in article 28 of the Vienna Convention on the Law of Treaties: the provision that a treaty should not have retroactive effect "unless a different intention appears from the treaty" implied that a treaty might have retroactive effect if it so provided. Article 18 dealt with just the kind of case that, by implication, was contemplated in article 28 of the Vienna Convention.

58. The CHAIRMAN suggested that article 18 should be referred to the Drafting Committee for further consideration.

*It was so agreed.*³

The meeting rose at 12.25 p.m.

³ For resumption of the discussion see 1293rd meeting, para. 34.

1274th MEETING

Monday, 10 June 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

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

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

[Item 7 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/279), and article 1 of his draft.

2. Mr. REUTER (Special Rapporteur) first drew attention to the bibliography prepared by the Secretariat on the topic under study (A/CN.4/277), which contained an interesting selection of works.

3. He explained that the draft articles appearing in his third report attempted to extend and adapt the Vienna Convention on the Law of Treaties¹ to the particular

sphere of treaties concluded between States and international organizations or between two or more international organizations. The similar attempts made with other topics also linked with the Vienna Convention—succession of States in respect of treaties and the most-favoured-nation clause—were already well advanced, and it was time for the topic under discussion also to assume the form of a draft of articles.

4. In drafting the articles, he had followed the Vienna Convention on the Law of Treaties very closely and had retained the order and numbering of the articles of that Convention. Of course, certain provisions of the Vienna Convention, such as article 5, could have no equivalent in the present draft, and in those cases the number had been omitted. In other cases, such as that of article 2, it had not been possible to reproduce all the paragraphs and subparagraphs systematically. On the other hand, it might perhaps be necessary to introduce articles into the draft which did not appear in the Vienna Convention; they would be numbered *his*, *ter* or *quater* so as not to break the numerical correspondence between the two sets of articles so long as the Commission was working on them.

5. In his third report he had reduced the commentaries to a minimum, in response to the suggestions to that effect made in the Sixth Committee at the twenty-eighth session of the General Assembly.

6. The draft articles were very different from those which the Commission usually had to examine. In the present case he, as Special Rapporteur, must not depart from the Vienna Convention unless it was necessary to do so. In view of that rigid framework, he even had to disregard any new thinking that might have emerged since the adoption of the Vienna Convention in 1969. The preparation of the articles was therefore mainly a matter of drafting and most of the ten provisions proposed should not give rise to long discussions on matters of principle. Six of them raised drafting problems; three raised relatively simple matters of principle; and only one, article 6, raised an important point of principle.

7. The fact that members of the Commission had not sent him any written notes on his draft, as he had asked them to do, certainly did not mean that they fully approved of it.

ARTICLE 1

8. Introducing article 1, he said that he proposed the following wording:

Article 1

Scope of the present articles

The present articles apply to treaties concluded between States and international organizations or between two or more international organizations. Article 3(c) of the Vienna Convention on the Law of Treaties does not apply to such treaties.

9. The first sentence corresponded to article 1 of the Vienna Convention; it was only with some hesitation that he had added the second.

10. The term "treaty" had been preferred to the term "agreement", in order to conform to the spirit of the

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

Vienna Convention. In that instrument, the term "agreement" had a very wide meaning, for it covered any conventional act governed by international law, regardless of the form it took and the parties to it, the term "treaty" being confined to agreements in written form between States. The term "agreement" meant any international conventional act that was not subject to a special régime. So since the draft before the Commission made certain specific conventional acts subject to a special régime, it was undesirable to use the word "agreement", which should continue to be used in its widest sense. Furthermore, since the fate of the draft was linked with that of the Vienna Convention, it was necessary to use the term "treaty", and, following the wording of the resolution adopted by the Vienna Conference, to describe the treaties in question as "treaties concluded between States and international organizations or between two or more international organizations".² The disadvantage of that formula was its length and the impossibility of replacing it by an abbreviated expression.

11. At the Commission's twenty-fifth session Mr. Ushakov had suggested that, from the start, treaties concluded between States and international organizations should be kept separate from treaties between two or more international organizations,³ and his suggestion had subsequently been taken up in the Sixth Committee. He (the Special Rapporteur) considered it inadvisable to stress that distinction from the outset. Both the Commission and the United Nations Conference on the Law of Treaties had decided against making a systematic distinction between the different categories of treaty. They had taken the view that such a distinction should be made only within individual articles and to meet certain needs. It was obvious that not all the rules applicable to treaties concluded between international organizations would apply to treaties concluded between States and international organizations. For instance, in the case of treaties between States and international organizations, and more particularly with regard to the formation and expression of consent, the Vienna Convention would apply to States, whereas the future convention based on the draft articles would apply to international organizations. It would then be necessary to apply the two conventions simultaneously. On the other hand, the Vienna Convention would not apply to treaties concluded between international organizations. In his opinion, it would be better to make such distinctions in individual articles than to make them the basis of the draft.

12. The second sentence of draft article 1 made the wording less simple than that of its model, article 1 of the Vienna Convention. It raised the delicate question of the relationship between a conventional text and a text which might one day become conventional, but to which other subjects of international law might become parties. In adding the second sentence his intention had not been to provide an answer to that question, but to

take account of what had happened at the Vienna Conference. When it had been decided at that Conference to exclude treaties concluded between States and international organizations or between two or more international organizations, some speakers had expressed concern because the future convention on the law of treaties would not cover "trilateral" treaties, which joined two States and an international organization, and which were very numerous, especially where assistance or supplies of fissionable materials were concerned. It was to allay their fears that a subparagraph (c) had been added to article 3 of the Vienna Convention, the effect of which was to reserve the application of that Convention to treaty relations between States, to the exclusion of relations between States and other subjects of international law. But the second sentence of draft article 1 would no longer be justified once the draft had become a convention; for any treaty concluded between two States and an international organization, all three of which were parties to the future convention, would be entirely governed by that new instrument, even where relations between the two States were concerned. If the Commission thought it desirable, the second sentence of article 1 could be placed in square brackets, or replaced by explanations in the commentary, or inserted in one of the final provisions of the draft.

13. Mr. HAMBRO, after congratulating the Special Rapporteur on his excellent report, said that the preparation of the future convention was by no means a simple matter of drafting. It touched on the development of international co-operation and the increasing part played in it by international organizations. It would lead to the discussion of essential questions such as the capacity of international organizations to conclude treaties and the advisability of their acceding to multilateral conventions. Like the Special Rapporteur, he thought the time had come when it was essential to formulate draft articles, in particular, to enable international organizations to provide fresh information on the topic.

14. With regard to article 1, the term "treaty" was certainly preferable to the term "agreement", but it did not seem necessary to specify each time that what was meant was "treaties concluded between States and international organizations or between two or more international organizations". It would be sufficient to indicate that for the purposes of the future convention the term "treaty" was to be understood in that sense. It might, moreover, be thought that in the future jurists would understand the word "treaty" as meaning both treaties concluded between States and treaties concluded between States and international organizations or between international organizations. Besides, in the resolution by which it had recommended the General Assembly to refer the topic under consideration to the Commission, the United Nations Conference on the Law of Treaties had used the word "treaty", even though in article 2 of the Vienna Convention a treaty was defined as "an international agreement concluded between States". The reason why only that one term had been used was that there was no other adequate expression.

² *Ibid.*, p. 285, resolution relating to article 1.

³ See *Yearbook* . . . 1973, vol. I, p. 189, para. 76.

15. Mr. SETTE CÂMARA said that the Special Rapporteur's report was remarkable for the clearness and simplicity of the draft articles and commentaries it contained, which would greatly facilitate the Commission's task of examining the complex and intricate problems of treaty relations between States and international organizations and between international organizations. In accordance with the recommendations of the Sixth Committee, discussions and theoretical references had been reduced to a minimum; the report contained all that need be said on each particular aspect of the problem and no more. The conciseness of the oral presentation of the draft articles also met the wishes of many representatives in the Sixth Committee, and in any case concrete draft articles would do more than long theoretical dissertations to persuade States and international organizations to submit comments and information.

16. As to methodology, the Special Rapporteur's main guideline was that the Commission "should remain as faithful as possible to the Vienna Convention on the Law of Treaties" (A/CN.4/279, preface, para. 3). That was the only possible method, since the essential purpose of the Commission's work was to extend the provisions of the Vienna Convention to treaties concluded between States and international organizations or between two or more international organizations. The fact that the draft articles had been given the same numbers as the corresponding provisions of the Vienna Convention would enable the Commission to keep constantly in mind the parallelism between the two texts.

17. With regard to article 1, he approved of the Special Rapporteur's terminology. Parallelism between the use of the words "treaty" and "agreement" in the Vienna Convention and their use in the present draft was necessary and had been fully justified by the Special Rapporteur in his commentaries.

18. He had found quite convincing the arguments advanced by the Special Rapporteur against separation of the treaties at that early stage into two categories, namely, those concluded between States and international organizations and those concluded between international organizations. The Commission should endeavour to preserve the unity of the juridical régime applicable to international treaties which had emerged from the Vienna Convention.

19. Lastly, he could accept the second sentence of draft article 1, since the saving clause in article 3(c) of the Vienna Convention would no longer be necessary once the rules of that Convention were extended to treaties to which international organizations were parties.

20. Mr. TABIBI said that he, too, welcomed the simplicity and clarity of the Special Rapporteur's report and draft articles.

21. The topic was a very important one, which touched on many sensitive issues. The Commission should lose no time in dealing with it in order to complete the codification of the law of treaties. It was worth noting that the first three Special Rapporteurs on the law of treaties, and Sir Humphrey Waldock himself in

the early stages of his work, had favoured studying the whole of the law of treaties at once. It was only owing to lack of time that it had been decided to concentrate on treaties concluded between States and to defer the study of the present topic. In those circumstances, the General Assembly and the world community as a whole would welcome the early conclusion of the Commission's work on that topic, which would constitute an essential complement to the Vienna Convention on the Law of Treaties.

22. An instrument to govern the present topic was a matter of vital importance to the small nations, which had concluded many assistance agreements with the United Nations and its specialized agencies. Thousands of experts were working all over the world under those agreements to carry out numerous projects. And the number of agreements of that kind was growing very fast—even faster than the number of treaties between States. Over six thousand assistance agreements had already been concluded by the United Nations, mostly through such bodies as the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF) and the World Food Programme. At the United Nations Conference on the Law of Treaties, the observer for the International Bank had mentioned that the Bank was then a party to some seven hundred agreements with States. At present, five years later, the International Bank, the International Development Association (IDA) and the International Monetary Fund (IMF) were parties to some two thousand agreements. Those figures bore witness to the importance of the subject and the care needed in dealing with it.

23. On the question of capacity, he thought it was now abundantly clear—from custom, law and judicial precedent—that not only States, but also international organizations had the capacity to conclude treaties. For instance, no one could doubt the treaty-making capacity of the United Nations, which had been conferred on it by the collective sovereign authority of the community of States. Hence it was possible—and essential—to complete the codification of the law relating to the present topic. An international instrument on it would protect small nations in the same way as the provisions of the Vienna Convention protected them in regard to treaties concluded between States. He was thinking, in particular, of the provisions of that Convention relating to the validity of treaties.

24. The need to protect States benefiting under assistance agreements was all the greater because of the large sums allocated for programmes covered by those agreements. Moreover, the greater proportion of the funds did not come from the regular budget of the United Nations, but from voluntary contributions promised by States at pledging conferences. Huge sums were thus allocated and spent, without being subject to the control machinery provided for the United Nations budget. The Office of Technical Co-operation allocated funds to the various projects and divided the amounts available among various executing agencies. There had been cases in which a specialized agency, acting as the executing agency, had not spent all the funds allocated to a

project, ostensibly because of some delay on the part of the recipient country, but really in order to divert some of the money into the agency's regular budget. It had to be remembered that, in the case of most specialized agencies, all operational activities were financed with United Nations funds, mainly through UNDP; an agency's regular budget covered only its administrative expenses. The adoption by the Commission of draft articles on the present topic, and their ultimate incorporation in an international instrument, would have the beneficial effect of introducing regularity and discipline into the execution of assistance agreements.

25. That being said, he wished to stress a number of other points. The first was that care should be taken to formulate rules that would not hamper the activities of the international organizations concerned. The activities covered by assistance agreements were beneficial to the recipient countries, and it was in the general interest that they should operate smoothly. Small nations had more faith in agreements with international organizations than in bilateral arrangements. They were, of course, grateful to donors under bilateral arrangements, but they believed that multilateral arrangements were always preferable.

26. Another point to be considered was the question of succession which arose when one international organization or body absorbed another. Examples of such absorption were to be found in the history of the Office of Technical Co-operation, the Governing Council of the Special Fund and the Governing Council of UNDP. When one international body or organization absorbed another, all the technical assistance agreements concluded with recipient States had to be transferred.

27. His third point related to the importance of subsidiary organs. An interesting example was provided by the activities of the regional economic commissions. Resident representatives of UNDP attached to those Commissions often concluded important agreements with States on behalf of the United Nations. Clearly, projects such as those relating to the Mekong River and the Asian Highway could be directed and supervised much better from the offices of the Economic Commission for Asia and the Far East (ECAFE) than from United Nations Headquarters.

28. Lastly, he wished to urge, as he had constantly done, that agreements entered into by international organizations should be registered either at a regional office or at United Nations Headquarters. Those agreements, unlike treaties between States, were not at present registered with the United Nations Secretariat and it would be financially very useful if some form of registration were introduced, if only to minimize the risk of duplication. For instance, it had happened that UNESCO had concluded an agreement with the Ministry of Education of a certain country and another organization had later concluded an agreement with another Ministry covering some of the same ground.

29. Generally speaking, he approved of the content of article 1. On the question of terminology, however, he thought the term "agreement" was preferable to the term "treaty", although the use of the latter term

involved no danger, since its meaning was defined in the Vienna Convention on the Law of Treaties. The term "agreement" was the one generally used by United Nations bodies; it was difficult, for example, to designate as a "treaty" an understanding embodied merely in a letter addressed to a recipient State by an organ of the United Nations.

30. Mr. USHAKOV said he supported the idea that the order and numbering of the articles of the Vienna Convention should be followed in the draft; that would greatly facilitate the Commission's work. In his otherwise excellent report, the Special Rapporteur had adopted a comprehensive method, lumping together treaties between States and international organizations and treaties between international organizations. That method was bound to raise difficulties, of which draft article 1 provided some examples.

31. According to the second sentence of draft article 1, article 3(c) of the Vienna Convention on the Law of Treaties did not apply to "such treaties". According to the first sentence of draft article 1, the expression "such treaties" meant "treaties concluded between States and international organizations or between two or more international organizations". But article 3(c) of the Vienna Convention related only to treaties between States and international organizations, not to treaties between international organizations. Legally, it would be impossible to change the scope of article 3(c) of the Vienna Convention by a provision in another convention, even if the States parties to both conventions were the same. Hence he doubted whether the second sentence of the article under consideration was necessary. Moreover, it followed from article 3(c) of the Vienna Convention that that Convention could, but need not necessarily, apply to the relations referred to in that sub-paragraph. If a new convention dealing with that particular subject-matter was drawn up, it might take precedence.

32. With regard to the drafting of article 1, he suggested that the words "between two or more international organizations" should be replaced by the words "between international organizations", for the sake of symmetry with the Vienna Convention, which used the words "between States". Besides, in the text proposed by the Special Rapporteur, the expression "two or more" was not used with reference to treaties concluded between States and international organizations. That difference might create difficulties of interpretation, as could the use of the plural in the phrase "between States and international organizations". That phrase gave the incorrect impression that the article referred only to multilateral treaties and excluded bilateral agreements between one State and one international organization. Article 3 (c) of the Vienna Convention, on the other hand, did refer to multilateral agreements to which at least two States were parties, as well as another subject of international law.

33. Mr. YASSEEN, referring to the method of work adopted by the Special Rapporteur, said he recognized that there was a close resemblance between the rules governing treaties between States and those governing agreements between international organizations or be-

tween States and international organizations. Nevertheless, the fact that the Commission had decided that the latter question should be considered separately showed that there were certain differences between the two sets of rules. The Vienna Convention should, of course, be followed closely, and the Special Rapporteur had facilitated the Commission's work by following the numbering of the articles of that Convention. The method adopted was therefore acceptable for the first reading, provided that the Commission kept open the possibility of reviewing the whole structure of the draft articles on second reading, or even at the end of the first reading. It should not be blinded by the analogy between the two kinds of treaty, but should recognize the separate nature of the subject-matter it was now trying to codify. The explanations given by the Special Rapporteur did not appear to conflict with that approach.

34. He agreed with the Special Rapporteur that it was necessary to prepare a draft convention to complete the work already done on the general law of treaties. He supported the idea expressed in the first sentence of article 1, but doubted whether it was advisable to assert, in the second sentence, that article 3(c) of the Vienna Convention on the Law of Treaties did not apply to the treaties in question. In fact article 3(c) provided that the Vienna Convention could apply to relations between States under international agreements to which other subjects of international law were also parties, so that the second sentence of draft article 1 might conflict with the Vienna Convention. Moreover, article 3 of the Vienna Convention did not reserve the application of that instrument to agreements between international organizations or between international organizations and States, but its application to relations between States under such agreements. Hence, the second sentence of draft article 1 was unnecessary and there would be no harm in deleting it.

35. With regard to the definition of the subject-matter, he agreed with Mr. Hambro that it was unnecessary to repeat the title of the draft articles every time, and that it would be sufficient to define the word "treaty" for the purposes of the present articles. The Vienna Convention in fact applied only to treaties between States and had not defined the word "treaty" in absolute terms; so in dealing with agreements concluded between States and international organizations or between two or more international organizations, the Commission might well decide to call such agreements "treaties". In doing so, it would not be formulating an absolute definition, any more than the Vienna Convention had done, since the definition would be given only for the purposes of the articles under consideration.

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

36. Mr. TSURUOKA said he associated himself with the other members of the Commission in congratulating the Special Rapporteur on his very clear and logical report. Broadly speaking, he agreed with the position taken by the Special Rapporteur, both in his general introduction and in his comments on draft article 1.

37. As to the method of work, he agreed with the Special Rapporteur that it was time to prepare a draft

convention on the important topic of treaties concluded between States and international organizations or between two or more international organizations, and that in doing so the Commission should be faithful not only to the form, but also—and above all—to the spirit of the Vienna Convention.

38. With regard to terminology, he was not sure whether it would be right to refer simply to "treaties", or whether that term needed qualification. He was sure that the Drafting Committee would be able to solve that problem. He himself would be inclined to favour the solution suggested by Mr. Hambro, the Chairman of the Drafting Committee, but he also understood the Special Rapporteur's point of view. For so long as the Commission remained faithful to the Vienna Convention, the term "treaty" would have a precise meaning, and that must be borne in mind when formulating article 1. In any case, article 2 would clarify that point.

39. He agreed with Mr. Yasseen about the second sentence of article 1. At first sight, it was hard to understand the import of that provision, and he thought that it would be wiser not to refer to article 3 (c) of the Vienna Convention at the outset, but to wait and see later whether it was really necessary to include such a provision in the draft. Apart from that point, he was in general agreement with the Special Rapporteur on the draft articles as a whole and on the wording of article 1.

40. Mr. ŠAHOVIĆ said that the draft articles were of great interest and importance to all specialists in international law, from the point of view of the codification and progressive development of the rules relating to treaties concluded between States and international organizations or between two or more international organizations.

41. The discussions which had taken place in the International Law Commission at its twenty-fifth session and in the Sixth Committee at the twenty-eight session of the General Assembly, had made it possible to delimit the scope of the draft and to establish the principles which should govern its formulation. The Special Rapporteur had analysed those basic principles very well, and he agreed with him in recognizing that there must be an underlying unity between the different parts of the law of treaties—that was to say, between the Vienna Convention and the draft in course of preparation. The Special Rapporteur believed that that underlying unity lay in the basic value of consensualism; he had made laudable efforts to preserve it, but in regard to the method to be followed, the question arose whether the Vienna Convention should be taken as the sole basis for the work. In paragraph (7) of his commentary to article 1 (A/CN.4/279), the Special Rapporteur said that the Commission had avoided classification of treaties in order to maintain for all treaties the unity of the régime applicable. In his own opinion, however, the difference between treaties concluded between States and international organizations and treaties concluded between international organizations should be taken into account, for it was a difference resulting from the different legal character of States and international organizations as subjects of international law. The practice relating to

each of those two classes of treaty should therefore be examined more fully.

42. He agreed with the Special Rapporteur's views on the first sentence of article 1 and hoped it would subsequently be possible to find answers to the questions raised during the discussion. With regard to the second sentence, on the other hand, he agreed with Mr. Yassen and Mr. Ushakov; even though it might later be possible to take a more precise position, he thought the problem should be mentioned in the commentary from the outset. Article 1 should, indeed, be perfectly clear and precise, since it defined the scope of the draft. Personally, he did not think it would be possible to follow the presentation of the Vienna Convention in all respects.

43. Mr. EL-ERIAN said he was pleased to note that, in his third report, the Special Rapporteur had complied with the wish of the Sixth Committee that a set of draft articles should be prepared as quickly as possible. With his usual clarity of vision, the Special Rapporteur had brought out the essential points of the subject, and he fully agreed with his conclusions.

44. He also approved of the pragmatic approach adopted by the Special Rapporteur when he said, in the preface to his report, that it was "preferable to draw the attention of international organizations to a set of draft articles which, perhaps because of their very imperfections, will re-attract their attention in a specific way" and thus "elicit observations more valuable than those which might be obtained in reply to additional questionnaires". Speaking from his own experience as a Special Rapporteur, he could say that international organizations were generally reluctant to reply to questionnaires and much preferred to examine a set of draft articles.

45. He fully endorsed the Special Rapporteur's decision to adhere to the general spirit of the provisions of the Vienna Convention on the Law of Treaties, while introducing adaptations of a substantive or drafting nature wherever appropriate.

46. With regard to the method of work, however, he could not share the hope expressed in the Sixth Committee in 1973, and mentioned in paragraph 6 of the preface to the report, that the Commission's documents would be shorter and omit certain doctrinal or theoretical considerations. On the contrary, he strongly believed that the Commission's doctrinal and theoretical observations, including those contained in the Special Rapporteur's third report, represented a valuable contribution to international law and could be of great use, especially to small countries which did not possess large international law libraries.

47. As to article 1, he agreed with the Special Rapporteur that the idea underlying the draft articles should be the unity of juridical régimes, in accordance with the basic concept of consensualism. Like Mr. Ushakov, Mr. Tsuruoka and Mr. Šahović, however, he doubted that the second sentence of article 1 was necessary, and he accordingly endorsed the last sentence of paragraph (10) of the commentary.

48. Mr. AGO said he was glad to see that the draft articles were beginning to take shape, for although the

Vienna codification of the law of treaties between States had been a very great achievement, it was really only the starting-point for a whole set of instruments which the Commission must draft if it was to complete its work on the law of treaties. The topic of treaties concluded between States and international organizations or between two or more international organizations was perhaps the most important of those still outstanding. It involved some very awkward problems and one of the Special Rapporteur's great merits was to have pointed them out; for the Commission was now aware that at every step it would come up against the problem of co-ordination with the basic convention, which was the Vienna Convention on the Law of Treaties. Like the Special Rapporteur, he believed that even before coming into force that Convention had already gained wide authority as a definition of existing customary law on the subject, and that the same would probably be true of the draft codification on which the Commission was now engaged.

49. During the discussion, reference had been made to the principle of the unity of treaty régimes, and it was precisely in order to solve the problem which arose in that connexion that the second sentence of article 1 made article 3(c) of the Vienna Convention inapplicable. While he appreciated that that sentence was open to discussion, he did not think the problem could be solved by merely deleting it.

50. Was it really possible to speak of a unity of treaty régimes? Article 3(c) of the Vienna Convention dealt with relations between States under international agreements to which other subjects of international law, such as international organizations, were also parties. And there was no reason why the Vienna Convention rules should not apply *in toto* to relations between States under a treaty, even if an international organization was a party to the treaty on the same footing as States. But that did not necessarily mean that there was unity of régime—for instance, in regard to part II of the Vienna Convention, concerning the conclusion and entry into force of treaties. It was, indeed, quite evident that an international organization did not participate in the conclusion and entry into force of a multilateral treaty in the same way as a State. The fact that a treaty was a unity did not mean that the participation of States and the participation of international organizations in the treaty were governed by the same rules. Indeed, it was practically impossible for certain rules to apply both to States and to international organizations. For instance, it was obvious that the rule on the capacity of organs of the State to conclude treaties applied only to States and could not apply to international organizations. Thus, in the case of a treaty concluded between States and international organizations, the rules that would apply to States would necessarily be those laid down in part II of the Vienna Convention, whereas the rules applicable to international organizations would be those that would be laid down in part II of the new convention.

51. That was a complex problem, and he did not think the Commission could solve it by pretending to ignore it or by relying on the principle of the unity of treaty régimes. The Commission should reflect on that prob-

lem, to which the Special Rapporteur had so rightly drawn attention, and seek the formula that would provide the best solution.

52. Mr. KEARNEY, after congratulating the Special Rapporteur on his report, said he had no objections to the method and approach adopted in it, though he was inclined to agree with Mr. Hambro and other speakers that it was unnecessary to repeat, whenever the word "treaty" was used, that it meant a treaty concluded between States and international organizations or between two or more international organizations. He suggested, however, that that matter might best be discussed in connexion with article 2, paragraph 1 (a).

53. He did not consider it necessary to distinguish, from the outset, between treaties concluded between States and international organizations and treaties concluded between two or more international organizations. That was a question which could be better settled in the context of each article as it came up for examination.

54. Lastly, he pointed out that the purpose of the second sentence of article 1 was merely to make it clear that the present set of draft articles would apply to the situation dealt with in article 3 (c) in the Vienna Convention. But whether the present set of articles would provide a complete substitute for that provision of the Vienna Convention could only be known when the articles lay before the Commission in their entirety. He suggested, therefore, that the logical approach would be to leave the second sentence aside until the contents of the draft were better known.

55. Mr. RAMANGASOAVINA said he had read with great interest the Special Rapporteur's third report, which defined the approach and precise scope of the draft articles on treaties concluded between States and international organizations or between two or more international organizations. The draft was, in his view, the logical sequel to the Vienna Convention on the Law of Treaties. He endorsed the recognition of the principle of consensualism on which the draft had been prepared, and the Special Rapporteur's method of following the Vienna Convention step by step. That method was a very sensible one, not only because the Commission must remain faithful to the Vienna Convention, but also because the draft was the necessary complement to that Convention.

56. With regard to article 1, which defined the scope of the draft articles, he noted that the Vienna Convention already encroached to some extent on the topic of treaties concluded between States and international organizations. The first sentence of the article raised no problem, but he thought the second, excluding the application of article 3 (c) of the Vienna Convention, called for clarification. The precise effect of the second sentence did not seem very clear: did it mean that article 3 (c) of the Vienna Convention lost its effect, or that it did not apply to the cases dealt with in the draft articles, but continued to apply to other cases of treaties between States and other subjects of international law? Was article 3 (c) out of place in the Vienna Convention and would it be more appropriate in the present draft,

or did the present draft article 1 cover subject-matter already partly covered by the Vienna Convention? The Commission would have to settle those questions later, in the light of the other draft articles.

57. He thought it desirable that the international organizations should be consulted, since they did have a say in the matter.

The meeting rose at 6.10 p.m.

1275th MEETING

Tuesday, 11 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

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

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

[Item 7 of the agenda]

(continued)

ARTICLE 1 (Scope of the present articles) (continued)

1. Mr. MARTÍNEZ MORENO said that the Special Rapporteur's report was solid in content and distinguished throughout by its elegance and clarity of style.

2. In article 1, there could be no question about the logical correctness of the first sentence. As to the second sentence, he himself would prefer to retain it, subject to some redrafting, to show that the present set of draft articles did not apply to subjects of international law other than those envisaged in the Vienna Convention on the Law of Treaties.¹

3. Mr. QUENTIN-BAXTER said that at the last session the Special Rapporteur had made the Commission fully aware of the fact that the topic under discussion was one which would have to be considered on two levels: first, in terms of the need to remain faithful to the central structure of the Vienna Convention, an instrument already completed and adopted; and secondly, in terms of a voyage of discovery in an area with which international lawyers were not yet very familiar. He welcomed the fact that the Special Rapporteur was uniquely qualified as a guide on that voyage of discovery and as a master of the meticulous legal craftsmanship it would necessarily entail.

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. With regard to article 1, he thought the Special Rapporteur had been correct in using the word "treaty" and in refusing to allow the language of the Vienna Convention to stand in the way of the use of that word. He agreed, however, with the objections voiced by Mr. Hambro and other speakers to the long, periphrastic expression "treaties concluded between States and international organizations or between two or more international organizations". It would be sufficient to define the word "treaty" for the purposes of the present articles. In his view, the second sentence of article 1 should be understood as a warning by the Special Rapporteur against any unjustified attempt to transpose, even in part, the corresponding provisions of the Vienna Convention. For the time being, the Drafting Committee need not attempt to find a definitive text, but could retain that sentence provisionally, between square brackets.

5. Mr. CALLE y CALLE said that the report which the Special Rapporteur had presented with such lucidity and elegance served to confirm the existence of numerous treaties which had been concluded between States and international organizations or between two or more international organizations. Mr. Tabibi had referred to that important new source of international law, which was already implicitly recognized in Article 38 of the Statute of the International Court of Justice.

6. Article 1 defined the purpose of the draft, which was to extend and complement the provisions of the Vienna Convention on the Law of Treaties, by codifying the rules applicable to treaties concluded between States and international organizations or between two or more international organizations. In dealing with that article, the Drafting Committee would have to make a careful distinction between the two kinds of treaty. In his opinion, that was a problem which could best be dealt with article by article and, where necessary, by amplifying the commentary.

7. Lastly, he thought the somewhat controversial second sentence of article 1 might be more appropriately placed in article 3, which was intended to safeguard the legal force of international agreements not within the scope of the present articles.

8. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those speakers who had pointed out the need to distinguish two categories of treaties, namely, those concluded between States and international organizations and those concluded between two or more international organizations. In that connexion, he noted that the Commission appeared to be unanimously in favour of using the word "treaty" as defined for the purposes of the present draft articles, though he himself considered it important to distinguish between treaties and contracts. That, however, was a question which would be dealt with in connexion with article 2.

9. With regard to the second sentence of article 1, he did not think it possible to decide its ultimate fate at the present stage, although it was quite conceivable that there might later be provisions in the draft articles which would make such a clause necessary.

10. Speaking as Chairman, he invited the Special Rapporteur to reply to the comments made on article 1.

11. Mr. REUTER (Special Rapporteur) thanked the members of the Commission for their comments and for the helpful way in which they had been presented. He accepted the criticisms of his draft and would even like to add one more, which had not been made, but was perhaps the most important of all, since it accounted for the imperfections of the text. That criticism was that by starting with article 1 he had chosen a course contrary to that usually followed in examining the text of a treaty. For it was dangerous to begin a draft of articles with the most general provisions; if possible, the most specific provisions should come first. The reason why he had adopted that method was that there were, nevertheless, initial questions on which a choice had to be made. If that choice proved to be impracticable, the Commission must at least be fully aware of the importance of the problems involved, and starting with the introductory articles would confront it with those problems and those choices.

12. The adoption of numbering corresponding to that of the Vienna Convention was a purely provisional arrangement, open to change.

13. He agreed that the term "treaty" should, if possible, be used without qualification, and intended to submit a proposal to that effect. He could also agree to delete the second sentence of article 1. That sentence had served a purpose, however, as Mr. Ago had observed, since it had alerted the Commission to a basic problem: that of the relationship between the draft articles and the Vienna Convention, which would constantly confront the Commission throughout its work and cause considerable difficulties. The draft convention now being prepared and the Vienna Convention were, of course, two separate, independent instruments; but it was very hard to conceive of States being bound by one without being bound by the other. He therefore wondered whether the most reasonable solution might not be to sacrifice—up to a point, at least—the independence of the draft articles in relation to the Vienna Convention. In a number of cases the texts of the two conventions would clearly be applicable simultaneously, especially the whole section on the formation and expression of consent to be bound, so the Commission would certainly be obliged to refer to the Vienna Convention in its draft articles.

14. It should also be noted that not only the Commission, but also Governments, had for several years been adopting texts of codification conventions containing some provisions that were inapplicable, without causing the slightest comment. For instance, no comment had been made, either in the Commission or at the Vienna Conference, on the provision in article 20, paragraph 3, of the Vienna Convention which provided that "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." That provision could not be applied as treaty law, because a treaty between States could not bind organizations which were not parties to it. Furthermore, the Vienna Convention formally proclaimed that

treaties had no effect for third States. That meant that the rule stated in article 20, paragraph 3, would become a customary rule, since it could not be applied by treaty machinery. It would be remembered that the draft articles on succession of States in respect of treaties had given rise to similar difficulties. Obviously, therefore, the Commission could not hope to solve the problem of the relationship between two independent conventions simply by means of treaty machinery.

15. With regard to Mr. Ushakov's comment, which had been endorsed by several other members of the Commission, he explained that he had started from the assumption that most of the articles in the future convention would apply both to treaties between States and international organizations and to treaties between international organizations, whereas Mr. Ushakov thought it wiser for the time being to adopt a text that would make it possible to distinguish, where necessary, between those two classes of treaty. He was not changing his position, but in the interests of clarity and precision, and to reserve the future, he submitted to the Commission an amended text for the article, which he hoped would satisfy Mr. Ushakov and those who, like Mr. Hambro, would prefer a simpler text. The amended text read:

The present articles apply

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

(b) to treaties concluded between international organizations.

16. The Commission would thus only need to refer to treaties covered by sub-paragraphs (a) and (b) of article 1, or by one or other of those sub-paragraphs, depending whether it wished to refer to all treaties covered by the present articles or to one or other of the two classes of treaty covered.

17. The CHAIRMAN said that the discussion on article 1 was concluded and suggested that the article should be referred to the Drafting Committee.

*It was so agreed.*²

18. The CHAIRMAN suggested that, in order to save time, the Special Rapporteur should introduce the remaining four articles of his draft together.

19. Mr. USHAKOV supported that proposal.

20. Mr. KEARNEY said that he would prefer additional meetings to the adoption of procedure that would result in a confused mass of comment being transmitted to the Drafting Committee. He suggested that the Commission should take up the remaining articles one by one, and that members should refrain from making comments unless they were submitting a specific proposal.

21. Mr. TSURUOKA said he would like to hear the Special Rapporteur's views on the matter.

22. Mr. REUTER (Special Rapporteur) reminded members that he had on several occasions advocated a change in the Commission's methods of work and had suggested the possibility of speeding up discussion. He

was therefore quite willing to try the experiment suggested by the Chairman, and would leave it to the members of the Commission to judge its success. His own view was that the suggested method could well be applied. Of the four remaining articles, article 6 was the most important and the one that raised most problems; in so far as the other articles were of interest, they simply led up to article 6 and in any case only called for relatively straightforward decisions.

23. The CHAIRMAN asked Mr. Kearney whether he was prepared to agree to the simplified method.

24. Mr. KEARNEY said he was willing to do so.

ARTICLES 2, 3, 4 AND 6

25. The CHAIRMAN invited the Special Rapporteur to introduce the remaining articles of his draft, which read:

Article 2

Use of terms

1. For the purposes of the present articles:

(a) "treaty concluded between States and international organizations or between two or more international organizations" means an international agreement concluded between States and international organizations or between two or more international organizations in written form and governed principally by general international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

[(b) and (c)]*

(d) "reservation" means an unilateral statement, however phrased or named, made by a State or by an international organization, when signing, ratifying, accepting or approving a treaty concluded between States and international organizations or between two or more international organizations, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

(e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty; "negotiating organization" means an organization which took part, as a potential party to the treaty, in the drawing up and adoption of the text of the treaty;

(f) "contracting State" or "contracting organization" means a State or organization which has consented to be bound by the treaty, whether or not the treaty has entered into force;

[(g) and (h)]*

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

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

Article 3

International agreements not within the scope of the present articles

The fact that the present articles do not apply to international agreements concluded between international organizations and subjects of international law other than States or international organizations, or to agreements between States and international organizations or between two or more international organizations not in written form, shall not affect:

(a) the legal force of such agreements;

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

² For resumption of the discussion see 1291st meeting, para. 4.

* No provision corresponding to the Vienna Convention included; see report (A/CN.4/279), preface, para. 5.

(c) the application of the articles to the relations between States and organizations or to the relations of organizations as between themselves under international agreements to which subjects of international law other than States or international organizations are also parties.

Article 4

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between States and international organizations or between two or more international organizations would be subject under international law independently of the articles, the articles apply only to such treaties which are concluded after the entry into force of the present articles with regard to such States and organizations.

[Article 5]*

Article 6

Capacity of international organizations to conclude treaties

In the case of international organizations, capacity to conclude treaties is determined by the relevant rules of each organization.

26. Mr. REUTER (Special Rapporteur) said that paragraph 1 (a) of article 2 added two useful, though perhaps not indispensable qualifications to the corresponding wording of the Vienna Convention: the phrase “governed by international law” had been amended to read “governed principally by general international law”. The first addition was intended to solve a problem that might arise when a conventional act binding an international organization to a State or to another international organization was subject simultaneously to international law and to the national law of a State. The problem might equally well arise in the case of treaties between States covered by the Vienna Convention. Indeed, it often happened that a legal situation governed as a whole by international law was in some respects subject to rules of national law, through the mechanism of *renvoi*. The question was really very simple: any conventional act whatever must be subject, principally, to a specific legal system—international law or national law. If it was subject to national law, it was a contract; if it was subject to international law, it was an international agreement or a treaty. The practical effect of that distinction might not be very important for treaties between States or between States and international organizations, but it was useful for agreements concluded between international organizations and private persons or other international organizations. Lack of precision on that point could raise difficulties, as in the arbitration case cited in his report. Hence it was essential to determine whether a conventional act was subject principally to national law or to international law.

27. Unlike the first additional qualification, the second, specifying “general” international law, applied only to agreements involving international organizations. He had considered it useful because, in the case of treaties between States, when the Vienna Convention specified that the term “treaty” meant an international agreement governed by international law, there was no possible ambiguity; it was obviously general interna-

tional law that was meant. In the case of an international organization, on the other hand, one might be dealing with a specific phenomenon. For each international organization had its own law, which was laid down in its constituent instrument, but also included elements of varying scope depending on the organization—agreements concluded with States or with other international organizations, rules of procedure, or sometimes even quasi-legislative enactments. It was therefore conceivable that an international organization might make some conventional acts subject to the régime of general international law, and it was to those conventional acts that the draft articles applied. But it was also conceivable that an international organization might make a conventional act subject principally to its own legal régime. That would mean that when an organization concluded an agreement with a member State, that act came under a special legal régime which was that of the organization, so that the agreement was subject not only to the constituent instrument, but also to all the rules making up the law of the organization. That was the case in the European Communities, which had their own law—or “derivative law”—and specialists in community law, included the judges of the Court of Justice of the European Communities, accepted that hypothesis. On the other hand, when international organizations were asked whether they were aware of the problem, their replies, on the whole, showed great surprise, if not total incomprehension. He nevertheless believed that that hypothesis would be less surprising in the light of the agreements concluded by the financial agencies with certain States, since those agencies had established a whole body of rules, directives and internal practices which were deemed to govern directly all agreements they concluded. Another example was the agreements concluded between the United Nations and certain States on the operation of an emergency force, which presupposed the application, not only of the Charter, but of a whole body of United Nations law consisting of rules, decisions and various other provisions drawn up by the Secretary-General. He admitted that the concern which had prompted him to add the word “general” to the text of the Vienna Convention perhaps rather anticipated the future, but he considered it important and it was relevant to the case of international organizations.

28. He had no comments to make on paragraph 1 (d) of article 2, which had been taken direct from the corresponding provision of the Vienna Convention.

29. Paragraph 1 (e) seemed to require explanation. The corresponding provision of the Vienna Convention defined the term “negotiating State”; the definition in the draft articles should therefore include a “negotiating organization”. But States took part in the negotiation of treaties to which they were to become parties, whereas organizations took part in the negotiation of treaties which would remain treaties between States and to which they would never be parties. In modern practice, international organizations participated in various ways—through their secretariat, specialized bodies or officials—in the drafting and adoption of treaties between States. That practice was followed not only by the

* No provision corresponding to the Vienna Convention included; see report (A/CN.4/279), preface, para. 5.

United Nations, but by all the specialized agencies, in particular, the International Bank for Reconstruction and Development. In that sense, an organization could be said to take part in the negotiation of a treaty between States. But the case contemplated in the draft articles was solely that of participation by an organization in the preparation of a treaty to which it was to become a party.

30. Paragraph 1 (f) required no comment.

31. Paragraph 1 (i), which reproduced verbatim the corresponding provision of the Vienna Convention, called for no comments as to drafting, but he wished to draw the Commission's attention to the special importance of the proposed definition in the context of the present draft. Like the Vienna Convention, and for the same reasons, his draft did not attempt to define an international organization. He had also refrained from taking up the problem of entities which formed part of an organization while retaining a certain individuality. Indeed, he preferred not to deal with the problem of subsidiary or connected organs, since the status of such special bodies depended on the internal constitutional law of each organization and it would be very dangerous to lay down general rules on the subject.

32. He reminded the Commission, however, that, in the draft articles on the representation of States in their relations with international organizations, which was to be submitted to an international conference in 1975, it had adopted a different solution by deciding to confine its draft to certain organizations of a universal character³—mainly the organizations of the United Nations system. He had been aware of the problem which that difference in approach might create and had taken up a very categorical position on the matter in the light of the debate at the Commission's twenty-fifth session.⁴ In his opinion, two entirely different situations were involved. In the case of the draft articles on the representation of States, the Commission had tried, by choosing a clearly-defined group of international organizations, to establish a kind of uniform law for a group of organizations which had common features, although each had its own law. In the case of treaties between international organizations, however, the situation was entirely different, since no treaty to which an international organization was a party could derive its régime from the law peculiar to that organization. To assert that it could do so would be to deny the international character of the treaty. For whether it was a treaty between an international organization and a State or one between two international organizations, the ultimate source of the treaty's binding force and of its régime was foreign to the law peculiar to each organization, except in regard to rules such as those concerned with the formation and expression of consent to be bound.

33. Paragraph 2 of article 2 simply reproduced the corresponding provision of the Vienna Convention and therefore raised no difficulties, except perhaps one of vocabulary. Could one speak of the "internal law" of an

international organization, as the Vienna Convention spoke of the "internal law" of a State, or was it preferable to use the expression "law peculiar to any international organization"? In its work, the Commission had occasionally used the expression "internal law of an international organization", but the word "internal" had a certain meaning and applied rather to the law of States. He had therefore chosen the expression "law peculiar to any international organization". That choice was the logical outcome of his initial position that general international law must be distinguished from the special international law of an organization.

34. Article 3 raised some rather difficult drafting problems and he hoped that the Drafting Committee would approach them in the light of the new text proposed for article 1. Article 3 raised the problem of subjects of international law other than States, referred to in article 3 of the Vienna Convention, which were also not international organizations. For as the Vienna Convention dealt only with agreements between States to the exclusion of other subjects of international law, and the draft articles dealt only with agreements between international organizations or between States and international organizations, there remained another class of agreements: those involving subjects of international law which were neither States nor international organizations. Would such agreement be governed by the Vienna Convention or by the draft articles? He had decided to bring some of those agreements under the draft articles and some under the Vienna Convention. That solution seemed the most logical, as the Vienna Convention would enter into force before the draft articles and would have a wider application.

35. Draft article 4 called for no comment.

36. Article 5 of the Vienna Convention could obviously have no equivalent in the present draft. It was on that article, however, that he had based the wording used in article 6.

37. The comments of members of the Commission showed that draft article 6 was the most important article. He had not expressed his personal opinion in the text, but had tried to find a wording that would reconcile the two trends of opinion in the Commission, both of which were perfectly tenable.

38. The position he had taken in article 6 was justified on theoretical grounds. For whereas States were equal from the point of view of international law and all, without exception, had the same capacity to conclude treaties, the same was not true of international organizations, which were creations resulting from a discretionary act by States and, consequently, were highly individual entities characterized by a fundamental inequality; each was shaped individually by the will of its founders and then of its members, and entirely governed in regard to its structure and powers by its constituent instrument. Thus the relevant rules of each organization might or might not include, depending on their character, a "practice" which could complement or modify its constituent instrument. In fact, however, it would be difficult to find an instance of an international organization which excluded "practice" from the sources of its

³ See *Yearbook ... 1971*, vol. II, Part One, p. 286, article 2.

⁴ See *Yearbook ... 1973*, vol. I, pp. 187-189 and 198-210.

law. In attempting to define the capacity of international organizations to conclude treaties, it was therefore necessary to take into account, not only established practice at the time of the entry into force of the draft articles, but also potential practices. It would be wrong to accept past practice and exclude future practice, as that would exclude custom.

39. He was aware that the wording he proposed would not entirely satisfy those who wished to give international organizations more importance and prestige. While it was true that it was the relevant rules of each organization that conferred treaty-making capacity upon it, it was equally true that, if the law peculiar to each organization had that effect, it was by virtue of a general rule of international law authorizing it. The bald statement in draft article 6 might therefore be softened by adopting the alternative he had proposed in paragraph (20) of his commentary to the article (A/CN.4/279). That wording would emphasize that the international community now recognized that States considered themselves to be vested with a new power: that of creating other subjects of international law. He must warn the Commission, however, that the alternative text might cause many practical as well as theoretical difficulties. The participants in the Vienna Conference had been unable to agree whether it was international law or federal constitutions that gave the member states of federal unions the right to conclude treaties, and the relevant provision had been deleted.⁵

40. Mr. USHAKOV said that following the example of the draft articles on the representation of States in their relations with international organizations, the present draft might perhaps define the expression "Organization" as meaning "the international organization in question".⁶

41. In draft article 2, paragraph 1 (a), treaties concluded between States and international organizations and treaties concluded between international organizations were included in the same definition, whereas they were two quite distinct categories of treaty which it would have been better to define separately. As to the expression "general international law", the Special Rapporteur had explained that it related only to treaties concluded between international organizations. That explanation was necessary, since the provision in question, which had been drafted by the method of synthesis, gave the impression that both treaties concluded between States and international organizations and treaties concluded between international organizations were governed by general international law. That was one of the many drawbacks of that method.

42. As he had done in the case of article 1, he suggested that the words "two or more international organizations" should be replaced by the words "international organizations".

43. In saying that the treaties referred to in article 2, paragraph 1 (a) were governed "principally" by general

international law, the Special Rapporteur seemed to have been trying to remove a doubt which might arise not only in regard to those treaties, but also in regard to treaties between States, to which the Vienna Convention applied. In his (Mr. Ushakov's) view, treaties could only be governed by international law. On the other hand, certain situations resulting from treaties could be governed by other branches of law. For instance, situations governed by the law of the air were sometimes subject to rules of public international law and sometimes to rules of private international law, in other words—through the mechanism of *renvoi*—to internal law. It was by a legal fiction that it was possible to speak of the law of the air as a single whole, even though the rules of public international law and of internal law, of which it was composed, were quite separate. Although certain situations deriving from treaties could be governed either by public international law or by internal law, treaties themselves could not be governed "principally" by international law: they were governed entirely by international law. The addition proposed by the Special Rapporteur was not acceptable, especially as it would have the indirect effect of modifying the Vienna Convention on a point on which that Convention was perfectly clear.

44. With regard to the words "general international law", which the Special Rapporteur considered to be applicable only to treaties between international organizations, it should be remembered that regional international law might perfectly well be applied to such treaties if it was not in conflict with general international law. For example, the States members of the Common Market or of the Council for Mutual Economic Assistance might well draw up rules of regional international law that were more detailed than the rules of general international law. Hence there was no reason why treaties between international organizations should be made subject to general international law only.

45. The method of synthesis gave rise to some particularly thorny problems in paragraph 1 (d). There, the words "signing, ratifying, ..." etc., applied both to a State and to an international organization. While it was possible to say that States signed, ratified, accepted or approved a treaty, the same was not true of international organizations. It should first be established how international organizations could become bound by international treaties, and then the distinctions to be made in that respect between States and international organizations should be introduced into the provision. That suggested formidable difficulties, which were not brought out either in the text or in the commentary on it. Perhaps the Commission should leave paragraph 1 (d) aside provisionally, and await suggestions from the Special Rapporteur on the question how an international organization could become a party to a treaty.

46. In defining the expression "negotiating organization" in paragraph 1 (e), the Special Rapporteur had introduced the notion of a "potential party" to a treaty. He did not think that was necessary, since it must be presumed that any organization which had taken part in both the drawing up and the adoption of the text of a treaty intended to become a party to that treaty. In

⁵ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (1969), Summary Records (United Nations publication, Sales No. E.70.V.6) pp. 6-15.

⁶ See *Yearbook ... 1971*, vol. II, Part One, p. 284.

those circumstances, it had participated in the negotiation of the treaty on the same footing as a State. When an organization took part only in drawing up the text of a treaty, as the Commission did, it was not normally expected to participate in negotiating the treaty and to become a party to it.

47. With regard to paragraph 1 (f), which closely followed the corresponding provision in the Vienna Convention, he wondered whether an error had not crept into both of those provisions. He could not agree that a State or an international organization bound by a treaty already in force could be a "contracting State" or a "contracting organization"; they could only be parties to such a treaty. Moreover, article 2, paragraph 1 (g) of the Vienna Convention provided that "party" meant "a State which has consented to be bound by the treaty and for which the treaty is in force". That point needed clarification. As he interpreted them, the terms defined in the paragraph 1 (f) should apply only in the case of a treaty that was not yet in force.

48. As to paragraph 1 (i), it might be advisable to explain in the commentary that the expression "international organization" meant a lawful intergovernmental organization. Whereas the question of lawfulness did not arise in the case of States, an international organization must be lawful in order to be regarded as a subject of international law. It must have been constituted in accordance with the peremptory norms of general international law, or *jus cogens*.

49. Draft article 3 was entirely acceptable, but its wording should be changed so as to cover every conceivable case. In particular, provision ought to be made for the possibility of an international agreement concluded between a State and an international organization, in which yet another subject of international law, such as a belligerent party, participated.

50. He had no comments to make on article 4, except that the changes he had suggested in article 1, should also be made in it.⁷

51. It followed from article 6 that an international organization might not have the capacity to conclude treaties, since that capacity was determined by the relevant rules of each organization. In his view, every international organization had that capacity, and could not exist without it; for international organizations were necessarily attached to the territory of a State and had to conclude a headquarters agreement with that State, which might, of course, be a tacit agreement, not a written treaty. Hence it was not the treaty-making capacity as such that was in question, but the exercise of that capacity, and that was determined by the nature of the activities of the organization concerned. For example, the United Nations Educational, Scientific and Cultural Organization (UNESCO) could not conclude a commercial treaty. He therefore doubted whether article 6 was necessary. If it was retained, it should perhaps stipulate that every international organization possessed capacity to conclude treaties, but that the exercise of that capacity had limitations.

52. Mr. TAMMES said that he would have liked to have given his views on several of the articles, but would confine his remarks to article 6 because of the shortage of time and his own inability to attend the 1277th meeting, at which the present discussion was to be continued. He had been confirmed in his impression that the confrontation with the Vienna Convention on the Law of Treaties would face the Commission with a number of problems which it would have preferred to postpone until the practical need for a clear answer arose.

53. He was inclined to agree with Mr. Ushakov's approach. Article 6 of the Vienna Convention had not raised any fundamental problems at the Vienna Conference on the Law of Treaties, but it did raise some important issues in the present context, as was shown by the long commentary in the Special Rapporteur's third report. In particular, the origin or source of capacity and the whole question of the hierarchical structure of international law had attracted the attention both of the Commission itself and of the Sixth Committee of the General Assembly. There could be little doubt that those problems had not been in the minds of the negotiators of the agreement concluded in 1875 by the International Bureau of Weights and Measures with its host country, France, which was mentioned in the Special Rapporteur's admirable first report (A/CN.4/258, para.6).⁸ Those responsible for that agreement had simply taken action in the matter. The lesson to be drawn from such situations was that the action of concluding a treaty always preceded any recognition of the capacity of the organization concerned. The main point, however, was that the capacity of the organization could not be provided for by the internal law of the organization itself.

54. For those reasons, he had difficulty in accepting the proposed text of article 6, which entirely ignored the external element implicit in any general reference to international law like that on which article 6 of the Vienna Convention was clearly based. The text was thus incomplete as it stood and could not be accepted as a true statement of the position. In all legal systems, capacity was conferred by an outside source. A legal entity could never invest itself with general capacity; it could only limit that capacity. In the case of an international organization, that meant that the organization determined, by its own rules, its own competence and that of its organs.

55. It was significant that the opinions of the International Court of Justice cited in paragraph (16) of the commentary spoke of the "competence" required to discharge certain functions and of the "powers" conferred upon an organization, but did not refer to "capacity".

56. He therefore preferred the alternative language for draft article 6 submitted by the Special Rapporteur in paragraph (20) of the commentary. He had some misgivings, however, even about that wording, and thought the Commission might once again be entering the

⁷ See previous meeting, para. 32.

⁸ Reproduced in *Yearbook ... 1972*, vol. II.

treacherous field of semantics by attempting to deal, in one and the same article, with the two problems of capacity and competence. Perhaps it would be desirable to omit the last part of the text, which was not strictly necessary and for which there was no parallel in article 6 of the Vienna Convention.

57. Mr. TSURUOKA said that, generally speaking, he approved of all the provisions of the draft, subject to certain drafting amendments. In particular, he was in favour of retaining article 6, despite the practical difficulties it might cause with regard to the recognition, by States or international organizations parties to the future convention, of the capacity of international organizations to conclude treaties. But as the article in no way prejudged questions relating to the recognition of that capacity by other subjects of international law, it should not give rise to insuperable difficulties.

58. Mr. CALLE Y CALLE said it was essential to retain the key article 6 in the draft. It did, however, raise the problem of the origin or source of capacity. There could be no doubt that an organization, when it entered into an agreement, acted in virtue of an existing capacity, even though that capacity was not set forth in any rule. The question that arose was whether article 6 should purport to attribute capacity to international organizations or simply recognize an existing capacity and possibly limit its scope. On that point, he was strongly of the opinion that international organizations had the capacity to conclude treaties; it was only the exercise of that capacity which was subject to regulation or limitation.

59. Consequently, it was not sufficient for article 6 to refer to the "relevant rules" of the organization; he suggested an expanded formula such as "the constituent instrument and the other relevant rules of the organization". To ascertain the source of the capacity, it was necessary to refer to the constituent instrument of the organization. The other rules related to the exercise of the capacity, the limits of which would depend on the nature and purposes of the organization.

60. In conclusion, he suggested that the Drafting Committee should frame a more elaborate rule for inclusion in draft article 6, introducing the idea of the "extent of the capacity" of international organizations, which was to be found in the Special Rapporteur's alternative text.

The meeting rose at 1 p.m.

1276th MEETING

Wednesday, 12 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martinez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

Tributes to the memory of Mr. Milan Bartoš

1. The CHAIRMAN declared open the special meeting which the Commission had decided to hold to honour the memory of its dear friend and distinguished colleague, the late Milan Bartoš. He reminded members that eloquent tributes had already been paid to Mr. Bartoš at the first meeting of the present session by Mr. Castañeda, the Chairman of the Commission's twenty-fifth session, and by the Legal Counsel, representing the Secretary-General, who had conveyed to the Commission not only his own and the Secretary-General's condolences, but also those of the whole Secretariat of the United Nations. On the proposal of the Senior Legal Officer in charge of the Seminar on International Law, the tenth session of that Seminar had been entitled the Milan Bartoš Session. He wished to take that opportunity of expressing his own sorrow at the loss of one who had been a close personal friend of his and indeed of all the members of the Commission.

2. Milan Bartoš had been born at Belgrade in 1901, and had graduated from the Faculty of Law of Belgrade University in 1924. In 1927, he had taken the French Degree of Doctor of Law (*Diplôme d'Etat*) at Paris. He had returned to Belgrade University in 1928, and in 1933 had risen to the position of Associate Professor of the Faculty of Law, becoming a Professor in 1940 and the Dean of the Faculty in 1945. He had personally suffered the horrors of the Second World War as a prisoner of war in a concentration camp—a dreadful experience which had left an indelible mark on him and which helped to explain his intense and unrelenting hostility to all forms of fascism, nazism and tyranny. His high dedication to the service of his country was exemplified by the many distinguished posts he had held. He had joined the Yugoslav Foreign Service in 1946 and been appointed Ambassador in 1950. He had been in charge of many missions and had served his country on numerous delegations, including the Yugoslav delegation to the United Nations from 1946 to 1958. He had held the office of Chief Legal Adviser to the Yugoslav Secretariat of State for Foreign Affairs from 1949 to 1962.

3. His great patriotism, and his devotion to the ideas of socialism and to the Socialist Federal Republic of Yugoslavia had been admired by all his countrymen, and Yugoslavia had honoured him with some of its highest decorations and prizes for his outstanding services. He had been a member of the Permanent Court of Arbitration, of several Academies and of many learned and scientific bodies, including the Institute of International Law, and had been made Honorary President of the International Law Association in 1956. His many learned books, articles and studies were familiar to all.

4. It was, however, as a dedicated and forceful advocate of the codification and progressive development of international law that Milan Bartoš had been best known. He had been one of the "founding fathers" of the Commission, having served on the Committee on the Progressive Development of International Law and its Codification in 1947. His long and dedicated service to the Commission, which had begun in 1957, would

always be remembered by all the members. He had served as Special Rapporteur for the topic of special missions, and also as Rapporteur, First Vice-Chairman, Second Vice-Chairman and Chairman of the Commission. He had thus had the remarkable distinction of serving in every office of the Commission, a fact which showed the deep respect in which he had been held by his colleagues for his vast knowledge of the law and his outstanding intellectual abilities. The Commission owed much of its success to the skill and visions he had brought to it during his seventeen years as a member.

5. The Commission had lost a man whose spirit and personal qualities set him apart. He was a truly cultured man, gracious and warm, a friend to all. His dedication and, indeed, love for peace, for international law and for humanity, would stand as an example to all. The Commission, his country and the whole international community would miss him greatly, but the greatest loss had been suffered by his faithful and devoted wife who had been his friend, companion and supporter for many years. He wished to convey his sincere condolences to Mrs. Bartoš, who was present at the meeting.

6. Bearing in mind the exceptional achievements of Milan Bartoš, he called on the members of the Commission to dedicate themselves to following his remarkable example so that his memory might live.

7. Mr. EL-ERIAN said that, in their contributions to the work of the Commission, members differed according to their background and outlook, their doctrinal approach and their practical experience. Some enriched the doctrinal value of the proceedings, while others drew upon a wealth of diplomatic experience and practice. Each member contributed his share, in his own way, to the harmonious mosaic and rich repertoire of the Commission. But the contribution of Milan Bartoš had been colossal and unique.

8. In contributing his modest share to a day of remembrance and homage to a great jurist, diplomat and fighter for peace and for the rule of law, but above all to a man, he wished to single out three aspects of the immense contribution made by Milan Bartoš to the Commission's work. In the domain of doctrine, his statements had always been profound and enriching. In the domain of practice, his incomparable memory, which had enabled him to cite diplomatic correspondence, arbitral awards and judicial cases, had earned him the name of "the walking encyclopaedia".

9. The colossal volume of his contribution was matched by a second aspect: the pioneering character of his ideological approach. In a recent book published by a number of his students and edited by a member of the Commission, Mr. Šahović, it was recorded that as early as 1956, and especially at the Dubrovnik session of the International Law Association, he had been working for codification of the principles of international law relating to peaceful co-existence, which the Sixth Committee of the General Assembly had only taken up in 1960. That work had been crowned in 1970 by the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, annexed to General Assembly resolution 2625

(XXV). His work as Special Rapporteur on the topic of special missions had likewise been of a pioneering character, and his lectures at the Hague Academy of International Law had focused early attention on the new phenomenon of *ad hoc* diplomacy.

10. The third aspect of Milan Bartoš's contribution was the fighting and forceful expression of his ideas. He had fought for his ideas because he knew from personal experience, both as a prisoner of war and as a fighter for freedom, the meaning of violations of the basic rules of conduct of States.

11. He would always be remembered as one of the founding fathers of the Commission, who had later become one of its most faithful and loyal sons.

12. Mr. AGO said he well remembered the day in 1957 when, for the first time, he had taken his seat in the Commission beside Mr. Bartoš. He had been struck at once by his neighbour's human qualities and had acquired a deep admiration and respect for him, accompanied by feelings of sincere affection. In return, Mr. Bartoš had shown him very great and constant friendship. They had met regularly at the sessions of the Commission; they had represented the Commission in the General Assembly; and they had come together again with equal pleasure at the Institute of International Law and the Academy of International Law at the Hague.

13. The most striking characteristic of Mr. Bartoš had been his exceptional culture. When he had spoken in the Commission, his statements had been replete with historical references, and listeners had been impressed by his erudition, his memory and his inestimable contribution to the Commission's work. Endowed with an outstanding scientific intelligence and trained in the best European schools of law, he had been extraordinarily devoted to the Commission. The submission of his report on special missions had been for him an opportunity to show how much he valued that branch of diplomatic law and how pleased he was at the progress it was making towards codification.

14. One of Mr. Bartoš's many qualities had been his courage, which he had proved not only at the time of his imprisonment during the war, but on many other occasions and even in the Commission. He had never taken a position in a debate for reasons of mere expediency. He had defended an idea only when he had been deeply convinced of its rightness, and, at the risk of offending his best friends, he had spoken only according to his conscience; and when he had supported ideas which he found good, he had done so with great force. More than once, when he (Mr. Ago) had joined battle in the Commission to vindicate his own ideas, he had afterwards turned to Mr. Bartoš to see if he would support him. Mr. Bartoš had been rather like the good giant in the fable who helped the child in trouble. He had always been able to rely on Mr. Bartoš's support when the latter had approved of his ideas, and that support had been invaluable, because the strength of his conviction had generally carried the day. He had sometimes become angry, but his anger had always been of short duration and he had never hesitated to acknowledge his mistakes or to apologize to those whom he had misunderstood.

15. Before his period of incarceration in a Nazi concentration camp, Mr. Bartoš had been in a prison camp near Parma. When he had mentioned that period, it had never been to recall the suffering he had endured, but to emphasize the ties of friendship he had formed with the local population—with a people whose language he had learned and whose great human qualities he had admired regardless of the régime to which it was subjected.

16. His only fault had been not to take care of himself; and as if by a miracle, at a time when his state of health had been most precarious, Mrs. Bartoš had appeared and had forced him to do so. Thanks to her, the Commission had been able to benefit from his valuable advice for many more years. Now that he had gone, his colleagues constantly wondered what his opinion would have been on particular questions. In the Commission, Mr. Bartoš was still alive and would live for ever.

17. Mr. ŠAHOVIĆ said he was well aware that to pay a fitting tribute to the person and work of Professor Milan Bartoš in the International Law Commission was an extremely difficult task. As a member of the Commission since 1957, as a participant in the work of the Sixth Committee of the General Assembly since 1946 and in the major codification conferences of the 1960s, and as a member of the Committee on the Progressive Development of International Law and its Codification, Milan Bartoš had identified himself to a great extent with the results achieved by the United Nations in the legal sphere. Having been his pupil, colleague and friend, he well knew the friendship, full of that human warmth and devotion which were characteristic of him, that Milan Bartoš had felt for the members of the Commission and its secretariat. Those things were well known, and, in referring to them, he thanked the Commission for having decided to devote a meeting to tributes to the memory of Professor Bartoš.

18. In considering his contribution to international law, the point that should be mentioned first was the exceptional importance which Milan Bartoš had attached to the Charter of the United Nations and its role as a fundamental source of positive international law. In all his studies and articles, he had developed that thesis, which was now almost universally accepted and formed the foundation of contemporary international law. Having understood the dialectic of the establishment and operation of the rules and institutions of international law, he had carefully followed the application of the Charter and the changes which had taken place in the machinery of the United Nations. He had reacted to every innovation, endeavouring to demonstrate that, while respecting the letter of the Charter, it was essential to take account of the necessities and requirements of life, and to interpret the Charter on the basis of its context, in particular its purposes and principles, which for him had remained the ultimate criteria for determining the direction in which international law should be developed. In that connexion, Milan Bartoš had never forgotten the interdependence of politics and law, which many jurists had not yet been prepared to accept during the early post-war years, and he had liked to speak of

the “indissoluble marriage between politics and law”—an expression which had become famous.

19. In assessing Milan Bartoš's contribution to the work of the legal organs of the United Nations, it was impossible not to mention also his statements and studies concerning the adoption of a definition of aggression. Now that the work on that question was about to be concluded, it could be recalled that, speaking on behalf of the Yugoslav Government, he had been one of the authors of the “mixed” definition formula.

20. Milan Bartoš had been firmly convinced that codification and progressive development were the best means of consolidating the rules of international law and adapting them to reality, and also of strengthening the role of law in the international community. He had seen in codification and progressive development an effective instrument in the campaign for the democratization of international law, the sovereign equality of all States, large and small, regardless of their political systems, and the elimination of the vestiges of colonialism.

21. One of his remarkable qualities had been his capacity to translate theoretical thought into practical action. As President of the Yugoslav International Law Association, he had succeeded in organizing the Conference of the International Law Association at Dubrovnik, in 1956, and in having placed on its agenda, as a subject for study, the question of the legal aspects of peaceful and active co-existence. It had not been until the Tokyo Conference, in 1964, that the International Law Association had completed its study of that question. At the time, that had been an outstanding achievement, because the cold war had been in progress and the world had only just begun to seek the ways of *détente*. The Dubrovnik Conference, over which Milan Bartoš had presided, had contributed effectively to the process of *détente*; it had been at that Conference that, for the first time in many years, jurists from Western countries had met jurists from the Soviet Union and other socialist countries including the People's Republic of China.

22. During his long membership of the International Law Commission, Milan Bartoš had succeeded in representing harmoniously his own ideas, the point of view of Yugoslav doctrine and the aims of Yugoslav foreign policy. His country had paid a tribute to his personal qualities and to his work as a teacher, a man of learning and a diplomat. He (Mr. Šahović) was convinced that, thanks to his contribution to the work of the International Law Commission, Milan Bartoš would be accorded a place of honour in the history of Yugoslav doctrine on international law.

23. Mr. KEARNEY said that in his country the expression “a little big man” was used to describe someone who, though small in size and not really strong, could, because of his character and force of will, achieve results beyond the reach of other men. He would say that Milan Bartoš had been a “big big man” because of his physical, intellectual and moral dimensions. All those who had had the privilege of working with him would always remember his bigness in every respect. As far as he (Mr. Kearney) was concerned,

what had impressed him most had been the amazing range of erudition of a scholar who, during the discussion of any question, could produce an enormous wealth of historical precedent in a most fascinating manner.

24. It had been his good fortune to join the Commission in 1967, during the final phase of the work on special missions, when as Special Rapporteur, Mr. Bartoš had been at his very best in moving through the Commission the important set of draft articles which had later become the 1969 Convention on Special Missions.

25. It could be said that, within the ranks of the Commission, Mr. Bartoš had himself performed a special mission. The members came from many varied schools of thought and of social, economic and political belief, and it was at times difficult to reconcile the conflicts which resulted from those differences. It had been the special mission of Milan Bartoš to provide a bridge which had enabled members to cross the gaps separating them and reconcile their differing views. It was significant that he had succeeded in doing so without ever compromising his own fundamental and firmly held beliefs. He had been able to do so not only because of his unique range of legal knowledge, which had always so much impressed his colleagues, but even more because of his devotion to the ideal of world law. All members would miss him greatly, remember him always and remain grateful to Mrs. Bartoš, whose loyal support of her husband had rendered such great service to the Commission.

26. Mr. REUTER described the first occasion—in 1964—on which he had seen Mr. Bartoš in the Commission. Having hung his celebrated Panama hat on the peg, Milan Bartoš had walked into the conference room, greeted his colleagues and all the members of the Secretariat, and taken his seat beside Mr. Ago and Mr. Amado; he had obviously been pleased to be there. He had then taken out his newspaper and, out of a kind of affectation, had pretended to interrupt his reading only with reluctance once the meeting had begun. He had lighted a cigarette from which a cascade of white ash had slowly rolled down his jacket, attesting to his contempt for minor mishaps, and his certainty that there were people at his side who would look after him and deliver him from mundane cares. When he had spoken, it had been slowly and deliberately, in a voice whose range was remarkable; sometimes he had spoken so low as to be hardly audible. He would twist his thumb and forefinger in a familiar gesture, as if taking apart the works of a clock. Sometimes his voice would rise to express great principles or an idea he had held dear.

27. Mr. Bartoš could speak at length, for his knowledge had been universal. He (Mr. Reuter) had recently learned from one of Mr. Bartoš's pupils that he had never taught international law, but only private law.

28. Why had Mr. Bartoš seemed to be so happy to be participating in the Commission's work? Because he had been a believer: he had believed in justice and in the progress of law in absolute terms. His freshness and

faith had not been without merit, for he had known the reality of international life in all its aspects. If, with forefinger outstretched, he had sometimes violently attacked a member of the Commission, it had been because he had suspected him of denying justice in some way or defending some privilege; hatred of colonialism, love of *jus cogens*, but above all the excesses of the Great Powers could unleash his wrath. In surroundings where courtesy received a degree of priority that could not be accorded to sincerity, his outspoken probity had played a valuable part. He had spoken the French language with distinction. He had loved France; but not just any France, and he had made that quite clear.

29. None of all those characteristics had prevented him from having the tenderness of the strong. That tenderness he had devoted first of all to his faithful wife, whom he could not bear to be sick or absent; he had also shown it as soon as he had sensed sincerity in another. But why should Mr. Bartoš have been afraid of anything? Was he not a Yugoslav and a Serb?

30. Mr. TAMMES said that in recalling a life as rich and full of experience as Mr. Bartoš's had been, the exceptional place held by a personality such as his in contemporary intellectual and diplomatic life became clearly apparent. Having begun his career as a teacher at a number of European universities during the 1920s, he had for half a century taken an active part in events which had profoundly changed the political and legal structure of the world. Those experiences, combined with a prodigious memory, had made Mr. Bartoš a kind of personification of the continuity of international law. His remarkable memory had also been the source of a certain love of detail, he had often surprised the commission by citing historical cases unknown to its most erudite and specialized members. Although apparently rather remote from the subject of discussion, his examples drawn from practice had always proved pertinent in the end.

31. It was his liking for the exceptional case that had enabled him to prepare his draft on special missions—a living and fascinating subject. But it had not been only historical precedents which had interested him. He had followed closely, through his favourite newspapers, the details of day-to-day political life—during the Commission's discussions it was true, but without ever missing a word of them. Thus he had often given him (Mr. Tammes) detailed information on somewhat complex political events concerning his country.

32. It might be wondered how men like Milan Bartoš and Gilberto Amado had managed to be always present among the members of the Commission, even when they had not been able, for some time, to take part intensively in all the technical aspects of its discussions. It was probably because they had been not only good jurists, but also great characters, as Mr. Bedjaoui had so well put it.

33. For him, Professor Bartoš would always be a model of independence of mind—a mind always open to new and progressive ideas—and of belief in justice. He was happy to be able to express his great esteem for their late colleague in the presence of Mrs. Bartoš.

34. Mr. HAMBRO said that following those warm and eloquent tributes to Mr. Milan Bartoš, his contribution to international law and his work in the Commission, he wished to add a personal note.

35. All the members of the Commission had known that they had a treat in store when Milan Bartoš was about to speak at a meeting. His statements had been illuminated by his philosophical conception of law, history and politics and had invariably been enriched by illustrations drawn from his vast experience. Because of his truly staggering memory and colossal capacity for work, but also because of his personality, he had reminded one of Dr. Johnson, one of the greatest and most admired figures in English literary life 200 years ago. He had had the same compelling and forceful personality. Of his qualities, those that would be most cherished and constantly remembered in the Commission were his courage, endurance and rectitude, which had made him truly monolithic. He was a staunch and loyal friend whose memory would live very long and who illustrated well the words of a great English poet:

Yet meet we shall and part and meet again,
Where dead men meet, on lips of living men.

36. Mr. USHAKOV said that Mr. Bartoš's life, as a professor, ambassador and scholar had been very closely bound up with the history of the science of international law. The name of Milan Bartoš would appear in legal encyclopaedias among those of the great internationalists. He had been the glory of Yugoslav legal science and contemporary international law, and his outstanding works had won him high distinctions in his own country. Like many great men, he had been, in a way, a grown-up child, always kindly and loved by everyone. When he had been angry, his anger had never been taken for anything more than a child-like fit of temper, for it had not lasted.

37. He had always shown unqualified loyalty and devotion to the Commission. At the time of his death, which was felt by the Commission as a very great loss, he had been its senior member, not only in age, but also in length of service.

38. A teacher for nearly half a century, Mr. Bartoš had left behind him a number of students who now formed a large group of jurists and who would always be grateful for the knowledge he had imparted to them; he had been the real head of his country's school of international law. His scientific works included not only a treatise on international law in three volumes, which would remain one of the standard works on the subject, but also his drafts for the Convention on Special Missions. Those drafts had contributed both to the codification of contemporary international law on the topic and to its progressive development. For the application and interpretation of the Convention, States would inevitably have to refer to Mr. Bartoš's preparatory and subsequent work.

39. Mr. Bartoš had also been a great politician, who had worked to build the new socialist society in his country. Rich in experience gained at the head of the legal department of the Yugoslav diplomatic service, he

had given the Commission the full benefit of it by drawing frequently on his infallible memory.

40. Expressing his sincere condolences to Mrs. Bartoš, he assured her that her husband's memory would remain for ever present in the hearts of members of the Commission.

41. Mr. TABIBI said it was beyond the capacity of anyone to pay a really adequate tribute to Milan Bartoš. He had been an outstanding jurist and a pioneer of peace in the movement for a new legal order for the troubled world; he had worked for a more perfect system of law with worldwide participation to suit the new community of nations and the present generation, which was yearning for co-operation, international brotherhood and peace.

42. He had been a kind and faithful friend, a great scholar, a fountain of knowledge and, above all, a great patriot who had served his country in war and in peace; he had continued to serve it as a teacher, as a legal adviser, as a diplomatic negotiator and as a member of the Academy of Sciences, until his last breath.

43. It was a law of nature that all living beings sooner or later had to leave dear ones behind and move on toward the unknown, like a caravan or a silver river, until they reached their final destination. Moslems, and the faithful of all religions, believed that they would join the departed in a more permanent and peaceful life. Islamic mystics like Moulavi Balkhi (Rumi) and Farid-ud-din Attar had said in their immortal poems that mankind was always restless until it had completed its temporary journey on earth and joined the Creator, who was the permanent source of love, light, peace and happiness. But fortunate were those like Milan Bartoš who had left a good name behind them after a lifetime of service to their fellow men; for the prophet Mohammed—peace be upon him—had said that the best were those who were good to their fellow men.

44. He had first met Milan Bartoš when just beginning his career in 1948, in the early days of the United Nations at Lake Success. The Sixth Committee had then been the gathering place of many distinguished jurists, such as Amado of Brazil, Krylov of the USSR, Sir Benegal Rau of India, Rollin of Belgium, Spiropoulos of Greece, Manley Hudson of the United States, Lord Shawcross and Sir Gerald Fitzmaurice of the United Kingdom, and, of course, Bartoš of Yugoslavia. As a young jurist, it had been very thrilling for him to be in the company of those scholars of world renown and, since at that time the seats of Yugoslavia and Afghanistan had been next to each other, he had had the privilege of being the neighbour of Milan Bartoš during the meetings of the Sixth Committee and had felt like a sapling growing under the shelter of a great strong tree.

45. He had ever since been attracted by the philosophy of Milan Bartoš; they belonged to two traditionally non-aligned countries and their positions on every issue in the United Nations and at legal conferences had been similar. Milan Bartoš had believed firmly in the United Nations and its high principles, and had been dedicated to non-alignment; he had wanted the world to be fashioned under a new international law to serve the cause

of peace and justice. Their friendship had been further cemented in the Commission since 1962, at many international conferences and while he (Mr. Tabibi) had served as Ambassador of his country at Belgrade. Everywhere, in Yugoslavia and outside that country, he had seen evidence of the great esteem in which Milan Bartoš had been held for his depth of scientific knowledge of the law and his courage in fighting for peace and justice. He would always be remembered, not only by his beloved wife, but by all his countrymen and by the whole legal community throughout the world.

46. The Convention on Special Missions would remain as a permanent monument to an outstanding Special Rapporteur. It had been a fitting gesture to name the present session of the Seminar on International Law after him, because Milan Bartoš had believed in youth and trusted the present generation of jurists to shape a better international law that would fulfil the expectations of the contemporary community of nations. Milan Bartoš had departed, but the memory of his friendship, his ideals and his principles would always be present in the Commission, all of whose members shared in the deep grief of his devoted wife and his great country.

47. Mr. YASSEEN said that the death of Mr. Bartoš was a great loss for the international community and, in particular, for the Commission. He had always admired him as a great internationalist and valued him as an unusually devoted friend.

48. Mr. Bartoš had not been an internationalist like so many others: his learning had been infused with true humanism. He had not hesitated to abandon out-of-date techniques and support the solutions that were necessary for healthy change in the international community. He had been active in many international bodies, particularly international codification conferences and learned societies, such as the Institute of International Law. He had been listened to with the greatest respect, for everyone knew that he always had something new to say and a valuable contribution to make. In the Commission, he had been an inexhaustible source of information and had contributed a very wide and deep knowledge of international practice. With his astonishing capacity for analysis and synthesis, he had been as much concerned to defend his own views as to respect those of others.

49. His devotion to his ideals had been matched only by his devotion to his friends. His generosity had been exemplary, and his kindness of heart had caused him to lavish discreet advice on the new generation of lawyers, of whom he had been one of the best loved masters.

50. Despite his age, Mr. Bartoš had remained young in spirit. Until the end, he had urged the need to adapt the international legal order to the new facts of international life.

51. Both scientifically and personally, he (Mr. Yasseen) owed much to Mr. Bartoš and it was on his advice that he had stood as a candidate for election to the Commission in 1960.

52. Expressing his heartfelt sympathy to Mrs. Bartoš, he said that her husband's great virtues and human

qualities, his exceptional scientific achievements and his outstanding services to the international community would assure him of a high place among the immortals.

53. In the absence of Sir Francis Vallat, and at his request, he referred to the lasting ties of close collaboration which Sir Francis had maintained with Mr. Bartoš, and on his behalf conveyed his sincere condolences to Mrs. Bartoš.

54. Mr. QUENTIN-BAXTER said that, to his regret, he had served on the Commission during only the last two years of Professor Bartoš's long period of membership. He would leave it to those with a better right, to recall Mr. Bartoš's wide range of legal scholarship, and the richness and diversity of his human interests.

55. His own, most personal, memories of Mr. Bartoš went back to his work in the Third Committee of the General Assembly. It was only natural that a man like Mr. Bartoš, who had always believed firmly in the close relationship between law and politics, should not have spared himself the discomfort of involvement in political affairs. In the early 1950s, when some of the original promise of the United Nations had already begun to fade, there had been a great need for courageous men of Mr. Bartoš's stamp, who were prepared to cross the barriers of purely national interest and provide an inspiration for the coming generation of international jurists. Many of the members present could no doubt recall the fire which Mr. Bartoš had brought to the discussion of such questions as the right to self-determination—a fire which had kindled the enthusiasm of his less inspired colleagues. He would always be grateful that he had known Mr. Bartoš, both at the beginning of his own career and at the close of that of the doyen of the International Law Commission.

56. He hoped it would be of comfort to Mrs. Bartoš that her husband, during his distinguished career, had influenced so many lives in the direction of the pursuit of United Nations ideals and the progress of international law. Milan Bartoš had been a man of whom it could truly be said that he had treasured the past, lived in the present and believed in the future.

57. Mr. TSURUOKA said he had made Mr. Bartoš's acquaintance in New York, but had known him mainly at Geneva, in the Commission and outside it. For more than ten years Mr. Bartoš had guided him in the work of codification and progressive development of international law and had never ceased to show him the warmest friendship. He had been, for him, an example of the good, the just and the true, but above all, he had been an apostle of peace. His kindness had gained him many friends throughout the world, and that had served the cause of peace, for the more friends he had had the more easily his views had been disseminated.

58. Milan Bartoš had defended all that was just to the extreme limit. Many members of the Commission had already praised his courage. His love of justice had, indeed, given him courage, and being brave he had dared to attack—sometimes quite violently—those who represented the greatest powers of the time. But as everyone knew his love of justice, his quarrels had borne fruit: he had always succeeded in obtaining a compro-

mise which was to the advantage of the whole international community.

59. Milan Bartoš had, above all, been a lover of truth. All the members of the Commission had spoken of the breadth and depth of his knowledge; but he (Mr. Tsuruoka) wished to stress, particularly, his intellectual integrity. Everyone had respected and admired him and borne him deep friendship. That admiration, friendship and respect had enabled him to serve all the better the Commission and, through the Commission and the General Assembly, the cause of world peace.

60. He welcomed the presence of Mrs. Bartoš, who had always stood by her husband and helped him in his work. The memory of Milan Bartoš would remain alive, and his example would inspire the Commission with the courage, love of justice and respect for truth which it needed in its work.

61. Mr. SETTE CÂMARA, speaking also on behalf of Mr. Calle y Calle and Mr. Martínez Moreno, said that the International Law Commission was meeting in sadness at the present session without its beloved doyen, Mr. Milan Bartoš. The members of the Commission were so used to seeing him among them, to benefiting from his knowledge and his long experience of international problems and to sharing in the blessing of his warm friendship, that they could not help feeling that their work would hardly be the same without him.

62. He recalled the first time he had met Mr. Bartoš in the Sixth Committee, before his coming to the Commission. His great size had attracted the attention of everyone. He would sit at his place, quietly, sometimes dozing over a newspaper. One would think he was completely aloof from the debates. But as soon as he asked for the floor, prompted by some remark, the slumbering giant would show how attentive he was to the business on hand. His insight, his deep legal analysis of facts, his knowledge of the practice of States, his sense of realism, his disposition to fight for good solutions, would enhance the tone of any debate.

63. Gilberto Amado, whom he had replaced as the doyen of the Commission, used to call him "*la tour juridique de l'Europe centrale*". He had indeed been a towering personality, not only physically, but morally and intellectually. That living tower had been a stronghold of legal culture and international jurisprudence who had honoured his country and enriched the records of the Commission's work.

64. Fate had not permitted Mr. Bartoš to be present when the Commission had commemorated its twenty-five years of existence; but no member had made a greater or a better contribution to the record of those twenty-five years than he had. His absence had cast a shadow of grief and sadness over the festivities of the anniversary; but the fortitude of his example would continue to be present, setting a pattern to be followed. It was on men like Mr. Bartoš that the prestige of the International Law Commission rested. His ascetic devotion to research, study and teaching, his independence of mind, always assuring the primacy of scientific judgement, his modesty of attitude and heart, would remain

an ideal model for present and future members of the Commission.

65. The fact that the Commission was honoured by the presence of Mrs. Bartoš at the present meeting would give special meaning to its tribute to the memory of her great and eminent husband. She, who with estimable devotion had always helped him to fulfil his tasks and responsibilities, could go back to her homeland with the assurance that his colleagues would always cherish the memory of Milan Bartoš and endeavour to follow his unique example.

66. Mr. RAMANGASOAVINA said that the untimely death of Mr. Bartoš had deeply distressed the Commission. It was true that he had shown the weight of the years and the scars of the suffering he had endured for his patriotism; but in view of his courage, his lively mind and his lucid intelligence, the Commission had been entitled to hope that it would benefit for a long time yet from his science and learning. For science and learning had been the qualities which Mr. Bartoš had displayed throughout the years of his membership of the Commission, and, allied to them, love of his work, devotion, good faith and trust, and a great gift of persuasion. Beneath a sometimes gruff exterior, he had concealed great kindness of heart and understanding.

67. As a newcomer to the International Law Commission, when Mr. Bartoš had been the Special Rapporteur for the topic of special missions, he (Mr. Ramangasoavina) had admired the exceptional range of his experience and the depth of his knowledge. Mr. Bartoš had begun his statements with the rather stereotyped phrase: "I wished to say...", which had been, for him, a way of urging and persuading, and, where necessary, of adapting his position to the majority view.

68. Other members of the Commission had already retraced Mr. Bartoš's dual career as a diplomat and a lawyer. He had represented his country at several international conferences; he had been a member of various learned societies; and in 1945 he had represented Yugoslavia on the Reparations Committee which had met at the Palais du Luxembourg in Paris. Well known at the United Nations, particularly in the Sixth Committee of the General Assembly, he had impressed his personality on the International Law Commission and made substantial contributions to its work. And it had been as a member of the Sixth Committee that he had taken part in setting up the International Law Commission. Starting as a member of the committee of jurists which had drafted the Statute of the International Law Commission, he had become a founder member and subsequently the doyen of the Commission, whose work he had inspired and encouraged and in which he had successively held the offices of Special Rapporteur, General Rapporteur, Second Vice-Chairman, First Vice-Chairman and Chairman.

69. Milan Bartoš had left them all with the memory of a great man of generous mind and wide learning. He would never forget the warm welcome he had been given by him on joining the International Law Commission. Milan Bartoš had been particularly helpful to the representatives of young States, whom he saw as exemp-

lifying the renewal of the international community and the transformation which had taken place in the world. He extended his heartfelt sympathy to Mrs. Bartoš.

70. Mr. RYBAKOV (Representative of the Secretary-General, Director of the Codification Division) said that during the present session of the Commission there had been two commemorative meetings, one in honour of the Commission's twenty-fifth anniversary and the other in honour of Milan Bartoš, a great jurist, a great scientist, a great diplomat, a great man and a great and highly esteemed friend of all the members of the Commission and the Secretariat. To his mind that seemed symbolical, because twenty-five years of the Commission's work at the same time represented twenty-five years of the work of Mr. Bartoš in the Commission, twenty-five years of his constant and valuable contribution to the work of the Commission on the codification and progressive development of international law.

71. Today, the Commission was paying its tribute to a man who, as had rightly been said, was one of its spiritual fathers; a man who from the very outset had been an active proponent and partisan of real progress, of real historical and noble trends in modern international law; a man whose legal philosophy had not been formed and influenced by scientific research and scholarly study alone, but who had acquired his legal convictions, his professional conscience and his human dignity through years of fighting against the plague of fascism, through his experiences in concentration camps and during the liberation, through his noble struggle for the triumph of the principles of non-aggression and peaceful co-existence, and through years of both hot and cold war, down to the political *détente* which represented the most remarkable trend in modern international relations. Mr. Bartoš would certainly be satisfied that through his words and deeds, through his contribution to the progressive development of international law, he had made his own valuable contribution to that historical trend.

72. All those now present could be satisfied, too, that it was a man like Mr. Bartoš, an active anti-fascist, internationalist and humanist, who had been the spiritual father of the International Law Commission, the teacher, colleague and friend of its members and of members of the Secretariat. He would always be remembered not only as a remarkable jurist, scientist and diplomat, but also as a remarkable man who was highly respected and esteemed by all members, both past and present, of the Commission and the Secretariat. Today's meeting served to prove the words of Mr. Ago, that Milan Bartoš was not dead, but still among them.

73. Mrs. Bartoš had asked him to thank all the members of the Commission and the Secretariat, on her behalf, for the tributes paid to her husband and for their kind invitation to her to be present on that occasion, as well as for the sincere friendship they had shown for so many years to that really remarkable man, Milan Bartoš.

74. The CHAIRMAN read out the following telegram from Sri Lanka, which he had just received from Mr. Pinto. "Very much regret inability participate in

Milan Bartoš commemorative session June twelfth due commitments here. Association of Milan Bartoš with Commission as founding father, most dedicated and active member and Chairman make his contribution to international law incalculable. His prodigious knowledge sound judgement and appreciation of what was practical in the prevailing political context, together with a sympathetic understanding of human beings and values, all contributed to his stature as legislator and human being. Grateful convey my sympathy and respects to Madame Bartoš."

75. Mr. EL-ERIAN said he had received a message from Mr. Bedjaoui and Mr. Elias, who regretted their inability to be present and wished to associate themselves with the tribute paid to the memory of their beloved friend and colleague, Milan Bartoš.

76. The CHAIRMAN said that the records of the special commemorative meeting and of the opening meeting of the session would be forwarded to Mrs. Bartoš and to the Government of Yugoslavia, with an appropriate covering letter.

The meeting rose at 12.15 p.m.

1277th MEETING

Thursday, 13 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasavina, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Yasseen.

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

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

[Item 7 of the agenda]

(resumed from the 1275th meeting)

ARTICLES 2, 3, 4 AND 6 (continued)

1. Mr. HAMBRO commended the Special Rapporteur for the fidelity with which he had sought to express the Commission's views. If that had sometimes led him to diverge from his earlier work, it was only because international law on the subject had evolved.

2. He would not comment on draft articles 2, 3 and 4, but would confine his remarks to article 6. In that connexion, it should be remembered that the Commission had two aims: the codification and the progressive development of international law. Codification of the law must be based on practice and custom; but there were gaps in the custom relating to the topic under

consideration, and if it was to fill those gaps the Commission must develop the law. Moreover, since international organizations were assuming increasing importance in international life, it was the Commission's duty to do all it could to strengthen their legal position. That was the principle which should guide the Commission in its work.

3. He was therefore prepared to accept article 6 as drafted. He was glad that the Special Rapporteur had made it clear, in paragraphs (26) and (27) of his commentary (A/CN.4/279), that it was not the law of each organization which conferred treaty-making capacity upon it, but general international law. He was also glad that the Special Rapporteur, like several other members of the Commission, had affirmed that every international organization had capacity to conclude treaties from the outset. That capacity was, of course, subject to limitations and procedures determined by the law of each organization. Consequently, the Commission was not called upon to determine those limitations and procedures or to give a precise definition of an international organization; it only had to deal with the general law of international organizations in the sphere with which it was concerned.

4. Although he could accept article 6 as it stood, he much preferred the alternative suggested by the Special Rapporteur in paragraph (20) of his commentary, for he thought it useful to affirm that the capacity of international organizations to conclude treaties was already acknowledged in principle by general international law, so as to prevent any misunderstanding in the future. He did not much like the expression "the relevant rules of each organization", however, though he realized that it might be difficult to find anything better. He would prefer the expression "law proper to each organization", though he recognized that in English the term "proper law" was used mainly in private international law. The problem might perhaps be solved by saying simply "... by the law of each organization"; that was a general formula which would cover both the practice and the relevant rules of each organization.

5. He found the Special Rapporteur's commentary to article 6 excellent, and hoped that paragraphs (13), (16) and (26)-(28), including the extracts from the opinions of the International Court of Justice, would appear in the Commission's commentary to that article.

6. Mr. MARTÍNEZ MORENO said that the Special Rapporteur's presentation of the draft articles was so clear, and the method he had followed so closely in accordance with the Vienna Convention on the Law of Treaties,¹ that it was difficult for him to make any comments, except on the question of principle raised by article 6 and on a few points of detail which could be dealt with in the commentary.

7. With regard to paragraph 1 (a) of article 2, he had no objection to the use of the expression "general international law", but would like the precise scope of

that expression to be explained in the commentary in order to avoid confusion. In Latin America, there had been a lively debate since the beginning of the century between those who maintained that international law was universal and those who, like Judge Alejandro Alvarez, recognized the existence of regional international law. The commentary should also mention a point arising from the Special Rapporteur's proposal that the words "as a potential party to the treaty" should be included in paragraph 1 (e) of article 2. It was true that an international organization often provided assistance to States in negotiating and drafting a treaty, without indicating that it was a party itself. The same situation could arise, however, in the case of a State, which might provide facilities to two other States for the negotiation of a bilateral treaty.

8. Article 6 raised a very important question of principle. The Special Rapporteur had said that there had been two very clear positions on that question, both in the Commission and in the comments of Governments. One position was that an international organization, by the very fact of its existence, possessed capacity to conclude treaties; the other was that such capacity was determined only by the constitutional framework of the organization in question, as laid down in its constituent instrument. In the former case, the capacity to conclude treaties was derived from international law; in the latter it was derived from the will of the member States which had drawn up the constituent instrument. On the other hand, the suggestion that an international organization did not possess international personality and hence did not possess capacity to conclude treaties was belied both by practice—Mr. Tabibi had mentioned that more than six thousand treaties had been concluded by the United Nations—and by the advisory opinions of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*,² the *Effect of awards of compensation made by the U.N. Administrative Tribunal*³ and *Certain expenses of the United Nations* (article 17, paragraph 2, of the Charter).⁴

9. He himself did not think it possible to deny that all international organizations possessed capacity to conclude treaties, although he was not sure whether that capacity could not, hypothetically, be limited by their constituent instruments. It seemed clear, at least, that all international organizations had capacity to conclude treaties concerning their privileges and immunities in the host country. After making a detailed analysis of the subject, the Special Rapporteur had found a formula which he (Mr. Martínez Moreno) was prepared to accept. The statement that the capacity of international organizations to conclude treaties was determined by the relevant rules of each organization amounted to an implicit recognition of that capacity.

10. There were some differences in the opinions expressed by Governments on that subject. His own country had not taken up a position in the Sixth Committee,

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

² I.C.J. Reports 1949, p. 174.

³ I.C.J. Reports 1954, p. 47.

⁴ I.C.J. Reports 1962, p. 151.

but had done so very clearly in the General Assembly, when its Foreign Minister had suggested, on 26 September 1973, that since the United Nations had a fundamental responsibility to preserve world peace and security and to that end had established a Military Staff Committee at Headquarters, it should ratify the various Geneva humanitarian conventions concerning such matters as the treatment of prisoners of war and civilian populations.⁵ The Foreign Minister had, on that occasion, strongly affirmed the treaty-making capacity of international organizations, and he himself shared the views thus expressed on behalf of his country.

11. To sum up, he favoured a formula such as that concerning the capacity of States contained in the Vienna Convention; but in the interests of arriving at a generally acceptable text he was prepared to agree to the text proposed by the Special Rapporteur, stating that "capacity to conclude treaties is determined by the relevant rules of each organization".

12. Mr. RAMANGASOAVINA said that on the whole he approved of the draft articles proposed by the Special Rapporteur, though he had a few reservations about article 6.

13. In paragraph 1 (a) of article 2, he found the words "governed principally by general international law" very satisfactory. In paragraph 2 of that article, the expression "law peculiar to" an international organization seemed to him preferable to the term "internal law", which might be ambiguous.

14. He had no difficulty in accepting the principle stated in article 6. It was true that all codification work entailed some generalization, but he thought that international organizations should not be subjected to a uniform rule and confined within an unduly rigid framework, which would hamper their future development. Like Mr. Hambro, he therefore preferred the wording suggested by the Special Rapporteur in paragraph (20) of his commentary, which would preserve the organization's personality and allow its law to develop. In his view, every organization, large or small, was competent to conclude treaties unless expressly prohibited from doing so by its constituent instrument. Moreover, even if the constituent instrument did not give an organization capacity to conclude treaties at the outset, the organization could always acquire that capacity later. It must therefore be affirmed at the outset that every international organization possessed capacity to conclude treaties, subject to the provisions of its constituent instrument.

15. He did not much like the expression "relevant rules", although it appeared in article 5 of the Vienna Convention, for it did not seem to him to have quite the same meaning as the corresponding expressions in French and Spanish.

16. Mr. YASSEEN said that in principle he approved of the method adopted by the Special Rapporteur. As far as paragraph 1 (a) of article 2 was concerned, however, it would be easy to follow the text of the

Vienna Convention more closely and say: "For the purposes of the present articles 'treaty' means an international agreement concluded..." thus avoiding a lengthy repetition.

17. He understood why the Special Rapporteur had made two additions to the text when drafting paragraph 1 (a). The word "principally" did not seem necessary, however, since interpretation already inclined towards the solution indicated. Moreover, as the Special Rapporteur himself had pointed out, the problem that word was intended to solve arose not only with treaties between international organizations or between States and international organizations, but also with treaties between States, which were the subject of the Vienna Convention. The proposed addition might therefore cause some misunderstanding by giving the impression that, where treaties between international organizations or between States and international organizations were concerned, the Commission had wished to specify a condition which it had not seen fit to lay down with regard to treaties between States.

18. As to the second addition proposed by the Special Rapporteur, the treaties in question were not necessarily governed by "general" international law, for, as Mr. Ushakov had rightly observed, there might be a treaty that was governed by provisions of regional international law. He agreed with the Special Rapporteur that the expression "internal law of international organizations" should be avoided, since to some extent the law of international organizations was part of international law, so that it could not be assimilated to internal law. He therefore preferred the expression "international law" without any qualification, which covered both general international law and regional international law.

19. With regard to paragraph 1 (d) of article 2, in his view, Mr. Ushakov's remark about ratification⁶ raised a question of drafting rather than of substance; it had to be made clear that a State or an international organization could make reservations when signing or, later, when expressing its consent to be bound, whether by ratification, accession or acceptance. The Commission might reconsider that point when it had examined all the means whereby an international organization could express its consent to be bound.

20. In connexion with paragraph 1 (i) of article 2, he pointed out that, in a discussion at the Institute of International Law at Rome, the definition in the Vienna Convention—"international organization" means an intergovernmental organization—had not been found acceptable, speakers having pointed out that if an international organization was defined as an intergovernmental organization, there was no reason why the latter expression should not be employed from the outset. Personally, he thought that the wording of the Vienna Convention should nevertheless be retained, since in the present draft it was not a definition but merely a statement that was involved; the Commission was not trying to define an international organization, but merely stating that,

⁵ See *Official Records of the General Assembly, Twenty-eighth Session*, 2129th plenary meeting.

⁶ See 1275th meeting, para. 45.

among international organizations, it was to the inter-governmental organizations that the draft referred.

21. He thought article 6 was very well drafted, since it only stated a fact and did not prejudge the different doctrinal positions on the subject. In that respect he found it preferable to the wording suggested by the Special Rapporteur in paragraph (20) of the commentary, which was less neutral and more in the form of a doctrinal statement. He found article 6 acceptable as it stood.

22. The CHAIRMAN, speaking as a member of the Commission, said that, as Mr. Ushakov had rightly pointed out, paragraph 1 (a) of article 2 amounted to a revision of the corresponding provision of the Vienna Convention, which used the expression "governed by international law" rather than "governed principally by general international law".

23. He agreed with the Special Rapporteur that the question whether treaties could exist under different régimes of law had not been considered in depth at Vienna, but it was, of course, a matter of interpretation. A treaty concluded between two States was always governed by international law, because international law presumed the element of consent. On the other hand, a treaty could also be governed by national law, as, for example, when a State sold a parcel of land to another State for the building of an embassy. That would involve a simple contract by which the second State became the owner of the land, and the agreement would then be governed in many respects by national law.

24. Like other speakers, he thought that the Commission should perhaps not go beyond the Vienna Convention in paragraph 1 (a) of article 2; the Special Rapporteur himself had said, in paragraph (5) of his commentary, that the addition of the word "principally" was not absolutely essential, though it would be more important in inter-State treaties, since it was rare for such treaties to be governed by national law. He was inclined to think, therefore, that the Commission should adhere to the text of the Vienna Convention and include the Special Rapporteur's explanations in the commentary.

25. Article 6 was very important, for if it was admitted that there were international organizations which did not possess capacity to conclude treaties, it would be necessary to draft an article concerning the invalidity of treaties, since a situation might arise in which a treaty was concluded by an international organization which did not possess the necessary capacity. On the other hand, if it was assumed that all international organizations possessed capacity to conclude treaties, it would be necessary to provide for the possibility that organizations whose capacity was confined to certain kinds of treaty might conclude treaties *ultra vires*.

26. In his opinion, the real difficulty in article 6 was created by the seemingly harmless provision of article 2, paragraph 1 (i), which stated that "international organization" meant an intergovernmental organization. That would clearly exclude non-governmental organizations, but the problem was to distinguish between States as such and States which established international organi-

zations. For example, the Conference on Security and Co-operation in Europe, which was at present meeting at Geneva, had a secretariat, but could not be called an international organization. Would it become an international organization if, at some later date, it established a permanent headquarters?

27. The basic principle of international law concerning capacity was to be found in the following statement in the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*: "Whereas a State possesses the totality of international rights and duties recognized by international law, the right and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."⁷

28. When the Special Rapporteur referred to the "relevant rules of each organization" in article 6, he undoubtedly meant the organization's constitution and all other documents expressing the will of the States which had established it. He could therefore accept the text of article 6 in substance, although it might be possible to indicate more clearly what was meant by the words "relevant rules".

29. Mr. EL-ERIAN said he had no strong feelings about the position of article 2, although in conventional practice the article on the use of terms generally came first.

30. With regard to paragraph 1 (a) of article 2, he shared the doubts expressed by Mr. Ushakov, the Chairman and the Special Rapporteur himself. He appreciated the fact that the Special Rapporteur, in his commentary, had given the Commission a wide choice by presenting all the possible alternatives. He wished to make it clear, however, that his doubts did not proceed from a fear of departing from the provisions of the Vienna Convention, since he saw no reason why, after a few years, departures from that instrument should not be admissible if there were sufficient grounds.

31. In his opinion, the words "principally" and "general" created more problems than they were intended to solve. Obviously, the Special Rapporteur had wished to deal with the problem of contracts and other situations of international law vis-à-vis national law, but those matters could best be dealt with in the commentary. "General international law" was not an easy term, since it would seem to cover, in the present case, both the treaty-contract (*traité contrat*) and the law-making treaty (*traité loi*). It would be better, therefore, to adhere to the expression "international law" pure and simple.

32. For article 6 he preferred the alternative text suggested by the Special Rapporteur in paragraph (20) of his commentary. In the present draft articles, the Commission was dealing with international organizations of a universal character; it had no real right to deal with regional organizations, although the latter might be influenced by universal organizations, as evidenced by

⁷ I.C.J. Reports 1949, p. 180.

the impact of the Charter on such regional organizations as the League of Arab States and the Organization of African Unity.

33. In view of the vast amount of practice, the capacity of international organizations of a universal character to conclude treaties could scarcely be questioned, although that capacity might be subject to certain restrictions, just as the capacity of States might be, for example, as in the case of permanent neutrality. After all, organizations were created entities; legal persons were not the same as natural persons, but could it be said that legal persons similar to international organizations did not possess legal capacity? It was difficult to see how an international organization could establish its headquarters in another State if it lacked such capacity.

34. What could be said was that the capacity to conclude treaties was subject to the law of the international organization in question. But what if the organization's constitution was silent on the question of capacity? The Charter of the United Nations specifically empowered the Security Council and the specialized agencies to conclude certain treaties because of their evident importance, but that surely did not mean that they were necessarily restricted to treaties of that particular type.

35. Mr. KEARNEY, referring to paragraph 1 (a) of article 2, said that after studying the Special Rapporteur's proposal, he could agree to the deletion of the words "principally" and "general". The problem of distinguishing between contracts under national law and treaties under international law was already sufficiently complicated, and an attempt to solve it by definition would only introduce additional complications.

36. With regard to paragraph 1 (i) of article 2, Mr. El-Erian had reopened the old problem of the definition of an international organization, but he himself did not think the Commission should introduce the idea of a universal organization into the present study. There was also the question whether the Special Rapporteur's present definition would meet the situation, when it arose, of international organizations which included other international organizations in their membership, a trend that was already apparent in the case of GATT and the European Economic Community.

37. He saw no real difficulty in paragraph 2 of article 2, though he questioned the use of the phrase "the law peculiar to any international organization".

38. Lastly, he considered article 6 essential, because it corresponded to article 6 of the Vienna Convention, though he agreed with Mr. Tammes that it was difficult to distinguish between capacity and competence. He suggested that the text should be amended to read: "An international organization has capacity to conclude treaties in accordance with its relevant rules".

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

39. Mr. USHAKOV said he wished to supplement the comments he had made at the 1275th meeting.⁸ The text of article 2, paragraph 2 was acceptable, excepting the

words "in the law peculiar to any international organization". Those words raised the question—perhaps more theoretical than practical—of the existence of a law peculiar to international organizations. As he strongly doubted whether there was any such law, he would prefer the phrase in question to be replaced by the words "in the practice of any international organization".

40. With regard to article 3, he had entirely changed his previous view that the scope of that provision should be broadened; he now thought that it referred to certain kinds of agreement not in written form and reserved their legal force. The article covered the possibility that agreements not in written form might be concluded between States and international organizations or between international organizations. It was doubtful whether such agreements existed in practice, and it was also doubtful whether the future convention could be applied only to international organizations in the case of agreements between them and other subjects of international law. Article 3 was not easy to justify and it raised many questions. He wondered whether it was really advisable to apply rules drafted to govern the special relations between States and international organizations or between international organizations, to such exceptional situations as those to which article 3 referred.

41. In his previous statement, he had expressed doubt about the need for article 6 and had suggested that, if it was retained, it should be differently worded. Though still doubtful, he had finally come to the conclusion that the provision should be retained as it stood if the Commission decided not to delete it. The wording proposed by the Special Rapporteur was probably the most flexible that could be devised and the most acceptable, though it was not free from difficulties of interpretation. It was sometimes hard to decide whether one was dealing with a treaty or an organization. For instance, some writers maintained that the General Agreement on Tariffs and Trade (GATT) had been a treaty up to the moment when GATT had created its own organs and had become an organization. It was also a delicate matter to make the capacity of international organizations to conclude treaties dependent on contemporary international law. It was those considerations which had led him to change his views on article 6.

42. Mr. BILGE said that the subject before the Commission was a difficult one. He congratulated the Special Rapporteur on the masterly way in which he had handled it, and said that he would confine his comments to three of the provisions.

43. Paragraph 1 (a) of article 2 contained a definition of a "treaty" which had been drafted with the requirements of the draft articles in mind. The Special Rapporteur had made two additions to the corresponding definition in the Vienna Convention. He (Mr. Bilge) could only approve of the addition of the word "principally", since he had himself proposed it in the Sixth Committee during the discussion of the draft articles on the law of treaties. As the proposal had been rejected, however, it would perhaps be better not to include that word in the text of the provision, but merely to give an explanation

⁸ Paras. 40-51.

in the commentary. The purpose of adding the word "general" before "international law" was to distinguish international law proper from the law peculiar to an international organization. That distinction was certainly necessary, but it would be enough to refer to it in the commentary.

44. As Mr. Yasseen had pointed out, paragraph 1 (i) of article 2 did not contain a definition of the expression "international organization", but specified that only intergovernmental organizations were covered by the draft articles. It did not seem necessary to confine the application of the draft to intergovernmental organizations with a universal mission, as Mr. El-Erian had suggested since, under the terms of the resolution adopted by the United Nations Conference on the Law of Treaties,⁹ the Commission's mandate was to study the question of treaties concluded between States and international organizations or between two or more international organizations, in the sense given to the latter expression in the Vienna Convention on the Law of Treaties. It should be noted, however, that many treaties had been concluded by international organizations which did not have a universal mission, but were of a regional character, and that such treaties should not be outside the scope of the future convention. But the choice of a definition would have an effect on other articles. If the Commission did not intend to confine itself to international organizations of the United Nations system, it would have to be cautious, especially in defining the capacity of international organizations to conclude treaties.

45. Article 6, which dealt with that question, appeared to be indispensable. Moreover, the Commission had already recognized the need to include an article on the capacity of international organizations to conclude treaties, as would be seen from the commentary to draft article 5 of the draft articles on the law of treaties.¹⁰ The issue was not the actual principle of the capacity of international organizations to conclude treaties, but the extent of that capacity. The source of the capacity could be mentioned in the article, but the main point was to define its extent. The Special Rapporteur proposed to do that by referring to the relevant rules of each organization, but it might be better to adopt a different criterion. When States set up an international organization, they did so in order to pursue a common aim which they could not achieve by themselves. They therefore gave the organization capacity to carry out the functions which would enable it to achieve that aim. The criterion of functional capacity, as identified by the International Court of Justice in two of its advisory opinions, therefore seemed preferable. The alternative text for article 6 proposed by the Special Rapporteur in paragraph (20) of his commentary also did not apply the criterion of functional capacity and was not entirely satisfactory. Since the Commission was inclined to take the term "international organization" in a broad sense,

it should adopt a fairly restrictive attitude towards the capacity of an organization to conclude treaties, and limit that capacity to what was strictly necessary for the performance of its functions. He hoped the Special Rapporteur would consider the possibility of combining the wording he proposed in paragraph (20) of his commentary to article 6 with the wording submitted by Professor R.J. Dupuy to the Institute of International Law, which was reproduced in paragraph 39 of his second report (A/CN.4/271).¹¹

46. Mr. QUENTIN-BAXTER said that the problems involved in article 6 were fundamental and far-reaching. He himself was one of the minority of members who doubted the value of that article in the draft, but like the Special Rapporteur and Mr. Ushakov, he recognized the duty of the Commission to be guided by the fairly general desire to include a provision on those lines. He also recognized the logic and the reasoning behind the Special Rapporteur's formulation of article 6.

47. It was not the wording of article 6 or any of the proposed changes that caused him concern. His misgivings were due to the likelihood that different people would attach quite different values to the rule embodied in that article. Some would no doubt regard it as a virtual restatement of an axiomatic truth, namely, that an international organization, which was by its nature an artificial entity, almost always had to be limited by the purposes for which it had been set up. The formula "the relevant rules of each organization" allowed room to take the fullest account of doctrine as expounded by the International Court of Justice and as embodied in the provisions of the Vienna Convention relating to the interpretation of constitutive treaties. For those reasons, although he had little objection to the adoption of article 6 as it stood, he felt inclined to make a reservation. The adoption of that article should not make the Commission suppose that it had made any significant progress towards the solution of the problems inherent in the subject. Indeed, the article might well have the opposite effect by giving the impression that those problems did not exist.

48. He was prepared to accept the position that the present draft, like the Vienna Convention on the Law of Treaties, did not deal in any way with questions of recognition. Clearly, nothing in the draft could oblige a State to deal with an international organization which it chose not to recognize. That being said, he wished to draw attention to the difference between the situations covered by the present draft and those to which the Vienna Convention applied. There was a finite number of States and that number was fairly small. In the case of international organizations, on the other hand, the possibilities were absolutely unlimited. In the circumstances, he saw no reason why a State should concern itself with recognizing the existence of a very small organization situated in a remote part of the world and engaged in activities which did not bring it into contact with that State.

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. 285, resolution relating to article 1.

¹⁰ See *Yearbook ... 1966*, vol. II, p. 191.

¹¹ Reproduced in *Yearbook ... 1973*, vol. II.

49. It was less easy to dismiss the problem of a third State, which was in theory free to ignore the existence of an international organization, but which in practice had to deal with the organization because other States had chosen to delegate important powers to it. In that connexion, the formal parallel between article 6, which was the only possible text on the question of capacity, and the corresponding provision of the Vienna Convention was less important than the inherent contrast between them. It could be said, by way of explanation, that States were sovereign whereas international organizations were not. The variety of international life, however, did not lend itself to that simple dichotomy, even at present. As far as States were concerned, it was possible to rely on their capacity to conclude treaties without considering any possible constitutional limitations. In the case of international organizations, a similar assertion could not be made in such simple and irrevocable terms. It was necessary to look at the capacity or competence of the organization concerned. In other words, States could be said to deal with an organization at their own peril. An organization possessed only what had been given to it by the States that had set it up. Whether it had formal capacity or not, it obviously could not commit those States in matters alien to its functions. Accordingly, in the very nature of things and even without a provision on the lines of article 6, the recourse and options in the matter would be limited. In a world in which States were increasingly delegating sovereign powers to regional organizations, it would seem to be placing an unduly heavy burden upon a third party to require it to construe the constituent instrument of an organization with which it dealt and to do so in the light of the practice of the organization. He doubted whether it was advisable to lay down a rule to that effect in general and absolute terms. At any rate, such a rule would not be borne out by United Nations practice. Some bodies brought together both the representatives of States and those of international organizations. At such meetings, it was often not the representatives of States who were the most powerful or who fully exercised sovereignty. The variety of international life in that respect was great and was increasing.

50. Reverting to the definition in paragraph 1 (a) of article 2, he therefore thought it would be preferable not to insert the word "general" before the words "international law". It was true that the internal laws of States were operative at the domestic level, while the law of an international organization was operative at the international level. But to state a rigid and absolute rule in the matter would be to impose a formal framework that was neither sufficiently sensitive nor sufficiently elaborate to reflect the complex reality of international life.

51. Mr. TABIBI said he supported article 6 as it stood. As he saw it, the difficulties involved were more psychological than legal.

52. As far as States were concerned, there was general agreement that they had an inherent legal right to conclude treaties. The same inherent right could not, of course, be recognized as belonging to international organizations. At the same time, however, it had to be acknowledged that the law of international organiza-

tions was of a practical character and served the purposes of international co-operation, peace and economic and social development. Moreover, although an international organization, as an institution, did not have sovereign powers, its constituent instrument was a manifestation of the will of the sovereign States which had signed it. It could therefore be said that the inherent right of States was reflected collectively in the preparation of the constituent instrument. The same phenomenon was to be seen in the making of decisions by the representatives of sovereign States in an organ of an international organization, such as the Security Council or the General Assembly of the United Nations.

53. It was true that there were different types of organization and that the differences could be reflected in the extent of their treaty-making capacity, which was determined by the will of the sovereign States establishing them. It was a case of delegation of powers. A similar delegation could occur even with respect to States; it was sufficient to mention the example of a federal union which conferred on one of its component units the authority to conclude certain treaties.

54. He supported the retention of article 6, which was necessary to deal with the question of capacity.

55. The CHAIRMAN* speaking as a member of the Commission, said that he would have had nothing to say about paragraph 1 (a) of article 2 if the Special Rapporteur had made only the changes of wording necessary to adapt the corresponding provision of the Vienna Convention. But the Special Rapporteur had suggested, although with some hesitation, two additions for which the need was doubtful.

56. The insertion of the word "principally" in the phrase "governed by international law" was intended to establish some kind of boundary line between treaties and contracts. He did not think that the Commission should engage in such minutiae. Treaties were governed by international law and contracts by the national law chosen by the parties. If any doubt remained, the problem would be one of the application of rules of law, to be solved by interpretation or by recourse to a system for the settlement of disputes. It would be going too far to try to solve the complex problem of transnational and international contracts in the present draft.

57. The addition of the word "general" before the words "international law" was not only unnecessary, but could also be misleading. Adjectives were always dangerous in legal texts. The question would arise of what constituted "general international law" and it would be necessary to introduce a definition of that term in article 2. The concept of general international law was a controversial one in legal writings. For example, the Vienna school distinguished between general international law, which, in its view, consisted of the *corpus* of international law not included in conventions between States, and particular international law, consisting of rules embodied in conventions. For the supporters of that doctrine, the Charter of the United Nations did not constitute general international law, and that was an excellent illustration of the dangers

* Mr. Sette Câmara.

involved in the use of adjectives. For those reasons, he urged the adoption of a definition which followed the wording of the Vienna Convention without the proposed additions.

58. In paragraph 1 (*i*) of article 2, he supported the Special Rapporteur's suggestion that the Vienna Convention formula should be used. There was no reason to restrict the scope of the present draft articles to certain types of organization, as had been done in the draft on relations between States and international organizations; the two situations were completely different. The application of that other draft had been restricted to organizations of a universal character, but it dealt with problems involving a host State on the one hand and sending States on the other; the rules applicable in their case to such concrete and immediate problems as immunities could hardly be extended to regional organizations having different constituent instruments and customary rules. In view of the different situation dealt with in the present draft, the Special Rapporteur had been right to adhere to the definition in the Vienna Convention.

59. In paragraph 2 of article 2, he supported the reference to the "law peculiar to any international organization", which was an adequate adaptation of the Vienna Convention phraseology and a very useful expedient to avoid any reference to the "internal law" of an organization, which might give rise to legitimate doubts and misgivings.

60. As to article 6, in the debate at a previous session he had had occasion to explain his views on the problem of the treaty-making capacity of international organizations.¹² The Commission should avoid reopening a general debate on the sources of the treaty-making power of international organizations; that would involve it in a discussion of the problem of the personality of international organizations, which was at least *sui generis*, as some writers had recognized. The principle that had emerged from the debates, both in the Commission and in the Sixth Committee of the General Assembly, was that the capacity of international organizations to conclude treaties should be governed by their constituent instruments. That basic truth was, he believed, expressed in the text of article 6 now under discussion. The alternative text put forward by the Special Rapporteur in paragraph (20) of his commentary was more in the nature of an enunciation of principles than a provision of law. The meaning of the formula "acknowledged in principle by international law" was not clear. It was also difficult to see why a statement of that recognition should be included in the text of the article when the Special Rapporteur himself had acknowledged, in paragraph (5) of his commentary, that all international organizations did not have the "same capacity" to conclude treaties.

61. He therefore proposed that the article should be retained as it stood and that all the necessary explanations should be given in the commentary.

The meeting rose at 1.05 p.m.

1278th MEETING

Friday, 14 June 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

State responsibility

(A/CN.4/264 and Add.1; A/9010/Rev.1; A/CN.4/L.207 and L.208)

[Item 3 of the agenda]

(resumed from the 1263rd meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the text of draft articles 7, 8 and 9 proposed by the Drafting Committee (A/CN.4/L.207).

ARTICLE 7¹

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that before introducing article 7 he wished to make a brief observation on the title of the draft articles as a whole. At the previous session, the Commission had adopted the title: "Draft articles on State responsibility". It might now wish to amend that wording in order to follow the language of paragraph 3 (*b*) of General Assembly resolution 3071 (XXVIII), namely, "Draft articles on responsibility of States for internationally wrongful acts". The Drafting Committee had considered, however, that it would be premature for it to make a proposal to that effect at the present stage.

3. The title of chapter II, as adopted by the Commission at the previous session was: "The act of the State according to international law". The Drafting Committee had observed that the expression "under international law" was used in several provisions of the draft, such as articles 3 and 5 (A/9010/Rev.1, chapter II, section B); for the sake of consistency, it had therefore replaced the words "according to international law" by the words "under international law". That change affected the English version only.

4. For article 7, the Drafting Committee proposed the following title and text:

Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity,

¹² See *Yearbook ... 1973*, vol. I, p. 202, para. 38.

¹ For previous discussion see 1251st meeting, para. 14 and following meetings.

but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

5. Articles 5 and 6 dealt with the attribution to the State of the conduct of its organs. Article 7, as submitted by the Drafting Committee, dealt with the attribution to the State of the conduct of organs of two types of entity which, under its internal law, were not organs of the State.

6. While the principle on which article 7 was based appeared to have been generally accepted by the members of the Commission, difficulties had arisen with regard to the drafting of the article and, in particular, to the terms used to designate the two types of entity with which it dealt. After thorough consideration, the Drafting Committee had adopted, with some modifications, the terminology suggested by Mr. Kearney.²

7. The Committee had also given effect to the Commission's decision that, for the sake of clarity, each type of entity should be dealt with in a separate paragraph.

8. Paragraph 1 of the article dealt with the conduct of an organ of "a territorial governmental entity within a State". The notion of an "entity" had been criticized by some members and alternative terms had been suggested. A better word might perhaps have been found in one or other of the working languages, but in the Committee's view, "entity" was the only term that was acceptable in all of them. The Committee had decided to delete the enumeration of the entities in question, which appeared in brackets in the text of article 7 proposed by the Special Rapporteur, since no such enumeration could possibly be exhaustive.

9. Paragraph 2 of article 7, as proposed by the Drafting Committee, dealt with the conduct of an organ of "an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority". That phrase delimited the scope of the paragraph by introducing three limitations. The first resulted from the difference between paragraph 2 of article 7 and article 5, and was indicated by the words "which is not part of the formal structure of the State". The second resulted from the difference between the two paragraphs of article 7 itself, and was indicated by the words "which is not a part... of a territorial governmental entity". The third resulted from the difference between those entities whose conduct was covered by paragraph 2 of article 7 and those whose conduct could not be attributed to the State; it was indicated by the words "which is empowered by the internal law of that State to exercise elements of the governmental authority". Those words corresponded to the adjective "public" appearing in the text submitted by the Special Rapporteur. The Committee had used that paraphrase because the term "public" had different meanings in different languages and legal systems. It should be noted that the paraphrase had not

been used in paragraph 1 because it was clear that the territorial governmental entities dealt with in that paragraph were always empowered to exercise elements of the governmental authority; the Committee suggested that that point should be made clear in the commentary.

10. Finally, he wished to explain why article 7, as submitted by the Drafting Committee, contained no reference to contracts—a question which had been raised during the first reading of the article. The Committee had considered that if there was a rule of international law imposing upon a State the duty to ensure the observance of a particular contract, the international responsibility of the State in case of non-observance of the contract would result from the breach of the rule in question and not from the contract *per se*. If there was no such rule, the non-observance of the contract would not engage the responsibility of the State. The Commission might wish to include that explanation in the commentary to article 7.

11. Mr. YASSEEN said that the new wording for article 7 had a number of advantages over the text proposed by the Special Rapporteur. Division into two paragraphs made the text clearer. The enumeration of examples, which might have been regarded as exhaustive, had wisely been dropped. Lastly, the words "*habilité ... à exercer des prérogatives de la puissance publique*" exactly conveyed the meaning which the Commission had intended to give in French to the adjective "*publique*", for which there was no exact equivalent in certain systems of law other than those of continental Europe. He therefore approved of the proposed new wording.

12. Mr. TSURUOKA congratulated the Drafting Committee on its work, which had resulted in considerable improvements, especially in paragraph 2 of the article. The article established clearly, on the basis of two criteria, the relationship that must exist between the State and the author of the act complained of. That clarification should make article 7 easier to apply.

13. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 7 provisionally, in the form proposed by the Drafting Committee.

It was so agreed.

ARTICLE 8³

14. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 8:

Article 8

Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements

² Sec 1258th meeting, para. 11.

³ For previous discussion see 1258th meeting, para. 1.

of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

15. Article 8 dealt with the action of private persons. It concerned the attribution to the State of the conduct not of organs, as in the three preceding articles, but of private persons or groups of persons. From the discussion in the Commission and in the Drafting Committee it had become clear that article 8, as originally submitted by the Special Rapporteur, sought to cover two distinct situations, each of which was now the subject of a separate sub-paragraph.

16. The first, dealt with in sub-paragraph (a), was the situation in which, although official authorities of the State were available, a particular action was carried out on behalf of the State, not by those authorities, but by a person or group of persons. It was indispensable in such a case to establish that the person or group of persons in question had in fact been acting on behalf of the State. That condition was expressly set out in the text of the article.

17. The second situation, dealt with in sub-paragraph (b), was that in which a person or group of persons exercised elements of the governmental authority because no official authorities were available. Such a situation occurred when, for instance, a natural disaster, hostilities or other exceptional circumstances caused the disappearance of the official authorities in a particular area of a State.

18. The CHAIRMAN said that in the absence of any comments he would take it that the Commission agreed to approve article 8 provisionally, in the form proposed by the Drafting Committee.

It was so agreed.

ARTICLE 9⁴

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

Article 9

Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ of another State or of an international organization which has been placed at the disposal of a State shall be considered as an act of the latter State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

20. Article 9 dealt with a problem which had created some difficulty in the Commission and had been discussed at length in the Drafting Committee: the problem of the attribution to a State of the conduct of an organ placed at its disposal by another State or by an international organization. The text submitted by the Drafting Committee provided for two important limitations to the rule.

21. In the first place, the article applied only if the organ "was acting in the exercise of elements of the

governmental authority of the State at whose disposal it has been placed". That clause, which echoed a similar clause in sub-paragraph (b) of article 8, eliminated all such situations as the secondment of technicians, advisers and experts, who all acted in a personal capacity.

22. The second limitation resulted from the use of the expression "placed at the disposal of a State". That expression excluded from the scope of the article all cases in which the organ in question acted on the authority and instructions of the State to which it belonged. Article 9 applied only to cases in which the organ lent acted on the authority and instructions of the State in which it acted; that point had been extensively discussed in the Drafting Committee.

23. In particular, the article did not apply—and that point would have to be made very clear in the commentary—to the armed forces of a State sent for military purposes to the territory of another State with its agreement; that was to say, to the action of military forces for military purposes.

24. The situation was different, however, when a State sent its armed forces to the territory of another State for civilian purposes, for example, to lend assistance after a natural disaster. In such cases, it might well happen that the State to which the armed forces belonged actually placed them at the disposal of the other State, under whose authority they would operate. Article 9 would then apply. An example, drawn from the practice of the League of Nations, was the sending of military contingents to the Saar territory by a number of countries to supervise the plebiscite of 13 January 1935. Those contingents had acted as ordinary civilian police.

25. Lastly, he drew attention to the redraft of article 9 proposed by Mr. Ushakov (A/CN.4/L.208) as an alternative to the Drafting Committee's proposal.

26. Mr. AGO (Special Rapporteur) said that the reason why the article could be considered as not applying to cases in which a State placed military organs at the disposal of another State to be used for military purposes was that usually such cases were not genuine loans of organs, so that they did not fall within the scope of the article. In such cases the organs usually continued to act on behalf of the State to which they belonged and in accordance with its instructions. It was important to give that explanation in the commentary.

27. He preferred the original wording of article 9, in which the introductory phrase corresponded to that used in the preceding articles, to Mr. Ushakov's text (A/CN.4/L.208). But if Mr. Ushakov's proposal would facilitate the adoption of the article, he would not oppose it.

28. Mr. USHAKOV said that his proposal related only to the form of article 9. Its purpose was to replace the words "The conduct of an organ of another State" by the words "the conduct of that organ", and that had entailed recasting the whole article. Once an organ of another State or of an international organization had been placed at the disposal of a State, the conduct in question was not necessarily that of "an organ of another State", but perhaps already that of an organ of the State at whose disposal the organ was.

⁴ For previous discussion see 1260th meeting, para. 35.

29. Mr. TSURUOKA said he hoped the commentary would explain in detail that the article in question did not apply to military organs in the territory of another State, so long as they were pursuing military objectives. It should be indicated why armed forces could not be placed under the control of another State. Was it because of their very nature, or did the matter depend on the interpretation of treaties of alliance? What were the reasons which made it impossible for a foreign army to be subject to the country where the internationally wrongful act had taken place? Those were questions of undoubted practical importance.

30. Mr. AGO (Special Rapporteur) said that he would provide a clear explanation in the commentary. In theory, it was not impossible that a military organ might be genuinely placed at the disposal of another State, even to perform military duties. But such cases were extremely rare. Where there was a treaty of alliance, armed forces sent to another State continued to be organs of the State to which they belonged and acted under its authority and control.

31. Mr. RAMANGASOAVINA said he preferred the Drafting Committee's text, but pointed out that the Commission was not bound to conform to any set pattern in the wording of the articles. Mr. Ushakov's text had the merit of being clear, but its opening words might give the impression that it referred rather to cases in which a State or an international organization placed one of its organs at the disposal of another State on its own initiative. The Drafting Committee's text, on the other hand, covered both that case and the case in which the organ was placed at the disposal of the beneficiary State at its request.

32. Mr. USHAKOV said that he was prepared to withdraw his proposal, which related only to drafting.

33. Mr. KEARNEY said he wished to emphasize, for the record, that article 9 did not deal with the question of the possible responsibility of the State whose organ had been placed at the disposal of another State, or with the question whether that responsibility would be joint or several.

34. Mr. AGO (Special Rapporteur) said that that point would be dealt with as fully as necessary in the commentary. It was better not to mention it in the text of the article itself, since it referred only to the quite exceptional case in which a State was held responsible for the act of an organ placed at its disposal by another State.

35. Mr. BILGE said that if the use of the expression "*prérogatives de la puissance publique*" (elements of the governmental authority) was intended to restrict the idea of "*fonctions publiques*", he would be obliged to reserve his position on the article.

36. Mr. AGO (Special Rapporteur) said that that expression was used solely to avoid translation difficulties and had no restrictive effect. It was clearly understood that a mayor or a policeman exercised "*prérogatives de la puissance publique*". That would be explained in the commentary.

37. Mr. BILGE said that in the light of the Special Rapporteur's explanations he withdrew his reservation.

38. Mr. AGO (Special Rapporteur) suggested that the beginning of the Drafting Committee's text should be combined with the beginning of Mr. Ushakov's text so as to read:

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law. . . .

39. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 9 provisionally, in the form submitted by the Drafting Committee, with the change proposed by the Special Rapporteur. The text would read:

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

It was so agreed.

Tenth session of the Seminar on International Law

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

41. Mr. RATON (Secretariat) said that the tenth session—the "Milan Bartoš" session—of the Seminar on International Law ended that day, and he wished to thank all the members of the Commission for their participation in the programme. The Seminar did not consist only of a series of lectures by voluntary speakers; it also covered the work and the discussions of the Commission.

42. In ten years, there had been nearly 250 participants in the Seminar, some of whom now held important post. They included a Minister for Foreign Affairs, a member of the United Nations Administrative Tribunal, heads of delegations to the United Nations or to other international organizations, and many representatives in the Sixth Committee of the General Assembly and at international conferences. The Seminar thus performed a very useful function, which would be impossible without the support it received from the members of the Commission; he thanked them most warmly, both personally and on behalf of the participants in the Seminar.

Co-operation with other bodies

[Item 10 of the agenda]

(resumed from the 1271st meeting)

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

43. The CHAIRMAN welcomed the observer for the Asian-African Legal Consultative Committee and invited him to address the Commission.

44. Mr. NISHIMURA (Observer for the Asian-African Legal Consultative Committee) said that having been unable, to his great regret, to attend the meeting

commemorating the Commission's twenty-fifth anniversary, he now wished to express his Committee's profound admiration for the work the Commission had accomplished during the past twenty-five years. It was a matter for gratification that in spite of the meticulous care and thought the Commission devoted to the drafting of each article, it had been able to complete its recommendations on as many as eighteen different topics, some of which had had a tremendous impact on the development of international law and had received general acceptance by the world community through their incorporation in multilateral conventions. In that connexion, the Commission's work on the law of the sea, diplomatic intercourse and immunities, consular relations and the law of treaties deserved special mention, for without its efforts, successful codification of the law on those important topics would surely have been impossible.

45. It gave him particular satisfaction that the Commission had shown its willingness not only to co-operate with various regional bodies, but also to take their work into account. The Asian-African Committee was particularly pleased by the close links which had existed from the first between it and the Commission. It had been a particular privilege for him to welcome Mr. Castañeda, the Chairman of the Commission, at the Committee's fifteenth session, held at Tokyo in January 1974. Such exchanges between the Commission and the Committee had always been extremely fruitful; he sincerely hoped that they would not only be maintained, but would be further strengthened in the years to come.

46. Turning to the work of the Committee, he said that the increase in its membership, which had now risen to twenty-six, the requests of its member Governments for assistance in various legal fields, and the general desire to use it as a forum for Asian-African co-operation in legal matters, had confronted the Committee with much heavier responsibilities during the past four years. For example, the Committee's secretariat had been engaged in collecting and analysing various data with a view to assisting its member Governments to prepare for the Third United Nations Conference on the Law of the Sea. Four of the regular sessions of the Committee, as well as several sub-committee meetings, had been devoted to exchanges of views on that subject. At the last session, Mr. Tabibi had submitted a statement of principle on behalf of the landlocked countries, in preparation for the conference at Caracas. But although a good deal of the Committee's time had been devoted to the law of the sea, it had not neglected other subjects studied by the Commission, such as State succession and State responsibility, which were of great importance to many new States. The Committee was also closely following the studies made by other United Nations organs and bodies, such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL), on legal matters of common interest; it had devoted considerable time to an exchange of views on the role of foreign office legal advisers; and it was also interested in the non-navigational uses of international watercourses—a subject

which presented great problems for the countries of Asia and Africa.

47. On behalf of the Asian-African Legal Consultative Committee, he extended an invitation to the Chairman of the International Law Commission to attend the Committee's next session, which was to be held at Teheran in 1975.

48. The CHAIRMAN thanked the observer for the Asian-African Legal Consultative Committee for his statement.

49. Mr. YASSEEN said that in Mr. Nishimura he was glad to welcome a distinguished internationalist and a friend of long standing. He emphasized the importance of the close co-operation that existed between the Committee and the Commission; the Committee's activities helped the members of the Commission in their codification work and enabled them to become acquainted with the attitude of African and Asian countries concerning a number of difficult problems. The Committee, for its part, collaborated closely with the Commission, studying its work in depth and seeking to formulate a common approach by the Asian and African countries to the various problems examined by the Commission in its codification activities.

50. He had had the honour to participate in the Committee's work on several occasions and in various capacities. He had represented the Commission, as its Chairman, at the session which the Committee had held in Thailand and he had also been present at its session at New Delhi; he had been Vice-Chairman at the session which the Committee had held at Lagos; and he had presided over three consecutive sessions of the Subcommittee it had set up to examine the difficult question of the law of the sea. Hence he spoke of the Committee with full personal knowledge. He had greatly appreciated Mr. Nishimura's participation in all the sessions he had attended and had admired his devotion to the cause of international justice and his concern to arrive at common solutions which served that cause. He must also mention with admiration the contribution of Mr. Sen, the Secretary-General of the Asian-African Legal Consultative Committee.

51. Mr. EL-ERIAN said he was glad that the Asian-African Legal Consultative Committee was represented by such an eminent Japanese diplomat and jurist as Mr. Nishimura.

52. Referring to the Committee's work during the past two years, he said he was particularly interested in the exchange of views it had organized on the role of foreign office legal advisers. It was those legal advisers who bore the heavy burden of preparing draft treaties and, in his opinion, it was of the greatest importance that their role should be strengthened, especially in Asia, Africa and Latin America.

53. Also of vital importance was the work being done by the Committee in collecting and analysing data to aid Governments in preparing for the Third United Nations Conference on the Law of the Sea, a subject which greatly affected the interests of newly independent States.

54. Lastly, it was gratifying to hear that the Committee, in spite of its many other commitments, was still giving priority to the subject of State succession, that it proposed to resume its consideration of State responsibility and that it intended to take up the question of the non-navigational uses of international watercourses.

55. Mr. MARTÍNEZ MORENO, speaking on behalf of the American members of the Commission, welcomed Mr. Nishimura as a very distinguished jurist, and paid a tribute to the outstanding work done by his Committee in promoting the codification and progressive development of international law.

56. The interest of the Latin American countries in the Committee's work was reflected in the increasing attendance at its meetings of Latin American observers, including Mr. Castañeda, who had been present at its last session, at Tokyo.

57. He noted with great satisfaction that many of the subjects being studied by the Committee were also on the Commission's agenda and, in particular, that the Committee was making a real effort to help the new countries of Asia and Africa to defend their newly won freedom and to work for a better world under the rule of law.

58. Mr. BILGE thanked the President of the Asian-African Legal Consultative Committee for his account of the Committee's work. The topics considered by the Committee were very important—in particular, it had done extremely useful work on the role of legal advisers—and were of great interest to the Commission. As Mr. Nishimura had said, the Committee showed the closest interest in the Commission's work, and that interest was certainly reciprocated. The exchanges of views which took place between the Commission and the Committee were very valuable and should be followed up by exchanges of documents, which would give the Commission a more complete idea of the Committee's work. The Committee and the Commission not only did parallel work, but also had a common aim: the building of the international legal order, which was a prerequisite for the welfare of the entire international community.

59. Mr. RAMANGASOAVINA said that the members of the Commission were happy and proud to welcome the President of the Asian-African Legal Consultative Committee. The very interesting statement he had made showed similarity of the subjects which attracted the interest of all those concerned with the progressive development of international law. The subjects studied by the Committee were of great topical interest; on the eve of the opening of the Caracas conference it was right to draw attention to the importance of questions concerning the sea and shipping. Those questions were of particular interest to young countries; for it was partly due to the deterioration in the terms of trade that the countries of the third world, whose voices had been heard at the special session of the General Assembly on raw materials, were underprivileged and faced with very difficult international trade problems. In examining those problems, the Committee was thus studying matters of vital interest to young countries.

60. He appreciated the fact that the Committee had sent Mr. Nishimura to the Commission as its observer, not only because he was the President of the Committee, but also because he represented a country which was an example to the nations of the third world. For Japan would probably be among the developing countries had it not been for its extraordinary courage and enormous development drive, which had raised it to the level of the leading economic Powers. He was therefore especially appreciative of the assurances which Mr. Nishimura had given the Commission. The exchanges which took place between the Committee and the Commission were extremely fruitful for the development of international law and should be continued.

61. Mr. QUENTIN-BAXTER, speaking also on behalf of Mr. Hambro, Mr. Kearney and Sir Francis Vallat, said he was grateful to Mr. Nishimura for being prepared to spend a significant amount of his time at the Commission's present session.

62. The geographic area covered by the Committee was so immense, and characterized by so many rich and varied cultures and legal inheritances, that the Committee had a valuable contribution to make to the discussions not only of the Commission, but also of the General Assembly and the Sixth Committee. The Committee and the Commission could help each other in the pursuit of their common aim, and he was gratified that the Committee had devoted so much time to the study of problems which were on the Commission's agenda. He was especially interested in the Committee's work on the role of foreign office legal advisers; members of the Commission knew only too well how the ratification of multilateral treaties could often be delayed by a lack of skilled personnel in government service.

63. Mr. USHAKOV thanked Mr. Nishimura for his statement. He noted that both the importance of the work of the Asian-African Legal Consultative Committee and the number of questions it studied continued to increase. He had attended its session in January 1970 as observer for the International Law Commission, of which he had been Chairman, and had been much impressed by the range of the Committee's work and the high level of the participants. The Committee had then had fourteen African and Asian members and three associate members; its membership had since increased, which showed the growing importance of its role. International lawyers of the Soviet Union were greatly interested in the Committee's work; Mr. Movchan, for example, the former Director of the United Nations Codification Division, had attended the Committee's 1974 session.

64. He welcomed the close links that had been forged between the Commission and the Committee. He hoped they would become even closer and wished the Committee success in its work.

65. Mr. TABIBI thanked the observer for the Asian-African Legal Consultative Committee for his concise and comprehensive report on the Committee's work. He himself had participated in its last session, at Tokyo, where he had served as Chairman of its Committee on Landlocked Countries, making preparations for the Caracas conference on the law of the sea. Much of the

success of that session had been due to the untiring efforts of the Committee's President, Mr. Nishimura, who had been a distinguished jurist since the time of the League of Nations and one of the chief architects of his country's peace treaty.

66. He (Mr. Tabibi) had attended many sessions of the Committee and had always admired the interest shown by its members in promoting international law and in developing co-operation with the rest of the world in an atmosphere of mutual understanding. Since half the Members of the United Nations were Asian and African States with a rich historical, legal and cultural heritage, the Commission could benefit greatly by the Committee's experience. He also wished to pay a tribute to the Committee's secretariat, which not only provided practical advice to the Governments of member States, but also carried out studies in which the Commission itself was interested. For example, it had contributed to the success of the United Nations Conference on the Law of Treaties and was now preparing for the conference at Caracas. There were also some subjects in which the Committee was in advance of the Commission, such as the non-navigational uses of international watercourses.

67. He wished to express his thanks to Mr. Nishimura and to Mr. Sen, the Committee's Secretary-General, for the hospitality extended to him during the Tokyo session.

68. Mr. ŠAHOVIĆ said he had listened with great interest to Mr. Nishimura's statement on the work of the Asian-African Legal Consultative Committee. That statement had given the Commission an insight into the activities of African and Asian lawyers in the field of international law, and had shown that the major concerns of African and Asian countries in that sphere were those of the international community in general and of the United Nations in particular.

69. Yugoslavia had always attached very great importance to the Committee's proceedings and had consistently found new horizons for the development of international law in its reports. As a member of the Subcommittee on the Law of Non-Navigational Uses of International Watercourses,⁵ he was at present studying the reports of the Asian-African Legal Consultative Committee, which he found indispensable for the current development of international law. He wished the Committee every success in its future work.

70. Mr. TSURUOKA, after congratulating Mr. Nishimura on his statement, said that, as Director of United Nations Affairs in the Japanese Ministry of Foreign Affairs, he had participated in the establishment of the Asian-African Legal Consultative Committee. Co-operation between the Committee and the Commission had proved very fruitful, because of the similarity of the topics studied by the two bodies and the close relations they maintained. The Commission often drew inspiration from the results of the Committee's deliberations and the Committee, in turn, kept its members informed of what the Commission had done. Mr. Nishimura had

made a great contribution to the progress of the Asian-African Legal Consultative Committee and he hoped that the links between the Committee and the Commission would be further strengthened.

71. The CHAIRMAN, speaking as a member of the Commission, thanked the observer for the Asian-African Legal Consultative Committee for his excellent account of the Committee's work. He himself attached very great importance to co-operation between the Commission and regional bodies working in the legal field.

72. The Committee was distinguished from other regional bodies by the fact that, under its Statute, one of its tasks was to study and comment on the drafts prepared by the International Law Commission. Conversely, the Committee's own ideas were of great importance to the Commission, which was attempting to draft legislation of universal scope and therefore needed to familiarize itself with the thinking of the new countries of Asia and Africa. The Committee undoubtedly had an important role to play in promoting the progressive development of international law throughout the world, and it was useful for its views to be available to the Commission at as early a stage as possible.

73. He thanked the observer for the Asian-African Legal Consultative Committee for his kind invitation to attend the Committee's session at Teheran, which he would be very glad to accept if his commitments so permitted.

The meeting rose at 1 p.m.

1279th MEETING

Monday, 17 June 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-5; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1273rd meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 19

1. The CHAIRMAN invited the Special Rapporteur to introduce article 19, which read:

⁵ See 1256th meeting, para. 1.

Article 19

Conditions under which a treaty is considered as being in force

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

- (a) they expressly so agree; or
- (b) by reason of their conduct they are to be considered as having so agreed.

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

2. Sir Francis VALLAT (Special Rapporteur) said that article 19 stated the basic principle that a bilateral treaty did not automatically continue to be in force between a successor State and the other State party, although it might continue to be in force by virtue of agreement. Paragraph 1 (a) and (b) provided that that agreement might be either express or tacit.

3. The Netherlands Government had expressed some doubts about the desirability of providing for tacit agreement, and had considered it "preferable that both the new State and the treaty-partner of the predecessor State *expressly* state their willingness to apply the treaty in the relations between them" (A/CN.4/275/Add.1). The Byelorussian delegation had adopted a similar position (A/CN.4/278/Add.4, para. 320).

4. If the Commission agreed with that view, it would be necessary to amend article 19 by deleting paragraph 1 (b) and introducing a provision requiring a notification of succession by the successor State, as suggested by the Byelorussian delegation, followed by the conclusion of an express agreement with the treaty-partner of the predecessor State. He continued to believe, however, as stated in his observations (*ibid.*, para. 324), that "practice and convenience are in favour of the continuation of bilateral treaties by agreement made either expressly or by conduct" and that consequently sub-paragraphs (a) and (b) of paragraph 1 should be retained.

5. The United Kingdom Government had said that the purpose of the words "in conformity with the provisions of the treaty" in paragraph 1 of article 19 was not clear (*ibid.*, para. 321) and he thought that those words added nothing to the text.

6. The Finnish delegation had suggested that paragraph 2 should specify the exact date on which succession took effect (*ibid.*, para. 326), but he believed that paragraph 2 was already sufficiently explicit, since the date of the succession of States, if not certain, could always be made certain.

7. Lastly, he noted that the Swedish Government had raised the questions whether a time-limit should be provided for article 19, for the reasons adduced with respect to article 12 (*ibid.*, para. 323). He could not agree that those reasons applied to article 19.

8. Mr. BEDJAOUÏ said that article 19, as adopted by the Commission in 1972, seemed to him to express a correct rule, which was certainly better than that

adopted by the International Law Association, according to which there was, on the contrary, a general presumption of the maintenance in force of a bilateral treaty by a newly independent State.¹ For unlike the case of multilateral treaties, in the case of bilateral treaties the legal nexus which had existed between the territory and the treaty created neither a right nor an obligation to maintain the treaty in force. In his commentary to article 13,² contained in his fourth report, Sir Humphrey Waldock had clearly shown the full specificity of bilateral treaties. The personal equation played a greater part in bilateral treaties than in multilateral treaties, and it was not obligatory to maintain a bilateral treaty in force between the predecessor State and the successor State—that would be stipulated in article 20—or, indeed, between the predecessor State and the other State party to the treaty. For accession to independence was more than a fundamental change of circumstances: it brought a change in the parties to a bilateral treaty, especially if the treaty applied exclusively to the territory which had become independent.

9. In that connexion, he noted that there were, in fact, two kinds of bilateral treaty concluded by the predecessor State which might concern the newly independent State. There were bilateral treaties concluded between a State A and a State B, the application of which was extended by State A, State B or both States to their colonial possessions, in a final provision of the treaty. But there were also bilateral treaties concluded between States A and B in which one of the two States or both entered into an undertaking exclusively in respect of their colonial territories. For instance, in 1927, Belgium and Portugal had concluded, in respect of the Congo (now Zaire) and Angola, a bilateral treaty relating to the right of transit of persons and goods, which regulated transit traffic between Katanga and the Angolan port of Lobito, carried by the Benguela railway.³ That example, like that of the treaty concluded between the United Kingdom and Portugal concerning Rhodesian copper traffic to the port of Lourenço Marques on the coast of Mozambique, showed, first of all, that two predecessor States could conclude a bilateral treaty on behalf of two territories which would subsequently become independent. It also showed that the hypothesis of article 20 was undoubtedly correct, but also somewhat outdated, since it was clear that a localized agreement on rail or road traffic in a colonial territory could no longer concern the metropolitan State when that territory became independent. Lastly, it showed that the personal equation played a smaller part in multilateral treaties than in the two kinds of bilateral treaty he had referred to, namely, those whose application had been extended to the colonial territory by a final provision and those concluded exclusively for the colonial territory in question.

10. The personal equation came into operation in particular when, in the second kind of treaty, only one of

¹ See *The International Law Association, Report of the Fifty-third Session (1968)*, pp. 596 *et seq.*

² See *Yearbook ... 1971*, vol. II, Part One, pp. 145 *et seq.*

³ *British and Foreign State Papers*, vol. CXXVII, p. 121.

the two colonies became independent. Thus, in the first example, it was impossible to conclude that there was continuity of the treaty régime for traffic and transit between Zaire, which had become independent, and Portugal, which was still master of Angola. The personal equation was also very marked when two States were bound by agreement by themselves, and mainly for themselves, and decided to extend the application of the treaty to their colonial territories by a final provision. The predecessor State, the newly independent State and the other State party to the treaty each had the right to reappraise the situation. Their consent—whether express, as provided for in paragraph 1 (a), or tacit, as provided for in paragraph 1 (b)—was therefore necessary.

11. In the commentary to article 13, Sir Humphrey Waldock had, in his opinion, over-emphasized the concept of continuity, which had led the International Law Association to adopt a general presumption of the maintenance of the treaty. It was true that practice seemed to be moving in that direction, and reference had been made to tax conventions, conventions relating to consular powers and visas, bilateral economic or technical assistance agreements, trade treaties, and so on. Reference had also been made to the Secretariat studies on trade treaties and treaties relating to air transport. But in his own view that continuity was only apparent. The treaties involved were, in fact, treaties which the newly independent State knew it could not terminate immediately without causing a sudden breakdown in its economic relations. But there were many other bilateral treaties, such as extradition and establishment treaties, and treaties relating to the exploitation of natural resources, coastal fishing, and so on, which were the subject of express negotiations and for which there was no presumption of continuity. The fact that States soon contacted one another in order to exchange notes concerning the fate of such bilateral treaties showed that there was no automatic continuity, and such an exchange constituted the manifestation of consent by both parties which formed the basis of article 19.

12. Moreover, consent was often given on a provisional basis—both by the successor State and by the other State party to the treaty—for renewal of the treaty pending negotiation of a new agreement. The continuity, when it was observed, was only apparent and resulted, not from the application of a customary rule, but from the will of the newly independent State and the other State party. What was involved, therefore, was mainly a voluntary succession. Hence the idea expressed in article 19 was entirely valid and should be retained. The manifestation of consent seemed to him to be a necessary condition for the maintenance in force of a bilateral treaty, whether the consent was express or tacit.

13. With regard to the problem dealt with in paragraph 2, he thought the date of the succession of States should be adopted.

14. On the question of a time-limit, raised by the Swedish Government, he, like the Special Rapporteur, saw no reason to raise that problem in the context of

article 19, since the treaty was considered as being in force when there was express or tacit agreement. It was therefore unnecessary to fix a time-limit, since neither of the two States—the newly independent State or the other State party to the treaty—would passively await a unilateral manifestation of will by the other.

15. As far as the duration of the bilateral treaty was concerned, he reminded the Commission that in his fourth report, Sir Humphrey Waldock had proposed an article on that question,⁴ which would have followed article 19. While recognizing that the provisions of the treaty concluded between the predecessor State and the other State party could remain valid, he believed it was the new expression of will by the successor State and the other State party to the treaty that should settle the matter. The reference to the problem of duration made in the commentary should therefore be sufficient, and should enable the Commission to dispense with the article on duration proposed by Sir Humphrey Waldock.

16. Mr. TABIBI said that the question of succession to multilateral treaties was less complicated than succession to bilateral treaties, since the element of invalidity seldom arose. Most bilateral treaties which raised the question of succession dated from the colonial era and involved elements of invalidity, since they had often been concluded between a strong nation and a weak one. It was most important that succession to such treaties should not be automatic, but should be subject to the express agreement of the parties.

17. He therefore supported the position taken by the Governments of the Netherlands and the Byelorussian Soviet Socialist Republic. He hoped the Special Rapporteur would give further consideration to that point of view, especially as one eminent authority, Sir Gerald Fitzmaurice, had repeatedly pointed out that succession to bilateral treaties always gave rise to very complex problems which called for the most careful consideration.

18. Mr. USHAKOV said he could not agree to the deletion of the phrase “in conformity with the provisions of the treaty” in paragraph 1, proposed by the Special Rapporteur, since the provisions in question might be special provisions applicable to the territory covered by the treaty.

19. Mr. KEARNEY said that Mr. Bedjaoui had been quite right in saying it was the express or tacit consent of the parties which provided the effectiveness of a treaty; but the fact that there was a legal nexus with the original treaty did have the effect of permitting simplified modes of entry into force, such as the declaration of succession, instead of repetition of the constitutional procedures. In his opinion, there was a distinct advantage in retaining the idea of that legal nexus.

20. With regard to paragraph 1 (b), he wished to say, in reply to Mr. Tabibi, that the volume of available practice seemed to be sufficient to call for the inclusion of a rule of that kind. As to the period of time which

⁴ See *Yearbook ... 1971*, vol. II, Part One, p. 151, article 14.

would be necessary to establish the "conduct" of the parties, that would always be a question of fact, depending on the circumstances of each individual case. It would seem obvious, for example, that a special agreement concerning air transport should be considered as being in force after being observed for a relatively short time, whereas other agreements, such as extradition treaties, would require longer.

21. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he could accept the text of article 19 proposed by the Special Rapporteur. However, in the case of treaties which had three parties, but which regulated local problems and were by their nature similar to bilateral treaties, he thought it was not article 19, but rather article 12, paragraph 3, or article 13, paragraph 3, that would apply. To his mind, the word "consent" in paragraph 3 of articles 12 and 13 meant the same thing as the word "agree" in paragraph 1 (a) and (b) of article 19, since the consent in question could be either express or implied. As a matter of drafting, therefore, he wondered why it should not be possible to use the same expression in all three articles.

22. Mr. EL-ERIAN said he supported the Chairman's view.

23. Mr. TSURUOKA said he had little to add to the discussion except to draw the Commission's attention to the fact that article 19 should be read in conjunction with part V of the draft articles, on boundary régimes or other territorial régimes established by a treaty. He fully supported the idea of tacit agreement provided for in paragraph 1 (b) of article 19 and reminded the Commission that on a previous occasion he had cited the example of the treaty concluded between Australia and Japan on 6 February 1974, concerning migratory birds, for which the prior consent of Papua had been necessary, although that country was not yet completely independent.⁵

24. Mr. BILGE said he endorsed the principle stated in article 19, but wished to draw the Special Rapporteur's attention to a rather complex case. There were multilateral treaties to which were annexed bilateral declarations forming an integral part of those treaties. For example, the Lausanne Peace Treaty⁶ was a multilateral treaty which contained bilateral declarations. He wondered whether it could not be indicated, in the commentary, that such bilateral declarations would be governed by article 19.

25. Sir Francis VALLAT (Special Rapporteur) said that, in general, he did not think the present draft articles should try to deal with the classification of individual treaties in any greater depth than had been done in the Vienna Convention on the Law of Treaties.⁷ If specific examples were mentioned, especially in connexion with peace treaties, the Commission might find itself in serious difficulties.

26. Concerning the Chairman's question as to how to handle what were in form trilateral and in substance bilateral treaties, he thought it would be necessary to consider each case and classify it as falling under either one or the other heading. However, the difference between article 19 and article 12, paragraph 3, did call for careful consideration in drafting, since in a way paragraph 3 of articles 12 and 13 reflected article 20, paragraph 2, of the Vienna Convention, although the latter used the word "acceptance", while the present draft used the word "consent". In the case of a group of States, it was for them to decide how consent was to be expressed, but in the case of bilateral treaties, where it had been made clear that agreement could be either express or implied by the conduct of the parties, the situation was not the same and there was some reason for a different wording.

27. He sympathized with Mr. Tabibi's view that some treaties ought to be agreed upon expressly, though he agreed with Mr. Kearney that most practice showed that conduct was sufficient. While not sharing the view expressed by Mr. Tabibi, he could see some echo of his thought in articles 29 and 30, which would call for further consideration. Nevertheless, the Commission should not allow what was right or wrong in article 30 to distort the basic principle of article 19.

28. He would reflect further on Mr. Ushakov's observation regarding the phrase "in conformity with the provisions of the treaty" in paragraph 1.

29. The CHAIRMAN suggested that article 19 should be referred to the Drafting Committee.

*It was so agreed.*⁸

30. The CHAIRMAN invited the Special Rapporteur to introduce article 20, which read:

Article 20

The position as between the predecessor and the successor State

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

31. Sir Francis VALLAT (Special Rapporteur) said that article 20 stated an obvious principle and was, in his opinion, a pivotal article. It should remain in the draft articles in spite of the adverse opinion of the Government of Finland (A/CN.4/278/Add.4, para.327).

32. Mr. USHAKOV said he wondered whether the language used in article 20, particularly the expression "not by reason only of the fact", would permit of a situation in which a treaty could be considered as being in force in the relations between the predecessor and the successor State.

33. Mr. ŠAHOVIĆ said he had at first shared the doubts expressed by the Finnish delegation, but had subsequently understood why the Commission had included article 19 in the draft. It was, in fact, a clarification of a point on which the Commission had felt concern. He wondered, however, whether the specific

⁵ See 1269th meeting, para. 18.

⁶ League of Nations, *Treaty Series*, vol. XXVIII, p. 13.

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. 289.

⁸ For resumption of the discussion see 1294th meeting, para. 35.

reasons which had prompted the inclusion of the article should not be stated in the commentary, which seemed to him to be too abstract and too theoretical.

34. He also thought the wording of the article, which was drafted in very general terms, should be revised. The words "by reason only of the fact" did not seem very clear in the context of such a general formulation.

35. Mr. BEDJAOUÏ said he thought that article 20 should be kept in the draft, since it must be read in conjunction with article 19, which the Commission had just decided to retain. He noted, however, that the situation differed slightly, according to the nature of the bilateral treaty in question.

36. Where a treaty was localized—in other words, where it related only to a territory which subsequently became independent—it was obvious, not only that article 20 dealt with a proved hypothesis, but that it was even outdated. There were two kinds of bilateral treaties involved: those concluded between the predecessor State and the other State party to the treaty, which agreed in the original treaty itself to extend its application to their colonial possessions; and those concluded between two States in respect of a colonial territory which would subsequently become independent. In the first case, the colonial territory had only indirectly become subject to a treaty primarily intended to govern relations between the predecessor State and the other State party. Hence article 20 applied perfectly to that kind of treaty, for it was obvious that the express consent of the successor State and the other State party to be bound by the treaty should not automatically mean that the predecessor State and the newly independent State were also bound. In the second case, however, the hypothesis of article 20 was more than proved, it was outdated, since the treaty clearly had no further significance for the predecessor State, which was the former colonial Power.

37. He also drew attention to the title of article 20, which suggested that the article would govern the future position as between the predecessor and the successor State. Article 20 did not deal with that position: it simply provided that the newly independent State's express or tacit agreement with the other State party to the treaty did not affect the relations between the predecessor State and the successor State with respect to the treaty. A provision indicating what would happen to the treaty should therefore be added to the article if it was to fulfil the promise of its title.

38. Article 20 laid down an excellent rule, but it should be expanded to define the relationship between the predecessor State and the successor State with respect to the treaty.

39. Mr. PINTO said that, like Mr. Ushakov, he wondered whether the words "not by reason only of the fact" did not create a certain confusion. In the case of former colonial countries, it would seem unreasonable to assume that there was some legal nexus between them and the former metropolitan State with respect to extradition treaties, though in the case of other treaties, such as those concerning air communications, which had been in force between the former metropolitan State

and a third State, there might be a possible connexion between the predecessor State and the successor State.

40. He agreed that article 20 should be clarified by adding another paragraph.

41. Mr. KEARNEY said he agreed with Mr. Bedjaoui that the title of article 20 suggested that the article dealt in its entirety with a problem which the text really covered only in part. The difficulty arose, perhaps, from the form in which the text of the article was cast. The combination of the negative verb "is not" with the words "by reason only of the fact" gave rise to doubts about the interpretation of the provision.

42. He did not believe that the problem could be adequately solved by introducing an additional paragraph. The draft articles as a whole did not really attempt to deal with the relationship between the predecessor State and the successor State, and he thought it would be going too far to try to cover that exclusion in article 20. The only solution would be to find a form of words which did not have an inflexible negative effect, as did the phrase "by reason only of the fact". He had no specific proposal to make; he hoped the Special Rapporteur would submit suitable wording to the Drafting Committee.

43. Mr. YASSEEN said he thought the Finnish delegation's comment was justified, since the rule laid down in article 20 was self-evident, and the article was not concerned with relations between the predecessor State and the successor State. But in view of the initial unity of the two entities which the succession had separated, it might be thought necessary to specify that there would be no treaty relations between the predecessor State and the successor State.

44. The words "by reason only of the fact" expressed a valid reservation, since in the matter of consent the will of States could do anything. It was, indeed, conceivable that the predecessor State and the successor State might agree to maintain the treaty in force between them, however unlikely that might be. He was therefore in favour of retaining article 20, even though the rule laid down in it might seem too obvious.

45. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 20, said that a central point which had been raised was the effect of special cases in which some future relationship might be necessary between the predecessor State and the successor State. As he saw it, that particular kind of case was not, strictly speaking, a matter of succession at all. If initially no treaty had existed between those two States, there was no treaty relationship to which the successor State could succeed. That situation had been stressed by Mr. Ushakov.

46. He agreed, in principle, on the impossibility of succession in that type of case. There might well be a treaty relationship between the successor State and the predecessor State, but that relationship would arise from a new bilateral treaty between them. It was essential that the Commission should be perfectly clear on that central issue, on which much light had been shed by the present discussion.

47. Those considerations did not appear to call for the introduction of a second paragraph, but, rather, a close examination of the wording of article 20 with a view to clarity. He believed that the words "only" and "also" had been introduced into the present text precisely in order to make it clear that article 20 would not have the effect of creating some kind of treaty relationship between the successor State and the predecessor State, even though such a relationship was outside the scope of the present draft articles.

48. In conclusion, he suggested that article 20 should be referred to the Drafting Committee.

49. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 20 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁹

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

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

[Item 7 of the agenda]

(resumed from the 1277th meeting)

ARTICLES 2, 3, 4 AND 6 (continued)

50. The CHAIRMAN invited the Special Rapporteur to reply to the comments made on his draft articles 2, 3, 4 and 6.

51. Mr. REUTER (Special Rapporteur) said he thought the articles under consideration should be referred as a whole to the Drafting Committee, together with the amended texts he had drafted in the light of the comments made on their form or substance.

52. In the case of articles 2 and 3, it was necessary to distinguish between two aims, only one of which seemed to be of interest to the Commission at present, though he had intended to pursue them both at once. The Commission considered that the draft articles should be regarded as an independent whole capable of becoming a convention, which should enter into force without raising any problems due to the existence of the Vienna Convention on the Law of Treaties. Keeping that aim in view, he had hoped to prepare a draft convention which took those problems into consideration, but also had an additional aim. It should be noted, however, that if it had been decided at the United Nations Conference on the Law of Treaties to extend the scope of the draft articles then under consideration to include treaties involving international organizations, there would now be a single text: the present articles would have been embodied in the Vienna Convention. It might perhaps be decided some day to try to combine the two sets of articles, so that governments could bring them into force simultaneously, as a whole. For the present, it seemed that the Commission had abandoned that

second aim and would prefer to draft clear, simple articles and to defer consideration of any adjustments which the existence of two conventions might necessitate. Obviously, if the second aim was provisionally set aside, many of the criticisms made during the discussion would be pointless.

53. Reviewing the sub-paragraphs of article 2, paragraph 1, he said that in sub-paragraph (a) the term "treaty" should be defined "for the purposes of the present articles", so that it would not be necessary to repeat, throughout the draft, the words "treaty concluded between States and international organizations or between two or more international organizations". Moreover, in order to adhere to the letter of the Vienna Convention, it would be better to delete the words "principally" and "general" qualifying the phrase "governed by international law". Those words were not indispensable and they might not even be quite correct, since it could be argued that some international agreements were governed entirely either by international law or by internal law.

54. The statement that the application of the draft articles was subject to *jus cogens* should not be put in the commentary only, as Mr. Ushakov had suggested, but in a separate provision of the draft, corresponding to the relevant provision of the Vienna Convention.

55. It had been suggested that consideration of sub-paragraph (d), which closely followed the equivalent provision of the Vienna Convention, should be deferred, because the notions of ratification, approval and acceptance might perhaps be meaningless in the case of treaties to which international organizations were parties. He suggested that the Commission should refer the matter to the Drafting Committee without taking any decision on postponement.

56. At the Vienna Conference, a provision which had never been considered by the Commission had been adopted on the proposal of two delegations. In article 11, which dealt with the means of expressing consent to be bound by a treaty, the words "or by any other means if so agreed" had been added to the words "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession".¹⁰ That revolutionary addition meant that henceforth no formalism or specific designation would be required for the act by which a State expressed its consent to be bound by a treaty. The Vienna Conference seemed to have omitted to make a consequential amendment to article 2, paragraph 1 (d) of the Convention on the Law of Treaties. The idea it had introduced now seemed to be widely accepted, however, and in the provision under consideration it would probably be possible to refer to the time of signature or the time of final expression of consent to be bound by a treaty, whatever the form or designation of the consent might be. That would solve an important problem in a way that would be most welcome

⁹ For resumption of the discussion see 1294th meeting, para. 37.

¹⁰ See *Official Records of the United Nations Conference on the Law of Treaties, Summary Records, First Session*, p. 83, para. 42 *et seq.* and p. 344 para. 67 *et seq.*; *Second Session*, pp. 24 and 25 (United Nations publications, Sales Nos. E.68.V.7 and E.70.V.6)

to him, since he had no intention of proposing a formalism which international organizations did not observe and which they were not prepared to accept.

57. With regard to sub-paragraph (e), if the definition in sub-paragraph (a) was formulated "for the purposes of the present articles" the words "as a potential party" could be deleted. Those words were, in fact, justified only in so far as an attempt was already being made to combine the draft articles and the Vienna Convention in a coherent system.

58. The use of the terms "contracting State" and "party" in the Vienna Convention had raised difficulties for Mr. Ushakov. The term "contracting State" had been used when a State had expressed its consent to be bound by a treaty, whether or not the treaty was in force; the term "party" had been used only for treaties that were in force. Article 2 might have been expected to refer to a "State or organization party", but it should be noted that no provision corresponding to article 2, paragraph 1 (g) of the Vienna Convention, which defined the term "party" had been included in the draft articles, because it was very difficult to define an international organization party to a treaty. That definition had been left for later consideration.

59. Sub-paragraph (i) raised a question of substance which would be examined in connexion with article 6. Mr. Kearney had taken the view that the term "inter-governmental organization" was no longer quite correct, because there were now international organizations which were members of an international organization. In addition to the examples already mentioned, there was that of United Nations participation in the International Telecommunication Union (ITU). It was true that the United Nations was not a member of ITU, but it occupied a certain position in that organization. In addition, since Namibia had become an associate member of the World Health Organization (WHO), it was represented there by the Council for Namibia, which was an organ of the United Nations. Its status as a member of WHO would oblige Namibia to make a contribution, which would be paid by the United Nations. Thus it was true that the situation of the international organizations was becoming increasingly complicated, but that was no reason for departing from the official terminology. Even though the United Nations was in a sense an associate member of ITU and participated in WHO through Namibia, the inter-governmental character of ITU and WHO was in no way changed. Moreover, that was the terminology used in the Charter itself.

60. Article 2, paragraph 2 had raised the problem of the "law peculiar to any international organization", for which he had no final solution to propose. He agreed to the deletion of the word "peculiar", but was not sure whether the terminology of article 2, paragraph 2 should be made uniform with that of article 6. The expression "relevant rules of each organization", in draft article 6, had been borrowed from article 5 of the Vienna Convention. It was the product of long discussions and a process of elimination by the Commission. The Drafting Committee would have to seek a suitable

form of words for article 2, paragraph 2, to convey that every international organization was the centre of a body of rules which constituted its specific law.

61. The term "practice" of international organizations should not be used in the text, however, as Mr. Ushakov had suggested. That rather flexible term covered both established practice, which was to say customary rules, and practice in the process of formation. To secure the assent of the international organizations, the Commission would have to respect their faculty of developing a practice, to which they attached great importance. That was why he had pointed out in his commentary that the relevant rules of an international organization included, where applicable, the practice of that organization. The use of the word "practice" would suggest that there might be a customary element in the constitution of an international organization. That was possible, but not necessarily so. Governments might very well establish an international organization and give it an inflexible constitution, rejecting the possibilities of adaptation afforded by recourse to practice. The idea of practice should not be imposed on international organizations; it should follow implicitly from the rules of the organization, as it followed from the internal organization of States in the case of the Vienna Convention.

62. With regard to article 3, he would merely explain why he had drafted that provision and leave it to the Drafting Committee. By the corresponding provision of the Vienna Convention, the Commission had intended to reserve the secondary effects of that Convention on treaties to which it did not apply. The same procedure should be followed in the draft under consideration. It might be asked, however, whether the treaties not covered by the draft articles should be reserved in them or only in the Vienna Convention. According to the present wording of article 3, a treaty concluded between one or more States, one or more international organizations and one or more other subjects of international law, such as the International Committee of the Red Cross, would come under the Vienna Convention rather than the draft articles.

63. As Mr. Ushakov had maintained, it might be doubted whether it was advisable to reserve so strictly the legal force of agreements which increasingly departed from the principal type of agreement, namely, the treaty between States. There was no denying, however, that many oral agreements existed between international organizations and States, and their legal force could not be questioned. By requiring written form, the Vienna Convention defined a treaty rather narrowly. It was quite common for the Secretary-General or an authorized representative of an international organization to make a statement at an international conference, which represented an undertaking by a State. Such undertakings were included in the record of the meeting, which constituted written evidence, but there was no agreement "concluded in written form". Article 3 thus filled a need, but it ought to reserve the relevant rules of international organizations, which might impose any limitations required on undertakings given orally in such circumstances. Accordingly, reservation of the rele-

vant rules of the organizations would provide a safeguard.

64. Article 6 raised the basic question of the field of application of the draft. Should it apply only to international organizations in the United Nations system, only to organizations with a universal mission, or to all international organizations? In his opinion it should apply to all international organizations. The *sedes materiae* of the subject under study was not the law of international organizations, but the law of treaties. The object was to supplement the Vienna Convention, as could be seen from the attitude adopted by the General Assembly and by the Commission itself.

65. The draft could not be confined to certain international organizations when the régime of the treaties to which international organizations were parties depended on general international law and not on the law of each organization, except where the formation of consent was concerned. For instance, any agreements which the Arab League might conclude with the United Nations would derive their legal force from the law of treaties, not from the Charter or from the Statute of the Arab League. If, in addition to the Vienna Convention, there were to be one convention for certain large organizations and another for other organizations, the Commission would be moving towards extremely difficult rules on co-ordination. The only set of draft articles relating to international organizations which was likely to become an international convention was the draft concerning representation of States in their relations with international organizations. There would probably be no other; moreover, apart, perhaps, from a few very general principles, the law of international organizations did not exist. It was possible to discern a common tendency in the different laws of international organizations, but at present there was no single legal régime.

66. The number of international organizations, which was about two hundred, was greater than the number of States and would continue to increase. There were enormous differences between organizations. Among those in the United Nations system, certain characteristics had been established for practical purposes, but even when the International Court of Justice had created the notion of "functional competence" it had specified that that notion was to be understood as it appeared in practice. It could not be extended to any and every type of organization.

67. Certain international organizations did not conclude headquarters agreements; it was their member States which did so. Recently, a European Patent Office had been set up by a Convention¹¹ which itself determined the headquarters agreement; there was a provision merely specifying that the patent office could amplify the provisions on the headquarters agreement. For the Latin American Energy Organization, also recently established,¹² there was no general capacity either, but it was provided that a headquarters agreement could be negotiated.

68. True, it followed clearly from the draft articles that an international organization could be a subject of international law, which almost necessarily implied that it participated in conventional acts. But if it were affirmed that every international organization had the right to conclude treaties, that would be giving a definition of an international organization. It was, however, necessary to take account of developments in that sphere: many entities were on the way to becoming international organizations and that development must not be obstructed. In the practice of the North Atlantic Treaty Organization, member States had taken many precautions to ensure that that entity did not conclude external agreements, especially not a headquarters agreement, but if the practice were known, it might perhaps be found that some small international agreements had been concluded.

69. The Commission would have to choose between the two texts proposed for article 6. Personally, he was inclined to prefer the second version. (A/CN.4/279, para. (20) of commentary). The term "capacity", borrowed from private law, was not the most attractive, but it was the term used in the Vienna Convention; besides, private law was old and its notions were concrete. As Special Rapporteur, however, he gave his preference to the first version, since it followed from the discussion that the capacity of international organizations to conclude treaties derived from international law.

70. The competence of States to create new subjects of international law in the form of international organizations itself derived from international law. That point should be made in the commentary, but it was implicit in the first version of article 6. The principal merit of that provision, which could not be deleted as Mr. Ushakov had suggested, was that it respected simultaneously the will of States, which satisfied those who considered that will the only source of international law, the social reality, which satisfied those who emphasized that aspect of the problem, and the autonomy of international organizations, which feared restriction of their creative power.

71. Mr. USHAKOV, referring to article 2, paragraph 1 (f), reiterated that he did not understand how a State or an international organization could become a "contracting State" or a "contracting organization" to a treaty that was already in force. Not only the draft under consideration, but also the Vienna Convention and the draft articles on succession of States in respect of treaties raised that question.

72. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer draft articles 2, 3, 4 and 6 to the Drafting Committee.

*It was so agreed.*¹³

The meeting rose at 6.05 p.m.

¹¹ See *International Legal Materials*, vol. XIII (1974), p. 268.

¹² *Ibid.*, p. 377.

¹³ For resumption of the discussion see 1291st meeting, para. 9.

1280th MEETING

Tuesday, 18 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-5; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 21

1. The CHAIRMAN invited the Special Rapporteur to introduce article 21, which read:

Article 21

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

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

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

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

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

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

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

2. Sir Francis VALLAT (Special Rapporteur) said that the purpose of article 21 was to make it clear that any changes in the relations between the original parties to the treaty which took place after the date of the succession of States did not affect the position between the successor State and the other States parties.

3. Since the situation was crystallized at the date of the succession of States, the rule in article 21 was self-evident. Nevertheless, it was desirable to include the article, despite its length, because otherwise there might be some doubt about the possible effect of any changes in the treaty occurring after the date of succession of States.

4. The only specific comment on article 21 had been made by the United Kingdom Government, to the effect that paragraphs 2 and 3 appeared to restate the rules in paragraph 1, so that the article could probably be simplified (A/CN.4/275). At first sight that proposition seemed attractive, but on reflection, it became apparent that the situations dealt with in paragraphs 2 and 3 were not the same as those dealt with in paragraph 1.

5. Paragraph 1 dealt with the situation in which a bilateral treaty was considered as being already in force between a newly independent State and the other State party; the other two paragraphs dealt with situations in which the newly independent State had a right to become a successor. If the article dealt with one type of situation and not with the other, doubts would arise about its interpretation and it would do more harm than good.

6. He therefore recommended that the various situations should be dealt with separately and that article 21 should be kept essentially in its present form.

7. Mr. YASSEEN said he supported the Special Rapporteur's conclusion. Article 21 stressed the fact that, from the date of the succession, the treaty no longer belonged to the predecessor State; it was the successor State which became a party to it. Not only should the article be retained, but it should stay in its present detailed form, since it was important, for the sake of clarity, to deal successively with the questions it covered.

8. Mr. TABIBI said that, as he understood it, the rule in article 21 was simply that even if a treaty was terminated as between the predecessor State and the other State party, it would remain in force under article 19 for the newly independent State. He hoped the Special Rapporteur would devise a simpler form of words to express that idea.

9. The relevant rule of international law was that no State, whether new or old, could derive any benefit from a treaty to which it was not a party. If, under the provisions of article 19, the newly independent State and the other State party agreed to bring into operation a treaty which had been terminated as between the predecessor State and the other State party, it could only be a new treaty.

10. Mr. RAMANGASOAVINA said he endorsed Mr. Yasseen's views. Article 21 appeared to be difficult, because it dealt with a whole series of special cases, but the Special Rapporteur had been right in saying that they should all be included.

11. Succession in respect of bilateral treaties did not operate in the same way as succession in respect of multilateral treaties. In the case of bilateral treaties, a completely independent relationship was established between the new State and the other State party, from the

date of the succession. If a link subsisted between the predecessor State and the other State party, it derived from another treaty. Nor was there any question of a trilateral treaty, for the ties linking the other State party with the successor State, on the one hand, and the predecessor State, on the other, were independent, even though their purpose was the same.

12. It was useful to provide for the case in which relations between the other State party and the predecessor State were suspended, and the case in which the treaty was amended in the relations between the predecessor State and the other State party. Those situations in no way affected the relations between the newly independent State and the other State party.

13. Mr. BEDJAOUI said he supported article 21, the wording of which was felicitous, although too detailed. At first he had thought that paragraph 1 could be condensed, but he was now convinced that it should be kept as it stood, in an easily readable and understandable form.

14. As soon as article 19 applied, the treaty no longer belonged to the predecessor State. There was not a trilateral treaty, but two treaties of identical content, each with its own legal existence. Consequently, whatever might affect the legal existence of the treaty between the predecessor State and the other State party could not affect the new collateral treaty between the successor State and the other State party.

15. Article 21 was faultless and should be retained.

16. Mr. CALLE Y CALLE said that he fully accepted article 21, which stated self-evident rules. He was, however, concerned at the use of the expression "by reason only of the fact", which could give rise to misunderstanding. It might be construed to mean that there could be facts which produced a different result.

17. He therefore proposed that the word "only" should be deleted.

18. The CHAIRMAN, speaking as a member of the Commission, asked whether the rules stated in article 21 for bilateral treaties did not also apply to the "restricted" multilateral treaties referred to in article 12, paragraph 3. If so, that fact should perhaps be stated.

19. Sir Francis VALLAT (Special Rapporteur) said that the situation with respect to bilateral treaties needed to be clarified because, as a result of the succession of States, there were two bilateral treaties in the place of one. Under a multilateral treaty, no new treaty was created. All the treaty mechanics continued, and they were not affected by the succession of States. The life of a multilateral treaty was independent of succession.

20. It would be a mistake to try to deal with multilateral treaties in article 21; each of those treaties operated under its own provisions. Those considerations applied with equal and possibly with even greater force to "restricted" multilateral treaties.

21. The CHAIRMAN, speaking as a member of the Commission, said that the rules in article 21 would apply to "restricted" multilateral treaties even if the draft articles did not say so. Under article 19, to which

article 21 referred, the consent of both parties to a bilateral treaty was necessary for the treaty to be considered as remaining in force after a succession. The situation would be similar for a "restricted" multilateral treaty; for it to remain in force, the consent of all the three or four parties to it would be required. That point could perhaps be explained in the commentary.

22. Mr. USHAKOV said it would be necessary for the Special Rapporteur to prepare a draft article on the matter.

23. Sir Francis VALLAT (Special Rapporteur) said that, in the present draft articles, a clear-cut distinction had been made between bilateral treaties and multilateral treaties. The treaties referred to in article 12, paragraph 3 were still multilateral, even if they were "restricted". Hence he did not think it advisable to suggest in any way that those treaties were in the same position as bilateral treaties.

24. THE CHAIRMAN, speaking as a member of the Commission, said he was satisfied with that explanation.

25. Speaking as Chairman, he suggested that article 21 should be referred to the Drafting Committee.

*It was so agreed.*¹

ARTICLE 22

26. The CHAIRMAN invited the Special Rapporteur to introduce article 22, the first article in part III, section 4 (Provisional application), which read:

Article 22

Multilateral treaties

1. A multilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and another State party to the treaty if the successor State notifies the parties or the depositary of its wish that the treaty should be so applied and if the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. However, in the case of a treaty which falls under article 12, paragraph 3, the consent of all the parties to such provisional application is required.

27. Sir Francis VALLAT (Special Rapporteur) said that the comments made by the Swedish Government on the need to include articles 22, 23 and 24, on provisional application (A/CN.4/275), must be viewed in the light of the adoption of the clean slate principle. The Swedish criticism of the basic philosophy of the draft articles need not detain the Commission, since it had already agreed not to prepare an alternative set of draft articles based on continuity.

28. The Swedish Government had also raised the question of the apparent inequality between the successor State and the other State party with regard to the operation of article 22. In fact, however, that inequality was not a matter for concern, since it related to the mechanics of the provision. A successor State wishing to apply the treaty provisionally would have to notify its wish to the depositary, or to the parties as the case

¹ For resumption of the discussion see 1294th meeting, para. 42.

might be. The other State party, could either agree expressly to such provisional application or show its agreement by its conduct.

29. The articles on provisional application were of great practical value. They provided a very useful bridge between non-application and notification of succession, and would help to minimize any hardship that might result from the clean slate principle. That was particularly true of article 22, about which a number of detailed suggestions had been made by Governments.

30. The Swedish Government had objected to the words "or by reason of its conduct is to be considered as having so agreed" at the end of paragraph 1. The effect of deleting those words would be to require the express consent of the other State in all cases, and it could be argued that to attach legal effect to mere conduct always left room for doubt and might give rise to disputes. Nevertheless, he thought the provision should be kept as it stood, because there was some State practice to support it and because it was useful to allow other States parties to make the position clear by their conduct.

31. The United Kingdom Government had suggested that the expression "successor State" in article 22 should be replaced by the expression "newly independent State", in the interests of consistency with the earlier articles in part III of the draft (A/CN.4/275). He thought that change would be an improvement.

32. The same Government had pointed out that the possibility of provisional application between the newly independent State and the predecessor State itself would seem to be excluded by the use of the term "another State party", since according to article 2, paragraph 1 (*m*), the term "other State party" meant a party "other than the predecessor State". He himself saw no reason why the predecessor State should not itself have the benefit of provisional application, and thought that the wording of article 22 should be clarified to that end.

33. For the reasons given in his report (A/CN.4/278/Add.4, para. 340), he suggested that, in paragraph 1, the word "so" should be deleted from the phrase "its wish that the treaty should be so applied".

34. The Spanish delegation in the Sixth Committee had criticized the wording of article 22 as being unduly involved. That criticism was really a comment on the classification of multilateral treaties in article 12, so it did not call for any alteration in the language of article 22. It was, however, true to say that the relationship between the two paragraphs of article 22 was not sufficiently clear, particularly with regard to the application of the procedural provisions of paragraph 1 to the situations contemplated in paragraph 2. He had therefore proposed a redraft of article 22 (*ibid.*, para. 342) in which he had attempted to make the meaning clearer by combining the two paragraphs of the article.

35. Mr. KEARNEY said he fully supported the philosophy of section 4, on provisional application. The provisions it contained were essential in view of the recent history of State succession. Owing to the pressing problems faced by newly independent countries and the time they required to consider their position in regard to

a large number of treaties, it was likely that in most cases provisional application would continue for a very long time.

36. He agreed that article 22 gave rise to a number of difficult drafting problems and thought the Special Rapporteur's proposals for dealing with them were basically sound. He was not certain, however, that the complete redraft appearing in the report fully met the case. In redrafting the article, it might perhaps be desirable to deal not only with the possibility of the predecessor State benefiting from temporary application, but also with a situation in which two successor States made a notification of provisional application. There would seem to be no objection to provisional application between two successor States, although neither of them was, strictly speaking, a party to the treaty.

37. With regard to the formalities required, he found the language of article 17 much clearer than that of article 22. The meaning of article 22 was that, where there was a depositary, the notification had to be made to the depositary, and where there was no depositary, it had to be made to all the parties. That should be made quite clear.

38. Lastly, he wished to draw attention to a question arising from the provisions of article 12. Paragraph 1 of that article enabled a newly independent State to establish its status as a party to a multilateral treaty by a notification of succession. Paragraph 2, however, ruled out the application of paragraph 1 "if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty". What would be the effect of that provision on provisional application? The relationship established by provisional application was in the nature of a bilateral arrangement under a multilateral treaty, but it might have some side effects on the other parties to that treaty. Another State party might, in those circumstances, complain that provisional application was incompatible with the object and purpose of the treaty. That point did not appear to have been considered on first reading.

39. Mr. USHAKOV said there was a deep-seated contradiction between article 22 and article 12. Article 22 dealt not only with the provisional application of a multilateral treaty, but with the bilateral application of a multilateral treaty by only two of the parties.

40. It had been said that there was a choice in the matter of provisional application. If that was so, the choice lay not with the newly independent State, but with the other State party. The newly independent State was required, under paragraph 1 of article 22, to notify its wish for provisional application to all the parties. When that notification was made, the other parties to the treaty could agree to provisional application or refuse it, either expressly or by their conduct. That situation was in flat contradiction with the provisions of article 12. For if a newly independent State made a notification of succession under article 12, the other States parties had no choice; the treaty would be automatically applicable, regardless of their consent.

41. Another contradiction lay in the absence of any time-limit for the application of article 22.

42. Behind what appeared to be a lucid draft, the article thus concealed some very difficult problems of substance. He would not discuss the improvements in drafting suggested by the Special Rapporteur; what he was concerned about was the meaning and purpose of article 22.

43. Mr. MARTÍNEZ MORENO said that he accepted the three articles on provisional application. The clean slate rule had two results: the first was that a newly independent State came to life free of treaty obligations, except in so far as it wished to be bound by them; the second was that a newly independent State had a right to participate in multilateral treaties, except "restricted" multilateral treaties.

44. It had been repeatedly stressed that a newly independent State required time to consider the desirability of accepting its predecessors's treaties. The articles on provisional application would be of great assistance in that respect, since they would allow the treaty to continue to operate until the newly independent State had reached a decision.

45. It had to be recognized, however, that the resulting uncertainty could create problems for the other States parties. That uncertainty should not be prolonged unduly, and he suggested that a reasonable period of provisional application should be allowed, at the end of which the newly independent State would be required to decide whether it wished to become a party to the treaty or not.

46. Lastly, he supported the drafting improvements proposed by the Special Rapporteur to meet the valid points made by the United Kingdom Government.

47. Mr. PINTO said he had no objection to the retention of articles 22, 23 and 24, which constituted a complement to the clean slate principle.

48. With regard to the text of article 22, he had at first shared the misgivings of the United Kingdom Government: the possibility of the predecessor State benefiting from temporary application seemed to be excluded by the wording of the article. On reflection, however, he thought the use of the singular form "another State party" was due to grammatical considerations and that the intention was to refer to all other States parties, including the predecessor State.

49. It was appropriate to emphasize the question of express consent in article 22 because of the kind of relationship produced by provisional application. There was no contradiction with the provisions of article 12; if a newly independent State established its status as a party to a multilateral treaty under the provisions of article 12, the other State party would still be free to express its views on the question.

50. Lastly, he suggested that consideration should be given to covering the case of a multilateral treaty which expressly provided for provisional application; such a treaty might well, at the time of the succession, be provisionally in application in the territory to which the succession related.

51. Mr. RAMANGASOAVINA said he approved of the three articles on the provisional application of treaties.

52. In the preceding articles, particularly in article 12, the Commission had dealt with the situation of a successor State which, by a notification of succession or a devolution agreement, expressed its will to become a party to a treaty. But it had also noted, in regard to article 12, that a successor State could maintain a waiting attitude, and it had wondered whether it would not be advisable to set a reasonable time-limit for that period of uncertainty, which put the other States parties at some disadvantage. Article 22, however, dealt with an intermediate situation—that of the provisional application of the treaty. That situation presented a twofold advantage: it served to fill the temporary gap which existed so long as the successor State had not expressed its will; and it enabled the successor State to take a positive position, even if that position was only a provisional one.

53. After thus providing for that transitional period the Commission specified, in article 24, the conditions in which it would terminate. There were two possibilities: termination of the treaty, as provided for in article 24; and maintenance in force of the treaty, if the successor State finally agreed to be bound, thus confirming the situation it had accepted provisionally. He thought the second possibility had not been sufficiently emphasized.

54. Mr. QUENTIN-BAXTER said that as the Special Rapporteur had pointed out, once the fundamental decision had been made to follow the clean slate method, the articles in section 4 came to play an essential part in the mechanism of the draft. Once it was decided that a newly independent State should have an absolute right to become a party to a multilateral treaty, there was no reason to be restrictive as to the procedure by which it might indicate its desire to apply that treaty provisionally.

55. As he understood it, the practice which the Commission had intended to reflect in articles 22 and 24 was, precisely, the State practice which had grown up around the institution of the unilateral declaration. Reference was made to such declarations in article 9, where it was stated, however, that they could have effect only "in conformity with the provisions of the present articles".

56. Like many members, he really had no difficulty in principle about the relationship between article 22 and article 12. It did not seem to him strange that there should be an absolute right to become a party under article 12, while under article 22 the wishes of the other State party should also affect the equation. Because the procedure in question was a permissive one, the other State should be entitled to say that, while the successor State had an absolute right to become a party, it was so inconvenient to have any uncertainty about the treaty that it wished the successor State to regularize its position.

57. In his opinion, there was no need to reconcile the bilateral nature of provisional application with the procedure established in article 12, by which a newly independent State could notify its intention to succeed to a treaty; but once the question of time-limits had become prominent in the discussion, as it had in connexion with articles 12 and 13, it seemed to him inevitable that, as Mr. Ushakov had pointed out on one

occasion, the problem should be considered in relation to the procedure laid down in article 24 for the termination of provisional application. Once it was established that either State could terminate the provisional application on reasonable notice, it would seem to be highly unreasonable that by subsequent action under article 12 the newly independent State should be able to claim that its succession related back to the date of the succession of States.

58. In logic and in practical convenience, there surely had to be a connexion between those two things. The practice was a permissive one; the new State only had to make its declaration, which would normally be conveyed to the Secretary-General of the United Nations and circulated to member States. Article 22 assumed that the other States parties to a multilateral treaty would not be too hasty in concluding that the newly independent State wished to sever its connexion with that treaty.

59. The various drafting suggestions which had been made during the discussion should provide a good basis for reconsideration of the articles in section 4 by the Drafting Committee.

60. Mr. CALLE Y CALLE said he was in fundamental agreement with the provisions of article 22. Mr. Ushakov had said that the article actually concerned the possibility of bilateral application of a multilateral treaty, and its background was to be found in article 16 of the draft submitted by Sir Humphrey Waldock in his fourth report,² which provided that a new State could declare that it was willing to apply a multilateral treaty "on a reciprocal basis with respect to any party thereto". That had indeed been a bilateral relationship with respect to the application of a multilateral treaty, but article 22 of the present draft abandoned the concept of reciprocity and dealt with a treaty which was essentially multilateral. The treaty could be applied provisionally, but the consent of the other parties to that procedure did not establish a bilateral relationship.

61. Article 22 presented certain drafting problems, which had been skilfully solved by the Special Rapporteur in his proposed redraft. By eliminating the idea of the "other State", he had brought the text closer to the very nature of the multilateral treaty, so that it could also include the predecessor State or, as Mr. Kearney had suggested, the other successor States which might exist at the same time.

62. He suggested, however, that the order of subparagraphs (a) and (b) of the redraft should be reversed. Sub-paragraph (a) referred to the case of a treaty falling under article 12, paragraph 3, which was a special case, whereas sub-paragraph (b) contained the more general rule governing the provisional application of multilateral treaties, which should come first.

63. Mr. REUTER said he wished to make a theoretical observation in order to place the problem raised by Mr. Ushakov within the framework of the general law of treaties. The Vienna Convention on the Law of

Treaties³ contemplated cases in which a treaty might give rise to a collateral agreement—the expression used by Sir Humphrey Waldock, especially in connexion with the articles concerning the effect of treaties on third parties. If that effect did not exist, it could nevertheless be generated by a collateral agreement concluded between a third State and all or some of the other States parties to the original treaty. There was no reason, therefore, why a multilateral treaty could not give rise to a provisional collateral agreement. It was not, of course, the multilateral treaty which applied under that provisional bilateral agreement: it was the rules stated in the multilateral treaty, which became the subject of a collateral bilateral agreement. That was a completely classical situation, which did not give the successor State all the rights of the parties to the multilateral treaty, but merely settled, in a collateral agreement, the question of the application of the rules.

64. In his opinion, therefore, the only problem that arose was purely a matter of drafting: it was necessary to word the article in such a way that the collateral character of the provisional application would appear more clearly than it did in the present text.

65. Mr. USHAKOV said he thought the situation contemplated by Mr. Reuter was possible not only in regard to provisional application, but in regard to any kind of application whatever; for as Mr. Yasseen had pointed out, everything depended on the will of the parties. In his opinion, what was involved was a rule laid down in the Vienna Convention, which added nothing to the draft since it did not relate to a multilateral treaty as such. Thus the article said nothing new about the possibility of two States applying any multilateral treaty whatsoever as between themselves, by mutual consent.

66. Mr. CALLE Y CALLE, referring to the rule in article 25 of the Vienna Convention, which permitted the provisional application of a treaty, said that there was a difference between that classical rule and the rule in draft article 22. The article in the Vienna Convention referred to treaties which, although not in force, could be applied provisionally by agreement between the parties, whereas article 22 of the draft referred to treaties which were already in force, and might therefore call for somewhat different treatment.

67. Sir Francis VALLAT (Special Rapporteur), summing up the discussion, said it would be difficult for him to comment on all the points that had been raised, but he thought a large majority of the Commission was prepared to support articles 22, 23 and 24.

68. Mr. Reuter had singled out the central point at issue when he had spoken of "collateral agreements". To think too restrictively in terms of the bilateral application of multilateral treaties would only result in unnecessary confusion. A collateral agreement, however, could apply between a successor State and one party to a multilateral treaty and would present no insuperable doctrinal difficulties.

² See *Yearbook ... 1971*, vol. II, Part One, p. 153.

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.

69. The time factor, which had been mentioned by Mr. Ushakov and Mr. Martínez Moreno, was a special question which would call for much reflection. Also linked with the question of time-limits was another problem he found rather troublesome, which had been mentioned by Mr. Quentin-Baxter: the possibility of the retroactive effect of a notification of succession after a period of provisional application. If that period was terminated, it would surely be unreasonable to allow the successor State to become a party to the treaty a year later with retroactive effect.

70. Another point was that raised by Mr. Calle y Calle in connexion with article 25 of the Vienna Convention, on provisional application. Since the Commission was using language parallel to that of the Vienna Convention, the interpretation of its draft articles should be on the same basis, but the language of article 25 would not seem to apply to multilateral treaties already in force. It was, of course, a matter for the Commission whether it wished, or was able, to provide for such cases.

71. The other questions of detail which had been raised were primarily drafting points. With reference to Mr. Ushakov's comment on article 12, he had already observed that if article 22 were regarded as providing for collateral agreements, there would be no basis for any conflict with article 12 and the question of the bilateral application of multilateral treaties would not arise.

72. The CHAIRMAN suggested that article 22 should be referred to the Drafting Committee.

*It was so agreed.*⁴

ARTICLE 23

73. The CHAIRMAN invited the Special Rapporteur to introduce article 23, which read:

Article 23

Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State party if:

- (a) they expressly so agree; or
- (b) by reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

74. Sir Francis VALLAT (Special Rapporteur) said that the discussion on article 22 had made any long discussion of article 23 unnecessary, but he would like to draw the Commission's attention to paragraphs 345 and 346 of his report (A/CN.4/278/Add.4), which contained his observations on the comments of the Zambian and United Kingdom Governments.

75. Mr. YASSEEN said he thought that article 23 met a need for symmetry, but did not deal with the same problem as article 22, of which it was the counterpart. It concerned the application of a general principle of international law, which affirmed that States were free to provide for the provisional application of a treaty as

between themselves. He did not see anything in it which called for a discussion.

76. In his view, the merit of article 23 might be that it stressed the possibility of provisional application by reason of the conduct of States. He therefore considered that the article should be retained and that the question whether to replace the expression "the successor State" by "the newly independent State", should be considered in the Drafting Committee.

77. Mr. USHAKOV suggested that, since article 23 presented no problems of substance it should be referred to the Drafting Committee.

*It was so agreed.*⁵

The meeting rose at 12.50 p.m.

⁵ For resumption of the discussion see 1295th meeting, para. 13.

1281st MEETING

Thursday, 20 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-5; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 24

1. The CHAIRMAN invited the Special Rapporteur to introduce article 24, which read:

Article 24

Termination of provisional application

1. The provisional application of a multilateral treaty under article 22 terminates if:

- (a) the States provisionally applying the treaty so agree;
- (b) either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or
- (c) in the case of a treaty which falls under article 12, paragraph 3, either the successor State or the parties give reasonable notice of such termination and the notice expires.

2. The provisional application of a bilateral treaty under article 23 terminates if:

- (a) the successor State and the other State party so agree; or
- (b) either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

⁴ For resumption of the discussion see 1295th meeting, para. 2.

3. Reasonable notice of termination for the purpose of the present articles shall be:

- (a) such period as may be agreed between the States concerned; or
- (b) in the absence of any agreement, twelve month's notice unless a shorter period is prescribed by the treaty for notice of its termination.

2. Sir Francis VALLAT (Special Rapporteur) said that since a section on provisional application was to be included in the draft, an article providing for the termination of provisional application was obviously necessary.

3. Government comments on the article were extremely few. Those of the Swedish Government (A/CN.4/275), which applied to the whole section on provisional application, were really directed not so much against the articles it contained as against the clean slate doctrine. Thus they did not amount to a request for the deletion of article 24.

4. Two valid drafting points had been raised by the United Kingdom Government, which he had already discussed in connexion with article 22. In his report, he had proposed that they should be taken into account in article 24 as well (A/CN.4/278/Add.4, para. 350).

5. Mr. ŠAHOVIĆ, referring to sub-paragraphs (a) and (b) of paragraph 3, said that since paragraphs 1 and 2 distinguished between the period which might be agreed between the States concerned and reasonable notice of termination, the Drafting Committee should consider whether paragraph 3 (a) was really necessary.

6. Mr. YASSEEN said he thought sub-paragraph (a) of paragraph 3 was covered by sub-paragraph (b), which began with the words "in the absence of any agreement"; that left States free to agree on any period whatsoever.

7. The CHAIRMAN, speaking as a member of the Commission, drew attention to paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C), which stated that provisional application could be terminated under the general law of treaties in ways other than those specified in paragraphs 1 and 2 of article 24, and gave the example of the conclusion by the States concerned of "a new treaty relating to the same subject-matter and incompatible with the application of the earlier treaty". Other examples could be given, such as the expiry of a period fixed by a newly independent State for the provisional application of a bilateral treaty, which was the case mentioned in paragraph (1) of the commentary to article 23.

8. He therefore suggested that the words "*inter alia*" should be inserted after the word "terminates" in paragraphs 1 and 2 of article 24; that would indicate the existence of other possible cases of termination.

9. Article 24 did not deal with the commencement of provisional application. The idea seemed to be that it would start on the date of the succession of States; but since it was based on agreement between the parties, it was possible for the parties to agree that provisional application would not be retroactive to that date. The Commission should therefore consider introducing into article 24 a provision dealing with the commencement of provisional application; it could specify that provi-

sional application would begin on the date of the succession of States unless otherwise agreed.

10. Mr. MARTÍNEZ MORENO supported the Chairman's proposal that the words "*inter alia*" should be inserted in paragraphs 1 and 2.

11. He was concerned about the fact that provisional application might continue for an unduly long time and thus affect the interests of other States. Consideration should be given to introducing a time-limit within which a newly independent State would have to decide whether to adopt the treaty finally or abandon it. Provisional application should not be allowed to continue indefinitely pending that decision.

12. Sir Francis VALLAT (Special Rapporteur) said he would reflect on the interesting points raised by the two previous speakers. The idea of dealing with the date of commencement of provisional application seemed logical in view of the detailed provisions on commencement in other parts of the draft. Nevertheless, since the situations covered in articles 22 and 23 involved an agreement between the States concerned, it might perhaps be best to leave the date of commencement to be agreed by those States and not to try to legislate on the subject.

13. The example mentioned by the Chairman, of termination resulting from a newly independent State's offer to apply a bilateral treaty provisionally during a fixed period, would appear to be covered by the reference to the terms of the agreement; there seemed to be no reason to make special provision for it.

14. The other example mentioned by the Chairman, that of the conclusion of a new treaty, raised some difficulties. As he saw it, the rule in article 24 ought to be recognized as a residuary rule—a fact which was made clear by the language of paragraph 3. But the case of conclusion of a new treaty raised a much deeper and larger question, which had recurred throughout the discussion of the draft articles, namely, their relationship with the general law of treaties and, in particular, with the Vienna Convention on the Law of Treaties.¹ His own assumption was that none of the provisions of that Convention should be written into the present draft, except where necessary having regard to the needs of a particular article.

15. That general position would have to be stated clearly, either in the general commentary to the draft or in the text of an article. Because of the difficulty of drafting such an article so that it could not be interpreted as having implications that were not intended, his present inclination was to explain the position in the commentary.

16. The various suggestions made on the wording of article 24 would be considered by the Drafting Committee.

17. Mr. RAMANGASOAVINA said that at the previous meeting he had raised the question whether the draft should provide for the possibility of provisional application becoming definitive application.² The

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

² See previous meeting, para. 53.

period of provisional application was a time of waiting, at the end of which the newly independent State might decide that it was in its interest to accept full succession to the treaty; there would be cases in which it would prefer to accept the whole treaty definitively rather than terminate its application. Neither the article under discussion nor any other provision in the draft seemed to provide for that possibility.

18. Sir Francis VALLAT (Special Rapporteur) said that there did seem to be, in article 24, a lack of liaison with the provisions of articles 12 and 13. The question of the relationship between provisional application and final acceptance of the treaty as being in force was a difficult one, which could be important in practice and had many implications for the draft. It would be carefully considered by the Drafting Committee.

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

*It was so agreed.*³

ARTICLE 25

20. The CHAIRMAN invited the Special Rapporteur to introduce article 25, which read:

Article 25

Newly independent States formed from two or more territories

When the newly independent State has been formed from two or more territories in respect of which the treaties in force at the date of the succession of States were not identical, any treaty which is continued in force under articles 12 to 21 is considered as applying in respect of the entire territory of that State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty to the entire territory would be incompatible with its object and purpose or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty;

(b) in the case of a multilateral treaty other than one referred to in article 12, paragraph 3, the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(c) in the case of a multilateral treaty of the kind referred to in article 12, paragraph 3, the successor State and the other States parties otherwise agree;

(d) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

21. Sir Francis VALLAT (Special Rapporteur) said that article 25 was necessary, because it covered a phenomenon that was quite likely to occur.

22. The Netherlands Government (A/CN.4/275/Add.1) had raised the question of the inequality between the newly independent State and the other States parties—a question which had already been discussed in connexion with articles 12 and 13. His reaction, like that of the Commission, was that any attempt to reverse that apparent inequality would amount to reversing the clean slate doctrine, and since the Commission had decided to abide by that doctrine in the draft, article 25 should stand.

23. A special problem arose, however, in regard to article 25. Under its provisions, a treaty which had applied to only one part of what was later to become the newly independent State could be extended to the whole territory of that State, and that extension might well cause a substantial increase in the obligations of the other States parties. On reflection, however, he had decided not to recommend any change in article 25 on those grounds, for the reasons given in his report (A/CN.4/278/Add.5, para. 356) and bearing in mind that no other Government had taken up that point.

24. Sub-paragraph (a) contained two qualifications: first, that arising from the incompatibility test and, secondly, that expressed in the concluding provision “or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty”. On those points, there had been three different kinds of comment. The Spanish delegation in the Sixth Committee had strongly supported the second of those qualifications (*ibid.*, para. 353) and had even suggested that it should be extended to other articles of the draft. He had himself favoured the idea of introducing it into article 10, which had some elements in common with the case contemplated in article 25. The Netherlands Government had suggested that an umbrella article should be introduced into part I to provide for the possibility of invoking fundamental change of circumstances (A/CN.4/275/Add.1, para. 7). That proposal contained two ideas: first that the language at the end of sub-paragraph (a) of article 25 should be replaced by wording taken from article 62 of the Vienna Convention on the Law of Treaties; secondly, that the provision should be extended to cover all the articles of the present draft. The comments of the United Kingdom Government on sub-paragraph (a) (A/CN.4/275) were somewhat similar; it had criticized the departure from the wording used in article 62 of the Vienna Convention (Fundamental change of circumstances).

25. As he saw it, sub-paragraph (a) of article 25 dealt with cases in which, unlike those covered by article 62 of the Vienna Convention, the time element was not present. The use of the short phrase “radically to change the conditions for the operation of the treaty”, instead of the much stricter provisions of article 62 of the Vienna Convention, would therefore seem justified. The intention was that article 25 should apply a more flexible and wider test than the Vienna Convention. That approach seemed reasonable and he would therefore suggest retaining sub-paragraph (a) as it stood.

26. The United Kingdom Government had also criticized sub-paragraph (b) as possibly going beyond what was provided in article 29 of the Vienna Convention (Territorial scope of treaties). That article, however, qualified the rule that a treaty was binding upon each party “in respect of its entire territory”, by the proviso “Unless a different intention . . . is otherwise established”. Sub-paragraph (b) of article 25 was thus consistent with the spirit, if not the letter, of article 29 of the Vienna Convention, and he saw no reason to alter it.

27. A more difficult point had been raised by the United States Government (A/CN.4/275), namely, the possibility of conflicts arising from the application of

³ For resumption of the discussion see 1295th meeting, para. 16.

different treaties in two parts of the same State as a result of the operation of sub-paragraph (b). His own feeling in the matter was that the problems involved should be left to be dealt with by the newly independent State, which would have the choice of extending or restricting the application of the treaty. On balance, for the reasons given in his report (A/CN.4/278/Add.5, para. 362), he thought it wiser not to limit the scope of sub-paragraph (b), or delete it as suggested by the United States Government.

28. Mr. TAMMES said he did not favour the principle of the equality of all parties to a treaty, if that principle would mean the introduction of a system of objections available to all "other States parties".

29. The Commission should understand equality to mean bringing the newly independent State, as far as possible, into a position equal to that which it would have had if it had been independent and in possession of all the rights of a sovereign State at the time when the treaty had been concluded. A system of objections would frustrate that equality and, particularly, the purpose of part III, section 2, of the draft, which established the right of option. In that respect he fully agreed with the views of the Special Rapporteur.

30. There was, however, a more limited kind of inequality, or rather incongruity. Under article 25, a newly independent State formed from two or more territories would be free to choose to continue a treaty in force either for its entire territory or with the original territorial restriction mentioned in sub-paragraph (b). The other State party, on the other hand, would normally be bound for its entire territory, in accordance with article 29 of the Vienna Convention; it would thus never have enjoyed a free choice. Nor would the newly independent State itself enjoy a free choice if it acceded to the treaty instead of notifying succession.

31. As indicated in paragraph (11) of the commentary (A/8710/Rev.1, chapter II, section C), the Secretary-General, acting as depositary, had originally rejected that incongruity. That fact, combined with the government comments, particularly those of the United Kingdom, justified reconsidering the question whether sub-paragraph (b) should be retained. The difficulties indicated by the United States Government constituted an additional reason for reconsideration.

32. Examining article 25 in the light of the government comments, he was even more convinced than when he had discussed article 10, that it was necessary to include in the draft a general article on fundamental change of circumstances.⁴ Both article 10 and article 25 dealt with the extension of the territorial scope of a treaty, but in article 10, the radical change of reciprocal rights and duties was not taken into consideration, whereas in article 25 it was.

33. In addition, the possibility would arise under the draft articles of concurrent objections by the other State party which found its interests threatened by an unexpected extension of the territorial scope of its treaty

obligations. That State could, in the first instance, invoke a radical change under article 25, sub-paragraph (a) of the draft, as an objection to the operation of the extended treaty through succession of States. Then, after succession, the same State could invoke article 62 of the Vienna Convention against the treaty in force, on somewhat different grounds and by an entirely different procedure.

34. He thought that those disturbing questions had not been fully answered in the Special Rapporteur's analysis. Perhaps the introduction of a general article on the relationship between the present draft and the Vienna Convention on the Law of Treaties could provide a solution to the problem.

35. Mr. CALLE Y CALLE said that although the situations dealt with in article 25 were quite complex, its provisions were sufficiently clear. They established a general presumption of extension of the territorial application of the treaty, combined with the option for the newly independent State to restrict that application.

36. He shared the view expressed by the Spanish delegation in the Sixth Committee that the wording of the article was much too involved. In particular, the last clause of sub-paragraph (a) was somewhat ambiguous and could be taken to mean that the territories in question had been combined for the purpose of radically changing the conditions for the operation of the treaty. He therefore suggested that that clause should be amended to read: "... that the succession of States would be incompatible with the object and purpose of the treaty or that the conditions for the operation of the treaty have radically changed as a result of the combining of the territories".

37. Article 25 had a direct connexion with article 10, on transfer of territory; a newly independent State could be formed from two or more territories, one of which was transferred by another State. He therefore supported the Special Rapporteur's suggestion that an additional paragraph should be inserted in article 10 to deal with radical change in the conditions of operation of the treaty as an exception to the rule in that article (A/CN.4/278/Add.5, para. 358).

38. He believed that the difference in language between article 25, sub-paragraph (a) and article 62 of the Vienna Convention on the Law of Treaties was justified. The effects of draft article 25 were less profound than those of article 62 of the Vienna Convention; draft article 25 referred simply to the possibility of applying a treaty. He therefore supported the retention of article 25 as it stood.

39. Mr. PINTO said he agreed with article 25 and with the Special Rapporteur's comments on it. His only difficulty related to the presentation of the article, but it was more than a mere drafting problem.

40. He was not at all certain of the relevance of the qualification contained in the words "were not identical". A single treaty could be applied by a metropolitan State to two territories which later became two successor States. In a case of that kind, the various sub-paragraphs of article 25 could still apply. For example, the application of the treaty to the entire territory formed

⁴ See 1268th meeting, para. 36.

by the two successor States could be incompatible with its object and purpose.

41. From the point of view of drafting, he found the words "the entire territory of that State" confusing and suggested that they should be replaced by the words "the newly independent State as a whole".

42. Lastly, he would like to know whether there was any reason for using the words "prior to the succession" at the end of sub-paragraph (b), instead of the usual formula "at the date of the succession".

43. Mr. EL-ERIAN congratulated the Special Rapporteur on his lucid analysis of the comments by Governments, in particular those of the United Kingdom and the United States.

44. With regard to the United Kingdom comment on the difference in language between sub-paragraph (a) of draft article 25 and article 29 of the Vienna Convention, he pointed out that there was a basic difference between the two articles. Article 29 of the Vienna Convention applied the subjective criterion of intention. The criterion in draft article 25, on the other hand, was an objective one, based on a radical change that had taken place in the conditions for the operation of the treaty.

45. The article was an elaborate one, but its presentation was adequate. The introductory paragraph contained a rule in the form of a presumption; the four sub-paragraphs which followed stated the exceptions.

46. In view of the comments made by certain Governments, there could be a temptation to change the wording of article 25, but he thought the Special Rapporteur had done well to resist that temptation and to recommend that the article be retained as it stood.

47. Mr. KEARNEY said that the point raised by Mr. Pinto was a very valid one. The question whether the treaties were not identical probably had limited relevance. Some of the examples given in the commentary to article 25 (A/8710/Rev.1, chapter II, section C), and particularly the complicated set of treaty relationships of Ghana on attaining independence, showed that in practice there was no great difference whether the treaties were identical or not.

48. Another valid point had been raised by Mr. Tammes, with regard to incongruity under the exception provided for in sub-paragraph (b) of article 25. There appeared to be no justifiable reason for making that exception to the general rule that the treaty applied in respect of the entire territory of the newly independent State. Sub-paragraph (b) established an unnecessarily wide distinction between a multilateral treaty and a bilateral treaty, for in the case of a bilateral treaty the consent of the two States concerned was necessary, under sub-paragraph (d), for an exception to the general rule.

49. The Commission had adopted the basic approach that the newly independent State had a unilateral right of choice as to becoming a party to a multilateral treaty; its unilateral decision could not be vetoed by any other State party to the treaty. Once the newly independent State had decided to apply the treaty, however, there was no reason why it should not apply it to the

entire territory. Any restriction on territorial application should have a good reason; it should not be left to the discretion of the newly independent State to decide the scope of territorial application.

50. For those reasons, he urged the Commission to consider rewording sub-paragraph (b) if it was decided to retain it.

51. Mr. EL-ERIAN asked whether the Commission had had any reason, in 1972, for adopting the expression "radically to change" in sub-paragraph (a), instead of the expression "fundamental change" which was used in article 62 of the Vienna Convention. No explanation on that point was given in the commentary.

52. Mr. ŠAHOVIĆ asked why article 25 referred only to articles 12 and 21 and did not take into account the treaties contemplated in articles 22 to 24. That question did not appear to be answered in the commentary, and he saw no reason why article 25 should not extend to treaties applied provisionally.

53. He thought that sub-paragraph (b) ought to be reconsidered in the light of the comments made during the discussion, and that the Commission should not be bound by the decision it had taken when adopting the text on first reading. He did not find sub-paragraph (b) very clear, because the treaty in question was defined negatively, by reference to a treaty referred to in article 12, paragraph 3, which itself was not worded sufficiently clearly.

54. The commentary to article 25 only examined the practice and indicated the solution chosen by the Commission. Although he approved of that solution, he thought the commentary should give the Commission's reasons for adopting it. The new commentary to article 25 to be prepared in the light of the discussion could take account of a number of entirely pertinent observations. The Special Rapporteur's replies to them should form the basis of the new commentary.

55. Mr. USHAKOV said that the expression "under articles 12 to 21" in the introductory paragraph was too broadly inclusive; the only article to which it was necessary to refer was article 13, though reference to articles 14, 15 and 16 might also be envisaged. He would like the Special Rapporteur to consider whether the expression "which is continued in force" did not call for a reference to section 4, on provisional application.

56. The CHAIRMAN, speaking as a member of the Commission, said that the point made by Mr. Šahović and Mr. Ushakov concerning the possible need to include a reference to provisional application was a valid one. Obviously, a newly independent State could avail itself of the provisions of section 4, but he wondered whether that would not appear more clearly if the order of sections 4 and 5 were reversed.

57. He endorsed the point made by Mr. Pinto concerning identical treaties and treaties which were not identical. If both territories had belonged to States parties to the same general multilateral treaty, and if one of those States had acceded to the treaty with important reservations whereas the other had no reservations, should the treaties be considered identical or not identical?

58. Lastly, he hoped that the Special Rapporteur would give careful consideration to the relationship between the present articles and the Vienna Convention on the Law of Treaties.

59. Sir Francis VALLAT (Special Rapporteur), summing up the discussion, said that the most important point of substance raised had been in connexion with sub-paragraph (b), but speakers had perhaps lost sight of the fact that that sub-paragraph dealt primarily with notification of succession. Even if article 25 did not exist, there could still be a situation in the case of a newly independent State in which there was a legal nexus between part of its territory and a multilateral treaty. It would then be only natural to allow it to make a notification of succession with respect to the part affected by that nexus. But the introductory paragraph of article 25 stated that in such cases the treaty should be considered as applying in respect of the entire territory of the State. It was that provision which made sub-paragraph (b) appear to be an exception. In fact, however, it would correspond to the natural, rightful position of the State, so that it would be a mistake to deprive the State of the possibility of limiting its notification to that part of the territory for which the treaty was in force.

60. While appreciating the comments made by Mr. Kearney and Mr. Tammes, he thought that there should first be a general presumption that the entire territory was affected, and that the *status quo* should be maintained as in sub-paragraph (b). Views in the Drafting Committee might differ, but he suggested that for the time being sub-paragraph (b) should be retained.

61. He agreed with Mr. Calle y Calle that the phrase "effect of the combining of the territories" in sub-paragraph (a) was not an altogether happy one.

62. Mr. Pinto's comment concerning identical treaties and treaties which were not identical should be given further consideration by the Drafting Committee. He would prefer to retain the expression "the entire territory", but that was a minor point which could be considered later.

63. As to use of the expression "radically to change the conditions for the operation of the treaty" in sub-paragraph (a), he thought that it should be further clarified in some part of the commentary, perhaps in connexion with article 10, and that some explanation should be given why wording different from that of article 62 of the Vienna Convention had been chosen. He could see certain advantages in the use of the expression, if applied reasonably, because it was more flexible.

64. With regard to the question of provisional application, he thought that, as a matter of principle, a newly independent State should not be deprived of that possibility merely because it was formed from two or more territories. However, the use of the words "in force", in the first paragraph of article 25, would seem to exclude the provisional application of multilateral treaties by such newly independent States. The Drafting Committee should consider whether it might not be better to reverse the order of sections 4 and 5.

65. Mr. Ushakov had suggested that the reference to "articles 12 to 21" in the opening paragraph should be made more specific by singling out the exact articles concerned. That raised the problem of cross-references, which, on the basis of his own experience, he thought should be as broad as possible. In any case, that was a point to be considered by the Drafting Committee. The drafting of sub-paragraph (b), in particular, would call for careful consideration, since it was linked to article 12, paragraph 3. The commentary should also be expanded to include a new reference to article 13.

66. He agreed that there might be certain advantages in deleting the reference to treaties which were not identical, since such a reference only tended to make the draft more complicated. The fundamental problem was always to keep in mind the relationship between the present articles and the Vienna Convention, a matter to which he was sure the Drafting Committee would give its closest attention.

67. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion other provisions, such as article 15 on reservations, also applied to the newly independent States referred to in article 25. He therefore suggested that since part III dealt with newly independent States, it should be introduced with some such wording as: "The following part applies to newly independent States as defined in article 2, paragraph 1 (f) and subject to certain rules in article 25 concerning newly independent States formed from two or more territories".

68. Sir Francis VALLAT (Special Rapporteur) said that the point could also be clarified by expanding the definition in article 2, paragraph 1 (f) to include a newly independent State formed from two or more territories. That would be another question to be dealt with by the Drafting Committee.

69. The CHAIRMAN suggested that article 25 should be referred to the Drafting Committee.

*It was so agreed.*⁵

The meeting rose at 12.40 p.m.

⁵ For resumption of the discussion see 1295th meeting, para. 29.

1282nd MEETING

Friday, 21 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties
(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6;
A/8710/Rev.1)

[Item 4 of the agenda]
(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND
READING

ARTICLE 26

1. The CHAIRMAN invited the Special Rapporteur to introduce article 26, which read:

Article 26
Uniting of States

1. On the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties to the treaty continues in force between the successor State and such other States parties unless:

(a) the successor State and the other States parties otherwise agree: or

(b) the application of the particular treaty after the uniting of the States would be incompatible with its object and purpose or the effect of the uniting of the States is radically to change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 is binding only in relation to the area of the territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States unless:

(a) the successor State notifies the parties or the depositary of a multilateral treaty that the treaty is to be considered as binding in relation to its entire territory;

(b) in the case of a multilateral treaty falling under article 12, paragraph 3, the successor State and all the parties otherwise agree; or

(c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraphs 1 and 2 apply also when a successor State itself unites with another State.

2. Sir Francis VALLAT (Special Rapporteur) said that part IV, on the uniting, dissolution and separation of States, probably contained the most important articles in the draft having regard to cases which might arise in the future, and deserved very careful consideration. Articles 27 and 28 would also have to be considered in relation to the articles in part III.

3. Introducing article 26, he pointed out that the Commission had already adopted the comparatively simple principle of *ipso jure* continuity of treaties, not only for what had previously been called "union of States", but also for the uniting of States generally. Members would be aware of the transition which had taken place between Sir Humphrey Waldock's original proposals¹ and the adoption of the concept of "uniting of States" for the purposes of article 26. He was convinced that that change had been justified, since it obviated the need to examine the internal structure of successor States and the difficult question of what, precisely, was meant by a

union of States, which was not easy to define. The present formulation had the advantage of covering all conceivable cases in which a new State might be formed by the joining together of two or more old States.

4. Although the principle of *ipso jure* continuity was not based on much practice and diverged from the general view taken of newly independent States, he thought that the wisdom of the Commission in adopting that principle had been endorsed by almost all Governments, the only dissenting opinion having been expressed by Belgium, which took the view that one category, that of the "new State", would have sufficed (A/CN.4/278/Add.5, para. 364).

5. In paragraph 371 of his observations he had referred to the relation between a "transfer of territory" under article 10 and a "uniting of States" under article 26, which involved the question, raised by Mr. Tammes, whether article 10 covered cases of the complete absorption of the territory of one State by another.² He believed that articles 10 and 26 ought not to overlap, and that cases of complete absorption were really cases of union, which should be covered by article 26. Article 10 should apply where part of the territory was transferred, but not where the whole of it was absorbed. He would welcome the views of the Commission on that point.

6. Another interesting comparison was that between articles 25 and 26. Paragraph 2 of article 26 established the presumption that a treaty was binding only in relation to the area of the territory of the successor State in respect of which it had been in force at the date of the uniting of the States, subject to an exception in the case of multilateral treaties if the successor State so decided. That seemed to him to emphasize the desirability of retaining sub-paragraph (b) of article 25; the two situations were broadly parallel, though they were based on two different assumptions, both of which should be borne in mind when considering the two articles.

7. With regard to paragraph 1 (b) of article 26, the United Kingdom Government had questioned the test of incompatibility and the test of a radical change of conditions (A/CN.4/275). He had discussed that problem in connexion with article 25 in paragraph 376 of his observations (A/CN.4/278/Add.5), while in paragraph 378 he had stressed that the significance of a radical change should be further clarified in the commentary.

8. With regard to paragraph 2, the Australian Government had said that there might be a strong case for dropping the principle of consent, but had not given any reasons for such a change (*ibid.*, para. 364). He himself thought paragraph 2 should be left as it stood, though he would be interested to hear the views of other members of the Commission.

9. As to paragraph 3, he had expressed his own doubts about the need for that paragraph in paragraphs 380 and 381 of his observations; it seemed to him that if a

¹ Article 19 and Excursus A; see *Yearbook ... 1972*, vol. I, pp. 158-173 and 271-272.

² See 1268th meeting, paras. 34 and 35.

successor State united with another State, it would become a predecessor State.

10. The Netherlands Government had suggested that the provisions of part III concerning the rights of a successor State to complete the signature of its predecessor would be equally useful in the cases referred to in articles 26 and 27 (*ibid.* para. 365). The provisions in question would seem to be article 13 (Participation in treaties not yet in force), article 14 (Ratification, acceptance or approval of a treaty signed by the predecessor State), article 15 (Reservations) and article 16 (Consent to be bound by part of a treaty and choice between differing provisions). The applicability of those articles would have to be considered in the light of the basic principle of *ipso jure* continuity set out in article 26. That principle differed fundamentally from the clean slate principle and might lead to different conclusions.

11. In the case of article 13, where the predecessor State gave its consent to be bound by a treaty, a legal nexus existed and the newly independent State should be able to take advantage of that consent, partly as a matter of law and partly as a matter of policy. In his view, however, the legal nexus was very thin in the case of articles 14, 15 and 16, and the question arose whether a mere signature would be sufficient for *ipso jure* continuity. He himself did not think it would, since the situation was not the same as when there was consent to be bound. The only obligation would be one of good faith, as the International Court of Justice had made clear in the *North Sea Continental Shelf cases*.³

12. With regard to articles 15 and 16, the uniting of States did not normally call for a notification of succession, and the case of reservations would not arise under the principle of *ipso jure* continuity unless it was provided for by applying article 14 for the purposes of the completion of signature. If article 14 were adapted for the purposes of article 26, the question would arise whether it would not be logical to make provisions corresponding to the provisions in articles 15 and 16.

13. Mr. TAMMES said he understood from what the Special Rapporteur had said when discussing article 10, and from what was implied in paragraph 371 of his report, that he did not think article 10 should cover cases of absorption or total succession. That opinion was an important one, since the Drafting Committee would soon reach article 10 and there was no doubt that that article, as drafted at present, did cover cases of absorption. That was confirmed by paragraph (11) of the commentary to article 26 (A/8710/Rev.1, chapter II, section C), in which the Commission had discussed the admission of Texas into the United States of America in 1845 as "a case for the application of the moving treaty-frontier principle".

14. In the present draft, however, it was necessary to be careful, since if the concept of absorption was removed from the scope of article 10, there would be no place for it elsewhere, although cases of the absorption of one State by another might well occur in the future. Neither article 10 nor article 26 would then apply, since

the latter article dealt, precisely, with the emergence of a new State from a process of uniting in which all the States involved disappeared as such. That was clear from paragraph (2) of the commentary to article 26 which stated that "The succession of States envisaged in the present article involves therefore the disappearance of two or more sovereign States and, through their uniting, the creation of a new State".

15. In order to make the Commission's intention quite clear, he suggested that the words "in one State", in the first sentence of article 26, should be replaced by the words "in a new State", since the present wording could apply equally well to cases of total absorption. In Sir Humphrey Waldock's original formulation the intention had been quite clear, since his draft had begun with the words "When two or more States form a union of States",⁴ though the Commission had later dropped the concept of a union of States.

16. But even if the suggested improvement were made and article 10 was left as it stood, the situation would not be quite clear, since there would always be cases in which the question whether a State had absorbed another, while itself remaining intact, or had united with another State so that a new State had emerged, would be decided by a political judgement. He need only recall the prolonged discussions on whether Italy had come into existence as the result of a succession of incorporations into the Kingdom of Sardinia, or as a new State resulting from a union between the Sicilies and other States, as Anzilotti had maintained.

17. He shared the Special Rapporteur's doubts about the desirability of retaining paragraph 3.

18. So far as the application of articles 13-16 to the case of *ipso jure* continuity was concerned, he could follow the Special Rapporteur's arguments in paragraphs 382-389 of his report, but would reserve his final opinion until he had fully studied article 27.

19. Mr. RAMANGASOAVINA said he approved of the principle stated in part IV of the draft. Part IV was completely different from the preceding part, which dealt with newly independent States, and the Special Rapporteur had been right to base it on the principle of *ipso jure* continuity of treaties.

20. In that connexion, he found it surprising that in their observations on article 26 some States—in particular Belgium—should have said that the Commission had linked the clean slate principle to the principle of self-determination. In his opinion, the clean slate principle did not apply to part IV. Articles 10 and 25 related to territories which had become part of a new State that was entering international life for the first time; it was therefore logical that the clean slate principle should be applied to that State. Part IV, on the other hand, dealt with States which, although new, had been formed through the uniting or dissolution of States which had had international responsibility.

21. Where a number of States united to form a single State, it was natural that they should retain their inter-

³ ICJ Reports 1969, p. 3.

⁴ See *Yearbook ... 1972*, vol. I, p. 158, para. 62.

national responsibility, in the same way as the different parts of a State which parted from each other to become separate States. Strictly speaking, those were not so much cases of succession as of inheritance, since before the new State was formed, what was to become its patrimony had already included a number of treaties. And in the interests of the stability of international relations it was reasonable to take the principle of continuity of those treaties as the starting point, it being clearly understood that the newly created State, by virtue of its independence, could adjust the treaties in question to suit its particular circumstances. Thus article 26 concerned, not a successor State, but a State party which had changed its form, either by uniting with other States or by splitting up to form two or more independent States. Thus the principle stated in article 26, paragraph 1 was fully justified, since it was only natural that a State formed through the fusion of a number of States should inherit the treaties they had concluded.

22. It might be questioned whether sub-paragraph (b) of paragraph 1 was necessary and whether it was not already implied in sub-paragraph (a), since the consent of the parties was always required and it was always open to the newly formed State to seek an adjustment of an existing treaty or to withdraw from it with the consent of the other parties. Nevertheless, he thought that sub-paragraph (b) was necessary.

23. He approved of the principle stated in paragraph 2, that the treaty applied only to the area of the territory of the successor State in respect of which it had been in force at the date of the uniting of the States—unless, of course, the successor State asked that the treaty should apply to the whole of its territory.

24. Paragraph 3 raised a more difficult question and some doubt might be expressed about its application.

25. He approved of the principle set out in article 26 and did not think the clean slate principle should be applied in that case. Agreements previously concluded by the States which had become part of the new State should indeed be maintained, on the understanding that the new State could always limit their application to the territory in respect of which they had been in force or seek their revision in the light of the changes that had taken place.

26. Mr. PINTO said he agreed with the principle of *ipso jure* continuity embodied in article 26, as distinct from the clean slate principle adopted in part III. The Special Rapporteur had raised the question whether part IV should not cover some of the situations covered in part III, such as those referred to in articles 13 to 16, but had answered that question in the negative. He himself had not yet reached any conclusion on the point, but might do so later.

27. Some uncertainty seemed to arise out of the contrast between the provision in article 25, sub-paragraph (b) and that in article 26, paragraph 2 (a). On the basis of article 25, sub-paragraph (b) and the clean slate principle, the continuity of treaty application in respect of a particular territory was a matter of choice by the successor State, coupled with a presumption that the

treaty would apply to its entire territory. In article 26, paragraph 2, on the other hand, the situation was different, since the continuing in force of the treaty was automatic and was subject to the principle that, unless the contrary was established, it would apply only to the particular area in respect of which the treaty had been in force at the date of the uniting of the States. He did not, however, see any reason why there should be a presumption that the treaty would apply to two or more sections of the territory, and he hoped the Special Rapporteur would elaborate on that point.

28. With regard to the use of the expression “uniting of States”, referred to in paragraph 369 and the following paragraphs of the Special Rapporteur’s report, he thought it might be necessary to distinguish between different kinds of “uniting”. For example, could it not be considered a kind of “uniting” when a metropolitan country took over territories as colonies?

29. The words “at the date of the uniting of the States”, in paragraph 2, should perhaps be replaced by the expression defined in article 2, paragraph 1 (e): “date of the succession of States”.

30. He supported the proposal to delete paragraph 3, which served no useful purpose.

31. Mr. USHAKOV said that article 26, like articles 27 and 28, bore signs of hasty drafting and raised numerous problems which the text did not settle.

32. With regard to the relationship between article 26 and article 10, he found the wording of article 10 unsatisfactory, because without its title it could be interpreted as applying to the uniting of States and not to the transfer of territory. Perhaps the Drafting Committee could add an introductory paragraph to article 10 to make its meaning clear.

33. The date of the uniting of States, referred to in article 26, paragraph 1, had not been defined, whereas the “date of the succession of States” had been defined in article 2. If the Commission had seen fit to define the latter expression, it should also define the former.

34. The use of the plural in the expression “other States parties” in paragraph 1 and its sub-paragraph (a) seemed to indicate that the article applied only to multilateral treaties, whereas paragraph 2 (c) concerned bilateral treaties.

35. With reference to the expression “otherwise agree” in paragraph 1 (a), he observed that article 26 should envisage the possibility of provisional application of a bilateral or multilateral treaty, in the same way as part III. That point might well be dealt with by interpretation, by a reference in the commentary or by a separate provision.

36. Paragraph 2 (a) did not refer to the notification of succession provided for in articles 17 and 18, but to a notification of an entirely different kind. Paragraph 1 of article 17 provided that a notification of succession must be made in writing, but that point was not mentioned in paragraph 2 (a) of article 26.

37. Lastly, with regard to article 16, paragraph 1 (b), he wondered how the Commission would deal with the problem of the continuation in force of a treaty where

one predecessor State made one choice, in conformity with a treaty, between differing provisions, and another predecessor State made another choice. That situation was not dealt with in article 26 and it might also arise in connexion with reservations. The question of ratifications, covered by article 14, also presented difficulties in the case of article 26.

38. Mr. KEARNEY, referring to the relationship between article 10 and article 26, said he was not sure that the case of the absorption of a State was necessarily covered by article 10. In support of that idea, Mr. Tammes had referred to the example of Texas, but he himself doubted that the United States of America had ever specifically advocated the principle of the moving treaty-frontier in that connexion. The case of Texas had certain unique aspects and could hardly be cited as an example of that principle.

39. There was a problem of overlapping between articles 10 and 26, and he thought that the cases of total absorption should be covered by the latter article rather than the former. Article 10 applied rather to cases in which there was a transfer of territory from one State, which remained in existence, to another State.

40. He agreed with Mr. Pinto that it was very difficult to follow the logic of the differentiation between article 25 and article 26. However, he recalled that in his own country Justice Holmes had once said that the spirit of law was not logic, but experience, and in the present case perhaps the Commission had to rely on experience.

41. As to the question whether it was necessary to introduce rules to cover newly independent States into part IV, there might be cases of reservations or choices that would be affected if treaties were extended to the new territory in its entirety. That was a point which the Drafting Committee should bear in mind.

42. Lastly, in situations where one or more of the unified States had become a contracting party to a treaty, he could see no objection to the application of the contracting party rule, but he wondered whether it was not the unified State which should become a party, rather than a part of it.

43. Mr. ŠAHOVIĆ said that part IV of the draft marked a turning point, since it no longer applied the clean slate principle, but the principle of continuity. That point had been noted both during the first reading of the articles and in the commentary to article 26.

44. As to the link between article 26 and article 10, he observed that the difficulties raised by article 10 were due to its drafting, its position in the draft and its title. On reading that article, which was placed near the beginning, one had the impression that the Commission had wished to lay down a general rule applicable to the whole draft. In his opinion, article 10 applied only to transfers of parts of a territory. If that was the case, the provision should be made more clearly understandable, particularly in regard to its legal consequences; the title should be amended, even if it was to disappear later.

45. With regard to the relationship between articles 25 and 26, to which Mr. Pinto had already drawn attention, it should be noted that according to article 26,

paragraph 2, the treaties which continued in force were binding only in relation to the area of the territory of the successor State in respect of which they had been in force before the uniting of States. In article 25, on the other hand, the Commission had applied a different principle: the treaties applied to the entire territory of the newly independent State. That provision did not seem to have been prompted by considerations relating to the consequences of the application of the continuity principle, and he wondered whether the Commission could go so far as to make a distinction between States which united in accordance with article 26 and States which united in accordance with article 25.

46. Paragraph 3 of article 26 could be deleted for the reasons given by the Special Rapporteur (A/CN.4/278/Add.5, para. 381).

47. Mr. BILGE said that, except for paragraph 3, he approved of the substance and the drafting of article 26.

48. Since, in article 26, the Commission had abandoned the clean slate principle in favour of the principle of continuity, the relationship between those two principles should be explained in the commentary. Did one of them constitute the rule and the other the exception, or were they, as he supposed, to be regarded as parallel principles?

49. In paragraph 366 of his report the Special Rapporteur rightly stressed that the principle of *ipso jure* continuity involved an element of progressive development of law. That point should be reflected in the commentary, for the rule stated in article 26 was certainly not a customary rule. After the union of Egypt and Syria, for instance, Turkey had continued to apply, with Syria only, a certain treaty which it had concluded with both countries. It had been for practical reasons, however, not because it had felt obliged to act in that manner that Turkey had continued to apply the treaty.

50. With regard to the relationship between articles 10 and 26, he was in favour of retaining both those provisions and emphasized that the former had a rather limited scope. It would be advisable to specify in the commentary to article 26 what situations the Commission had in view, and to illustrate them by examples drawn, in particular, from the practice in regard to peace treaties.

51. Paragraph 3 of article 26 could be dropped, as it did not refer to any specific situation and contained no separate rule.

52. Lastly, he thought it would be useful to introduce provisions corresponding to articles 13 to 15 into part IV of the draft. The part dealing with newly independent States was longer than that devoted to other cases of State succession, but it was, precisely, the latter cases which would be the most numerous in the future.

53. Mr. USHAKOV said it might happen that a multi-lateral treaty, because of its nature, could not be applied to only part of the territory of a State. In that case it would not be possible to apply the rule in article 26, paragraph 2. For example, if only one of the States which had united was a party to a treaty banning nuclear weapons tests, it was unthinkable that the suc-

cessor State should be bound to observe that ban in respect of part of its territory only and be free to carry out nuclear tests in the rest. He suggested that the Special Rapporteur should draft a clause to deal with that obvious exception to the rule in paragraph 2.

54. On article 10, he had a drafting proposal. The article should be recast to deal separately with two distinct situations: first, the case of transfer of territory envisaged in the present text, and secondly, the case of a dependent territory which severed its links with the former administering Power, but instead of becoming independent chose to become part of an existing State.

55. Mr. QUENTIN-BAXTER said that the present discussion had shed some light on the comments made by the Australian delegation in the Sixth Committee, reserving its position with respect to article 26, paragraph 2 (A/CN.4/278/Add.5, para. 364). It was very likely that the Australian Government, when considering articles 25 and 26, had had in mind its responsibility for bringing to independence the territories of Papua and New Guinea, which was a classic case for the application of article 25. In that context, the Australian Government had naturally approved of the main rule in article 25, namely, that treaties were considered as applying in respect of the entire territory of a newly independent State formed from two or more territories. Naturally also, the Australian Government had been struck by the contrary presumption in article 26, paragraph 2; hence the comment to which he had referred.

56. Actually, article 26, paragraph 2 applied to a different case—that of two or more States which united to form a single State—and good reasons had been given to explain the difference between the rule it stated and the rule in article 25, which dealt with the merging of two or more formerly dependent territories to form one newly independent State.

57. On the question of the relationship between articles 10 and 26, he thought further reflexion was required. There was an important difference between the case contemplated in article 10, in which the old international personalities continued, and that dealt with in article 26, in which an entirely new character came on the international scene. During the long discussion in 1972, which had led to the adoption of article 10,⁵ the Commission had not been conscious of the particular case contemplated in the present article 26. That article, like all the later articles of the draft, had not then been formulated by the Special Rapporteur.

58. In view of the introduction, at a later stage, of the distinction between various kinds of new States, such as a State formed as a result of the uniting of States, he thought the Drafting Committee should give careful consideration to the need for provisions on further machinery. If it was decided to draft such provisions, those on newly independent States could be used to the extent that they were applicable.

59. The CHAIRMAN, speaking as a member of the Commission, said that the Commission's guiding princi-

ple for the whole draft had been the desire to maintain the stability of treaty relations. The clean slate doctrine was simply an important exception to that principle, made for the benefit of newly independent States.

60. In the case of uniting of States, it was necessary to consider the different kinds of union. The first was that resulting from transfer of territory dealt with in article 10; in that case, the application of the moving treaty-frontier principle was an exception to the general rule of continuity.

61. The case of the merging of two or more formerly dependent territories to form a single new State also constituted an exception to the rule of continuity and article 25 laid down special rules for that case. Article 26 dealt both with the case of two independent States which united to create a new State, and with the case of absorption of one State by another.

62. As Mr. Pinto and Mr. Ushakov had pointed out, however, there could be cases of a mixed character, half way between those dealt with in articles 25 and 26. For example, a former dependent territory could unite with an old-established State. A case of that kind might be said to be covered by article 10, but the rule in that article did not seem suitable where the former dependent territory was much larger than the old State. It would seem strange for all the treaty relations of the larger territory to disappear and be replaced by those of a much smaller pre-existing State. He thought that case, and all the other mixed cases that might arise, deserved careful consideration by the Special Rapporteur and the Drafting Committee.

63. Mr. USHAKOV said that no provision could be made for cases of absorption, because they were bound to be wrongful under contemporary international law. A State could not absorb the territory of another State without using force.

64. Article 26 referred to cases of uniting to form a unitary State, a federal State or a State based on some kind of linguistic, cultural or other unity. In all such cases, uniting took place by the will of the peoples concerned and in accordance with international law, never by absorption. When the Commission had examined the draft articles on first reading, it had reached the conclusion that all those cases constituted uniting of States. It had distinguished the case of transfer of territory from the case in which a newly independent State was formed by the uniting of territories formerly under the administration of different States—for instance, Nigeria.

65. The CHAIRMAN, speaking as a member of the Commission, said that in mentioning the case of absorption of one State by another, he had really meant voluntary fusion. He had kept well in mind article 6, which expressly stated that the draft articles applied only to the effects of a succession of States occurring in conformity with international law.

66. Mr. AGO said that on the substance he agreed with the Chairman. Perhaps it would be better not to speak of "absorption". What the Commission had in mind was not "absorption"—a term which implied that a State wrongfully extended its power over another

⁵ Formerly article 2; see *Yearbook ... 1972*, vol. I, pp. 43-50, 152-154, 156-158 and 181-182.

State by force—but rather “incorporation”, which would take place in full conformity with the law and with the will of the country incorporated. That case could not be excluded. At the present time, for example, one could not exclude the possibility that certain islands in the Caribbean Sea under the administration of European countries were preparing either to become independent States or to be incorporated into Venezuela. In the latter event, they would not be absorbed by that country by force, but would be incorporated in it of their own free will and in their own interests.

67. It caused him some concern that the Commission still seemed to interpret the notion of a newly independent State as applying solely to States created by decolonization. History provided examples of newly independent States which did not fall into that category, such as Poland and Czechoslovakia, which had been formed from territories separated in 1918 from Hungary, Austria and Germany. There was no reason why such cases should be treated differently from that of Nigeria. Just because many States had recently acceded to independence as a result of the process of decolonization, which was nearly at an end, there was no reason to neglect the other cases of creation of newly independent States. It should be noted, moreover, that the definition of the expression “newly independent State” in article 2, paragraph 1 (*f*), could apply to a case like that of Czechoslovakia.

The meeting rose at 1.5 p.m.

1283rd MEETING

Monday, 24 June 1974, at 3.5 p.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-6; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 26 (Uniting of States) (continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 26.

2. Sir Francis VALLAT (Special Rapporteur) said that the problems involved in article 26 were perhaps

not quite so complex as they seemed during the discussion.

3. The relationship between article 26 and article 10 would need to be made clear in the commentary. There had been considerable dissent from the view expressed by Mr. Tammes that cases of absorption were covered by article 10.¹ He himself had carefully examined the records of the 1972 discussions and they had strengthened his impression that article 10² had been intended to deal solely with transfers of territory. There was also much force in the comment made by several members that the idea of one State taking over another was repugnant to the contemporary international community. If one State voluntarily united with another, the case would be covered by article 26, but absorption was unacceptable, both as a concept and as a term, whether in English or in any other language.

4. With regard to the relationship between articles 25 and 26, those articles had been compared largely because of their proximity in the draft; fundamentally, their provisions were quite different. Article 25 dealt with the case of a newly independent State, while article 26 dealt with a combination of independent States. The Commission had adopted different principles for those two cases. In article 25 the ordinary doctrine of the clean slate was applied; clearly, whether the newly independent State was formed from one territory or several, that doctrine would still be applicable. For the case dealt with in article 26, the applicable principle was that of *ipso jure* continuity. He would consider whether it was advisable to clarify that point further in the commentary.

5. As to the possibility of making provision for further categories, he believed that it would be a mistake to try to develop rules for rare and unusual cases. In the process of codification in its broad sense, there was always a risk in trying to be too detailed. It was generally better to leave a few such cases unanswered, to be dealt with by analogy.

6. He would endeavour to formulate a provision on the possible case, falling between articles 25 and 26, of a former dependent territory being joined with an independent State—a situation that was not clearly covered by the draft. Cases of that kind would probably be rare in the future, since dependent territories were vanishing.

7. He found less difficult, in principle at least, the case of a union formed from parts of the territory of independent States. It seemed to him clear that if, for example, a part of each of three States separated and the three seceding territories immediately formed one new State, the provisions of article 28 would apply. The case had to be treated by analogy with a newly independent State, unless the three seceding territories formed independent States and remained independent for a time before uniting, in which case article 26 would apply.

8. It was always necessary, however, to bear in mind the possibility of new situations arising in the future.

¹ See previous meeting, para. 13.

² Formerly article 2; see *Yearbook ... 1972*, vol. I, pp. 43-50, 152-154, 156-158 and 181-182.

There was no certainty that the exact status of the political entities which would emerge in the future would be the same as that of those which had been known in the past.

9. As to the suggestion that various articles in part III should be used for the purposes of article 26, and perhaps also article 27, his own general reaction was that the doctrine of continuity should be applied in a consistent manner. That would not leave much room for the application of the provisions of part III relating to notification of succession. Nevertheless, he would submit to the Drafting Committee texts of possible draft articles, which were bound to be complicated, merely to enable that Committee to study the problem thoroughly.

10. He would not dwell on the various drafting points raised in regard to article 26, all of which would be considered by the Drafting Committee. An important question had arisen, however, regarding the wording of paragraph 1 of the article, which had led some members to doubt whether its provisions applied to bilateral as well as to multilateral treaties. In fact, the plural "other States parties" had been meant to include the singular, so that both classes of treaty were covered. That interpretation was supported by the provisions of paragraph 2 (c) which expressly referred to bilateral treaties. Since the main clause of paragraph 2 referred back to paragraph 1, there could be no doubt that the provisions of the latter paragraph dealt with the bilateral treaties mentioned in paragraph 2 (c) as well as with the multilateral treaties mentioned in paragraph 2 (a) and (b).

11. There was general agreement that paragraph 3 was unnecessary and should be omitted.

12. Mr. USHAKOV said that at the previous meeting Mr. Ago had spoken of new States formed from territories detached from a number of States, not from former dependent territories. Article 25 dealt with the case of newly independent States formed from two or more dependent territories, which must be distinguished from cases of the formation of a State on a cultural, linguistic or other basis by the uniting of territories belonging to different States. The formation of a State in that way took place by agreement, not as a result of a liberation struggle. It would be logical for the draft to contain a provision corresponding to article 25 and dealing with the formation of States from two or more territories other than dependent territories. Czechoslovakia belonged to that class of States and the future might furnish other examples.

13. Sir Francis VALLAT said that from the point of view of principle that case did not involve any difficulty. It needed to be dealt with logically in the context of article 28. That article, as it now stood, would not appear to cover the case, if its provisions were read strictly. Hence it would be necessary either to amend article 28 or to introduce a separate article, unless it was thought sufficient to dispose of the matter in the commentary.

14. Mr. USHAKOV said that when the Commission had drawn up article 27, on the dissolution of a State, it had had in mind the normal case in which a State

divided by agreement. That was what had happened when the United Arab Republic had split into two States. Article 28, on the other hand, was intended to cover the exceptional case in which part of a State detached itself following a war, as Bangladesh had done.

15. The case of the uniting of States, dealt with in the article under discussion, had to be distinguished from the case of formation of a new State from territories ceded by a number of States, not from dependent territories. He was still convinced that a provision should be drafted to cover the latter case.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 26 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³

ARTICLE 27

17. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

Article 27

Dissolution of a State

1. When a State is dissolved and parts of its territory become individual States:

(a) any treaty concluded by the predecessor State in respect of its entire territory continues in force in respect of each State emerging from the dissolution;

(b) any treaty concluded by the predecessor State in respect only of a particular part of its territory which has become an individual State continues in force in respect of this State alone;

(c) any treaty binding upon the predecessor State under article 26 in relation to a particular part of the territory of the predecessor State which has become an individual State continues in force in respect of this State.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) the application of the treaty in question after the dissolution of the predecessor State would be incompatible with the object and purpose of the treaty or the effect of the dissolution is radically to change the conditions for the operation of the treaty.

18. Sir Francis VALLAT (Special Rapporteur) said that, more than most other articles of the draft, article 27 raised a question of classification and a question of principle.

19. The principle embodied in article 27 was that continuity should apply in the event of the dissolution of a State. There had been no comments by Governments on the details of the article, but he himself had had some doubts about the effects of paragraph 2 (b), which did not specify the consequences of the situation it covered. On reflection, however, he thought it might not be necessary to introduce any provision on that point, because it seemed obvious that the treaty would cease to have any effect after the dissolution of the predecessor State.

³ For resumption of the discussion see 1295th meeting, para. 42.

20. In their comments, a number of Governments had questioned the validity of the distinction made between the dissolution of a State, covered by article 27, and the separation of a part of a State, covered by article 28. It was, in fact, easy to draw a distinction between those two cases: in the event of dissolution, the old State disappeared altogether, whereas in the event of separation, the old State retained its identity and its treaty relations continued. The fact that particular cases were sometimes difficult to classify under one heading or the other did not blur that clear-cut distinction. Hence there was no difficulty of principle involved.

21. It was much more difficult to decide whether it was necessary to have two separate articles to deal with the two cases. The principles that applied were quite distinct: in cases of dissolution the principle of continuity applied, in cases of separation the principle of the clean slate. He had found that problem a difficult one, but in the end he had concluded that the distinction should be maintained, even though it could be said that, in regard to the newly independent States which emerged from the processes of separation and dissolution, there was no difference.

22. Lastly, there was the entirely different question whether the articles in part III should be adapted for the purposes of article 27. In view of the doctrine of continuity applied in article 27, he thought there was perhaps even less room than in article 26 for provisions taken from the articles in part III.

23. Mr. YASSEEN said that the principle of continuity, which was confirmed by article 27 and derived from the principle *pacta sunt servanda*, prevented a State from evading the application of a treaty by dividing. Article 27, like article 26, took due account of the facts of international relations and provided for exceptions to the principle of continuity where the application of the treaty would be incompatible with its object and purpose and where the effect of the new situation was radically to change the conditions for the operation of the treaty. The reason why that solution had not been adopted for newly independent States was that the *pacta sunt servanda* principle could not be applied to them. It was necessary to respect the future of those countries and to leave them free to organize their new existence as they wished.

24. Article 27 was thus perfectly satisfactory. Moreover, there was no reason in legal logic why different solutions should be adopted in articles 27 and 28. The situations resulting from the dissolution of a State and from the separation of part of a State were very similar and should not be treated differently.

25. Mr. TAMMES said that the text of article 27 had originally been drafted for the dissolution of unions.⁴ All the precedents on which the article was based, and which were mentioned in the commentary (A/8710/Rev.1, chapter II, section C) constituted examples of unions which had fallen apart and thus disappeared. Cases of the dissolution of a unitary State had not been considered in connexion with the present text;

they had been discussed under the clean slate rule of the article which followed, and which was now article 28.

26. The Commission had subsequently dropped the concept of union, because it had found it too difficult to handle for the purposes of an international instrument, but the substance of the article had not been changed. As a result, it now applied to all States, whether unions or unitary States. Hence it was not surprising that a number of Governments had pointed out that while *ipso jure* continuity might be reasonable in the case of dissolution of a union, it was not necessarily so when applied to all States. The Government of the German Democratic Republic—one of the divided States referred to in Sir Humphrey Waldock's fifth report⁵—had rejected continuity in favour of the clean slate rule (A/CN.4/275) and the Special Rapporteur's report showed that the tendency of many of the government comments was in favour of the application of that rule (A/CN.4/278/Add.5, para. 398).

27. In the light of that governmental opposition coming from different quarters, it would not be advisable to generalize a rule that had originally been intended for the case of the dissolution of a union and which, even in that context, had raised doubts in the Commission at the first reading. Moreover, the attempt to generalize the rule was based on insufficient practice and doctrine, as was virtually admitted in paragraph (12) of the commentary. Indeed, after the amended article had come back from the Drafting Commission in 1972, the Special Rapporteur had stated in the Commission that it "might be said to represent progressive development".⁶

28. As he saw it, however, a draft rule of progressive development of international law could not be sustained against a clear trend of opposition from States unless there was a deep conviction that the rule was right and equitable. On that point, the Special Rapporteur had given a balanced account of the conflicting arguments in his report (A/CN.4/278/Add.5, paras. 401 and 402) and had concluded that continuity and stability of treaty relationships should prevail wherever possible.

29. Continuity should indeed prevail wherever possible, but in the case under discussion it was not possible from a legal point of view. The common denominator of all official and non-official criticism was that the Commission could present no conclusive argument to show why the principle of continuity of treaty relations was not applicable in the case of new States resulting from separation. The Special Rapporteur had put forward a strong argument in favour of the clean slate principle for the newly independent State, by pointing out that it had been in the situation of "a dependent territory which, although it may be consulted about the extension of the treaty, does not normally play any part in the actual government of the State concerned, and cannot therefore be regarded as responsible for the conclusion of the treaty as such". He failed to see however, on what basis the Special Rapporteur

⁴ Formerly article 20; see *Yearbook ... 1972*, vol. I, pp. 173 *et seq.*

⁵ See *Yearbook ... 1972*, vol. II, p. 43, para. 16.

⁶ *Yearbook ... 1972*, vol. I, p. 273, para. 53.

proceeded to state that: "The same observation may be made about the position of a part of a State that breaks away and becomes independent". In many cases of separation the seceding State, despite any tensions which might have arisen, had actually shared the responsibility for treaty relations through its representatives in the organs of the State from which it had seceded.

30. He was in favour of merging articles 27 and 28 into a new article which would deal with all cases of States formed through the processes of dissolution or separation, whether the predecessor State survived or not. The merged article would make a distinction between a "new" State and the newly independent State of article 25. In practice, no difference could be made between the cases covered by the present articles 27 and 28, unless the Commission decided to introduce the concept of a union of States.

31. Mr. REUTER said that he understood the Special Rapporteur's doubts, but thought that, from a theoretical point of view, the two cases could be maintained.

32. The introductory phrase of paragraph 1 of article 27 raised a drafting point: the eventuality contemplated was not that of "parts" of the territory of a dissolved State becoming individual States, but of all the parts of its territory becoming States. The phrase might be amended to read: "When a State is dissolved and all of its territory is split up into individual States".

33. That point was related to a fundamental problem which the Commission had not yet examined and was not called upon to solve, but which obliged it to distinguish between two cases: when the territory of a State split into a number of entities, could the international community impose the identity of the former State on one of them, and could that one entity claim such identity? If a country split into one very large part and three small parts, it was quite logical to identify the large part with the former State. But where the new entities were of equal size, it was not very logical to impose the identity of the former State on only one of them or to allow it to claim that identity. It seemed impossible to lay down strict rules on the matter. Common sense might decide in favour of either solution and the Commission should not draw up rules determining which cases came under article 27 and which under article 28. When the Republic of Austria had been created following the dismemberment of the Austro-Hungarian monarchy, there had been serious controversy about the identification of the new Republic with the former Austria.

34. Mr. USHAKOV said it was difficult to distinguish between cases of dissolution and cases of separation. He cited the withdrawal of Singapore from the Federation of Malaysia and the dissolution of the United Arab Republic into two States. In both instances, opinions differed as to the identity and continuity of the States concerned. When India and Pakistan had been created, the United Nations had decided that India should retain the identity of the Indian Empire, whereas Pakistan would have to be admitted to the Organization as a new Member. Such decisions were dictated only by practical

or political considerations. Legal considerations could not be the basis for deciding whether a particular case was one of dissolution or of separation.

35. He was not sure that the principle of continuity should be applied to cases of dissolution, and the clean slate principle to cases of separation. Bangladesh, although it had separated from Pakistan, had recognized the continuity of treaties. On the basis of practice, therefore, it might perhaps be simpler to deal with dissolution and separation in a single article confirming the principle of continuity. Then it would not be necessary to assign specific situations either to article 27 or to article 28.

36. Article 27 raised the same difficulties as article 26. The dissolution of a State and the separation of part of a State both produced new States concerning which many problems arose, particularly in regard to the reservations they might make.

37. Mr. KEARNEY said that the question of the interrelationship between articles 27 and 28 was possibly the most difficult problem the Commission would encounter in its consideration of the present draft.

38. With regard to the comments of Governments, paragraph 398 of the report (A/CN.4/278/Add.5) gave a list of States said to favour the clean slate principle with respect to articles 27 and 28. He did not think that the comments of the United States Government had been intended to indicate support of the clean slate principle, since those comments had been to the effect that the distinction between the dissolution of a State and the separation of part of a State was quite nebulous (A/CN.4/275). The United States Government had observed, in effect, that a solution might be found by applying the theory of a newly independent State in any circumstances which would justify such application. In other words, the idea, as he understood it, was that if there was a separation of part of a State under circumstances which would support the thesis that the separated part fell within the definition of a newly independent State, then obviously the rules relating to newly independent States should apply to that separated part.

39. However, that did not necessarily mean that the separation of part of a State would, in the majority of cases, result in the creation of a newly independent State; and if the part which separated did not fall within the definition of a newly independent State, there was no reason why the principle of continuity should not apply to the separated part.

40. In general, the major difficulty lay in drawing the line between what was a separation and what was a dissolution of a State. After the dissolution of the Austro-Hungarian Empire, for example, Austria had taken the position that it was not a successor State in respect of treaties, while Hungary had taken the position that it was a successor State and had maintained certain former treaties of the Austro-Hungarian Empire in force on that basis.

41. He believed it might be better to have rule of continuity which would cover both cases. A provision based on that approach would probably not result in so

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 6 p.m.

1284th MEETING

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

Chairman: Mr. Endre USTOR

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

vina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties
(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-6;
A/8710/Rev.1)

[Item 4 of the agenda]
(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND
READING

ARTICLE 27 (Dissolution of a State) (continued)

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

Article 28
Separation of part of a State

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ See previous meeting, para. 24.

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

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

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

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

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

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

It was so agreed.⁵

The meeting rose at 12.40 p.m.

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

1285th MEETING

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

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-6; A/CN.4/L.206; A/CN.4/L.209; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

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

ARTICLES 1, 3 and 4¹

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

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

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

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

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

PART I

GENERAL PROVISIONS

Article 1

Scope of the present articles

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

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

Article 3

Cases not within the scope of the present articles

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

- (a) the application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;
- (b) the application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties.

Article 4

Treaties constituting international organizations and treaties adopted within an international organization

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

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

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

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

It was so agreed.

ARTICLE 5²

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

Article 5

Obligations imposed by international law independently of a treaty

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

10. The title of the article remained as adopted in 1972, but several changes had been made in the text. In the first line, the words "a treaty is not in force" had been replaced by the words "a treaty is not considered to be in force". The question whether a treaty was or was not in force belonged to the general law of treaties, which the Commission was not codifying at present. The question which belonged to the law of succession of States was whether, for purposes of succession, a treaty was or was not considered to be in force. The expression "considered to be in force", or some similar formula, appeared in other provisions of the draft, such as

article 19, paragraph 1. The Drafting Committee would review all those expressions in the light of the draft as a whole at a later stage, and if it then adopted a different form of words it would recommend a change in the text of article 5.

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

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

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

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

It was so agreed.

ARTICLE 6³

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

Article 6

Cases of succession of States covered by the present articles

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

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

It was so agreed.

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

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

ARTICLE 6 *bis*

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

*Article 6 bis**Non-retroactivity of the present articles*

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

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

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

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

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

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

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

22. The Drafting Committee had therefore submitted, in article 6 *bis*, a provision on non-retroactivity which related not to the entry into force of the future convention with respect to each party, but to the entry into

force of that instrument as such. That result had been achieved by redrafting the provisions of article 4 of the Vienna Convention and, in particular, by omitting the concluding words "with regard to such States".

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

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

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

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

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

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

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

⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

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

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

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

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

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

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

Commission to be accused of having made light of that problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56. The reference to "rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently

of these articles" raised the difficult question of the content of the rules of customary international law. As far as State succession was concerned, there were conflicting State practices. Continuity of treaty relations had been favoured in some cases, but there was also considerable State practice in favour of the clean slate principle. That point deserved careful consideration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

79. He himself was clearly aware that if article 28 of the Vienna Convention, on the non-retroactivity of treaties, was left to operate by itself, it would only increase the misgivings of those who were concerned that the Commission should look to the future. There seemed, therefore, to be a certain advantage in adopting article 6*bis*, especially as the Special Rapporteur did not think that would involve any departure from the spirit of the Vienna Convention. Moreover, article 6*bis* would

help to settle the point raised by Mr. Tammes, namely, that the draft articles would apply, in particular, to newly independent States, which could not be bound by them until they had ratified the future convention.

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

1286th MEETING

Friday, 28 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6;
A/CN.4/L.205, L.206 and L.209; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

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

2. The codification of the topic under consideration was governed by the principle of the continuity of treaties, subject to application of the principle of the sovereign equality of States, since strict observance of the continuity principle would be unjust to newly independent States which had not participated in the formulation of pre-existing rules of international law. That group of States should accordingly be given certain privileges, but those privileges should be clearly delimited, because of their exceptional nature. The notion of newly independent States had to be transposed from the political to the legal plane and carefully defined. The privileges accorded to newly independent States had to

be justified, especially if they appeared to be contrary to the principle of the sovereign equality of States. The commentary should therefore stress the condition of dependence in which the territories of newly independent States must have been before their accession to independence. Unless the Commission made that clear, it might give the impression that it attached little importance to certain major principles of international law.

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

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

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

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

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

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

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

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

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

11. Several speakers had questioned the need for article 6*bis*, because articles 4 and 28 of the Vienna Convention on the Law of Treaties¹ established in clear-cut terms the non-retroactivity of international treaties, unless the parties expressly agreed otherwise. But the present wording of article 6*bis* raised certain doubts. First, what was to be understood by the "entry into force" of the articles? Mr. Ago had rightly pointed out that there was an important nuance in that wording. Was the "entry into force of the treaty" the moment at which the treaty, having received the required number of ratifications, came into force for the international community as a whole? Or was it the moment at which, as a result of the deposit of the necessary individual instrument of ratification, it came into force for a State party to the convention?

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

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

14. Furthermore, if the number of ratifications necessary for the entry into force of the future convention was much lower than the thirty-five required for the

Vienna Convention on the Law of Treaties, the former instrument would come into force before the latter. In that case, the rule stated in article 6*bis*, which, as it stood, admitted a form of retroactivity, would prevail over the general rules in articles 4 to 28 of the Vienna Convention.

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

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

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

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

² See 1266th meeting, para. 31.

³ *Ibid.*, para. 38.

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

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

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

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

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

22. Mr. USHAKOV said some members of the Commission had observed that article 6 raised the question of the lawfulness of successions, that was to say the replacement of one State by another. In his view, the present wording of the article did not limit that lawfulness in time. If the territorial changes that had taken place in previous centuries were considered in regard to their lawfulness under contemporary international law, it would be concluded that most of them were unlawful. It was because some States tried to apply the principles

of present-day international law to very old situations and thus met with great difficulties, that he had proposed article 6*bis*, to limit the scope of the preceding article. Article 6*bis* would become unnecessary, however, if the Drafting Committee could find adequate wording for article 6. For example, in the French text the Committee might replace the words "*une succession d'Etats se produisant conformément au droit international*" by the words "*une succession d'Etats qui se produira conformément au droit international*".

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

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

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

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

*It was so agreed.*⁴

ARTICLE 7⁵

27.

Article 7

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

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

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

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

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

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

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

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

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

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

It was so agreed.

ARTICLE 8⁶

33.

Article 8

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

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

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

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

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

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

It was so agreed.

ARTICLE 9⁷

36.

Article 9

Treaties providing for the participation of a successor State

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*⁸

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

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLES 29 AND 30

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

Article 29

Boundary régimes

A succession of States shall not as such affect:

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

Article 30

Other territorial régimes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56. Considerations derived from the general principles of law and the need to maintain peace and stability also supported the underlying doctrine of articles 29 and 30.

Acceptance of the idea that a bilateral boundary treaty could be swept aside by a succession of States would result in chaos. It was unthinkable that it should become necessary to renegotiate a boundary whenever a succession of States occurred.

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

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

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

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

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

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

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

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

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

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

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

68. The Netherlands Government had suggested that the system embodied in article 30 should also be adopted for certain treaties which guaranteed fundamental rights and freedoms to the population of the territory to which a succession of States related (*ibid.*,

para. 418). That suggestion was a very interesting one but the Commission had so far refrained from creating special categories of treaties. Moreover, it was difficult to see how the case mentioned by the Netherlands Government could be covered in a section which dealt with rights and obligations arising from boundary and other territorial treaties, that was to say rights and obligations running with the land. Clearly, the matter should be dealt with in the context of other articles of the draft.

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

The meeting rose at 1 p.m.

1287th MEETING

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

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.205; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (continued)

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

2. Mr. SETTE CÂMARA said that, during the Commission's long discussion on those articles in 1972¹ a consensus had emerged that the so-called "dispositive treaties", "treaties of a territorial character", "real treaties" or "localized treaties" could not be considered as governed by either the clean slate rule of article 11 or the moving treaty-frontiers rule of article 10. Since the time when the distinction between "real" and "personal" treaties had been recognized, the former had been regarded as transmissible and the latter as not transmissible. The legal basis for that treatment had been traced by some writers to the old Roman Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 297.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. He disagreed with the Special Rapporteur's conclusion that Governments supported articles 29 and 30: out of over 130 Members of the United Nations, only

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

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

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

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

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

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

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

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

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

¹² I.C.J. Reports 1962, p. 6.

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

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

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

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

35. The gap to which he had drawn attention could largely be filled in article 30 by inserting the words “or

its inhabitants” after the phrase “for the benefit of a particular territory” in sub-paragraphs (a) and (b) of paragraph 1. The Commission could also amend the commentary to indicate that the rights referred to in sub-paragraph (b) of article 29 were more extensive than was indicated by the present text of the commentary.

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

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

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

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

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

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

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

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

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

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

45. With regard to the problem of local populations, which had been mentioned by Mr. Tammes and Mr. Sette Câmara, he considered that, as a matter of

human rights and *jus cogens*, it was absolutely necessary to take full account of the situation of minority populations. He was therefore in favour of extending the principle of continuity of treaties to cover problems affecting the populations of border territories.

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 6 p.m.

1288th MEETING

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

Chairman: Mr. Endre USTOR

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

Statement by the Secretary-General of the United Nations

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

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

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

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

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

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

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

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

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

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

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

present office and his success in discharging his new responsibilities. The Commission was proud that it was a trained jurist who now held the high office of Secretary-General of the United Nations.

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

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

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.205; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

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

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

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

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

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

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

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

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

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

21. Generally speaking, it should be noted that in Africa, the boundaries separating territories belonging to different colonial empires had often been established arbitrarily. Some populations had been divided or united arbitrarily. To avoid chaos, the newly independent States of Africa had preferred to adhere to the established boundaries for the time being, though some of them had suffered more than others from the dissemination of their population among different States. It was conceivable that a colonial Power, knowing that a territory under its administration would soon become independent and wishing to develop its relations with

another already independent State bordering on that territory, might transfer to that State sovereignty over part of the territory which was about to become independent. The validity of such an agreement between a colonial Power and an independent State was undeniable, but what of the State which would then attain independence after being improperly stripped of part of its territory? In those circumstances one would hesitate to say that the succession of States could not affect the boundary thus established. Article 29 should be worded in such a way that it could not be construed in a manner prejudicial to the interests of certain countries.

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

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

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

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

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

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

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

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

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

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

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

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

33. The United Nations Conference on the Law of Treaties had been more skilful. Article 62, paragraph 2(a), of the Vienna Convention¹ was formulated simply in terms of objective rights, which, being a matter of status rather than of treaty law, did not come under that Convention. The articles under discussion, on the other hand not only indicated that boundary and territorial régimes were outside the scope of the draft, they stated a substantive rule—albeit an indisputable one—which took the Commission outside the subject it was considering. If the Commission wished to lay down a substantive rule of positive law, it must refer to treaties, both in the titles and in the text of the articles. It must not refer to boundary régimes or territorial régimes, but to the fate of the treaties establishing such régimes. The attachment of the subject of boundary and territorial régimes to that of treaties was thus quite artificial. To avoid such an artifice, either the Commission must deal with the fate of the treaties, or articles 29 and 30 must be transferred to the topic for which he was responsible.

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

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

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

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

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

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

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

37. The present versions of articles 29 and 30 dealt much more satisfactorily with those various points than the corresponding articles discussed in 1972.⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50. With regard to article 30, Mr. Tammes had made a very wise suggestion in introducing human considerations into the draft articles. The Commission should not concern itself solely with territories, but should place greater emphasis on the interests of the inhabitants of those territories, who were often split up between sever-

al neighbouring States, as in the case of the Somali pastoral nomads who had been deprived of their grazing grounds.

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

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

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

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

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

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

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

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

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

59. In his opinion, the rules involved should be more thoroughly examined in regard to their merits and actual content, with a view to delimiting their field of application. In doing so, special importance should be attached to the present practice of States established during the process of decolonization. On the whole, those States had shown that they were prepared, in their own interest, to observe the traditional rule of the stability of boundaries. The African countries, for instance, had decided to respect the boundaries imposed on them by the colonial Powers, even though they were conscious of the injustice done to them in the past by the imperialist countries. Thus, if international law was viewed as a whole, it must be concluded that the principle of self-determination and the principle of the inviolability of the territorial integrity of States were not conflicting, but interdependent principles, which should

both be equally respected, having regard to all the means available to States under contemporary international law for the settlement of their boundary problems. The traditional rule of the continuity of treaties must therefore be respected in regard to boundary régimes and other territorial régimes, but without denying States the possibility of settling boundary questions by applying the other lawful procedures open to them under international law.

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

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

62. He considered that articles 29 and 30 should be retained, but that their wording should be reconsidered in the light of all the suggestions made, particularly those by Mr. Tammes concerning article 30.⁵

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

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

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

⁵ See previous meeting, paras. 33-36.

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

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

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

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

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

The meeting rose at 1.05 p.m.

1289th MEETING

Wednesday, 3 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.205; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (continued)

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

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

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

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

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

¹ See previous meeting, paras. 44 and 65.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. Mr. BILGE said he could agree to the two exceptions provided for in articles 29 and 30, but wished to make it clear that he accepted them only as exceptions, since he was opposed to any widening of the scope of those two articles. He recognized the exception stated in article 29 as a necessity. The Special Rapporteur had decided, after long hesitation, to retain that article, because he had considered it necessary to give every successor State a preliminary base for the exercise of its authority. He (Mr. Bilge) was in favour of retaining the article, but thought its retention would raise a number

of important questions and affect the vital interests of States which had frontier problems. He understood the concern of those States, but thought that, as the Special Rapporteur had explained it in his report, article 29 did not impair their rights. No doubt the explanations given by the Special Rapporteur did not satisfy the States which had frontier problems, but the members of the Commission seemed to be in agreement in recognizing, first, that article 29 did not impair the rights of those States and did not purport to impose the *status quo* on them, and secondly, that it was necessary to allay the concern of those States by dispelling all possible misunderstanding. He thought the point should be made clear either in a reservation to article 29 or, as Mr. Elias had proposed, in a separate article. Failing that, the position taken by the Commission should be clearly explained in the commentary.

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

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

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

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

⁷ See 1287th meeting, paras. 33-35.

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

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

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

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

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

26. Mr. TABIBI said that, as a citizen of a small country, he fully recognized the necessity of maintaining the stability and permanence of boundaries. The question he had raised in his previous statement⁸ was the

altogether different one of disputed frontiers. It was essential to rectify boundary situations established contrary to the wishes of the people concerned, by colonial or unequal treaties. Those boundary treaties were invalid because they violated established principles of international law, such as the right to self-determination and the principles embodied in the Charter of the United Nations. While it was true that the Commission was not called upon to act as a tribunal for individual cases, it was nevertheless engaged in drafting an international instrument on the basis of actual cases, and in that legislative work it should study all aspects of existing disputes throughout the world.

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

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

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

30. During the discussion, some speakers had used the term "frontier" instead of the term "boundary". He would welcome some clarification of that point by the Special Rapporteur, bearing in mind in particular the confusion created by the "zones of influence" to which he had referred. Examples of such zones were the so-called "free tribal areas" and the settlement area of the former North-West Frontier Province, both of which were mentioned in the Treaty of Kabul⁹ of 22 November 1921, which had been validly terminated by a notification dated 21 November 1953.

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

⁸ *Ibid.*, paras. 11-28.

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

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

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

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

34. That exception was illustrated by the treaty concluded in 1935 between Italy and France¹⁰ with a view to settling a question dating back to 1915, the year when Italy had entered the First World War. It had then been provided that in the event of a common victory giving France and Great Britain advantages in their colonial territories, compensation would be accorded to Italy, especially in the form of a rectification of frontiers.¹¹ The effect of the 1935 treaty had been to readjust the frontier between Libya, which had been an Italian colony at that time, and the French dependent territories of Tunisia and Algeria. The articles under consideration did not only mean that when Libya, Algeria and Tunisia had acceded to independence, their territories had been limited by the frontiers thus established, the articles also meant that those States could not have availed themselves of the possibility of setting the treaties aside provided by article 11.

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

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

37. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on articles 29 and 30,

thanked those who had congratulated him and said that the discussion had been conducted on a very high level. He also wished to congratulate Mr. Tabibi, who had defended with great skill a view which had not been accepted by the majority.

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

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

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

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

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

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

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

¹¹ *Op. cit.*, vol. CXII, p. 973.

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

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

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

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

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

established by such a treaty. The purpose of article 29, therefore, was to protect both the newly independent State and the other State party.

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

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

*It was so agreed.*¹⁴

The meeting rose at 12.45 p.m.

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

1290th MEETING

Friday, 5 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.209/Add.1; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 31

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

Article 31

Cases of military occupation, State responsibility and outbreak of hostilities

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

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

¹² See previous meeting, paras. 44 and 65.

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

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

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

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

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

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

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

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

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

9. It was the provision for an exception for cases of military occupation which seemed to arouse the

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

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

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

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

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

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

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

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

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

17. Another point was that military occupation was not always illegal, for it might be occupation of the territory of an aggressor State by United Nations forces, ordered as a sanction by the Security Council. But even

where military occupation was unlawful under international law, the occupying State had to fulfil certain international obligations. In his opinion, the Commission should emphasize that point and should not concern itself with the lawful or unlawful nature of the military occupation.

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

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

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

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

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

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

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

*It was so agreed.*²

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

ARTICLE 10³

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

PART II

SUCCESSION IN RESPECT OF PART OF TERRITORY

Article 10

Succession in respect of part of territory

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

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

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

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

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

29. That amendment involved consequential changes in the titles of part II and of article 10 itself. Those titles would now both read "Succession in respect of part of

territory" instead of "Transfer of territory". Another consequential change was the substitution of the words "the territory in question" for the words "that territory" in both sub-paragraphs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

ARTICLE 11⁵

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

PART III

NEWLY INDEPENDENT STATES

SECTION I. GENERAL RULE

Article 11

Position in respect of the treaties of the predecessor State

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

43. Article 11 constituted section 1 of part III. It laid down a general rule concerning the position of newly

independent States in respect of the treaties of the predecessor State. The Committee had made no change in the titles of part III or section 1. In accordance with its earlier decision, however, it had replaced the words “the predecessor State’s treaties” by the words “the treaties of the predecessor State” in the English version of the title.⁶ In the English version of the article, the Drafting Committee had decided to delete the commas before and after the phrase “at the date of the succession of States”.

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

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

It was so agreed.

ARTICLE 12⁷

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

SECTION 2. MULTILATERAL TREATIES

Article 12

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

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

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

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

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

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

⁶ See 1286th meeting, para. 28.

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

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

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

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

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

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

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

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

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

55. Mr. YASSEEN said that the Commission had already considered that question and had concluded

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

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

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

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

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

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

It was so agreed.

ARTICLES 13⁹

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

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

Article 13

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

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

⁸ See 1294th meeting, para. 32.

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

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

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

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

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

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

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

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

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

66. In addition to those changes, the Drafting Committee, for the same reasons as in article 12, had replaced the expression "successor State", throughout the text, by the expression "newly independent State". It had also replaced the word "parties" in the phrase "a specified number of parties shall be necessary for its entry into force" at the beginning of the former paragraph 4, by the expression "contracting States", since

before the entry into force of a treaty there were clearly no parties to it, but only contracting States.

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

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

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

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

It was so agreed.

ARTICLE 14¹¹

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

Article 14

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

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

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

¹⁰ See 1294th meeting, para.32.

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

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

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

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

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

73. During the Commission's discussion of article 14 in 1972¹² and at the present session, several members had taken the position that a newly independent State should not have the right to inherit the signature of a predecessor State to a treaty, and had suggested that the article should be deleted. The majority of the Commission, however, appeared to be opposed to that suggestion, and the Drafting Committee had decided to recommend that article 14 should be retained.

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

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

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

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

It was so agreed.

The meeting rose at 12.30 p.m.

1291st MEETING

Tuesday, 9 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

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

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

[Item 7 of the agenda]

(resumed from the 1279th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

TITLE OF THE DRAFT ARTICLES AND OF PART I

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

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

ARTICLE 1²

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

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

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

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

Article 1

Scope of the present articles

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations;
- (b) treaties concluded between international organizations.

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

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

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

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

It was so agreed.

ARTICLE 2,³ PARAGRAPH 1 (a)

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

Article 2

Use of terms

1. For the purposes of the present articles:

- (a) “treaty” means an international agreement governed by international law and concluded in written form:
 - (i) between one or more States and one or more international organizations, or
 - (ii) between international organizations,

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

10. It would be recalled that the Commission had discussed at some length the question whether paragraph 1(a) of the present draft, which corresponded to article 2, paragraph 1(a) of the Vienna Convention on the Law of Treaties, should likewise define the term “treaty” or should, instead, define the expression “treaty concluded between States and international or-

ganizations or between international organizations”. The majority of the Commission, and also the Special Rapporteur in his concluding statement at the 1279th meeting, had favoured the simpler of those two solutions. The text now proposed by the Drafting Committee therefore defined the term “treaty” in the context of the present draft articles. That text was divided into two sub-paragraphs in order to reflect the distinction now made in article 1 between the two categories of treaty to which the draft applied.

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

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

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

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

It was so agreed.

ARTICLE 2, PARAGRAPH 1(d)

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

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

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

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

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

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

18. Mr. REUTER (Special Rapporteur) reminded the Commission that as the result of an amendment submitted by Poland and the United States, article 11 of the Vienna Convention had been substantially amended by the addition of the expression "or by any other means if so agreed" to the enumeration of the different traditional means of expressing consent to be bound by a treaty.⁴ On reading that article, it might be wondered whether the expression in question was not intended to include and summarize the various means previously mentioned, namely, signature, exchange of instruments constituting a treaty, ratification, acceptance, approval and accession. If that was so, the wording of the article could have been simplified by deleting the reference to those various means of expressing consent to be bound by a treaty, since they were agreed means. He recognized that in French the word "*convenu*" might suggest an agreement, whereas the English term "agreed" was more flexible and denoted any process whereby consent was given. Nevertheless, he recommended that paragraph 1(d) be approved as it stood, since the Commission would have to revert to the matter later. If it then took the view that international organizations had formal procedures analogous to those generally recognized—ratification, approval, accession, and so on—it would have to define those procedures and mention them in the text of the article. The replies from international organizations did, indeed, show that, just like States, they each had their own practice. He therefore thought it preferable provisionally to approve paragraph 1(d) as proposed by the Drafting Committee.

19. Mr. YASSEEN said he saw no objection to retaining the present wording of paragraph 1(d) until the draft was reviewed as a whole.

20. The CHAIRMAN said that if there were no further comments he would take it that the Commission

approved paragraph 1(d) of article 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPHS 1(e) AND 1(f)

21. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1(e) and 1(f):

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State.

(ii) an international organization

which took part in the drawing up and adoption of the text of the treaty:

(f) "contracting State" and "contracting organization" mean respectively:

(i) a State.

(ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force:

22. With very minor drafting changes, the text of those paragraphs was modelled on that of the corresponding provisions of the Vienna Convention on the Law of Treaties.

23. Mr. USHAKOV said that the translation of paragraphs 1(e) and 1(f) into Russian presented a grammatical problem, owing to the joint treatment of the separate subjects "a State" and "an international organization"; he hoped that type of construction could be avoided in future.

24. The CHAIRMAN said that the point made by Mr. Ushakov had been noted. If there were no further comments, he would take it that the Commission approved paragraphs 1(e) and 1(f), as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPH 1(i)

25. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for paragraph 1(i):

(i) "international organization" means an intergovernmental organization;

26. That paragraph was identical with the corresponding provision of the Vienna Convention on the Law of Treaties.

27. The CHAIRMAN said that if there were no comments he would take it that the Commission approved paragraph 1(i), as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 2, PARAGRAPH 2

28. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 2, paragraph 2:

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State or by the rules of any international organization.

⁴ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records* (United Nations publication, Sales No. E.68.V.7), p. 83, para. 42 *et seq.*

29. That paragraph reproduced the wording of article 2, paragraph 2, of the Vienna Convention on the Law of Treaties with the addition of the words: "or by the rules of any international organization". That addition, which corresponded to the reference to the internal law of any State, was necessary, because the draft dealt not only with treaties concluded by States, but also with treaties concluded by international organizations. The words "rules of the organization" had been taken from the passage reading "without prejudice to any relevant rules of the organization", in article 5 of the Vienna Convention. The use of the word "relevant" before "rules" was appropriate in that article because it dealt with specific matters, namely, treaties constituting international organizations and treaties adopted within an international organization. It was equally appropriate in article 6 of the present draft, which also dealt with a specific matter—the capacity of international organizations to conclude treaties. The word "relevant" would, however, have been out of place in paragraph 2 of draft article 2, which related to the whole body of rules of an international organization.

30. The CHAIRMAN said that if there were no comments he would take it that the Commission approved paragraph 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 3⁵

31. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 3:

Article 3

International agreements not within the scope of the present articles

The fact that the present articles do not apply

- (i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];
- (ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];
- (iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

32. Article 3 of the Vienna Convention on the Law of Treaties was a saving clause applying to all the international agreements not covered by that Convention. It was, of course, theoretically possible to include in the

present draft a corresponding clause safeguarding all the international agreements not covered by the draft, but such a clause would apply, in particular, to international agreements in written form concluded between States. In the Drafting Committee's view, that would be undesirable, since such agreements needed no safeguarding in draft articles which were the offspring of the Vienna Convention. The Committee had therefore come to the conclusion that article 3 of the present draft should apply to only some of the agreements not covered by the draft. That conclusion required that the categories of the agreements safeguarded by the article should be clearly specified. The text now proposed therefore contained a list of those categories, divided into three sub-paragraphs. It did not include either international agreements between States or international agreements between entities other than States or international organizations, which were both rare and varied, so that no rules on them could yet be formulated.

33. The word "entities" had been used in sub-paragraphs (i) and (ii) instead of the term "subjects of international law" used in article 3 of the Vienna Convention, in order not to prejudice the question whether all international organizations, whatever their nature, were subjects of international law. The Commission would no doubt wish to avoid prejudging that question in a draft which did not deal with the status of international organizations.

34. The term "parties", appearing in sub-paragraphs (i), (ii) and (c), had been placed in square brackets in order to indicate that, for the time being, the draft contained no definition of that term. The use of the term would be reviewed by the Drafting Committee and by the Commission itself when a definition had been agreed upon.

35. Mr. CALLE Y CALLE suggested that, in the Spanish text of sub-paragraph (iii), the words "*no escritos*" should be replaced by the language used in the corresponding provision of the 1969 Vienna Convention: "*no celebrados por escrito*".

36. Mr. REUTER (Special Rapporteur) said that agreements in written form should be distinguished from agreements of which there was merely evidence in writing; for there might be agreements concluded by oral exchanges whose existence was recorded in writing in the records of a conference or of an international organization. Such agreements were evidence in writing, but were not in written form.

37. It would not suffice, in sub-paragraph (iii), to refer to "oral" agreements, since that would exclude another category of agreements—those which might be concluded by conduct. For in addition to agreements in written form, agreements evidenced in writing and oral agreements, there was, perhaps, a fourth category: agreements resulting from conduct, which was neither written nor oral. It would therefore be preferable to keep to the negative and non-committal expression "not in written form".

38. Mr. ELIAS proposed the deletion of the word "or" at the beginning of sub-paragraphs (ii) and (iii) and its insertion at the end of sub-paragraph (ii).

⁵ For previous discussion see 1275th meeting, para. 25.

39. The CHAIRMAN said that the commentary should perhaps explain that the agreements mentioned in sub-paragraphs (i) and (ii) could be in written form or not.

40. If there were no further comments, he would take it that the Commission approved article 3 as proposed by the Drafting Committee, subject to final decisions on the change in the Spanish text proposed by Mr. Calle y Calle and the changes in the English text proposed by Mr. Elias.

It was so agreed.

ARTICLE 4⁶

41. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 4:

Article 4

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after their entry into force as regards those States and those international organizations.

42. The article was modelled, with the necessary changes, on the corresponding provision of the Vienna Convention on the Law of Treaties.

43. Mr. USHAKOV observed that the words "their entry into force" presupposed the participation of all international organizations in the future convention—a matter which the Commission had not yet considered. He doubted whether that assumption was justified at the present stage.

44. Mr. REUTER (Special Rapporteur) said that the present text did, indeed, presuppose the machinery of a convention and, as Mr. Ushakov had pointed out, the Commission had not yet taken up that problem. It would therefore be necessary to adopt a different formulation and say, for example, "after they have become invocable against those States and those international organizations". For States could conceivably conclude a treaty whose final provisions stipulated that the present articles could be invoked only against organizations which so agreed; that would not make those organizations parties to the convention, but it would enable them to recognize, by an independent juridical act, the rules laid down in the present articles. As to the future of the draft articles there were, in fact, three possibilities: a general convention to which States and organizations would be parties and which would remain within the general régime of treaties—the situation which seemed to follow from the present text; a resolution of the General Assembly recommending the application of the rules laid down in the draft articles; and a convention between States, with machinery enabling international organizations to recognize those rules without being parties to the convention.

45. Mr. HAMBRO (Chairman of the Drafting Committee) said he appreciated the problem raised by Mr. Ushakov, but thought that to make any change in the text might prejudice later decisions by the Commission. He would prefer to retain the text as it stood, while making it clear in the commentary that the Commission did not intend to deal with the question how international organizations would become bound by the instrument that would emerge from the present draft articles.

46. Mr. REUTER (Special Rapporteur) proposed that the words "their entry into force" should be placed in square brackets and that it should be explained in the commentary that the Commission was not taking any position on how the rules laid down in the draft articles could enter into force for international organizations.

47. Mr. AGO observed that, coming after the word "treaties", the word "their" was ambiguous. It might be preferable to say: "after the entry into force of the present articles".

48. Mr. KEARNEY said that the question of participation by international organizations in the instrument which would result from the present draft was a fundamental one. The matter should be dealt with fully in the commentary, so as to elicit government comments.

49. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved article 4, as proposed by the Drafting Committee, subject to the words "their entry into force" being placed in square brackets as proposed by the Special Rapporteur, and on the understanding that the commentary would explain very fully the reasons for that decision.

It was so agreed.

TITLES OF PART II AND SECTION 1

50. Mr. HAMBRO (Chairman of the Drafting Committee) said that the titles proposed by the Drafting Committee for part II and section 1 had been taken from the Vienna Convention on the Law of Treaties. They read:

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

51. The CHAIRMAN said that if there were no comments he would take it that the Commission approved the titles of part II and section 1, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 6⁷

52. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 6:

Article 6

Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

⁶ For previous discussion see 1275th meeting, para. 25.

⁷ For previous discussion see 1275th meeting, para. 25.

53. That text was the result of a compromise which, like the use of the word "entity" in article 3, was based on the obvious fact that the draft was not concerned with the status of international organizations. The Drafting Committee believed that, for the limited purposes of the draft, article 6 said all that needed to be said on the matter and did so briefly and clearly.

54. He had already explained the origin of the expression "the relevant rules of that organization", when introducing paragraph 2 of article 2. The commentary would, of course, explain what the Commission meant by that expression. The matter had been fully discussed in the Commission and he need not add anything to what had already been said, particularly by the Special Rapporteur and by Mr. El-Erian.

55. Mr. TAMMES said that, in spite of its commendable efforts, the Drafting Committee had not been able to produce a really satisfactory text on the question of the capacity of international organizations to conclude treaties. As the Special Rapporteur had pointed out in paragraph 50 of his second report,⁸ to say that the capacity of each organization was determined individually by the terms of its own statutes was tantamount to admitting that there was no general rule; a provision of that kind would be of little use.

56. Although article 6 might be said to state an obvious fact, it could still be dangerous in view of the prominent place it occupied in the draft: it could have a confusing effect on subsequent articles. That point could be illustrated by considering the consequences that would have ensued if article 6 of the Vienna Convention on the Law of Treaties had been worded to state that the capacity of a State to conclude treaties was governed by the internal law of that State—a formula which would correspond to the "relevant rules" principle embodied in the draft articles under consideration. An article of that kind would clearly have conflicted with the provisions of article 27 (Internal law and observance of treaties) and article 47 (Specific restrictions on authority to express the consent of a State) of the Vienna Convention. It would have made it possible, for example, to invoke internal law to argue that a treaty had been concluded *ultra vires*, which was precisely the possibility excluded by the rule in article 27 of the Vienna Convention.

57. Mr. YASSEEN said that, in his view, the Drafting Committee had succeeded in finding the appropriate wording, since the formulation of the article was neutral and did not prejudice the different doctrines concerning the basis of the capacity of international organizations to conclude treaties. Article 6 presupposed that, under international law, those who established an international organization had the power to confer a certain treaty-making capacity on it; but existing international law could not be held to contain rules on the capacity of the host of international organizations which might be created in the future. It was not for an international convention on treaties concluded between States and international organizations to grant an international

organization treaty-making capacity. The possibility of conferring that capacity on an international organization lay in international law itself, and the international organizations availed themselves of it to draw up rules on the subject. It was therefore correct to say that the capacity of an international organization to conclude treaties was "governed by the relevant rules of that organization".

58. Mr. KEARNEY said article 6 was a reasonably successful attempt to reconcile the conflicting approaches to the nature of international organizations. Undoubtedly, as Mr. Tammes had pointed out, the Commission would in due course have to deal with the problem of the effect of the constitutional law of an international organization on the conclusion of treaties by it. Problems of that kind would certainly have to be faced, because many of the treaties signed by international organizations involved large sums of money—a fact which would inevitably lead to arguments on questions like capacity. It would therefore be wise to mention in the commentary that the Commission would deal with the matter later in the draft.

59. Mr. ELIAS said that there was no real analogy with article 6 of the Vienna Convention to justify the argument put forward by Mr. Tammes. The treaty-making capacity of States was determined by the principle of the sovereignty and equality of all members of the international community; draft article 6 simply stated that the capacity of an international organization to conclude treaties would be determined by the internal rules of that organization.

60. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*,⁹ the International Court of Justice had based its finding that the United Nations had capacity to bring suit on a close examination of all the provisions of the United Nations Charter. What the Court had done had been, precisely, to refer to the "internal law" of the United Nations. The Commission could therefore do no more than adopt a similar formula for the purposes of draft article 6.

61. He therefore suggested that the Commission should approve article 6 as it stood, and revert to it if necessary in the light of the decisions taken with regard to later articles of the draft.

62. The CHAIRMAN, speaking as a member of the Commission, said that he found the terms of article 6 fully in conformity with the present stage of development of international law.

63. Mr. TAMMES said he would not oppose the approval of article 6, provided it was made clear in the commentary that the Commission might have to revert to it in the light of its later decisions on articles such as those corresponding to articles 27 and 47 of the Vienna Convention.

64. Mr. REUTER (Special Rapporteur) said it would be mentioned in the commentary that, in the opinion of some members of the Commission, the wording of

⁸ Document A/CN.4/271, reproduced in *Yearbook ... 1973*, vol. II.

⁹ I.C.J. Reports 1949, p. 174.

article 6 might have to be reconsidered in the light of subsequent articles.

65. The CHAIRMAN said that if there were no further comments he would take it that the Commission approved article 6, as proposed by the Drafting Committee, on the understanding that the commentary would contain a passage on the lines indicated by the Special Rapporteur.

It was so agreed.

The meeting rose at 12 noon.

1292nd MEETING

Wednesday, 10 July 1974, at 12.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Co-operation with other bodies

(A/CN.4/L.214)

[Item 10 of the agenda]

(resumed from the 1278th meeting)

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

1. The CHAIRMAN welcomed the observer for the European Committee on Legal Co-operation and invited him to address the Commission.

2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that it had been under the chairmanship of Mr. Bartoš that the Commission had decided, in 1966, to establish links of co-operation with the then recently established European Committee on Legal Co-operation. The passing of that great jurist, who had been wholeheartedly devoted to the cause of justice and peace in the world, was a loss not only to the Commission, but to the international community as a whole. He expressed his sympathy to the Commission and congratulated it on having elected Mr. Šahović to succeed Mr. Bartoš as a member.

3. He had been unable to attend the special meeting which the Commission had held on 27 May 1974 to celebrate its twenty-fifth anniversary, but he had already conveyed his Committee's sentiments of admiration in a message he had addressed to the General Assembly of the United Nations on the occasion of its celebration of that anniversary. In addition, the European Committee on Legal Co-operation had associated itself with that event by stressing, at its own tenth anniversary, the objectives which linked it with the Commission, namely, the codification and progressive development of interna-

tional law. The European Committee would seek to ensure the widest possible application of the drafts on which the Commission was engaged; Mr. Tabibi, who had attended its recent meeting as observer for the Commission, had encouraged the Committee to follow that course.

4. The activities of the European Committee on Legal Co-operation related to a number of subjects, three of which deserved special mention: the protection of human rights, water pollution control and practice relating to the law of treaties. The international protection of human rights was, of course, one of the Committee's main activities. It took the form, first, of action based on the European Convention on Human Rights,¹ and, secondly, of connected measures which might even lead to the formulation of more highly specialized treaties to supplement that Convention. France had recently ratified both the Convention and its additional protocols, with the exception of the protocol which conferred a consultative jurisdiction, though of a very limited character, on the European Court of Human Rights. That ratification had been accompanied by reservations which were of considerable interest with regard to international treaty practice in the matter of reservations. In addition, the application of the Convention had been developed by the European Court of Human Rights in a judgment that had awarded monetary compensation to an injured person on the basis of provisions which were to be found, in an almost identical form, in human rights treaties of a universal character.

5. During the twenty-five years since its signature, the European Convention on Human Rights had naturally given rise to procedural problems with regard to its application, and studies had recently been undertaken with a view to simplifying and speeding up procedure. It should be noted that the Court of Justice of the European Communities had recently invoked the Convention as a reference text, that was to say, in an area not formally within its scope.

6. With regard to the protection of water resources and, particularly, of international watercourses against pollution, a draft convention had been prepared² which was now before the Committee of Ministers of the Council of Europe; only political difficulties could now prevent its finalization. That draft contained legal innovations of some importance. It took the form of a basic instrument which laid down the obligation of the future contracting parties to enter into negotiations with each other, with a view to concluding co-operation agreements between the riparian States of the same international watercourse. In its present form, that *pactum de contrahendo*, which was set forth in articles 12 and 13 of the draft, was without precedent.

7. The draft convention also imposed specific material obligations on contracting States to maintain the quality of the waters in accordance with minimum quality standards, and to enact regulations to prohibit or re-

¹ United Nations, *Treaty Series*, vol. 213, p. 222.

² See *Legal problems relating to the non-navigational uses of international watercourses* (A/CN.4/274), part III, para. 377.

strict the discharge of certain dangerous or harmful substances into the waters. The obligations thus laid down raised the question of the international responsibility that would arise from their breach. A long discussion on that question had led to the formulation of article 21, which read: "The provisions of this Convention shall not affect the rules applicable under general international law to any liability of States for damage caused by water pollution". That provision left it to general international law to determine the consequences of the breach of an international obligation of the kind specified in the draft convention. On that point, the draft thus relied on the results of the work in progress in the Commission on the topic of State responsibility.

8. The system embodied in the draft for the settlement of disputes was more specific. It was based on the obligation to submit any dispute to an *ad hoc* arbitral tribunal to be set up for each individual case. Provision had had to be made for cases that were, perhaps, peculiar to problems of pollution of an international watercourse crossing the territory of several States—cases in which the dispute involved several States not having the same interests. It was difficult, when providing for *ad hoc* arbitration, to devise a system that would satisfy a diversity of interests. A tentative formula was embodied in an appendix to the draft, which made provision for the establishment of links between two or more arbitral tribunals seized of applications with identical or analogous subject-matters.

9. With regard to practice relating to the law of treaties, he drew attention to the increasing difficulties arising from the existence of several treaties covering more or less the same subject-matter or related subject-matters. Within the Council of Europe, for instance, there were successive agreements on criminal law which were applicable to different groups of States. That had led to an overlapping of international treaty obligations, because in the Council of Europe treaties were not binding on member States unless they individually expressed their consent to be bound. Studies were now in progress with a view to solving the problems of overlapping raised by the application of such treaties.

10. The position was complicated by the fact that, while the number of treaties was increasing, the structures of international society remained rudimentary, and were inadequate for the purpose of ensuring the harmonious development of international law. Perhaps there was no remedy for that state of affairs, but there were, at least, palliatives. For instance, in the matter of water pollution control it should be possible to co-ordinate closely the application of the draft European convention with the application of such other international instruments as the Oslo Convention³ protecting the North Sea against dumping, the quite recent Paris Convention for the Prevention of Marine Pollution from Land-Based Sources⁴ and the conventions protecting the Baltic Sea against pollution. The Council of Europe had taken care to establish links with the bodies

set up under the Oslo and Paris Conventions to supervise their application.

11. The European Communities could, moreover, simply accede to those conventions as subjects of international law. Such accession would not be anything new, but the participation of an entity other than a State in a multilateral treaty between States was bound to create some problems. Those problems had been raised during the preparation of the Paris Convention, but no definitive solution had been found; in that Convention each contracting party was presumed to possess full capacity to perform treaty obligations. It was not clear, however, what would happen if the European Communities acceded to the Paris Convention at the same time as one or more of their member States. Would capacity be shared between the Communities and the State or States concerned? The question became further complicated where a convention contained clauses relating to the supervision of its application and to arbitration. Such problems were associated with the question of treaties concluded between States and international organizations, which was on the Commission's agenda.

12. The last point he wished to mention concerned the final stage of the codification of international law. He had doubts about the wisdom of adopting resolutions in the General Assembly of the United Nations instead of concluding international codification treaties negotiated at diplomatic conferences. The European Committee on Legal Co-operation was faced with a similar situation, a major factor in which was the political will of States. Both the Committee and the International Law Commission were in duty bound to seek, in their respective spheres, legal solutions which were conducive to the progressive development of international law and were acceptable to as many States as possible.

13. The CHAIRMAN, thanking the observer for the European Committee on Legal Co-operation, said it had been decided by the Commission that his address should be answered only by the Chairman. The reason for that decision was that the end of the session was near and the Commission was running out of time, so that it was desirable to avoid repetitive oratory. The Commission would adopt the same procedure when observers for other regional bodies addressed it, and the fact that the new procedure was being followed for the first time at the present meeting should not be construed in any way as discrimination against the European Committee for Legal Co-operation. The observer for that Committee would certainly appreciate the Commission's desire to organize its work and time as efficiently as possible.

14. On behalf of the Commission as a whole, he wished to congratulate the observer on his lucid statement and on his description of the work of the European Committee on Legal Co-operation. The Commission greatly appreciated the Committee's work, and its documents, like those of the other regional legal bodies, were studied by members with great interest.

15. That being said, he wished to make a few remarks expressing his own personal views, which were shared no doubt by some, but not necessarily by all the other

³ See *International Legal Materials*, vol. XI (1972), p. 262.

⁴ Op. cit., vol. XIII (1974), p. 352.

members of the Commission. The visit of the observer for the European Committee, like other similar visits by representatives of regional bodies, was an occasion for informal discussions among members of the Commission on the nature and importance of its co-operation with regional legal bodies. There was general appreciation of the fact that the regional bodies were taking due note of the Commission's work and that the Commission, in its turn, was being kept informed of their work. The question arose, however, whether arrangements for the mutual exchange of information could not be improved. The Commission's documents and the records of its proceedings were, of course, available in its *Yearbooks*, but those volumes were published with some delay.

16. Apart from that question of information, he wished to draw attention to an interesting point of difference between the European Committee and the Asian-African Legal Consultative Committee. The latter body had its own Statute, which specified that one of the Committee's purposes was to study the work of the International Law Commission and possibly comment on it. The Asian-African Committee had in fact submitted comments concerning the Commission's work on the law of treaties, but the possibilities of that provision of its Statute had not yet been fully exploited. He understood that no similar provision existed in the case of the European Committee on Legal Co-operation.

17. So far as co-operation between the Commission and the European Committee was concerned, some members of the Commission considered that the present arrangements were fully satisfactory. His own view, however, was that some thought should be given to the possibility of improving the arrangements for co-operation, not only with the European Committee, but also with the other regional legal bodies.

18. The Commission could certainly learn much from the experience of the regional bodies. Since the members of the European Committee came from highly developed countries, the Committee dealt with problems such as water pollution which, in time, would be of increasing interest in other parts of the world. The Committee's experience in that field could certainly be useful to the Commission, which was considering a recommendation concerning commencement of work on the law of non-navigational uses of international watercourses, under item 8(a) of its agenda. He had been particularly interested by the observer's remarks on the idea of a *pactum de contrahendo* whereby riparian States were placed under an obligation to conclude agreements on questions of water pollution control. That obligation was clearly derived from the general principle of the duty of States to co-operate with one another in accordance with the Charter of the United Nations, a duty solemnly proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁵

19. He hoped that the time was not far off when co-operation in the legal sphere would extend beyond the

present membership of the European Committee on Legal Co-operation and include the whole of Europe. He was aware that such a development would involve some sensitive political problems, but his personal view, which did not, of course, bind the other members of the Commission, took account of the fact that a conference dealing with both security and co-operation was now in session at Geneva, attended by representatives from all European States. At the previous session, on a similar occasion, he had drawn attention to the preparations then under way for the Conference on Security and Co-operation in Europe, "the purpose of which would be to lower the barriers between the two parts of the old continent and to unite their peoples in their common interest and for the benefit of mankind".⁶

20. On behalf of the Commission he thanked the observer for his kind words about the Commission's twenty-fifth anniversary and for the sympathy he had expressed regarding the loss suffered by the Commission through the death of Mr. Bartoš. He hoped that co-operation with the European Committee would continue to develop and wished the Committee and its observer every success.

21. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said he wished to assure the Chairman that he did not feel at all discriminated against by the adoption of the new procedure, which meant that the Commission spoke with one voice through its Chairman.

22. He hoped that European jurists like the Commission's Chairman would have fruitful meetings with the Europeans on the Committee he had the honour to represent, which covered only part of Europe. He trusted that principles would be worked out to strengthen the arrangements for co-operation and mutual exchange of information between the Commission and the European Committee.

The meeting rose at 12.55 p.m.

⁶ *Yearbook* ... 1973, vol. I, p. 177, para. 56.

1293rd MEETING

Friday, 12 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.209/Add.2 and L.215; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1290th meeting)

⁵ General Assembly resolution 2625 (XXV), Annex.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider articles 15 to 18 as proposed by the Drafting Committee (A/CN.4/L.209/Add.2).

ARTICLE 15¹

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 15:

*Article 15**Reservations*

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 12 or 13, it shall be considered as maintaining any reservation to that treaty which was applicable in respect of the territory in question at the date of the succession of States unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 1 or 2, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

3. Article 15 dealt with the difficult matter of reservations. The 1972 text of the article² had been divided into three paragraphs, which he proposed to examine separately. Paragraph 1 of that text began with an introductory part laying down a general rule formulated as follows: "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States . . .". Sub-paragraphs (a) and (b) of paragraph 1—preceded by the word "unless" at the end of the introductory part—set out exceptions to that general rule.

4. One of the exceptions set out in sub-paragraph (a) was the formulation by a newly independent State of "a new reservation which relates to the same subject-matter and is incompatible with the said reservation", that was to say the reservation referred to in the introductory part of paragraph 1. The Drafting Committee had noted that the words "and is incompatible with" would necessitate the application of a difficult test which would be quite unnecessary in the present instance, since it could be assumed that the submission of a reservation on the same subject-matter as an existing reservation implied the intention to substitute the new reservation for the old. It had therefore decided that those words should be deleted.

5. Sub-paragraph (b) of the former paragraph 1 excepted from the rule laid down in the introductory part any reservation which "must be considered as applicable only in relation to the predecessor State". But it followed from the introductory part of paragraph 1 that the paragraph related only to a reservation which "was applicable in respect of the territory in question", and the effect of that clause was to exclude from the scope of the general rule laid down in paragraph 1 the type of reservation referred to in sub-paragraph (b). The Drafting Committee had decided that there was no need to exclude that type of reservation again and had deleted sub-paragraph (b) as an unnecessary repetition, which might be a source of perplexity.

6. The Committee had also made some drafting changes in paragraph 1. It had done away with the division into sub-paragraphs; it had inserted the words "under article 12 or 13" after the words "by notification of succession"; and it had deleted the adjective "new" in the phrase "formulates a new reservation", as being unnecessary. The adjective had presumably been used because it implied the existence of a prior reservation; that was true in the situation covered by paragraph 1, but not necessarily true in the situation covered by paragraphs 2 and 3. Having decided to delete the word "new" in the latter paragraphs, the Committee had also deleted it from paragraph 1.

7. Paragraph 2 of the 1972 text dealt with the formulation of reservations by newly independent States. It was rather long and complicated, because it reproduced the substance of several provisions appearing in the Vienna Convention on the Law of Treaties.³ Since drafting by reference to the Vienna Convention had been found acceptable for paragraph 3, the Committee believed that it should also be accepted for paragraph 2. It was therefore submitting a new text for that paragraph which referred to the relevant provisions of the Vienna Convention without reproducing them.

8. Paragraph 3 of the 1972 text had been divided into two sub-paragraphs. Sub-paragraph (a) read: "When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply." As he had already said, the Committee had deleted the word "new" before the word "reservation". It had also substituted the words "in conformity with paragraph 1 or 2" for "in conformity with the preceding paragraph", since paragraph 1 also referred to the formulation of reservations by newly independent States. Finally, it had replaced the reference to article 23, paragraphs 1 and 4, of the Vienna Convention by a reference to the whole of that article.

9. Sub-paragraph (b) of the former paragraph 3 read: "However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the

¹ For previous discussion see 1272nd meeting, para. 2.

² *Ibid.*

³ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

parties to the treaty". The Committee had taken the view that article 15 should be confined to the only new element introduced by the law of State succession into the whole field of reservations. That new element was the right to formulate a reservation when notifying a succession. Since sub-paragraph (b) dealt with a different matter, the Committee had decided that it should be deleted.

10. Mr. USHAKOV suggested that in paragraph 1 the words "applicable in respect of the territory in question" should be amended to read "applicable in respect of the territory to which the succession of States relates . . .", and that the word "at" in the phrase "at the date of the succession of States" should be replaced by the word "before" or "prior to".

11. Sir Francis VALLAT (Special Rapporteur) said that he accepted Mr. Ushakov's first suggestion. As to his second suggestion, however, he thought that the present wording was clearer.

12. He pointed out that in paragraph 3 of the Drafting Committee's text, the words "in conformity with paragraph 1 or 2" should be replaced by the words "in conformity with paragraphs 1 and 2".

13. Mr. AGO, referring to Mr. Ushakov's first suggestion, said that the French version of the phrase in question might be amended to read: "*il est réputé maintenir toute réserve au traité qui, à la date de la succession d'Etats, était applicable à l'égard du territoire auquel la succession d'Etats se rapporte,...*".

14. The CHAIRMAN suggested that the Commission should approve the title and text of article 15 proposed by the Drafting Committee, with the changes indicated by Sir Francis Vallat.

It was so agreed.

ARTICLE 16⁴

15. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 16:

Article 16

Consent to be bound by part of a treaty and choice between differing provisions

1. When making a notification of succession establishing its status as a party or contracting State to a multilateral treaty under article 12 or 13, a newly independent State may express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty.

2. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any consent or choice made by itself or made by the predecessor State in respect of the territory in question.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State it is considered as maintaining

(a) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory in question, by part of that treaty; or

(b) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory in question.

16. Article 16 dealt with the consent of a newly independent State to be bound by part of a treaty, and with the choice by that State between differing provisions of a treaty. The 1972 text⁵ set out the general proposition last and the qualifications to that proposition first. The text submitted by the Drafting Committee reversed the order, in accordance with what the Committee believed to be sound legal drafting. It also contained some changes in wording. In the Drafting Committee's text the qualifying clause "in respect of the territory in question" had been added at the end of paragraph 2 (former paragraph 3) after the reference to the right of the newly independent State to withdraw or modify any consent or choice made by the predecessor State. The newly independent State was clearly not concerned with a consent or choice which did not affect the territory. The same qualifying clause was included in paragraph 3. For the sake of precision, the Committee had also inserted in paragraph 1 a cross-reference to articles 12 and 13.

17. Sir Francis VALLAT (Special Rapporteur) proposed that, in view of the Commission's decision to replace the words "territory in question" in paragraph 1 of article 15 by the words "territory to which the succession of States relates", the Drafting Committee should, in the process of final editing, consider whether to make the same change in article 16.

It was so agreed.

18. Mr. AGO said he would prefer the French version of the beginning of article 16 to read: "*Lorsqu'un Etat nouvellement indépendant établit, par une notification de succession, conformément à l'article 12 ou à l'article 13, sa qualité de partie à un traité multilatéral ou d'Etat contractant à l'égard d'un tel traité...*". The existing formulation might give the impression that the words "under article 12 or 13" related to the status of a party or contracting State.

19. Mr. REUTER suggested that the wording proposed by Mr. Ago should be simplified to read: "*Lorsqu'un Etat nouvellement indépendant établit, par une notification de succession, conformément à l'article 12 ou à l'article 13, à l'égard d'un traité multilatéral sa qualité de partie ou d'Etat contractant...*".

20. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to adopt that wording for the French version of article 16.

It was so agreed.

21. Mr. KEARNEY pointed out that the words "under the conditions laid down in the treaty" following the words "or make a choice between differing provisions" at the end of paragraph 1, differed from the original wording (former paragraph 2), which had read: "under the conditions laid down in the treaty for making any such choice". He would like to know whether there was a good reason for that change.

⁴ For previous discussion see 1272nd meeting, para. 58.

⁵ *Ibid.*

22. Sir Francis VALLAT (Special Rapporteur) said that Mr. Kearney's point was well taken and suggested that the words "for expressing such consent or making such choice" should be added after the words "under the conditions laid down in the treaty" at the end of paragraph 1.

23. After a brief exchange of views between Mr. REUTER and Mr. USHAKOV, the CHAIRMAN suggested that the Commission should agree to the addition suggested by the Special Rapporteur.

It was so agreed.

24. Mr. TSURUOKA suggested that, in the French version of paragraphs 2 and 3, the verb "*rétracter*" should be replaced by the verb "*retirer*", which was the one used to translate the verb "withdraw" in the Vienna Convention on the Law of Treaties, for example, in article 22.

It was so agreed.

Article 16, as amended, was approved.

ARTICLE 17⁶

25. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 17:

Article 17

Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 12 or 13 must be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(a) be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the newly independent State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. (a) Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State.

(b) Subject to the provisions of the treaty, the notification of succession or such communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

26. The Drafting Committee had made no change in paragraph 1 of the article. In paragraph 2, it had inserted the words "of succession" after the word "notification", since article 2 defined the expression "notification of succession", not the term "notification".

27. Paragraph 3 of the 1972 text⁷ reproduced, *mutatis mutandis*, the provisions of sub-paragraphs (a), (b) and

(c) of article 78 of the Vienna Convention on the Law of Treaties. The Drafting Committee had thought, however, that some departures from that model would be appropriate.

28. Sub-paragraph (a) dealt with the transmission of the notification of succession by the newly independent State. The Committee had shortened the 1972 text of that sub-paragraph and had replaced the somewhat vague phrase "transmitted . . . to the States for which it is intended" by the words "transmitted . . . to the parties or the contracting States".

29. In the Committee's view, the purpose of sub-paragraph (b) was to determine the date of the notification. If there were no depositary, the notification would have to be considered as made by the newly independent State on the date on which it had been received by all the parties or, as the case might be, by all the contracting States. But if there was a depositary, by analogy with article 16 of the Vienna Convention on the Law of Treaties, the notification would have to be considered as made on the date on which it had been received by the depositary. The Committee had redrafted the sub-paragraph in order to bring out that purpose more clearly.

30. Sub-paragraph (c) of the former paragraph 3 concerned the transmission of the notification of succession by the depositary to the States for which it was intended or, to use the terminology proposed by the Drafting Committee, to the parties or the contracting States. The purpose of that sub-paragraph was to protect the interest of the States in question. It laid down the rule that the notification should "be considered as received by the State for which it was intended only when the latter State has been informed by the depositary". The Committee had taken the view that that rule was necessary, but that it should be broadened to cover not only notifications of succession, but also any communication made in connexion therewith by newly independent States. The broader rule should also specify that the preceding provisions of article 17 did not affect any duty the depositary might have to inform the parties. The Drafting Committee considered that, because of its subject-matter, the broader rule should constitute a separate paragraph. It had accordingly drafted the text of the present paragraph 4, which replaced the former sub-paragraph (c) of paragraph 3.

31. Mr. USHAKOV, referring to paragraph 4(a), suggested that the words "Paragraph 3 does not affect any duty" should be rendered in the French version by the words "*Le paragraphe 3 n'affecte aucun des devoirs*" instead of "*Le paragraphe 3 n'influe sur aucune des obligations*".

32. Mr. REUTER said he preferred the verb "*affecter*" to the verb "*influer*", which had a less precise and not necessarily legal meaning; but he preferred the term "*obligations*" to the term "*devoirs*". With regard to paragraph 3(b), he suggested that the French version should be brought exactly into line with the English, the words "*à la date de sa réception par toutes les parties*" being replaced by the words "*à la date à laquelle elle aura été reçue par toutes les parties*". It was not really reception by all the parties that was meant, for the date

⁶ For previous discussion see 1273rd meeting, para. 1.

⁷ *Ibid.*

of notification of succession was the date of receipt by the last party.

33. After a brief discussion in which Mr. SETTE CÂMARA, Mr. ELIAS, Sir Francis VALLAT and Mr. CALLE y CALLE took part, the CHAIRMAN suggested that article 17 should be approved, subject to possible changes by the Drafting Committee in the process of final editing.

It was so agreed.

ARTICLE 18⁸

34. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 18:

Article 18

Effects of a notification of succession

1. (a) Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 12 or paragraph 2 of article 13 shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

(b) However, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except so far as that treaty may be applied provisionally in accordance with article 22.

2. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under paragraph 1 of article 13 shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

35. Article 18 had given rise to a marked divergence of views. Some members had supported its provisions, while others had believed that there was a contradiction between paragraphs 1 and 2 of the 1972 text.⁹ Paragraph 1 of that text laid down the general rule that a newly independent State which made a notification of succession should be considered a party or, as the case might be, a contracting State to the treaty on the receipt of the notification. But paragraph 2 provided that, subject to certain exceptions set out in that paragraph, when a newly independent State was considered a party to a treaty which was in force at the date of the succession of States, the treaty was considered as being in force in respect of that State from the date of the succession. How, it was asked, could a treaty which came into force in respect of a State at a certain date be considered to have been in force in respect of that State from an earlier date? It was also pointed out that the retroactive effects of paragraph 2 would place the other parties to the treaty—and possibly third States—in a most difficult situation and would create problems which might be almost insoluble.

36. The Drafting Committee had found that there was some merit in those criticisms and had redrafted article 18 on new lines. The problem was twofold. On the one hand, it was necessary, for the sake of continuity, to

establish the existence of a nexus between the newly independent State and the treaty, from the date of succession or from the date of entry into force of the treaty if that was later. On the other hand, it was no less necessary to alleviate the retroactive effects following from that principle.

37. The 1972 text sought to solve the first part of the problem by providing that, while the newly independent State was a party to the treaty only from the date of the notification, the treaty was considered as being in force in respect of that State from the date of the succession. Taking a different view of the matter, the Drafting Committee had come to the conclusion that, in order to establish the nexus, the newly independent State must be considered a party to the treaty from the date of the succession or from the date of entry into force of the treaty, if that was later, and it had drafted paragraph 1(a) accordingly.

38. In order to alleviate the retroactive effects resulting from paragraph 1(a), however, the Committee had added paragraph 1(b), which provided that the operation of the treaty should be considered as suspended between the newly independent State and the other parties to the treaty until the date of making of the notification of succession, except so far as the treaty might be applied provisionally in accordance with article 22.

39. Paragraph 2 of the new text dealt with the case of a notification of succession made under paragraph 1 of article 13.

40. Mr. YASSEEN said he had found the previous version of article 18 unacceptable because of the difficulties its application would have raised as a result of retroactivity. The wording proposed by the Drafting Committee was satisfactory, and elegantly resolved all those difficulties.

41. Mr. USHAKOV said he had been unable to participate in the Drafting Committee's discussion of article 18 and express his disagreement with that provision. The Committee's text would make a notification of succession retroactive to the date of the succession of States or to the date of entry into force of the treaty. But that retroactivity was entirely artificial since, under paragraph 1(b) of the proposed article, the application of the treaty would be considered as suspended from the date of the succession until the date of the notification. It was contrary to the spirit and the letter of the Vienna Convention on the Law of Treaties that the operation of a treaty which had not entered into force should be considered as suspended.

42. The Drafting Committee had sought to eliminate the legal effects which might result from retroactivity between the date of succession and the date of notification; but it was obvious that a treaty whose application was suspended nevertheless had legal effects for all the parties to it. Although those effects might be acceptable to and even desired by the newly independent State, they would not be acceptable to the other parties to the treaty, for which the artificial suspension of the operation of the treaty could have grave legal consequences and entail international responsibility. There was no principle of international law which could justify such a

⁸ For previous discussion see 1273rd meeting, para. 10.

⁹ *Ibid.*

situation. He would therefore prefer article 18 to provide simply that the newly independent State should be considered a party to the treaty from the date of the succession of States.

43. As to drafting, the phrase “except so far as that treaty may be applied provisionally”, in paragraph 1(b), was unsatisfactory, since in the case of provisional application the operation of the treaty would not be suspended between the dates of succession and notification. That sub-paragraph would suspend the operation of all treaties except those which were applied provisionally, so that they would be the only treaties not suspended. That could scarcely have been the result which the Drafting Committee had intended.

44. He asked that, if the Commission decided to approve article 18 in its present form, his dissent should be recorded in the commentary.

45. Mr. AGO said he thought the Drafting Committee had considerably improved the wording of article 18. In its previous form, the article had contained a contradiction between paragraphs 1 and 2: under paragraph 1, a multilateral treaty would have entered into force for the newly independent State at the time of notification, whereas under paragraph 2 it would have done so at the time of succession. That contradiction had been due to the conflict between the Commission's wish to safeguard the continuity of multilateral treaties and its fear of the dangers such continuity would entail. If a treaty was considered as continuing in force for a long time, and a newly independent State finally decided not to accept that situation, there might be serious consequences for third States, particularly in regard to international responsibility.

46. The new version of article 18 rested on a dual fiction: the treaty was considered to be in force from the date of the succession and at the same time its operation was considered to be suspended. That system was not entirely satisfactory, but it might be necessary to make do with it.

47. It should also be noted that article 18 was closely connected with the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215). That proposal was based on a different system, which distinguished between different kinds of treaty. In the case of some treaties there would be no retroactivity, whereas for others—treaties of a universal character—the principle of continuity would apply. It might be desirable to defer a decision on article 18 until the Commission had discussed article 12 *bis*. The Commission might opt for either system, or prefer to submit an alternative to the General Assembly.

48. The CHAIRMAN agreed that there was a connexion between the new article 12 *bis* proposed by Mr. Ushakov and article 18 and that it might be useful to discuss the two articles together. Mr. Ushakov had, however, maintained that article 18 was inherently defective, and that argument certainly deserved consideration.

49. Mr. USHAKOV observed that the two systems described by Mr. Ago differed on one point. Under his

(Mr. Ushakov's) system, treaties of a universal character were considered as being in force until notice of termination was given; all the parties were aware of the legal consequences which could result from that situation. Under the system proposed by the Drafting Committee, on the other hand, the responsibility deriving from a treaty whose operation was suspended became retroactive upon notification of succession. That notion of retroactive responsibility was unacceptable.

50. Mr. AGO agreed that the idea of retroactive international responsibility was unacceptable, but maintained that no such responsibility was involved. He asked the Special Rapporteur to confirm that, under his system, third States were released from their obligation to observe the provisions of the treaty during the interim period and consequently could not be held responsible for failing to observe it.

51. Sir Francis VALLAT (Special Rapporteur) said that it was necessary to make article 18 relate to the practice recorded in the 1972 commentary to that article (A/8710/Rev.1, chapter II, section C) and, at the same time, to make it a realistic provision in the context of the draft articles. In his view, the article in its present form met both those requirements.

52. Paragraph 1 was directly based on practice, as set out in the 1972 commentary, which contained frequent references to the fact that a newly independent State which gave notification of succession was regarded as a party to a treaty from the date of independence. According to the definition in the present draft, a “party” meant a State “which has consented to be bound by the treaty and for which the treaty is in force”. There was therefore no doubt that when a State was described as a party, that meant that the treaty was in force for it. From a practical standpoint, that would imply that third States had a responsibility which might be unknown for many years, but which might suddenly be made retroactive to the date of independence of a newly independent State. Such a situation appeared to be unacceptable to the majority of members of the Commission.

53. Paragraph 2 of article 18 was therefore a realistic provision, which recognized the importance of provisional application, but which ruled out the possibility of a State imposing a retroactive liability on another State. It did so by stipulating that a newly independent State should be regarded as a party from the date of independence, but that, subject to provisional application, the treaty should be regarded as suspended in operation. That provision was entirely in conformity with article 57 of the Vienna Convention, concerning the suspension of the operation of a treaty under its provisions or by consent of the parties. He agreed, however, that a fuller explanation of the juridical basis of article 18 might be needed in the commentary.

NEW ARTICLE 12 *bis*

54. The CHAIRMAN said that the discussion had shown a close connexion between draft article 18, as proposed by the Drafting Committee, and the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215), which read:

Article 12bis

Multilateral treaties of universal character

1. Any multilateral treaty of universal character which at the date of a succession of States is in force in respect of the territory to which the succession of States relates shall remain in force between a newly independent State and the other States parties to the treaty until such time as the newly independent State gives notice of termination of the said treaty for that State.

2. Reservations to a treaty and objections to reservations made by the predecessor State with regard to any treaty referred to in paragraph 1 shall be in force for the newly independent State under the same conditions as for the predecessor State.

3. The consent of the predecessor State, under a treaty referred to in paragraph 1, to be bound by only a part of the treaty, or the choice by the predecessor State, under a treaty referred to in paragraph 1, of different provisions thereof, shall be in force for the newly independent State under the same conditions as for the predecessor State.

4. Notice of termination of a treaty referred to in paragraph 1 shall be given by the newly independent State in accordance with article 17.

5. A treaty referred to in paragraph 1 shall cease to be in force for the newly independent State three months after it has transmitted the notice referred to in paragraph 4.

New paragraph for inclusion in article 2:

(x) "multilateral treaty of universal character" means an international agreement which is by object and purpose of worldwide scale, open to participation by all States, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

55. He would therefore call on Mr. Ushakov to introduce the new article, which could then be discussed in conjunction with article 18.

56. Mr. USHAKOV said that if the treaty whose operation was suspended had no legal effect, as some speakers maintained, there was no reason to suspend its operation until the date of the notification of succession; it would be more logical simply to say that the treaty was in force from that date.

57. In his 1972 commentary to article 18 (A/8710/Rev.1, chapter II, section C), the previous Special Rapporteur, Sir Humphrey Waldock, had adduced existing practice in support of the principle of retroactivity. That practice was not conclusive, however, since it had no basis in any dispute, and if there had been any disputes concerning retroactivity, the practice would very probably have been different.

58. His proposed article 12bis was based on the principle that not every treaty could have retroactive effect, but that in the case of multilateral treaties of a universal character, such as humanitarian conventions, it was extremely important, not only for a newly independent State, but for all States, that the continuity of the treaty should not be broken. That principle did not conflict with the clean slate principle, for a newly independent State could terminate the application of a treaty to itself at any time. He had used the expression "multilateral treaty of universal character", but he would be prepared to accept any other adequate expression. He would also be prepared to accept another definition of that expression than the one he had suggested for inclusion in article 2.

59. The CHAIRMAN asked the Special Rapporteur whether it would be correct to say that the suspension

provided for in paragraph 1(b) of the Drafting Committee's text of article 18, would have the same result as a provision on the non-retroactive effect of a notification of succession.

60. Sir Francis VALLAT (Special Rapporteur) said that, since, under paragraph 1(a) of article 18, the newly independent State was considered as a party to the treaty from the date of the succession, there would clearly be certain legal consequences. It was true that under paragraph 1(b) the operation of the treaty was considered to be suspended as between the newly independent State and the other parties to the treaty, so that no liability would arise in the event of a breach. At the same time, however, there would be an element of continuity. The newly independent State would, as a rule, be considered a party to the treaty from the date of the succession of States. The machinery provisions of the treaty would operate retroactively and the depositary would have to communicate to the newly independent State all notifications received throughout the interim period, that was to say the period between the date of succession or of entry into force, whichever was the later, and the date of making of the notification of succession.

61. The CHAIRMAN said that, under the system proposed by Mr. Ushakov, the multilateral treaties of a universal character covered by his proposed article 12bis would remain fully in force for the newly independent State under the same conditions as for the predecessor State. Where other multilateral treaties were concerned, the clean slate rule of article 12 would apply for all purposes and the depositary's duties in relation to the newly independent State would begin only with the notification of succession.

62. Mr. USHAKOV said that, in regard to multilateral treaties which were not of a universal character, it would be possible to consider the formula proposed by the Drafting Committee in article 18. If the Commission adopted his proposed article 12bis for multilateral treaties of a universal character, it would be necessary to amend article 12, which the Commission had approved at its 1290th meeting, by inserting an opening proviso such as "Subject to the provisions of article 12bis".

63. Mr. KEARNEY said that he found the position somewhat confusing. He had understood that Mr. Ushakov could not accept the actual concept of suspension embodied in paragraph 1(b) of draft article 18 as proposed by the Drafting Committee. There would appear to be no difference from that point of view between multilateral treaties of a so-called "universal" character and other multilateral treaties. If suspension as such was objectionable for one kind of multilateral treaty, it would be objectionable for all multilateral treaties.

64. Mr. AGO said he was grateful to the Special Rapporteur for having indicated that the system of suspension made it possible formally to consider a new State as a party to a treaty. He noted, however, that article 18 made no reference to a reasonable period of time and he wondered how long the operation of a treaty would remain suspended if a newly independent State delayed making a notification of succession.

65. Sir Francis VALLAT (Special Rapporteur) said that that was a subsidiary question which would have to be left to be decided by practice. The essence of the Drafting Committee's text for article 18 was that the newly independent State would be entitled to receive, on a retroactive basis, all notices relating to such matters as reservations, which were received by the depositary during the interim period. At the same time, there would be no retroactive application, as between the parties, of the substantive provisions of the treaty—the application to which objection had been raised.

66. Mr. USHAKOV, in reply to Mr. Ago's comment, said that, as provided in article 18, paragraph 1(a), only a State which made a notification of succession was to be considered a party to the treaty. If there was no notification of succession, the treaty was neither in force nor suspended; the slate was clean.

67. The CHAIRMAN replying to a question by Mr. Elias, said that, regardless of the expression chosen to describe the multilateral treaties in question and of the definition of that expression, the Commission should consider at the present stage whether it wished to accept the idea underlying Mr. Ushakov's proposal. That idea was that there were certain important multilateral treaties which remained in force for a newly independent State under the same conditions as for the predecessor State, unless the newly independent State gave notice of termination.

68. Mr. USHAKOV repeated that he was not wedded to the expression "multilateral treaties of universal character". He could accept any other wording that reflected the situation contemplated in article 12 *bis*, the essential purpose of which was to establish a presumption of continuity for the important multilateral treaties in question.

69. Mr. ŠAHOVIĆ said that Mr. Ushakov's proposal should be examined very carefully, since it called in question one of the basic principles of the draft prepared by the Commission two years previously. The Commission had decided to uphold the clean slate principle stated in article 12, as against the position taken by the International Law Association.¹⁰ It had also decided to apply that principle to all treaties and not to distinguish between different categories. He himself was convinced that the solution adopted in article 12 was a good one, since it was consistent with the rest of the draft and was based on a correct interpretation of the clean slate principle. If Mr. Ushakov's proposal was adopted, that principle would have to be interpreted differently.

70. Mr. ELIAS said that the discussion on the proposed new article 12 *bis* amounted to a reopening of the decision the Commission had taken on article 12 at its 1290th meeting. If the Commission continued on that course, other members might wish to reopen the discussion on other articles of the draft. The Commission

might then be unable to adopt the draft articles as a whole on second reading at the present session, which had only two weeks to run.

71. Mr. AGO observed that the rather strict system laid down in article 18 did, nevertheless, raise a problem: if a newly independent State made a notification of succession, the depositary was obliged to consider it a party to the treaty during the interim period between the date of the succession of States and the date of the notification of succession; but if the newly independent State did not make a notification, was it to be considered retrospectively a party to the treaty during that period? The treaty was considered to be in force during that period only as a matter of form. In fact it was not in force, since it did not give rise to obligations or rights. Hence it would be logical for it to be applicable only from the date of notification.

72. Although that system might be acceptable, it left one very serious question unanswered: to what conventions did it apply? Did it apply to essential humanitarian conventions, such as the Red Cross conventions or the Convention on Genocide? And if the Commission adopted Mr. Ushakov's proposal, it would have to find some procedure for settlement of the disputes that might arise. He did not think the Commission had sufficiently explored all the possibilities open to it—in particular the possibility of resorting to the conciliation procedure provided for in article 66 of the Vienna Convention, which formed part of the law of treaties. Whatever solution the Commission adopted, a conciliation procedure of that sort would be indispensable because of the many practical problems that would inevitably arise.

73. Mr. YASSEEN reminded the Commission that the consensus two years previously had been that law-making treaties were not binding on newly independent States and that those States remained entirely free to accept or not to accept such treaties. It had been suggested that newly independent States were perhaps under a moral obligation to recognize such treaties, but were legally free not to do so. The conventions mentioned by Mr. Ago, however, contained rules of customary law rooted in the conscience of the international community. He believed that those rules, as customary rules, demanded some degree of continuity, but the conventions as such could not be invoked against newly independent States.

74. Mr. USHAKOV said that his proposal was justified in as much as the Commission had deleted from article 18 the provision in paragraph 2 of the 1972 text.

75. Mr. YASSEEN replied that the Drafting Committee had indeed changed its position on article 18, because of the Commission's concern about giving retroactive effect to treaties. The Drafting Committee had overcome that difficulty, but he did not think the Commission had consequently changed its opinion on the principle of the continuity of treaties.

The meeting rose at 1.05 p.m.

¹⁰ See The International Law Association, *Report of the Fifty-third Conference* (Buenos Aires) (1968), pp. xiii-xv and 589 *et seq.*

1294th MEETING

Monday, 15 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.209/Add.2; A/CN.4/L.215; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 18 (Effects of a notification of succession) and new

ARTICLE 12 *bis* (Multilateral treaties of universal character) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 18 as proposed by the Drafting Committee (A/CN.4/L.209/Add.2), together with the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215).
2. Speaking as a member of the Commission, he pointed out that, whatever decision the Commission took on article 12 *bis*, it would still have to deal with article 18, because article 12 *bis* covered only a certain kind of multilateral treaty, whereas article 18 dealt with all multilateral treaties.
3. As he saw it, article 18 laid down that once the notification of succession had been made, the newly independent State became a full party to the treaty, which came into operation from that date as between the newly independent State and all the parties to the treaty. With regard to the past, however, the problem arose of the interim period between the date of the succession of States—or of entry into force of the treaty as the case might be—and the date of notification of succession. Article 18 provided that during that interim period the newly independent State became a party, but the operation of the treaty was considered as suspended between that State and the other parties to the treaty.
4. That rule was a rather bold one, in that it purported to suspend the operation of a treaty retroactively, and suspension was normally a process which related to the future. The rule was, however, subject to an obvious exception, which was stated in the concluding words of paragraph 1(b): “except so far as that treaty may be applied provisionally in accordance with article 22”. The meaning of that exception was that if, prior to the notification of succession, a notification of provisional application had been made by the newly independent State and accepted by the other States parties, the operation of the treaty would commence accordingly.

5. In his view, however, there was another obvious exception to the rule: the case in which the newly independent State had not made any notification of provisional application, but had expressed its wish that the treaty should be considered as fully applicable on a retroactive basis between itself and the other parties. Should the other parties consent, the case would clearly be one of retroactive application of the treaty.

6. In the text now proposed by the Drafting Committee, article 18 protected the other States parties, but did not provide enough guidance to the newly independent State. He therefore proposed that the possibility to which he had referred should be specified in article 18. That possibility would, of course, exist in any event, but it was better to make express provision for it, as had been done in the case of the exception relating to provisional application under article 22.

7. Mr. KEARNEY asked whether, under that proposal relating to agreement on retroactive application, the matter would be one for bilateral determination, as in the case of provisional application under paragraph 1(a) of article 22, or whether the consent of all the parties to the treaty would be required to produce the effect the Chairman had in mind.

8. The CHAIRMAN, speaking as a member of the Commission, said that the system he proposed would be similar to that which operated in the case of provisional application.

9. Mr. USHAKOV said that the new system suggested by Mr. Ustor would be even more artificial than the one provided for in the Drafting Committee's text, since the date of entry into force of the multilateral treaty would vary according to the party concerned. The reason why he had proposed article 12 *bis* was to overcome the drawbacks of the system adopted in 1972, but he feared that the Commission did not have sufficient time to consider his proposal. He therefore suggested that consideration of article 12 *bis* should be deferred and that the attention of the General Assembly should be drawn to it by a statement in the report to the effect that the Commission had not had time to examine his proposal in detail.

10. The CHAIRMAN thanked Mr. Ushakov for his co-operative attitude. The Commission, however, still had to deal with article 18 and meet the valid criticisms made of the 1972 text of the article (A/8710/Rev.1, chapter II, section C), with particular reference to retroactivity. In that connexion he drew attention to the comments of the Government of Tonga on article 11 and those of the Government of Poland on article 12 (A/CN.4/278/Add.2, paras. 215 and 219).

11. Speaking as a member of the Commission, he said he fully agreed with Mr. Ushakov that the treaty should come into force as between the newly independent State and the other parties from the date of notification of succession only. Problems arose, however, such as the one to which the Government of Tonga had drawn attention, namely, the case of an aircraft crash which occurred after the date of independence, but before the notification of succession. A problem of that type would be readily solved if an “opting out” system had been adopted in the draft articles, because the Warsaw Con-

vention on International Carriage by Air would then have applied until the option was exercised. But the "opting out" system had not found much favour in the Sixth Committee, particularly among the newly independent States.

12. In the circumstances, the Commission had been led to adopt an "opting in" system, which would not solve problems of the type mentioned by the Government of Tonga. The proposal which he himself had now made would draw attention to the possibility open to the newly independent State of declaring its willingness to apply treaty provisions on a retroactive basis.

13. Mr. USHAKOV said that a treaty could be regarded as being in force from the date of the succession if all the parties to it so agreed, but if one of the parties rejected the offer of the newly independent State, there could be no retroactive application of the treaty provisions.

14. Mr. AGO said that the new system proposed in article 8 was far less ambitious than the one adopted in 1972, since the treaty would really enter into force at the time of the notification of succession. It was only in respect of certain minor matters that there could be retroactivity. Otherwise, article 18 neither conferred rights nor imposed obligations on the parties.

15. In his opinion, the system proposed by Mr. Ustor raised no problem with regard to the date of entry into force of the treaty. It was perfectly natural that a treaty should enter into force on different dates as between different parties. The real problem raised by Mr. Ustor's proposal was that of determining the will of the other parties to the treaty. If the will of the parties was expressly manifested, there was clearly no problem; but, as Mr. Ustor himself had said, States should be able to manifest their will tacitly by their conduct. How was such conduct to be interpreted in practice, and how much time must elapse before a conclusion could be drawn from it? Should there be some kind of presumption—for example, that the other parties consented if they did not expressly manifest their objection?

16. A further question was whether it was really necessary to defer the consideration of article 12*bis*, as Mr. Ushakov himself had suggested, and to state in the report that they had not had time to examine it. In his opinion, it would be preferable to incorporate Mr. Ushakov's proposal in the draft articles, by saying that treaties of a humanitarian character should be considered as being in force from the date of the succession—a proposition to which he fully subscribed. That suggestion obviously raised a difficulty, since it would be necessary to determine which treaties were humanitarian; but he thought the Commission might be able to solve that problem by specifying in a definition what it understood by that particular class of treaty.

17. If the Commission followed that course, it would also have to adopt a system for the settlement of disputes based on the Vienna Convention on the Law of Treaties,¹ to deal with all the practical problems that

were bound to arise. It might even adopt the system provided for in the Vienna Convention, namely, recourse to the conciliation procedure laid down in the annex to that Convention. As that system would be in existence, there was no reason for not applying it to the settlement of disputes arising in a domain so closely connected with that of the Vienna Convention as succession of States in respect of treaties.

18. He thought the Commission should make an effort to settle those questions rather than merely say in its report that it had not had time to examine them.

19. Sir Francis VALLAT (Special Rapporteur) said it would be extremely difficult to introduce into article 18 an explicit provision setting out the possibility mentioned by Mr. Ustor. The same effect could be achieved in practice, however, by amending the opening clause of paragraph 1 of article 18, so that it would also be applicable to sub-paragraph (b). The new text would read:

1. Unless the treaty otherwise provides or it is otherwise agreed:

(a) a newly independent State which makes a notification of succession under article 12 or paragraph 2 of article 13 shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date;

(b) however, the operation of the treaty shall be considered as suspended...

20. The commentary would explain the effect of the proviso "Unless . . . it is otherwise agreed" on the provisions of paragraph 1(b). It would thus be made clear that the treaty could have a retroactive effect as a result of the agreement of the other parties to accept the offer of the newly independent State.

21. He had some misgivings about Mr. Ago's suggestion concerning humanitarian conventions. That question had been dealt with at length in paragraph (10) of the Commission's 1972 commentary to article 11 (A/8710/Rev. 1, chapter II, section C). After referring to the practice of the depositary of waiting for a specific manifestation of the successor State's will with respect to each convention, that paragraph of the commentary went on: "As to the practice of individual States, quite a number have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessor's ratifications. On the other hand, almost as large a number of new States have not acknowledged any obligation derived from their predecessors, and have become parties by depositing instruments of accession". That paragraph was one of the key paragraphs in a long and careful consideration of the question whether there was any customary rule of international law which would require a newly independent State to accept its predecessor's obligations under the humanitarian conventions. The commentary rightly concluded that State practice did not seem to indicate the existence of any such rule.

22. In view of the care with which that question had been dealt with under article 11, he was concerned at what appeared to be an attempt to reopen it.

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 298, article 66.

23. The CHAIRMAN, speaking as a member of the Commission, said that although he would have preferred the introduction of an explicit provision on the lines he had suggested earlier, he would be prepared to accept the rewording proposed by the Special Rapporteur, provided that the commentary made it clear that the change had been made in order to meet his point.

24. Mr. KEARNEY said that, as he understood the position, Mr. Ago had not advocated that the obligations of the humanitarian conventions should be imposed on newly independent States, but had merely suggested that the presumption of non-continuity should be reversed in the case of those conventions.

25. The CHAIRMAN said that he had also understood Mr. Ago to favour the inclusion of a clause based on the proposed article 12 *bis* to deal with the humanitarian conventions, together with a clause on the settlement of disputes based on article 66 of the Vienna Convention on the Law of Treaties and the Annex mentioned in that article.

26. Mr. USHAKOV said that no treaty could provide for retroactive suspension of its operation, yet the proposed application of the words "Unless the treaty otherwise provides" to sub-paragraph (b) would be tantamount to saying that it could. In his opinion, therefore, it would be better to leave article 18 as it was.

27. The CHAIRMAN, speaking as a member of the Commission, said that, like Mr. Ushakov, he found the idea of retroactive suspension of the operation of a treaty extremely artificial. But as that idea had been introduced into article 18, he had proposed that a specific reference should be made to the possibility of express agreement by the parties to retroactive application. The adoption of his proposal would obviate the disadvantages of the "opting in" system embodied in the draft articles. As pointed out by the Polish Government, that system created uncertainty for the other parties to the treaty, which could last a considerable time.

28. Sir Francis VALLAT (Special Rapporteur) said that the small change in drafting which he had suggested for paragraph 1 would achieve the result desired by the Chairman.

29. With regard to Mr. Ushakov's point concerning the application of the words "Unless the treaty otherwise provides" to sub-paragraph (b), the opening clause of paragraph 1 would read: "Unless the treaty otherwise provides or it is otherwise agreed". Since one of the two elements in that clause, namely, the one reflected in the words "otherwise agreed", unquestionably applied to sub-paragraph (b), the construction of the whole paragraph was perfectly correct.

30. Mr. USHAKOV said he wished to place on record that he abstained from participating in the decision on article 18.

31. The CHAIRMAN said that, if there were no further comments, he would take it that, subject to that abstention, the Commission approved article 18 as reworded by the Special Rapporteur, on the understanding that the commentary would explain the reason for that rewording, as well as the uneasiness of some

members, including himself, about the notion of retroactive suspension of the operation of a treaty.

It was so agreed.

ARTICLE 12 (Participation in treaties in force at the date of the succession of States) and

ARTICLE 13 (Participation in treaties not in force at the date of the succession of States) (*resumed from the 1290th meeting*)

32. The CHAIRMAN reminded the Commission that when it had approved articles 12 and 13 at its 1290th meeting, it had left in square brackets certain words in paragraph 1 of article 12 and paragraph 2 of article 13, pending a decision on article 18. Following the decision just taken to approve article 18, he suggested that the Commission should now decide to delete the words in square brackets. The two paragraphs in question, with consequential amendments, as proposed by the Drafting Committee (A/CN.4/L.209/Add. 2, footnote 2), would then read:

Article 12, paragraph 1

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

Article 13, paragraph 2

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

33. If there were no comments, he would take it that the Commission agreed to approve those changes.

It was so agreed.

34. The CHAIRMAN suggested that the Commission should postpone taking a decision on the new article 12 *bis* proposed by Mr. Ushakov.

It was so agreed.²

ARTICLE 19³

35. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 3 and article 19:

SECTION 3. BILATERAL TREATIES

Article 19

Conditions under which a treaty is considered as being in force in the case of a succession of States

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:

² See 1296th meeting, para. 77.

³ For previous discussion see 1279th meeting, para. 1.

- (a) they expressly so agree; or
- (b) by reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

36. The only changes made in the 1972 text⁴ were the addition of the words “in the case of succession of States” to the title and the replacement of the words “successor State” by “newly independent State” in paragraph 2.

The title of section 3 and the title and text of article 19 were approved.

ARTICLE 20⁵

37. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 20:

Article 20

The position as between the predecessor and the newly independent State

A treaty which under article 19 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as in force also in the relations between the predecessor and the newly independent State.

38. Some members of the Commission had been in favour of inserting the word “bilateral” before the word “treaty”, but the Drafting Committee had considered that unnecessary. It should, however, be pointed out in the commentary that the article related exclusively to bilateral treaties.

39. Sir Francis VALLAT (Special Rapporteur) proposed that the word “State” should be inserted after the word “predecessor” in the last line; that would be in conformity with the practice followed in the previous articles.

40. Mr. RAMANGASOAVINA suggested that in the French version the words “*comme étant en vigueur aussi*” should be replaced by the words “*comme étant également en vigueur*”.

41. The CHAIRMAN suggested that the Commission should approve article 20 with the changes suggested by the Special Rapporteur and Mr. Ramangasoavina.

It was so agreed.

ARTICLE 21⁶

42. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 21:

Article 21

Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 19 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

⁴ *Ibid.*

⁵ For previous discussion see 1279th meeting, para. 30.

⁶ For previous discussion see 1280th meeting, para. 1.

(a) does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party;

(b) is not suspended in operation in the relations between them by reason only of the fact that it has subsequently been suspended in operation in the relations between the predecessor State and the other State party;

(c) is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered as in force, or as the case may be, in operation between the newly independent State and the other State party if it is established in accordance with article 19 that they so agreed.

3. The fact that a treaty has been amended in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the newly independent State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

43. The only change the Drafting Committee had made in the 1972 text⁷ was to replace the words “successor State” in paragraphs 2 and 3 by the words “newly independent State”.

44. The CHAIRMAN suggested that the Commission should approve article 21 as proposed by the Drafting Committee.

It was so agreed.

Draft report of the Commission on the work of its twenty-sixth session (A/CN.4/L.211)

Chapter IV

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

45. The CHAIRMAN invited the Commission to examine chapter IV of its draft report (A/CN.4/L.211).

A. INTRODUCTION

1. *Historical review of the work of the commission*
(paragraphs 1-12)

Paragraphs 1-12 were approved without comment.

2. *General remarks concerning the draft articles*
(paragraphs 1-10)

Paragraphs 1-5

Paragraphs 1-5 were approved without comment.

Paragraph 6

46. Mr. REUTER (Special Rapporteur) suggested that in the third sentence of the French version of paragraph 6, the words “*ce qui pourra éventuellement être le cas*” should be replaced by the words “*ce qui pourrait*”

⁷ *Ibid.*

éventuellement être le cas". No change was needed in the English version.

Paragraphs 6 was approved with that amendment to the French text.

Paragraphs 7 and 8

Paragraphs 7 and 8 were approved without comment.

Paragraph 9

47. Mr. KEARNEY proposed that in the second sentence the words "or, in this particular case" should be amended to read "and, in this particular case". That change applied to the English text only.

Paragraph 9 was approved with that amendment to the English text.

Paragraph 10

48. The CHAIRMAN, speaking as a member of the Commission, said that the word "vital" in the last sentence of the English text was not a satisfactory translation of the French word "*essentiels*"; he suggested that it should be replaced by the word "fundamental".

It was so agreed.

Paragraph 10 was approved with that amendment to the English text.

B. DRAFT ARTICLES ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS

PART I. INTRODUCTION

Text of article 1

(Scope of the present articles)

The texts of article 1 and of foot-note 3 were approved.

Commentary to article 1

Paragraph (1)

49. After an exchange of views between Mr. KEARNEY and Mr. REUTER concerning the English version of the third sentence of paragraph (1), the CHAIRMAN suggested that the English translation of that sentence should be revised by the Secretariat.

Paragraph (1) was approved, subject to revision of the English text.

Paragraph (2)

50. Mr. USHAKOV said he was not sure that paragraph (2) made it clear why the term "agreement" should be kept to denote conventional acts of an otherwise unspecified kind.

51. Mr. REUTER (Special Rapporteur) said that the term "agreement" was the most general of all the possible terms; it covered both written, oral and tacit acts and the acts of any international entity whatsoever. Several members of the Commission had said that they were in favour of using the term "treaty" rather than "agreement". He had meant to make it clear in the commentary that the word "agreement" should be kept for acts the nature of which was not identified by the parties to them or by any formal characteristic. The

term "conventional acts" was completely general. To meet Mr. Ushakov's point, however, he suggested that the last phrase of the paragraph might be redrafted to read: "conventional acts, whatever the parties to them and whatever their form".

It was so agreed.

Paragraph (2), as amended, was approved.

Text of article 2

(Use of terms)

The text of article 2 was approved, subject to a slight rearrangement of the French text of paragraph 1(a).

Commentary to article 2

Paragraph (1)

Paragraph (1) was approved without comment.

Paragraph (2) and foot-note 6

52. Mr. KEARNEY asked the Special Rapporteur whether it might not be desirable to give an example of the type of organization to which paragraph 2 referred.

53. Mr. REUTER (Special Rapporteur) suggested that the words "such as the European Communities" should be inserted after the words "certain integrated organizations" in the second sentence.

It was so agreed.

Paragraph (2), as amended, and foot-note 6 were approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved without comment.

Paragraph (5)

54. Mr. KEARNEY asked the Special Rapporteur whether the words "by participating through their organs in the preparation, and in some cases even the adoption, of the text of certain treaties", in the last sentence, did not refer to a rather unusual case.

55. Mr. REUTER (Special Rapporteur) said that in so far as the question related to adoption, there were quite a number of international instruments which had been adopted by such organs as the Assembly of the League of Nations and the General Assembly of the United Nations, so he did not think the case could be regarded as very exceptional. He was, however, quite prepared to delete the phrase if the Commission thought it unnecessary.

56. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, when a convention was adopted in the General Assembly of the United Nations, the Organization was not participating as such in its adoption, but merely providing the necessary framework in the form of a conference; the convention was, in fact, adopted by the representatives of Governments. As he understood the phrase mentioned by Mr. Kearney, it would cover such instruments as international commodity agreements, in which the European Economic Community might perhaps be regarded as participating as a contracting party.

57. Mr. REUTER (Special Rapporteur) explained that the term "adoption" should be understood to mean deliberation by an organ as such, which established the substance of a text *ne varietur*. History provided many examples. From the doctrinal standpoint, however, it could be maintained that an assembly acting in that way was not really an assembly, but a meeting of the delegations of member States. The problem could perhaps be solved by a change in wording.

58. Mr. USHAKOV observed that the term "negotiating State" could apply only to a State which had taken part in both the drawing up and the adoption of a treaty and had adopted it on its own behalf. When the General Assembly of the United Nations took part in the drawing up and adoption of a treaty, it did not adopt the text on its own behalf and the definition in paragraph 1(e) of article 2 was therefore not applicable to it. It would, on the other hand, be applicable to the Council for Mutual Economic Assistance when it participated in the drawing up and adoption of a treaty concluded with an individual State.

59. Mr. YASSEEN said that practice existed in that matter and was far from being exceptional. Both the General Assembly of the United Nations and other organs of international organizations took part in drawing up and adopting international treaties. The question remained whether they were then acting as organs of the organization or as assemblies in which States could be represented. The second alternative seemed to be corroborated by the fact that States not members of the United Nations had participated to some extent in the work of the Sixth Committee of the General Assembly for the purpose of adopting certain conventions.

60. Mr. REUTER (Special Rapporteur) suggested that the term "adoption", which was defined in the Vienna Convention on the Law of Treaties, should be replaced by the less technical term "establishment".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6)-(9)

Paragraphs (6)-(9) were approved without comment.

Paragraph (10)

61. Mr. USHAKOV suggested that the wording of the last phrase of paragraph 10 should be toned down by adding the words "subject to the provisions of article 6" or "which have relevant rules".

62. After a brief exchange of views between Mr. KEARNEY and Mr. REUTER (Special Rapporteur), the CHAIRMAN, speaking as a member of the Commission, suggested that the best solution would be to delete the underlining from the word "all" in that phrase.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were approved without comment.

Paragraph (13)

63. Mr. REUTER (Special Rapporteur) observed that the first sentence of paragraph (13) should be amended in the same way as the last phrase of paragraph (10).

Paragraph (13) was approved with that amendment.

Paragraphs (14)-(16) and footnote 11

Paragraphs (14)-(16) and footnote 11 were approved without comment.

Commentary to article 3

(International agreements not within the scope of the present articles)

Paragraph (1)

Paragraph (1) was approved without comment.

Paragraph (2)

64. Mr. KEARNEY said he would hesitate to accept the statement that an agreement made by telex was not an agreement in writing. He therefore proposed that the words "particularly telex", in the third sentence, should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3)-(6)

Paragraphs (3)-(6) were approved without comment

Commentary to article 4

(Non-retroactivity of the present articles)

The commentary to article 4 was approved without comment.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

Section 1. Conclusion of treaties

Commentary to article 6

(Capacity of international organizations to conclude treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved without comment.

Paragraph (3)

65. In reply to a question by Mr. KEARNEY, the CHAIRMAN said that the translation of the French word "*physionomie*" in the second sentence would be revised by the Secretariat.

Paragraph (3) was approved, subject to that revision of the English text.

Paragraphs (4)-(6)

Paragraphs (4)-(6) were approved without comment.

Chapter IV as a whole was approved.

The meeting rose at 6.20 p.m.

1295th MEETING

Wednesday, 17 July 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.209/Add.3; A/8710/Rev.1)

[Item 4 of the agenda]

(*resumed from the previous meeting*)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to resume consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.209/Add.3).

ARTICLE 22¹

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 4 of part III and article 22:

SECTION 4. PROVISIONAL APPLICATION

Article 22

Multilateral treaties

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls under article 12, paragraph 3, or article 13, paragraphs 2 and 4, the consent of all the parties to such provisional application is required.

3. If, at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

4. Nevertheless, in the case of a treaty which falls under article 12, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. The Drafting Committee had made no change in the title of article 22 or in the title of section 4 (Provisional application).

4. The text of article 22² had consisted of two paragraphs, both of which related exclusively to multilateral treaties which, at the date of the succession of States, were in force in respect of the territory to which the succession related. The text now proposed by the Drafting Committee consisted of five paragraphs, paragraphs 1 and 2 of which corresponded to the two paragraphs of the 1972 text, except for a few drafting changes.

5. One such change related to the words "the successor State notifies the parties or the depositary" appearing in paragraph 1 of the 1972 text. Many other articles of the draft specified that notification should be made to the depositary or to the States concerned. Some of those articles referred to "notification of succession", a term which was defined in article 2 and which was the subject-matter of article 17; others referred to notifications of another kind. To avoid all misunderstanding, the Committee proposed that the word "notification" should be used exclusively for notifications of succession, and that other notifications should be designated by the term "notice". A separate article would be devoted to the procedure by which such "notice" had to be given.³ In paragraph 1, the Committee had accordingly replaced the words he had quoted by the words "the newly independent State gives notice". The French and Spanish translations of the words "gives notice" were only provisional and would be reviewed by the Drafting Committee at the final editing stage. The substitution of the words "newly independent State" for "successor State" was in line with the decision already taken in regard to other articles; that change would, of course, be made throughout the draft.

6. Paragraphs 3 and 4 of the new text extended the rules set out in paragraphs 1 and 2 to the case of a treaty which was not yet in force at the date of the succession of States, but which was being applied provisionally—a case that had not been covered by the 1972 text.

7. Paragraph 5 was a new provision, based on paragraph 2 of article 12 and on paragraph 3 of article 13, as approved by the Commission. A number of other articles contained similar provisions, with differences in wording for which there appeared to be no good reason. In the interests of consistency, the Drafting Committee had therefore adopted for all the provisions in question a single model based on paragraphs 2(a) and 3(a) of article 25. The wording of paragraph 5 of article 22 was the first instance of the use of that model.

8. Sir Francis VALLAT (Special Rapporteur) pointed out that the words "or article 13, paragraphs 2 and 4" had been included in paragraph 2 by mistake and should be deleted.

9. The words "which falls under article 12, paragraph 3", in the same paragraph, were not altogether

¹ For previous discussion see 1280th meeting, para. 26.

² *Ibid.*

³ See next meeting, para. 44.

appropriate and he suggested that they should be replaced by the words: "which falls within the category mentioned in article 12, paragraph 3".

10. Mr. USHAKOV proposed that the words "in respect of its territory" should be inserted after the words "should continue to be applied provisionally" in paragraph 3.

11. Sir Francis VALLAT (Special Rapporteur) accepted that change, which was in conformity with the language adopted throughout the draft. He proposed that the same words should also be inserted after the words "should be applied provisionally", in paragraph 1, so as to make the intention absolutely clear.

12. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the title of section 4 of part III and the title and text of article 22, as proposed by the Drafting Committee, with the changes proposed by Mr. Ushakov and the Special Rapporteur.

It was so agreed.

ARTICLE 23⁴

13. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 23:

Article 23 *Bilateral treaties*

A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned if:

- (a) they expressly so agree; or
- (b) by reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

14. Article 23 dealt with the provisional application of bilateral treaties. Like article 22, article 23 of the 1972 draft⁵ had related exclusively to treaties which were in force at the date of the succession. As in the case of article 22, the Drafting Committee proposed that the scope of article 23 should be enlarged to cover treaties which were provisionally applied at the date of the succession. It had also made some minor drafting changes in the text of the article.

15. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved the title and text of article 23, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 24⁶

16. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 24:

Article 24

Termination of provisional application

1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 22 may be terminated:

(a) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty, and the expiration of the notice; or

(b) in the case of a treaty which falls under article 12, paragraph 3, or under article 13, paragraph 4, by reasonable notice of termination given by the newly independent State or the parties or, as the case may be, the contracting States, and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 23 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned, and the expiration of the notice.

3. Unless the treaty otherwise provides or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

4. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 22 shall be terminated if the newly independent State gives notice of its intention not to become a party to the treaty.

17. Article 24 related to termination of the provisional application of treaties. The Drafting Committee had observed that some of the provisions of the 1972 text⁷ belonged to the law of treaties rather than to the law of State succession. Paragraph 1(a), for instance, stipulated that the provisional application of a treaty terminated if the States provisionally applying it so agreed. A similar provision appeared in paragraph 2(a). The Committee had decided that such provisions had no place in article 24, which should deal only with the grounds for termination of provisional application that belonged to the law of State succession strictly speaking. It had accordingly reworded the opening clauses of paragraphs 1 and 2 to make it clear that those paragraphs did not attempt to give an exhaustive list of grounds for such termination.

18. Like paragraph 1 of the 1972 text, paragraph 1 of the Drafting Committee's text dealt with termination of the provisional application of multilateral treaties. It reproduced, with a number of drafting changes, the corresponding provisions of the 1972 text, but without subparagraph (a).

19. Paragraph 2 dealt with the termination of the provisional application of bilateral treaties and corresponded to paragraph 2 of the 1972 text, again without subparagraph (a). Paragraph 3 reproduced the corresponding provisions of the 1972 text in a simplified form.

20. Paragraph 4 was a new provision which was obviously necessary, since it would be unfair to propose the continuation of the provisional application of a treaty once the new independent State had given notice of its intention not to become a party to the treaty.

⁴ For previous discussion see 1280th meeting, para. 73.

⁵ *Ibid.*

⁶ For previous discussion see 1281st meeting, para. 1.

⁷ *Ibid.*

21. Mr. RAMANGASOAVINA said that during the debate on article 24 he had pointed out that the newly independent State could decide to accede definitively to the treaty before the termination of provisional application.⁸ He would have liked article 24 to contain a provision under which the newly independent State could accede definitively to the treaty by a notification of succession during the period of provisional application. Could he take it that that provision was implicit in the present text of the article?

22. Mr. USHAKOV proposed that following the decision taken regarding article 22, the words "or under article 13, paragraph 4" should be deleted from paragraph 1(b). The phrase "which falls under article 12, paragraph 3" in the same paragraph, should be replaced by the new wording suggested by the Special Rapporteur for article 22, paragraph 2.

23. Sir Francis VALLAT (Special Rapporteur) said he accepted those proposals. In reply to Mr. Ramangasoavina, he explained that the Drafting Committee had considered it unnecessary to add any provision to cover the case in which provisional application terminated as such because the treaty came fully into force. The reason was that article 24 had been recast so as not to give the impression of being exhaustive. The article did not contain a complete list of grounds of termination, and the one mentioned by Mr. Ramangasoavina was one of those not mentioned.

24. Mr. RAMANGASOAVINA observed that paragraph 4 provided that the provisional application of a multilateral treaty should be terminated if the newly independent State gave notice of its intention not to become a party to the treaty. He thought it might also have been indicated that the provisional application of the treaty terminated if the newly independent State made a notification of succession. He would not press that suggestion, but would like the commentary to make it clear that a notification of succession could terminate the provisional application of the treaty.

25. Mr. USHAKOV said that if the newly independent State made a notification of succession to the treaty, the application of the treaty did not terminate, but continued on a different basis, which was no longer provisional, but definitive, since the treaty then entered into force.

26. The CHAIRMAN said that the commentary would make that point clear. He assumed that it would also explain that the enumeration in article 24 was not exhaustive. He would like to know, however, how that point was made in the text of the article itself.

27. Sir Francis VALLAT (Special Rapporteur) said that article 24 was cast in a purely permissive form. Both paragraph 1 and paragraph 2 used the words "may be terminated", which made it plain that there could be other cases of termination.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission

approved article 24, as proposed by the Drafting Committee, with the changes proposed by Mr. Ushakov.

It was so agreed.

ARTICLE 25⁹

29. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and text for section 5 and article 25:

SECTION 5. NEWLY INDEPENDENT STATES FORMED FROM TWO OR MORE TERRITORIES

Article 25

Newly independent States formed from two or more territories

1. Articles 12 to 24 apply in the case of a newly independent State formed from two or more territories.

2. When a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of articles 12, 13 or 19 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(b) in the case of a multilateral treaty not falling under article 12, paragraph 3, or under article 13, paragraph 4, the notification of succession is restricted to the territory in respect of which the treaty was in force at the date of the succession of States, or in respect of which consent to be bound by the treaty had been given prior to that date;

(c) in the case of a multilateral treaty falling under article 12, paragraph 3, or under article 13, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree; or

(d) in the case of a bilateral treaty, the newly independent State and the other State concerned otherwise agree.

3. When a newly independent State formed from two or more territories becomes a party to a multilateral treaty under article 14 and by the signature or signatures of the predecessor State or States it had been intended that the treaty should extend to one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(b) in the case of a multilateral treaty not falling under article 14, paragraph 4, the ratification, acceptance or approval of the treaty is restricted to the territory or territories to which it was intended that the treaty should extend; or

(c) in the case of a multilateral treaty falling under article 14, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree.

30. Article 25 was the only article in section 5. In the 1972 draft (A/8710/Rev.1, chapter II, section C), the section had been entitled "States formed from two or more territories", whereas the title of the article itself had been "Newly independent States formed from two or more territories". The Drafting Committee had

⁸ *Ibid.*, para. 17.

⁹ For previous discussion see 1281st meeting, para. 20.

retained the title of the article and had inserted the words "Newly independent" before the words "States" in the title of the section, in order to emphasize that it belonged to part III of the draft.

31. The 1972 text of article 25 had consisted of a general rule, set out in an introductory clause, and of four exceptions to it, set out in sub-paragraphs (a), (b), (c) and (d). The Drafting Committee had observed that the general rule applied exclusively to treaties that were in force at the date of the succession. The rule was thus restricted to treaties to which the newly independent State became a party by virtue of article 12 or article 19. Under the provisions of sections 2 and 3 of part III, however, the right of a newly independent State to inherit a treaty was not limited to treaties that were in force at the date of the succession of States.

32. Thus, under article 13, paragraph 2, a newly independent State could establish its status as a party to a multilateral treaty which entered into force after the date of the succession of States if the predecessor State was a contracting State in respect of the territory to which the succession related; and under article 14, paragraph 1, a newly independent State could, under certain conditions, become a party to a multilateral treaty which the predecessor State had signed subject to ratification, acceptance or approval. The Drafting Committee had come to the conclusion that there was no valid reason to exclude from the scope of article 25 the situations covered in articles 13 and 14, and it had redrafted article 25 accordingly.

33. Paragraph 1 of the new text stated that articles 12 to 24 applied in the case of a newly independent State formed from two or more territories. That provision was required in order to make it clear that such a State had, *inter alia*, the right to become a party to a treaty under articles 13 and 14.

34. Paragraph 2 of the new text set out the provisions applicable to a treaty to which a newly independent State formed from two or more territories became a party by virtue of articles 12, 13 or 19. It reproduced, with some changes, the general rule and the exceptions to that rule contained in the 1972 text of article 25.

35. Paragraph 3 applied to a treaty to which a State became a party by virtue of article 14. Its provisions were an adaptation of the 1972 text to that particular situation.

36. Sir Francis VALLAT (Special Rapporteur) proposed that, at the end of the opening clause of paragraph 3, the words "the entire territory of that State" should be amended to read: "the entire territory of the newly independent State."

It was so agreed.

37. Mr. USHAKOV proposed that the references to article 13, paragraph 4, in paragraphs 2(b) and 2(c) should be deleted. In addition, the phrase "falling under article 12" should be replaced in each case by the new wording suggested by the Special Rapporteur for article 22, paragraph 2.

38. Sir Francis VALLAT (Special Rapporteur) suggested that those points should be left for the Drafting

Committee to decide at the stage of final editing. There was a difference between article 25 and article 22, in that article 25 really referred to the substance of the previous articles and not merely to a certain category of treaties.

39. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the title of section 5 of part III and the title and text of article 25, as proposed by the Drafting Committee, with the amendment adopted to paragraph 3 and subject to final editing.

It was so agreed.

Title of part IV

40. Mr. HAMBRO (Chairman of the Drafting Committee) said that, in the 1972 draft (A/8710/Rev.1, chapter II, section C), part IV consisted of articles 26, 27 and 28 and was entitled "Uniting, dissolution and separation of States". The word "dissolution" had been included in that title in order to cover article 27, the title of which had been: "Dissolution of a State". The Drafting Committee, however, had amended the title of article 27 to read "Succession of States in cases of separation of parts of a State", and had accordingly deleted the word "dissolution" from the title of part IV.

41. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved the title proposed by the Drafting Committee for part IV, which read: "Uniting and separation of States".

It was so agreed.

ARTICLES 26, ¹⁰ 26 *bis* AND 26 *ter*

42. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and texts for article 26 and for two new articles numbered provisionally 26 *bis* and 26 *ter*:

Article 26

Effects of a uniting of States on treaties in force at the date of the succession of States

1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

(a) the successor State and the other State party or States parties otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:

(a) in the case of a multilateral treaty other than one falling within the category mentioned in article 12, paragraph 3, the successor State gives notice in writing to the depositary or, if there is no depositary, to the parties that the treaty shall apply in respect of its entire territory;

(b) in the case of a multilateral treaty falling within the category mentioned in article 12, paragraph 3, the successor State and all the parties otherwise agree; or

¹⁰ For previous discussion see 1282nd meeting, para. 1.

(c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

Article 26 bis

Effects of a uniting of States on treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a successor State falling within article 26 may, by giving notice in writing, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, any of the predecessor States, which have united, was a contracting State to the treaty.

2. Subject to paragraphs 3 and 4, a successor State falling within article 26 may, by giving notice in writing, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date any of the predecessor States, which have united, was contracting State to the treaty.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

5. Any treaty to which the successor State becomes a contracting State or a party in conformity with paragraph 1 or 2 shall apply only in respect of the part of the territory of the successor State in respect of which consent to be bound by the treaty had been given prior to the date of the succession of States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 12, paragraph 3, the successor State indicates in its notice given under paragraph 1 or 2 that the treaty shall apply in respect of its entire territory; or

(b) in the case of a multilateral treaty falling within the category mentioned in article 12, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

6. Sub-paragraph 5(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

Article 26 ter

Effects of a uniting of States in the case of treaties signed by a predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States one of the predecessor States had signed a multilateral treaty subject to ratification, acceptance or approval, a successor State falling within article 26 may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

4. Any treaty to which the successor State becomes a party or a contracting State in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was signed by one of the predecessor States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 12, paragraph 3, the successor State when ratifying, accepting or approving the treaty gives notice that the treaty shall apply in respect of its entire territory;

(b) in the case of a multilateral treaty falling within the category mentioned in article 12, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

5. Sub-paragraph 4(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

43. Article 26 of the 1972 text¹¹ had been entitled "Uniting of States" and had consisted of three paragraphs. Paragraph 1 laid down, in its introductory clause, the rule that, on the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties, continued in force between the successor State and such other States parties. There were two exceptions to that rule, set out in sub-paragraphs (a) and (b). The introductory clause of paragraph 2 laid down the rule that any treaty continuing in force in conformity with paragraph 1 was binding only in relation to the area of the territory of the successor State in respect of which the treaty had been in force at the date of the uniting of the States. Three exceptions to that rule were set out in sub-paragraphs (a), (b) and (c). Lastly, paragraph 3 specified that paragraphs 1 and 2 applied also when a successor State itself united with another State.

44. The Drafting Committee had decided to delete the provisions of paragraph 3, since they actually referred to two distinct and not simultaneous successions of States, each of which should be considered separately. It had reproduced the substance of paragraphs 1 and 2, with a number of drafting changes, in the new text of the article 26 it now proposed.

45. The Committee had amended the title of the article to read: "Effects of a uniting of States on treaties in force at the date of the succession of States", since article 26 related only to treaties which were in force at the date of the succession.

46. Because of that limitation of the scope of article 26, there was no provision in the draft articles that would enable a successor State which emerged from a uniting of States to become a party, or a contracting State, to a treaty which was not in force at the date of the succession, by procedures similar to those established by articles 13 and 14 for newly independent States. The Drafting Committee had come to the conclusion that there was no valid reason for such a difference in treatment between two categories of successor States, namely, the newly independent and those which emerged from a uniting of States. It had therefore prepared two new articles which it now proposed to the Commission.

47. The first article, provisionally numbered 26 bis, was entitled: "Effects of a uniting of States on treaties not in

¹¹ *Ibid.*

force at the date of the succession of States". Its paragraphs 1, 2, 3 and 4 were based on the same paragraphs of article 13. Under conditions similar to those applying to newly independent States, those provisions enabled a successor State emerging from a uniting of States to establish, by giving notice in writing, its status as a party or as a contracting State to a multilateral treaty which had not been in force at the date of the succession.

48. Paragraph 5 of article 26 *bis* reflected the provisions of paragraph 2 of article 26 as now proposed by the Drafting Committee. Paragraph 6 embodied the exception set out in paragraph 1(b) of article 26.

49. The second new article proposed by the Drafting Committee, provisionally numbered 26 *ter*, was entitled: "Effects of a uniting of States in the case of treaties signed by a predecessor State subject to ratification, acceptance or approval". Paragraphs 1, 2 and 3 of that article were based on paragraphs 1, 3 and 4 of article 14, but it would be noted that paragraph 1 of article 26 *ter* did not contain the proviso that the predecessor State intended by its signature "that the treaty should extend to the territory to which the succession of States relates". That proviso, which had its place in paragraph 1 of article 14, had clearly no relevance to a uniting of States. Since the provisions of paragraph 2 of article 14 related exclusively to that proviso, they had also been omitted from the text of article 26 *ter* now proposed.

50. The provisions of paragraphs 4 and 5 of article 26 *ter* were similar to those of paragraphs 5 and 6 of article 26 *bis*.

51. Mr. USHAKOV proposed that the opening words of the titles of all three articles should be redrafted to read: "Effects of a uniting of States in respect of treaties...".

52. Sir Francis VALLAT (Special Rapporteur) supported that proposal which was in line with the language consistently used throughout the draft.

53. Mr. USHAKOV said that the expression "other State party" used in article 26, was not altogether suitable in the case of a uniting of States, because of the way in which that term was defined in paragraph 1(m) of article 2. The concluding words of the definition: "a treaty in force . . . in respect of the territory to which that succession of States relates" made the term inappropriate.

54. He suggested that the Drafting Committee should solve that problem during the final editing, either by using different wording in article 26, or by amending the definition in paragraph 1(m) of article 2.

55. Sir Francis VALLAT (Special Rapporteur) said it would be very difficult to solve the problem by altering the passages containing references to the "other State party". It would be better to deal with the problem in article 2.

56. The CHAIRMAN suggested that, on the understanding that the Drafting Committee would deal with that point at the final editing stage, the Commission should approve articles 26, 26 *bis* and 26 *ter*, as proposed

by the Drafting Committee, with the amendment to the titles proposed by Mr. Ushakov and accepted by the Special Rapporteur.

It was so agreed.

The meeting rose at 11.15 a.m.

1296th MEETING

Thursday, 18 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.209/Add.4 and 5; A/CN.4/L.212, L.215, L.221 and L.222; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider articles 27 to 31 *ter*, as proposed by the Drafting Committee (A/CN.4/L.209/Add.4). He then called on the Chairman of the Drafting Committee to introduce articles 27 and 28 together.

ARTICLES 27¹ AND 28²

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following titles and texts for articles 27 and 28:

Article 27

Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of a part of the territory of the predecessor State that has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be

¹ For previous discussion see 1283rd meeting, para. 17.

² For previous discussion see 1284th meeting, para. 1.

incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.

Article 28

Position if a State continues after separation of part of its territory

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

- (a) it is otherwise agreed;
- (b) it is established that the treaty related only to the territory which has separated from the predecessor State; or
- (c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. With the adoption of articles 26, 26 *bis* and 26 *ter*, the Commission had completed the examination of questions arising out of a uniting of States. It now had to consider the reverse situation, namely, the separation from a State of a part or parts of its territory.

4. In the 1972 text, article 27³ had been entitled "Dissolution of a State". It had been based on the assumption that parts of a State became individual States and that the original State ceased to exist. Paragraph 1 of the article had comprised three sub-paragraphs laying down rules which, by hypothesis, concerned only the successor States, that was to say the parts which had become individual States. Under sub-paragraph (a), any treaty concluded by the predecessor State in respect of its entire territory continued in force in respect of each successor State emerging from the dissolution. Under sub-paragraph (b), any treaty concluded by the predecessor State in respect only of a particular part of its territory which had become an individual State continued in force in respect of that State alone. Sub-paragraph (c) had dealt with the case of dissolution of a State previously constituted by the uniting of two or more States. It had referred, therefore, to two distinct and not simultaneous successions of State, which, in the Drafting Committee's view, should be considered separately. Accordingly, and in conformity with a decision it had taken in a similar case in regard to article 26,⁴ the Committee had decided that the provisions of sub-paragraph (c) should be deleted.

5. Paragraph 2 of article 27 had listed two exceptions to the rules laid down in paragraph 1.

6. Article 28 of the 1972 draft⁵ had been entitled "Separation of part of a State". It had been based on the assumption that the part which separated became an individual State, but—and that was the main difference

between it and article 27—that the predecessor State continued to exist. Article 28 had laid down two rules. The first, set out in the introductory part of paragraph 1, concerned the predecessor State. It laid down that any treaty which was in force in respect of that State continued to bind it in relation to its remaining territory. Exceptions to that rule were listed in sub-paragraphs (a) and (b) of paragraph 1. The second rule, set out in paragraph 2, concerned the successor State and laid down that that State was to be considered as being in the same position as a newly independent State in relation to any treaty which, at the date of the separation, had been in force in respect of the territory now under its sovereignty.

7. The Drafting Committee had observed that most of the examples given in the commentary (A/8710/Rev.1, chapter II, section C) in support of the second rule in article 28 concerned the separation from a State of what would now be called a dependent territory. It had therefore decided that the scope of the rule should be limited to cases in which the separation occurred in circumstances that were essentially of the same character as those existing in the case of the formation of a newly independent State.

8. After taking the two decisions he had mentioned, the Drafting Committee had sought to present the provisions of articles 27 and 28 in a clearer and more systematic manner. It had come to the conclusion that they should be rearranged in two groups, the first containing the provisions concerning the successor State, and the second those concerning the predecessor State. With those considerations in mind, it had prepared the new texts it was now proposing to the Commission. Article 27, as proposed by the Committee, contained the provisions concerning the successor State, while article 28 contained those concerning the predecessor State.

9. The new article 27 was entitled "Succession of States in cases of separation of parts of a State". As stated in the opening clause, the article dealt with the case in which a part or parts of the territory of a State separated to form one or more States, whether or not the predecessor State continued to exist—in other words, whether or not it had been dissolved, to use the terminology of the 1972 draft. Thus the new article 27 covered both the situation dealt with in the former article 27 and the situation dealt with in the former article 28, but did so exclusively from the standpoint of the successor State.

10. Sub-paragraphs (a) and (b) of paragraph 1 reproduced, with some drafting changes, the rules set out in the corresponding sub-paragraphs of the former article 27. Paragraph 2 reproduced, again with drafting changes, the exceptions to those rules set out in paragraph 2 of the former article 27.

11. Paragraph 3 provided for a further exception to paragraph 1. That exception concerned successor States which separated from the predecessor State in circumstances essentially of the same character as those existing in the case of the formation of a newly independent State. It reflected paragraph 2 of the former article 28,

³ See 1283rd meeting, para. 17.

⁴ See 1295th meeting, para. 44.

⁵ See 1284th meeting, para. 1.

with the limitation in scope which he had already mentioned.

12. The new text of article 28 submitted by the Drafting Committee was entitled "Position if a State continues after separation of part of its territory". As stated in the opening clause, the new text—like the former article 28—dealt with the case in which, after the separation of any part of the territory of a State, the predecessor State continued to exist; but it dealt with that case exclusively from the standpoint of the predecessor State.

13. The introductory part of the new text of article 28 reproduced, with several drafting changes, the rule laid down in the introductory part of paragraph 1 of the 1972 text; sub-paragraphs (a), (b) and (c) listed three exceptions to that rule. Sub-paragraph (a) corresponded to paragraph 1(a) of the 1972 text, sub-paragraph (b) to the first clause of paragraph 1(b) of that text and sub-paragraph (c) to the second clause of paragraph 1(b).

14. Mr. TAMMES said that the new texts of articles 27 and 28 had solved a number of problems; the precarious distinction between dissolution and separation had disappeared and a uniform régime of continuity had been established for both cases, with the exception referred to in paragraph 3 of article 27. He congratulated the Drafting Committee on having taken that courageous step in the progressive development of international law.

15. He thought, however, that the criterion for the application of the clean slate rule in paragraph 3 of article 27 would continue to present serious practical difficulties which could not easily be resolved by any method for the settlement of disputes. That criterion was the existence of circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. Reference to the 1972 commentary to article 28 (A/8710/Rev.1, chapter II, section C) showed, however, that such circumstances differed essentially from case to case. Moreover, no use could be made of the definition of newly independent State given in article 2, paragraph 1(f), since article 27 referred to the way in which such a State was formed. And it appeared from paragraph (6) of the 1972 commentary to article 2—which he hoped was still open to revision—that the term "newly independent State" was used there, precisely, to exclude cases of separation and dissolution, whereas in article 27, paragraph 3, the term was used for the purpose of an analogy.

16. It was to be feared that, as the Special Rapporteur had predicted when summing up the discussion, article 27 would not be applied in practice.⁶ After all, the separated State would not be automatically bound by the future convention, which meant that it could choose to be governed either by the customary rule applicable to secession, that was to say by the clean slate principle, or by the progressive rule of *ipso jure* continuity, according to whether it considered itself as emerging from a revolutionary or an evolutionary secession. It seemed

to him, therefore, that the commentary to article 27 might usefully refer to the possibility of an evolutionary separation after which the new State or newly independent State, which might not be fully responsible for all its international relations, nevertheless was constitutionally entitled to express its consent to be bound by a treaty. The inclusion of such an explanation in the commentary might be of great assistance in the otherwise difficult application of article 27.

17. Sir Francis VALLAT (Special Rapporteur) said that any suggestions Mr. Tammes could make for inclusion in the commentary would be welcome; he was fully aware of the difficulty of providing a clear-cut and workable test for the case referred to in paragraph 3 of article 27.

18. Mr. KEARNEY said there was much merit in what Mr. Tammes had said, since the test specified in paragraph 3 presented problems that would be difficult to solve in practice. He did not think, however, that their solution would be more difficult than that of the problems which would have been encountered in making the distinction between separation and dissolution provided for in the 1972 draft. One of the reasons why he had again submitted a proposal concerning the settlement of disputes (A/CN.4/L.221) had been, precisely, to meet the kind of difficulty to which Mr. Tammes had drawn attention and which seemed to be a serious potential source of disputes.

19. Mr. USHAKOV observed that in view of the diversity of cases covered by paragraph 3 of article 27, there were no objective criteria for determining what circumstances were essentially of the same character as those existing in the case of the formation of a newly independent State. Some of those cases would be easily settled in practice, while others would raise insurmountable difficulties. Hence, due consideration should be given to the question raised by Mr. Tammes.

20. With regard to the drafting of article 27, he hoped that the Drafting Committee would review the French translations of the word "concerned" in paragraph 2(a) and the word "character" in paragraph 3.

21. Mr. REUTER said that the comments made by Mr. Tammes on paragraph 3 were due to the fact that there was no legal criterion applicable to decolonization and that the Commission was not afraid of adopting articles containing purely protestative clauses.

22. The CHAIRMAN suggested that the Commission should approve articles 27 and 28, as proposed by the Drafting Committee, and that the comments made by members should be reflected in the commentary.

It was so agreed.

ARTICLES 28 bis AND 28 ter

23. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the new articles 28 bis and 28 ter, which read:

Article 28 bis

Participation in treaties not in force at the date of the succession of States in cases of separation of parts of a State

1. Subject to paragraphs 3 and 4, a successor State falling within article 27, paragraph 1, may by giving notice, establish its status as a

⁶ See 1284th meeting, para. 53.

contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, the predecessor State was a contracting State to the treaty and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates.

2. Subject to paragraphs 3 and 4, a successor State falling within article 27, paragraph 1, may by giving notice, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State to the treaty and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

Article 28 ter

Participation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States the predecessor State had signed a multilateral treaty subject to ratification, acceptance or approval and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates, a successor State falling within article 27, paragraph 1, may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 12, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

24. Mr. HAMBRO (Chairman of the Drafting Committee) said that article 27, both in the 1972 text and in the new version, related exclusively to treaties which were in force at the date of the succession of States. Consequently, in the case of separation of parts of a State, the successor State would not be able to inherit a treaty which had not been in force at that date, by procedures similar to those provided by articles 13 and 14 for newly independent States. In articles 26*bis* and 26*ter* the Drafting Committee had extended those procedures to successor States emerging from a uniting of States.

25. In that case, too, the Committee had come to the conclusion that there could be no valid reason for a radical difference in treatment between two categories of successor States: on the one hand, newly independent States and those emerging from a uniting of States, and on the other, successor States in cases of separation of parts of a State. It had accordingly prepared two new articles which it had numbered provisionally 28*bis* and 28*ter*

26. Article 28*bis* adapted the provisions of article 13 to the case of a successor State falling within article 27, paragraph 1, that was to say a successor State emerging from a separation of parts of a State. Article 28*ter* adapted the provisions of article 14 to the case of such a successor State. Since members were now familiar with that drafting technique, the two articles should require no further comment.

27. Mr. USHAKOV, referring to paragraph 1 of article 28*bis*, said he doubted the advisability of using the conditional mood in the phrase "if it had been in force at that date, would have applied in respect of the territory", since in the case covered by that provision it seemed that the predecessor State had clearly intended the treaty to apply in respect of the territory in question.

28. Mr. HAMBRO (Chairman of the Drafting Committee) said he agreed with Mr. Ushakov. The grammatical point he had raised had, however, been exhaustively discussed in the Drafting Committee.

29. Mr. ELIAS proposed that the Commission should approve articles 28*bis* and 28*ter*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLES 29, 30⁷ AND 30*bis*

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 29, 30 and 30*bis*, which read:

Article 29

Boundary régimes

A succession of States does not as such affect:

- (a) a boundary established by a treaty; or
- (b) obligations and rights established by a treaty and relating to the régime of a boundary.

Article 30

Other territorial régimes

1. A succession of States does not as such affect:

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

- (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

- (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

Article 30 bis

Questions relating to the validity of a treaty

Nothing in the present articles shall be considered as prejudicing in any respect a question relating to the validity of a treaty.

⁷ For previous discussion see 1286th meeting, para. 47.

31. Mr. HAMBRO (Chairman of the Drafting Committee) said that part V of the 1972 draft (A/8710/Rev.1, chapter II, section C), entitled "Boundary régimes or other territorial régimes established by a treaty" had consisted of articles 29 and 30, which had given rise to long and difficult debates. Several members had suggested the addition of a new article stating that nothing in article 29 or 30 should be considered as prejudicing in any respect a question relating to the validity of a treaty. Others had objected to the wording of the proposed new article, which, in their view, would imply that any article other than 29 or 30 could prejudice questions relating to the validity of treaties. Finally, thanks to the goodwill of all concerned, a compromise had been reached in the Drafting Committee, whereby the additional article would contain no reference to any specific provision of the draft and would be worded in general terms. The commentary, however, would explain the history of the article and would point out its relevance to articles 29 and 30. The additional article—numbered provisionally 30*bis*—and articles 29 and 30 would be transferred to part I of the draft, entitled "General provisions".

32. The only change made by the Drafting Committee in article 29 had been to replace the word "shall", in the first line of the English text, by the word "does". The object of that change was to emphasize that the article was in the nature of what the French called *une constatation de fait*. The Committee had also considered replacing the words "relating to", in sub-paragraph (b) by the words "forming an integral part of". It had finally decided against that change because it would be very difficult in practice to determine what did or did not form an integral part of the régime of a boundary.

33. As in the case of article 29, and for the same reasons, the Drafting Committee had replaced the word "shall", in article 30, by the word "does". In paragraph 1(a) of article 30 it had deleted the adverb "specifically", which added nothing to the text and might give rise to discussion, and had replaced the words "a particular territory" by "any territory". The phrase "rights established... specifically for the benefit of a particular territory" used in the 1972 text, could be interpreted as excluding transit rights. Similar changes had been made in paragraph 1(b) and in paragraph 2.

34. The Committee had considered the possibility of inserting the words "or of its inhabitants" after the words "for the benefit of any territory of a foreign State" in paragraph 1(a), but had decided against doing so because, in the last analysis, rights and obligations were always established for the benefit of the inhabitants of a territory. Furthermore, any qualification of the expression used in the 1972 text might limit the scope of that expression.

35. The CHAIRMAN suggested that the Commission should approve articles 29, 30 and 30*bis* as proposed by the Drafting Committee, and their transfer to part I of the draft.

It was so agreed.

ARTICLES 31⁸ AND 31*bis*

36. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 31 and 31*bis*, in part VI, which read:

PART VI

MISCELLANEOUS PROVISIONS

Article 31

Cases of State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudice any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States.

Article 31*bis*

Cases of military occupation

The provisions of the present articles do not prejudice any question that may arise in regard to a treaty from the military occupation of a territory.

37. Mr. HAMBRO (Chairman of the Drafting Committee) said that in the text proposed by the Drafting Committee, part VI, the title of which remained unchanged, consisted of three articles, provisionally numbered 31, 31*bis* and 31*ter*.

38. Article 31 in the 1972 text⁹ had excluded three specific matters from the scope of the draft articles. Two of those matters—State responsibility and the outbreak of hostilities—were excluded by article 73 of the Vienna Convention on the Law of Treaties¹⁰ from the scope of that Convention. As had been pointed out in the 1972 commentary (A/8710/Rev.1, chapter II, section C), both those matters might have an impact on the law of succession of States in respect of treaties, and it was therefore necessary to exclude them from the scope of the draft articles. The third matter—military occupation—was of a different kind and it was difficult to see what impact it might have on the law of succession of States in respect of treaties.

39. Strictly speaking, no exclusion of military occupation from the scope of the draft articles was required. But although military occupation was not a succession of States, it might raise analogous problems and that might induce an occupying power to attempt to apply, by analogy, some of the rules in the draft articles. A formal exclusion of military occupation from the scope of the draft articles might serve as a warning against such attempts. In order to underline the special nature of such an exclusion, the Drafting Committee had decided that it should form a separate article.

40. The Committee was accordingly submitting two articles, numbered 31 and 31*bis*, in place of article 31 of the 1972 draft. Article 31 reproduced, with minor drafting changes, the provisions excluding State responsibility and the outbreak of hostilities. Article 31*bis* repro-

⁸ For previous discussion see 1290th meeting, para. 1.

⁹ *Ibid.*

¹⁰ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

duced, with one drafting change, the provision excluding military occupation; that change consisted in the substitution of the words "do not prejudge" for "shall not prejudge". The purpose of that substitution was to underline that article 31*bis* was in the nature of a *constatation de fait*. Members would observe that the Committee had retained the expression "shall not prejudge" in article 31.

41. Sir Francis VALLAT (Special Rapporteur) said that the division into two articles had been made in order to take into account a point made by Mr. Ago, who had stressed that while it might be reasonable to include an article on the lines of article 73 of the Vienna Convention, it was not correct to refer to succession of States in connexion with military occupation.¹¹ It was for that reason that article 31*bis* used the words "in regard to a treaty", not "in regard to the effects of a succession of States".

42. The CHAIRMAN suggested that the Commission should approve articles 31 and 31*bis*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 31*ter*

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 31*ter*, which read:

*Article 31*ter** *Notification*

1. Any notification under article ... or ... must be made in writing.
2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.
3. Unless the treaty otherwise provides, the notification shall:
 - (a) be transmitted by the successor State to the depositary or, if there is no depositary, to the parties or the contracting States;
 - (b) be considered to be made by the successor State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.
4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification or any communication made in connexion therewith by the successor State.
5. Subject to the provisions of the treaty, such notification or communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

44. Mr. HAMBRO (Chairman of the Drafting Committee) said that article 31*ter* was the new article which, for the reasons he had explained when introducing article 22¹² the Committee had decided to devote to notifications other than notifications of succession. The Committee had been anxious to use the word "notice" in article 31*ter* in order to distinguish between notification of succession and other notifications. Unfortunately it would have been impossible to maintain that

distinction in the French text and, he believed, in the Spanish. In French, "notice" could be translated only by *notification*, the term which was used in article 17, on notification of succession. All substitutes for *notification* which had been suggested, such as *signification*, *avis*, *notice*, had proved unacceptable. The Committee had decided, therefore, to use the word "notification" in the English text of article 31*ter*.

45. The CHAIRMAN suggested that the Commission should approve article 31*ter*, as proposed by the Drafting Committee, and decide later on its exact place in the draft.

It was so agreed.

ARTICLE 2¹³

46. The CHAIRMAN invited the Commission to consider article 2, as proposed by the Drafting Committee (A/CN.4/L.209/Add.5).

47. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 2:

Article 2 *Use of terms*

1. For the purposes of the present articles:
 - (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
 - (b) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;
 - (c) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;
 - (d) "successor State" means the State which has replaced another State on the occurrence of a succession of States;
 - (e) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;
 - (f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;
 - (g) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty;
 - (h) "full powers" means in relation to a notification of succession or a notification referred to in article 31*ter* a document emanating from the competent authority of a State designating a person or persons to represent the State for communicating the notification of succession or, as the case may be, the notification;
 - (i) "ratification", "acceptance" and "approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
 - (j) "reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

¹¹ See 1290th meeting, paras. 5-7.

¹² See previous meeting, para. 5.

¹³ For previous discussion see 1264th meeting, para. 46.

(k) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(l) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(m) "other State party" means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;

(n) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

48. The Drafting Committee had made only minor changes in the provisions of article 2 (A/8710, chapter II, section C). Those changes concerned sub-paragraphs (b), (f), (g) and (h) of paragraph 1.

49. The first change—concerning sub-paragraph (b)—affected the French and Spanish texts only. It consisted in the replacement of the words "*du territoire*" and "*del territorio*" by "*d'un territoire*" and "*de un territorio*". The other changes affected the texts in all four languages.

50. In sub-paragraph (f), defining the term "newly independent State", the Committee had replaced the words "means a State" by "means a successor State", because a newly independent State was a successor State for the purposes of the present articles. The commentary would emphasize that the definition applied to all types of newly independent States, including those formed from two or more territories.

51. In sub-paragraph (g), defining the term "notification of succession", the Committee had deleted the words "to the parties, or as the case may be, contracting States or to the depositary". Those words were unnecessary, since article 17 specified to whom the notification had to be transmitted.

52. The Committee had made two changes in sub-paragraph (h), defining "full powers". First, it had extended the scope of the definition to cover not only notifications of succession, but also the other kinds of notification referred to in article 31*ter*. Secondly it had replaced the word "making", in the last line of the sub-paragraph, by the word "communicating", since that was the word used both in article 17 and in article 31*ter*.

53. Mr. TSURUOKA, referring to paragraph 1(f), said he was not sure exactly what the Commission meant by a "newly independent State". It seemed to him that the Commission found itself obliged to use that expression without being able to define its exact meaning.

54. Sir Francis VALLAT (Special Rapporteur) said that the term "newly independent State" was one used for convenience throughout the draft. Reference was made in the draft to States which had been dependent territories and the definition made it clear that the newly independent States were former colonies, trust territories or territories whose foreign relations had been handled by another State. In the context of the United

Nations, there could be very little doubt as to what the term meant.

55. Mr. USHAKOV said that article 6*bis* answered Mr. Tsuruoka's question. For the purposes of the future convention, newly independent States would be States which came into being after its entry into force.

56. The CHAIRMAN, speaking as a member of the Commission, said that since paragraph 1 contained a definition of "notification of succession", it would seem logical also to include a definition of "notification".

57. Mr. HAMBRO (Chairman of the Drafting Committee) said that that point had been discussed in the Drafting Committee, which had decided that a definition of "notification" was unnecessary, since it would merely be a repetition of articles 17 and 31*ter*.

58. Mr. ELIAS suggested that further discussion of that question should be deferred until the Commission had taken a final decision on the content of articles 17 and 31*ter*.

It was so agreed.

59. Mr. USHAKOV, referring to paragraph 1(m), pointed out that the expressions "other party" and "other State party" seemed to have been used without distinction in the draft. In his opinion, the former was sufficient.

60. Mr. HAMBRO (Chairman of the Drafting Committee) referring to sub-paragraph (n), said that one Government, in its comments, had recommended the use of the expression "international intergovernmental organization" (A/CN.4/278/Add.2, para. 155), but the Committee had decided against it.

61. Mr. EL-ERIAN suggested that the commentary should state that the expression "international organization" was the one normally used in drafts prepared by the Commission.

It was so agreed.

62. The CHAIRMAN suggested that the Commission should approve article 2, as proposed by the Drafting Committee.

It was so agreed.

ARTICLES 6 AND 6*bis*¹⁴

63. Mr. HAMBRO (Chairman of the Drafting Committee) said that at its 1286th meeting, the Commission had referred articles 6 and 6*bis* back to the Drafting Committee.¹⁵ After careful reconsideration of all the problems involved, the Committee had adopted, on second reading, the articles it was now proposing to the Commission (A/CN.4/L.222) which read:

Article 6

Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

¹⁴ For previous discussion see 1285th meeting, para. 15.

¹⁵ See 1286th meeting, para. 26.

Article 6bis

Non-retroactivity of the present articles

Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the present articles apply only in respect of a succession of States which has occurred after the entry into force of these articles except as may otherwise be agreed.

64. In article 6, the Committee had made no change in the title or the text it had adopted on first reading. Members would recall that they were identical with the title and text of article 6 in the 1972 draft.

65. The CHAIRMAN suggested that the Commission should approve article 6, as proposed by the Drafting Committee.

It was so agreed.

66. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Committee had retained the title it had previously given to article 6bis, but had made two changes in the text of the article.¹⁶ The first change, which was of a stylistic nature, consisted in replacing the words "the articles apply only to the effects of a succession of States" by the words "the present articles apply only in respect of a succession of States". The second change consisted in the addition of the words "except as may otherwise be agreed" at the end of the article; the purpose of that change was to introduce a measure of flexibility by adding a clause such as was referred to in the opening phrase of article 28 of the Vienna Convention on the Law of Treaties.

67. Mr. KEARNEY said he would not object to article 6bis, but wished to state once more that he considered the article unnecessarily broad.

68. Mr. ELIAS said that unless more arguments were advanced to justify that article, he would vote against it, since it seemed likely to detract from the force of article 6.

69. Mr. USHAKOV said it was perfectly clear from the present wording that the articles would apply only in respect of a succession of States which occurred after their entry into force. It must, of course, be a succession of States which occurred in conformity with international law, and, in particular, with the principles of international law embodied in the Charter of the United Nations.

70. The question was, to what situations was the present draft intended to apply? Was it to apply to past situations, or to future situations which would be governed by the convention resulting from the present articles? In his opinion, the draft could only apply to situations arising in the future, after the entry into force of the rules of international law formulated in it. It was clearly impossible to apply the draft articles to a situation which had arisen previously.

71. Mr. EL-ERIAN said he had no objection to the substance of article 6bis, though he had some doubts about the method the Commission appeared to be fol-

lowing. In the present case, the Commission was stating rules of law without indicating which of them it regarded as constituting codification of international law and which as constituting progressive development.

72. The CHAIRMAN, speaking as a member of the Commission, said that if article 6bis was not included in the draft, the future convention would be governed, as far as retroactivity was concerned, by article 28 of the Vienna Convention of the Law of Treaties. But that article was drafted in such a way that it was unsuitable for transposition to the present draft, which dealt with an entirely different subject. He appreciated the point made by Mr. El-Erian, but he still believed that the adoption of article 6bis would facilitate the work of the future conference which would eventually adopt the convention on succession of States in respect of treaties.

73. Mr. THIAM said he must reiterate the reservations he had previously expressed regarding article 6bis. First, the Vienna Convention on the Law of Treaties already contained a provision stating the principle of the non-retroactivity of treaties. Secondly, the articles under consideration would add nothing to the draft, but would weaken its effect, particularly with regard to newly independent States. In most cases of decolonization up to the present, the predecessor State and the successor State had found practical means of overcoming the difficulties they had encountered.

74. Mr. RAMANGASOAVINA said that he too had expressed reservations about the need for article 6bis.

75. The CHAIRMAN said that the points made by Mr. Kearney, Mr. Elias, Mr. El-Erian, Mr. Thiam and Mr. Ramangasoavina would be duly recorded. He then put article 6bis to the vote.

Article 6bis was approved by 8 votes to 4, with 5 abstentions.

76. Mr. TABIBI, explaining his vote, said that during the earlier discussion of article 6bis, he had expressed views similar to those of his African and Asian colleagues. He had strong objections to articles 29 and 30,¹⁷ however, and since those articles had now been included in the draft, he had abstained from voting against article 6bis, because it would weaken their effect.

ARTICLE 12bis¹⁸

77. The CHAIRMAN invited the Commission to resume consideration of the new article 12bis proposed by Mr. Ushakov, dealing with multilateral treaties of a universal character (A/CN.4/L.215).

78. Mr. USHAKOV observed that the Commission had not sufficient time to examine article 12bis. He would therefore prefer his proposal to be mentioned in the report, with an explanation that the Commission had not had time to study it. That would enable governments to take a position on the proposed article.

79. Mr. REUTER supported that suggestion. He himself was not opposed to the establishment of a special

¹⁶ For previous text see 1285th meeting, para. 17.

¹⁷ See 1287th meeting, para. 11 *et seq.*

¹⁸ For previous discussion and text, see 1293rd meeting, para. 54.

régime for certain treaties, as proposed in Mr. Ushakov's article 12*bis*; but it was a delicate question which required thorough study. It was, of course, easy to give examples of multilateral treaties of a universal character which should benefit from such a special régime; but examples could also be given of treaties in that category to which the special régime could hardly be applied. For instance, the 1958 Geneva Conventions on the law of the sea were multilateral treaties of a universal character, but a rule under which they would remain in force for a newly independent State after the date of the succession of States would be very difficult to apply, since many newly independent States would refuse to be bound by them. On the other hand, there were treaties which, although not of a universal character, should benefit from the special régime provided for by article 12*bis*. He therefore agreed with Mr. Ushakov that it would be better to defer consideration of the question.

80. Mr. USHAKOV said he still thought that, even in the case of the Conventions on the law of the sea, it was preferable for multilateral treaties of a universal character to remain in force in respect of the territory to which the succession of States related, since it was always open to the newly independent State to give notice of termination if it so desired. Besides, most of the treaties covered by article 12*bis* were advantageous for newly independent States.

81. The CHAIRMAN invited members of the Commission to comment on the suggestion that Mr. Ushakov's proposal should be mentioned in the appropriate chapter of the Commission's report.

82. In reply to a question by Mr. ELIAS, he said that a suitable place to include the text of the draft article 12*bis* might perhaps be the commentary to article 12.

83. Sir Francis VALLAT (Special Rapporteur) said that the commentary to article 12 would be seriously distorted if the whole of draft article 12*bis* was included in it. He did not think it would be advisable to insert it in the introductory commentary or in the commentaries to either article 12 or article 18, both of which were also touched on in some way by the proposed new article.

84. It was his firm view that if the régime proposed by Mr. Ushakov resulted in imposing the obligations arising out of a multilateral treaty upon a newly independent State, even for a single day, it would run counter to the spirit, if not to the actual text, of article 11, which embodied the clean slate rule. He therefore proposed that a short passage on the question should be included in the last part of the introductory commentary and that the text of the proposed article 12*bis* should be reproduced as an annex at the end of the chapter.

85. The CHAIRMAN said that, if there were no further comments, he would take it that the Special Rapporteur's proposal was acceptable to the Commission.

It was so agreed.

ARTICLE 32

86. The CHAIRMAN invited Mr. Kearney to introduce his revised proposal for an article 32 on the settlement of disputes (A/CN.4/L.221), which read:

Article 32

Settlement of disputes

1. In any dispute between two or more parties regarding the interpretation or application of these articles, which is not settled through negotiation, any one of the parties to the dispute may set in motion the procedure specified in the annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights or obligations of the parties, under any provisions in force binding the parties with regard to the settlement of disputes.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 32, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for

the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

87. Mr. KEARNEY said that the text he now proposed for article 32 superseded his previous proposal on the settlement of disputes (A/CN.4/L.212). His proposal embodied a conciliation system derived from the Vienna Convention on the Law of Treaties, which had been used as a model by the Commission throughout its present proceedings.

88. There was no need to explain in detail his reasons for proposing such an article. Many of the articles which the Commission had approved were bound to give rise to disputes; those disputes would necessarily relate to the application of treaties and would be of the same character as those for which article 66 of the Vienna Convention, and the annex to that Convention, had been adopted.¹⁹

89. Mr. EL-ERIAN said that he appreciated the concern Mr. Kearney had shown regarding the question of the settlement of disputes; it would serve to focus attention on that question, whether the Commission decided to include a provision on it in the draft articles or not. The question would be brought to the attention of the Sixth Committee of the General Assembly and subsequently to that of the diplomatic conference which would consider the draft articles.

90. As a matter of method, however, he believed that a provision on the settlement of disputes properly belonged in the final clauses, which, traditionally, the Commission did not include in its drafts. It was true that the Commission had to some extent departed from its traditional practice in its 1966 draft on the law of treaties, article 62 of which dealt with the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of the treaty.²⁰ That case, however, had been a very special one, in that article 62 had been included as part of an intricate compromise designed to satisfy certain members of the Commission who were concerned at the inclusion in the draft articles on the law of treaties of a number of provisions that could lead to the unilateral abrogation of treaty obligations, in particular draft article 50, on treaties conflicting with a peremptory norm of general international law.²¹ Hence the analogy with the draft on the law of treaties did not hold good.

91. He therefore urged the Commission not to depart from its consistent practice of not including in its drafts any final clauses, such as clauses on the settlement of disputes.

92. The CHAIRMAN said that the enlarged Bureau had discussed the question of the settlement of disputes

at length and a number of solutions had been proposed. One was that, subject to General Assembly approval, the Special Rapporteur should undertake a study of the problem and submit a report to the Commission at its next session. Another suggestion, made by Mr. Ago, was that a conciliation system should be adopted for the present draft, on the analogy of the Vienna Convention on the Law of Treaties.

93. Mr. ELIAS suggested that, in accordance with a view which had received fairly general support in the enlarged Bureau, the same solution should be adopted for the proposed article 32 as had been adopted for Mr. Ushakov's proposed article 12*bis*. An explanation would be given in the introductory commentary and the proposal itself would constitute a second annex to the draft. It would then be for the General Assembly to decide whether it wished the Commission itself to examine the problem or to leave it to the plenipotentiary conference, as had been done in the past for other drafts prepared by the Commission.

94. Mr. TABIBI and Mr. EL-ERIAN supported that suggestion.

95. Sir Francis VALLAT (Special Rapporteur) said he believed that because of the problems raised by many of the articles the draft was hardly viable without an article on procedure for the settlement of disputes. That being so, the conciliation system which Mr. Kearney had taken from the Vienna Convention would be a natural and logical one to adopt. He had not yet been able to complete his study of the question of the settlement of disputes in relation to the present draft articles. He would, of course, be prepared to undertake any work on that question which might be requested by the General Assembly.

96. Mr. TSURUOKA said he agreed with Mr. Kearney, but thought the Commission did not have time to study the proposed article 32. He suggested that the Commission should state in its report, for the information of the General Assembly, that it intended to study the question of the settlement of disputes.

97. Mr. USHAKOV said he thought the Commission should adopt the same procedure as for article 12*bis* and indicate in its report that it had not had time to study the proposed article 32. It was necessary to ascertain the views of the General Assembly on the subject, for without a clear-cut decision by the Assembly, the Commission would not be able to take up the question of the settlement of disputes at its next session.

98. Mr. REUTER said he agreed with the Special Rapporteur that it was desirable to include a clause on the settlement of disputes in the draft articles. He had to admit, however, that such a clause would probably not have the support of a majority of Governments, so perhaps it would be better not to include it.

99. Mr. HAMBRO said he could not agree with that approach. The Commission should prepare a draft that was as complete as possible and submit it for the consideration of Governments. A clause on the settlement of disputes should be included, even if it was ultimately rejected.

¹⁹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations Publication, Sales No. E.70.V.5), pp. 298 and 301.

²⁰ See *Yearbook ... 1966*, vol. II, pp. 261-263.

²¹ *Ibid.*, p. 247.

100. Mr. QUENTIN-BAXTER welcomed the fact that the question of a clause on the settlement of disputes had been raised. The Commission would be doing less than its duty if it failed to indicate that serious consideration needed to be given to the question of including such a clause in the draft. It was, however, clearly beyond the capacity of the Commission to deal with the matter at the present session. That fact should be reflected in its report, so as to draw the attention of the General Assembly to the matter and elicit the views of Governments on the course which the Commission should follow.

101. Mr. SETTE CÂMARA supported the suggestion made by Mr. Elias. It was desirable to cover the question of machinery for the settlement of disputes, but that machinery would clearly not be an integral part of the future convention.

102. It was necessary to respect the desire of Governments to be free to choose methods for the settlement of disputes. That point had been appreciated by Mr. Kearney; for after proposing, in document A/CN.4/L.212, arbitration machinery based on alternative B for article 12 of the Commission's 1972 draft articles on the prevention and punishment of crimes against diplomatic agents (A/8710/Rev.1, chapter III, section B), he was now proposing a totally different system, based on the conciliation procedure set out in the annex to the Vienna Convention on the Law of Treaties.

103. The procedure proposed by Mr. Elias would show Governments that the Commission had not overlooked the problem of settlement of disputes, but would not impair the flexibility which States obviously desired.

104. Mr. KEARNEY said he did not favour the course suggested by Mr. Elias, which would amount to a failure on the part of the Commission to deal with an essential problem. If no clause on the settlement of disputes was included in the draft articles, the General Assembly would certainly not ask the Commission to study the problem, but would refer the draft to a diplomatic conference without such a clause, so that no action would be taken in the matter. He therefore urged that his proposed article 32, which was based on the relevant provisions of the Vienna Convention, should be included in the draft, so that a future conference of plenipotentiaries could deal with the question.

105. He was not impressed by the argument that the settlement of disputes belonged in the final clauses of a convention; the Commission had just approved an article 6*bis* on non-retroactivity, which was also regarded as a subject for final clauses.

106. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to include in its report a paragraph stating that many members considered that a clause on the settlement of disputes should be included in the future convention on succession of States in respect of treaties. That paragraph would reflect the feeling of those members that, in view of the close affinity of the draft with the Vienna Convention on the Law of Treaties, the proposed conciliation system should be given serious consideration.

It was so agreed.

Organization of future work

[Item 9 of the agenda]

107. The CHAIRMAN drew attention to the recommendation by the General Assembly in paragraph 3(c) of its resolution 3071 (XXVIII) that the Commission should undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts. The enlarged Bureau had examined the matter and recommended that the Commission should decide to include that topic in its general programme of work. If there were no comments, he would take it that the Commission agreed to adopt that recommendation.

It was so agreed.

108. The CHAIRMAN reminded the Commission that it had agreed to give priority at its next session to the topic of State responsibility, which would take up four weeks. Bearing in mind that one week was required for consideration of the Commission's report on the session, that would leave only five weeks for the remaining topics. Those topics included succession of States in respect of matters other than treaties, for which the Special Rapporteur had strongly urged absolute priority, the question of treaties concluded between States and international organizations or between two or more international organizations, and the most-favoured-nation clause. Five weeks would obviously not be sufficient to deal with all those topics and the situation would be even more difficult if the General Assembly requested the Commission to study the problem of a clause on the settlement of disputes for inclusion in the draft articles on succession of States in respect of treaties.

109. The enlarged Bureau had not taken any decision on the allocation of time to the various topics at the next session, but it had unanimously agreed that ten weeks would not be sufficient to deal with all the work in hand. It had therefore agreed to recommend that the Commission should include a paragraph on the duration of forthcoming sessions in its report. The paragraph would state that, in order to carry out its programme satisfactorily, the Commission considered it necessary to request that the practice of holding a twelve-week session, which had been introduced in 1974, should be continued for the next and subsequent sessions.

110. If there were no comments, he would take it that the Commission agreed to adopt that recommendation.

It was so agreed.

The meeting rose at 6 p.m.

1297th MEETING

Monday, 22 July 1974, at 3.15 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney,

Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Yasseen.

Long-term programme of work

(a) Consideration of recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses

(A/CN.4/283)

[Item 8(a) of the agenda]

REPORT OF THE SUB-COMMITTEE ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

1. The CHAIRMAN invited the Chairman of the Sub-Committee on the Law of Non-Navigational Uses of International Watercourses¹ to introduce the Sub-Committee's report (A/CN.4/283).

2. Mr. KEARNEY (Chairman of the Sub-Committee on the Law of Non-Navigational Uses of International Watercourses) said that the Sub-Committee had held three meetings. At the first meeting, held on 23 May, there had been a general discussion, mainly on the scope of the study, and the Sub-Committee had decided that each of its members should prepare a memorandum of his views on the issues involved. At the second meeting, held on 1 July, the Sub-Committee had discussed the five memoranda submitted and had reached the conclusion that the views expressed in them reflected a sufficient measure of uniformity to enable it to prepare an agreed report. At the third meeting, held on 15 July, the Sub-Committee had discussed and adopted the report he was now introducing.

3. The report, which contained a number of recommendations, was divided into five sections, those from II to V each being devoted to one of the major issues involved. Section II dealt with the nature of international watercourses, a question which presented a problem of definition. The Sub-Committee had noted that a wide variety of terms was used both in State practice and in legal literature. In recent years there had been a tendency to use the term "basin" either by itself or in the phrases "river basin" or "drainage basin". It had been noted that the usage of the term "basin" varied according to the nature of the subject-matter. There was some practice to show that the wider term "drainage basin" was used in connexion with pollution in preference to other and narrower terms. But since there was no settled practice in the matter, the Sub-Committee recommended that three questions should be put to States, the first relating to the scope of the definition of an international watercourse and the other two to the geographical concept of an international drainage basin.

4. The second basic issue, dealt with in section III, was that of determining at least the major non-navigational uses of international watercourses, and the Sub-Committee had considered that those uses should be divided into three categories: agricultural; commercial and in-

dustrial; social and domestic. The Sub-Committee pointed out that the limitation of the study to non-navigational uses caused certain difficulties, since those uses could have an effect on navigation. For instance, in the absence of strict control, timber floating and navigation were not compatible uses. Moreover, most of the non-navigational uses involved waste disposal, and thus raised the issue of pollution. The Sub-Committee accordingly recommended that States should be asked whether the Commission should adopt, as the basis of its studies, the outline of fresh water uses set forth at the end of section II or whether other uses should be included. It further recommended that States should be asked whether flood control and erosion problems, which were not problems of use but were closely connected with water uses, should also be examined in order to present a balanced study.

5. Section IV dealt with the organization of the work. The Sub-Committee had reached the conclusion that it would not be wise to accord priority to any specific use, because the interaction among the various uses was too great. The report went on to consider whether it was advisable to deal first with the question of the quality of water, in other words pollution problems, or with the question of the quantity of water available. There was a clear interaction between the two questions and the Sub-Committee recommended that States should be requested to say whether they were in favour of the Commission's taking up the problem of pollution of international watercourses at the initial stage of its study.

6. Section V, the concluding section of the report, dealt with the problem of co-operation with other agencies, which had done an enormous amount of work on the subject. The Sub-Committee recommended that the Secretary-General should be requested to advise all the organizations concerned of the legal work being carried on by the Commission and to ask for their co-operation, in particular by designating an officer or officers to serve as the channel for information and co-operation. Lastly, in view of the technical, scientific and economic aspects of the study, the Sub-Committee suggested that the views of States should be sought on the desirability of setting up a committee of experts similar to the one set up in 1953 to assist the Commission in dealing with certain aspects of the law of the sea.

7. The CHAIRMAN thanked the Chairman and members of the Sub-Committee for their thorough and painstaking work and expressed his regret that, at that late stage of the session, it would not be possible to hold a full discussion on the Sub-Committee's valuable report.

8. Mr. EL-ERIAN expressing appreciation of the work done by the Chairman and members of the Sub-Committee, said that the Sub-Committee had carefully weighed all aspects of the question and he did not think the Commission need examine its report in detail. He was in full agreement with the approach adopted by the Sub-Committee and with the manner in which it had singled out the various issues. The questionnaire which would be prepared by the Secretariat on the basis of the Sub-Committee's recommendations would make it pos-

¹ See 1256th meeting, para. 1.

sible for the Commission to obtain from Governments, international organizations and other bodies, the necessary information and views to form a basis for its own conclusions.

9. He himself interpreted the term “uses” in its broad sense, taking recent developments into account. Some thirty or forty years previously, the uses of watercourses had been studied almost exclusively in terms of navigation. The Danube Commission, which had perhaps been the first international organization of its kind, had been concerned with navigation. Later, problems of the quantitative distribution of water had received greater attention. Still more recently, other aspects of water uses had come to the fore. As the Chairman of the Sub-Committee had pointed out, the problem of water quality and that of the quantity of water available were closely interrelated. Those considerations argued in favour of a broad interpretation of the term “uses”.

10. Lastly, he fully supported the idea of appointing a committee of experts to advise the Commission on the scientific and technical aspects of the matter, as had been done in the past in connexion with the law of the sea.

11. Mr. HAMBRO associated himself with the tributes paid to the work of the Sub-Committee and its Chairman.

12. He considered it very important to deal with the problem of pollution, but at the same time, the Commission should make it clear that it did not intend any aspect of its work on non-navigational uses of international watercourses to overlap with that of other organizations.

13. It was essential that the Commission should have the help of a group of technical experts in dealing with the topic.

14. Mr. USHAKOV joined in congratulating the Chairman and members of the Sub-Committee on the excellent work they had done during a particularly busy session of the Commission. The Sub-Committee's report clearly showed the course to be followed. The Commission should approve the question the Sub-Committee suggested should be put to Governments, and request the Secretary-General to transmit them.

15. Mr. AGO expressed his admiration at the number of questions the Sub-Committee had succeeded in dealing with in its excellent report. The new topic under discussion was clearly related to that of liability for the consequences of internationally lawful acts and the best way of obtaining an over-all view of the latter topic might perhaps be to study it in the different contexts in which it arose.

16. The CHAIRMAN suggested that the Commission should endorse the recommendations of the Sub-Committee, and that Mr. Kearney should be appointed Special Rapporteur for the topic of the law of non-navigational uses of international watercourses. If there were no comments, he would take it that the Commission agreed to adopt those suggestions.

It was so agreed.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.216; A/CN.4/L.218 and Add.1-3)

(resumed from the 1294th meeting)

Chapter I

ORGANIZATION OF THE SESSION

17. The CHAIRMAN invited the Commission to consider chapter I of its draft report (A/CN.4/L.216) paragraph by paragraph.

Paragraphs 1-10

Paragraphs 1-10 were approved.

Paragraph 11

18. After a brief discussion in which Mr. REUTER, Mr. YASSEEN and Mr. AGO took part, the CHAIRMAN suggested that paragraph 11 should be expanded to cover various other aspects of the work of the Commission. The revised text would be submitted to the Commission at a later stage.

It was so agreed.

Paragraphs 12-14 (section G)

19. After a brief exchange of views between Mr. YASSEEN and Mr. EL-ERIAN, Mr. SETTE CÂMARA proposed that the title of section G should be amended to read “Visit by the Secretary-General”.

It was so agreed.

Paragraphs 12-14 were approved with that change in the title of section G.

Paragraph 15

20. Mr. AGO said he thought that paragraph 15 should be completely recast to give greater prominence to the Commission's achievements during its 25 years of existence. During that period, a large part of international law had passed from unwritten and customary form into written form. Whole chapters of international law had been codified, and the Commission could be proud of that achievement. Furthermore, the addresses made by Mr. Suy on behalf of the Secretary-General, and by Sir Humphrey Waldock on behalf of the International Court of Justice, both contained passages of such importance that they deserved to be reproduced in the report.

21. The CHAIRMAN said that, if there were no further comments, he would take it that the revision of paragraph 15 suggested by Mr. Ago was acceptable to the Commission.

It was so agreed.²

Chapter III

STATE RESPONSIBILITY

22. The CHAIRMAN invited the Commission to consider chapter III of its draft report (A/CN.4/L.218 and Add.1-3) paragraph by paragraph.

² For resumption of the discussion see 1301st meeting, para. 1.

A. INTRODUCTION

Paragraphs 1-14

Paragraphs 1-14 were approved, with a minor drafting change in paragraph 2.

Paragraph 15

23. Mr. SETTE CÂMARA said it was his recollection that in 1971 and 1972 the Commission had dealt with one or two other topics, in addition to those mentioned in paragraph 15.

24. The CHAIRMAN suggested that paragraph 15 should be approved on the understanding that if other topics had been dealt with in those years, references to them would be included.

It was so agreed.

Paragraphs 16-34

Paragraphs 16-34 were approved, with a minor drafting change in paragraph 33.

Paragraph 35

25. Mr. ELIAS proposed the deletion of the words "of conduct", in the sentence ending with the words "successive acts of conduct".

26. Mr. AGO (Special Rapporteur) pointed out that a remarkable English translation of the French original had been produced very quickly by the competent service. The point mentioned by Mr. Elias, and other points of that kind, would be dealt with in the process of final editing of the various language versions of the report.

Paragraph 35 was approved on that understanding.

Paragraphs 36 and 37

Paragraphs 36 and 37 were approved.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY

Paragraph 38

Paragraph 38 was approved.

Commentary to article 7

(Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority) (A/CN.4/L.218/Add.1)

Paragraph (1)

27. Mr. KEARNEY suggested that the word "purely" in the last sentence of paragraph (1) should be deleted.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

28. Mr. KEARNEY suggested that the word "municipalities" should be inserted in the phrase in brackets in the third sentence.

29. Mr. HAMBRO suggested that the point could be met by translating the French word "*communes*" as "municipalities".

It was so agreed.

30. Mr. ELIAS pointed out that the same change should be made in the first sentence of paragraph (4) and in subsequent paragraphs.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved without comment.

Paragraphs (4)-(7)

Paragraphs (4)-(7) were approved without comment.

Paragraph (8)

31. Mr. KEARNEY observed that various terms seemed to be used to refer to federal States. In particular, he wondered whether a "composite" State was the same as a "component" state.

32. The CHAIRMAN, speaking as a member of the Commission, said that a component state referred to a member state of a federation, whereas a composite State referred to a federal State. He suggested that the present wording should be retained.

It was so agreed.

Paragraph (8) was approved.

Paragraph (9)

33. Mr. KEARNEY said that, in his opinion, the third sentence of paragraph (9) was too broad a statement for international law in general, especially in areas where aspects of private international law were involved.

34. After a brief discussion in which the CHAIRMAN, Mr. KEARNEY and Mr. AGO (Special Rapporteur) took part, Mr. ELIAS proposed that the words "at the international level" should be replaced by the words "in public international law".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved without comment.

Paragraph (11)

35. Mr. KEARNEY proposed that the word "wondered" in the first sentence should be replaced by the word "discussed".

It was so agreed.

36. Mr. KEARNEY said that the penultimate sentence of paragraph (11) seemed to him to be somewhat obscure. Should there not, perhaps, be some reference to the nature of the theory behind the attribution?

37. Mr. AGO (Special Rapporteur) said that the meaning of the sentence could be clarified by the following example: the Republic of Geneva might have a limited capacity in international law to conclude a treaty with France on a matter such as the passage of seasonal workers. If the Republic of Geneva committed a breach of its obligations under such a treaty, the act would be attributable to the Republic of Geneva. That did not mean, however, that the Government of France could make a claim against the Republic of Geneva on the grounds of its responsibility; the claim would proba-

bly have to be addressed to the authorities at Berne. The attribution of the act and its consequences with respect to responsibility were thus two different questions. The case could perhaps be described as involving the indirect or vicarious responsibility of one subject of international law for an act attributed to another subject of international law.

38. Mr. KEARNEY said that Mr. Ago's explanation seemed to be of a procedural rather than a substantive nature; in other words, France would approach Switzerland because that was the appropriate international channel, not because it regarded Switzerland as responsible for the act of the Republic of Geneva.

39. Mr. AGO (Special Rapporteur) said that, in his view, it was a substantive question. In the paragraph under discussion, however, he had been concerned only with the attribution of the act. He intended to deal with the consequences of the act as to responsibility in a later chapter.

40. Mr. KEARNEY said he feared that anyone looking at the earlier articles on the requirements for bringing State responsibility into play would be confused, since those articles made attribution an essential part of State responsibility.

41. Mr. AGO (Special Rapporteur) said that in the example he had given the act would not be attributed to the federal State. As he had already said, however, the case would be dealt with in a later chapter.

Paragraph (11), as amended, was approved.

Paragraphs (12)-(16)

Paragraphs (12)-(16) were approved without comment.

Paragraph (17)

42. Mr. KEARNEY said he wondered whether the distinction made in the first sentence between decentralization *ratione loci* and *ratione materiae* was satisfactory, since decentralization *ratione materiae* had to be understood in a broader context than the special aspect with which the Commission was now concerned. It might, for example, be interpreted as referring to the basic purpose of particular organizations, such as the operation of an airline or the manufacture of certain products. But the Commission was trying to avoid so broad an approach and to confine itself to the question whether the organs concerned were exercising governmental authority. He feared that by contrasting *ratione loci* and *ratione materiae* the Commission was obscuring that point.

43. Mr. AGO (Special Rapporteur) said that Mr. Kearney was right in so far as there were municipalities on the one hand and private companies on the other, and those two types of entity could not be placed on the same footing. It was, of course, more common to make an attribution in the case of municipalities. He had not said, however, that the same phenomenon was involved in both cases.

Paragraph (17) was approved.

Paragraphs (18)-(20)

Paragraphs (18)-(20) were approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8

(Attribution to the State of the conduct of persons acting in fact on behalf of the State)
(A/CN.4/L.218/Add.2)

Paragraph (1)

44. Mr. KEARNEY, referring to the third sentence in paragraph (1), said that the rule in sub-paragraph (a) of article 8 was broader than that sentence would suggest. Under sub-paragraph (a), persons or groups of persons could be acting on behalf of the State in a wide variety of circumstances: they could, for instance, be acting on the basis of a long-term contract with the State.

45. Mr. AGO (Special Rapporteur) said that Mr. Kearney's difficulty might be due to the English translation of the phrase "*sans pourtant avoir reçu à cette fin une investiture formelle de la part du système juridique étatique*" ("without, however, having been formally appointed for that purpose under the State's legal system").

46. Mr. KEARNEY said he could agree to a revision of the translation. He still believed, however, that the formulation used in sub-paragraph (a) of article 8, which had been debated at great length in the Drafting Committee, was open to a broader interpretation than that given it by Mr. Ago.

Paragraph (1) was approved subject to revision of the English text.

Paragraph (2)

47. Mr. AGO (Special Rapporteur) said he hoped that paragraph (2) would dispel the doubts expressed by Mr. Kearney.

48. Mr. KEARNEY, referring to the last sentence, said that the conduct in question could surely be *de lege* as well as *de facto*. He therefore proposed that the words "*de facto*" should be deleted.

49. Mr. AGO (Special Rapporteur) pointed out that the French text used the words "*en fait*", which would be more correctly translated as "in fact".

Paragraph (2) was approved subject to revision of the English text.

Paragraph (3)

50. Mr. KEARNEY asked whether the concluding words of paragraph (3), "certain missions which may or may not bear the light of day" was a correct translation of the French phrase "*certaines missions, avouables ou non*".

51. Mr. REUTER said that those words had a moral, rather than a legal connotation. In French they were somewhat ironical, and if the English translation was not precisely equivalent, he would suggest that they be deleted.

52. Mr. ELIAS proposed that the last clause of paragraph (3) should be amended to read "... the acts of

persons employed to carry out certain missions in foreign territory”.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

53. Mr. USHAKOV said he thought that in both paragraph (4) and paragraph (5) it would have been preferable not to quote disputes occurring in time of war, because of the difficulties such situations involved.

Paragraph (4) was approved.

Paragraphs (5)-(8)

Paragraphs (5)-(8) were approved without comment.

Paragraph (9)

Paragraph (9) was approved subject to correction of a typographical error.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

54. Mr. KEARNEY said he found the argument set out in the third sentence difficult to follow.

55. Mr. AGO (Special Rapporteur) said he thought that was a translation problem which could be solved in consultation with the Secretariat.

Paragraph (11) was approved.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were approved without comment.

The commentary to article 8, as amended, was approved.

The meeting rose at 6.20 p.m.

1298th MEETING

Tuesday, 23 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.217, Add.1-4 and Add.7; A/CN.4/L.223; A/8710/Rev.1)

(continued)

Chapter II

SUCCESSION OF STATES IN RESPECT OF TREATIES

1. The CHAIRMAN invited the Commission to consider chapter II of the draft report on the work of its twenty-sixth session (A/CN.4/L.217 and addenda).

2. As authorized by the Commission, the Drafting Committee had carried out the final editing of the draft articles on succession of States in respect of treaties approved by the Commission during the current session. The results of its work were contained in document A/CN.4/L.223, entitled “Draft articles on succession of States in respect of treaties, as adopted in final form by the Drafting Committee”. The texts of the draft articles themselves were not reproduced in the draft of chapter II contained in document A/CN.4/L.217 and the addenda thereto.

3. He suggested that consideration of the introduction (A/CN.4/L.217) should be deferred until the Commission had examined the commentaries to the individual articles.

Commentary to article 1

(Scope of the present articles) (A/CN.4/L.217/Add.1)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraphs (3) and (4)

4. Mr. USHAKOV proposed that, in the first sentence of paragraph (3), the reference to “succession of States” should be replaced by a reference to “the effects of a succession of States” and that the same change should be made in the first sentence of paragraph (4). In the second sentence of paragraph (4), the words in quotation marks, “the effects of succession of States”, should be amended to read: “succession of States”.

5. Sir Francis VALLAT (Special Rapporteur) said that the foot-note referring to the title of the article should be deleted, since a title had now been adopted.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraphs (3) and (4) with the changes indicated by Mr. Ushakov and the Special Rapporteur.

It was so agreed.

The commentary to article 1, as amended, was approved.

Commentary to article 3

(Cases not within the scope of the present articles) (A/CN.4/L.217/Add.1)

The commentary to article 3 was approved.

Commentary to article 4

(Treaties constituting international organizations and treaties adopted within an international organization) (A/CN.4/L.217/Add.1)

Paragraphs (1)-(7)

Paragraphs (1)-(7) were approved.

Paragraph (8)

7. Sir Francis VALLAT (Special Rapporteur) said that paragraph (8), like the earlier paragraphs, had been taken from the 1972 commentary (A/8710/Rev.1, chapter II, section C). Very careful consideration had been given to the question of ILO conventions and the conclusion had been reached that paragraph (8) as it stood covered that question. It did not, however, cover the question of the humanitarian or "Red Cross" conventions, which would be dealt with in the introduction.

Paragraph (8) was approved.

Paragraphs (9)-(14)

Paragraphs (9)-(14) were approved.

The commentary to article 4 was approved.

Commentary to article 5

(Obligations imposed by international law independently of a treaty) (A/CN.4/L.217/Add.1)

The commentary to article 5 was approved.

Commentary to article 6

(Cases of succession of States covered by the present articles) (A/CN.4/L.217/Add.7)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

8. Mr. CALLE Y CALLE proposed the addition, at the end of the last sentence, of the words "and, in particular, the principles of international law embodied in the Charter of the United Nations".

Paragraph (2) was approved with that amendment.

Paragraph (3)

9. Mr. AGO said that the penultimate sentence of paragraph (3), which stated that "it would not be feasible to distinguish between rights and obligations in the context of the present draft articles", might give a wrong impression, since the sentence went on to say that it was right in principle to restrict the application of the articles to situations occurring in conformity with international law. The passage could be interpreted to mean that, if a succession of States occurred in violation of international law, the successor State would be free of all international obligations.

10. Sir Francis VALLAT (Special Rapporteur) said that that point had not been explained in the commentary, because the Commission had taken the view that an unlawful event did not constitute a succession of States at all.

11. Mr. AGO proposed the deletion of the words "it would not be feasible to distinguish between rights and obligations in the context of the present draft articles".

Paragraph (3) was approved with that amendment.

The commentary to article 6, as amended, was approved.

Commentary to article 6bis

(Non-retroactivity of the present articles)
(A/CN.4/L.217/Add.7)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

12. Mr. ELIAS said that the statement in the first sentence, that the decision to include article 6bis had been "adopted by a narrow majority vote", was not sufficiently explicit. In fact, only eight members had voted in favour of the article out of 17 members present.

13. Mr. CALLE Y CALLE proposed the deletion of the adjective "serious" before the words "criticism had been expressed by several members" in the same sentence.

14. After a brief discussion in which Mr. EL-ERIAN, Mr. RAMANGASOAVINA and Mr. AGO took part, Sir Francis VALLAT (Special Rapporteur) proposed that the adjective "serious" should be dropped and that a footnote should be attached to the words "majority vote", explaining that the article had been adopted by 8 votes to 4, with 5 abstentions.

Paragraph (2) was approved with those amendments.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

The commentary to article 6bis, as amended, was approved.

Commentary to article 7

(Agreement for the devolution of treaty obligations or rights from a predecessor State to a successor State)
(A/CN.4/L.217/Add.2)

Paragraphs (1)-(4)

Paragraphs (1)-(4) were approved.

Paragraph (5)

15. Mr. CALLE Y CALLE proposed that, in the first sentence, the words "the former sovereign" should be replaced by the words "the predecessor State", since it was open to discussion whether an administering Power was in fact sovereign over a dependent territory. He proposed that the same change should be made wherever the expression "former sovereign" appeared in the commentaries.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

16. Mr. AGO said he found the French translation of the expression "moving treaty-frontiers" unsatisfactory. He would be glad if the Special Rapporteur would explain exactly what that expression meant.

17. Sir Francis VALLAT (Special Rapporteur) said that the expression "moving treaty-frontiers" was used for convenience to describe the application of a treaty to the territory of a State even if the frontiers of that State varied.

18. Mr. AGO proposed that the expression should be translated into French as "*variabilité des limites territoriales de l'application des traités*".

19. Mr. CALLE Y CALLE said that no change was needed in the Spanish translation.

20. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the French translation proposed by Mr. Ago wherever the expression "moving treaty-frontiers" appeared in the text of the report. The Russian version would be revised by Mr. Ushakov. The Spanish version would remain unchanged.

It was so agreed.

Paragraph (7) was approved with that amendment to the French text.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

21. Mr. AGO proposed that, in the French text, the words "*pour le territoire*" should be replaced by the words "*à l'égard du territoire*", which corresponded better to the words "in respect of the territory" in the English text.

Paragraph (9) was approved with that amendment to the French text.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

22. Mr. AGO proposed that, in the third sentence of the French text, the words "*maintenir les traités*" should be replaced by the words "*assurer la continuité des traités*", which corresponded better to the words "to continue the treaties" in the English text.

Paragraph (11) was approved with that amendment to the French text.

Paragraphs (12)-(23)

Paragraphs (12)-(23) were approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8

(Unilateral declaration by a successor State regarding treaties of the predecessor State) (A/CN.4/L.217/Add.2)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

23. Sir Francis VALLAT (Special Rapporteur) explained that the long foot-note,⁵ which set out the 1970 declaration by the Kingdom of Tonga, had been included to comply with a request by the Government of that country.

Paragraph (3) was approved.

Paragraphs (4)-(12)

Paragraphs (4)-(12) were approved.

Paragraph (13)

24. Mr. AGO said the readers of the long commentary to article 8 would certainly be struck by the fact that,

with the exception of a few Belgian examples, all the cases of succession mentioned were drawn from the practice of the United Kingdom regarding its former dependent territories. There was, for example, no reference to French practice.

25. The CHAIRMAN pointed out that the examples appearing in the commentary, which were taken from the 1972 report (A/8710/Rev.1, chapter II, section C), had been given by the former Special Rapporteur on the basis of documents submitted by the Secretariat. Those documents, in turn, were based on the information supplied by Governments.

26. Sir Francis VALLAT (Special Rapporteur) said that, since the reader would no longer refer to the 1972 commentary, there was every reason for reproducing in the present commentary all the examples given there. That being said, he agreed that Mr. Ago's point was a valid one.

Paragraph (13) was approved.

Paragraphs (14)-(22)

Paragraphs (14)-(22) were approved.

The commentary to article 8 was approved.

Commentary to article 9

(Treaties providing for the participation of a successor State) (A/CN.4/L.217/Add.4)

The commentary to article 9 was approved.

Commentary to article 10

(Succession in respect of part of territory)

(A/CN.4/L.217/Add.3)

Paragraphs (1)-(4)

Paragraphs (1)-(4) were approved.

Paragraph (5)

27. Mr. TAMMES said that the case of Newfoundland, mentioned at the beginning of paragraph (5), did not appear to be a good example of the application of article 10, because Newfoundland had already been as much an independent State as Canada before its union with that country.

28. Sir Francis VALLAT (Special Rapporteur) said that, in his own opinion, the normal rules of State succession did not apply to the dissolution of the Commonwealth of Nations, but he had had no option but to retain all the examples given in the 1972 commentary.

29. Mr. KEARNEY said that the case of Newfoundland was further complicated by the fact that its incorporation into Canada had been the subject of a plebiscite.

30. Mr. ELIAS said that, as a matter of constitutional law, it had always been doubtful whether the Statute of Westminster, which had established Dominion status, could be said to apply to Newfoundland, because that country had not been listed among the Dominions. He therefore considered that it would be correct to retain the example in paragraph (5).

31. The CHAIRMAN said he would take it that, subject to those views being noted in the summary

record of the meeting, the Commission agreed to approve paragraph (5) as it stood.

It was so agreed.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

32. Mr. TAMMES objected to the reference, in the second sentence of paragraph (7), to the case of “the incorporation of the entire territory of a State into the territory of an existing State”.

33. Sir Francis VALLAT (Special Rapporteur) drew attention to paragraph 1 of article 26, which dealt with the problem mentioned by Mr. Tammes as one of uniting of States.

34. Mr. USHAKOV said the essential point was that, in the case covered by article 26, all the treaties of both the States concerned continued in force, whereas in the case covered by article 10, there was a change of treaty régime.

35. Mr. TAMMES said he would revert to the matter in connexion with article 26.

Paragraph (7) was approved.

Paragraphs (8)-(12)

Paragraphs (8)-(12) were approved.

Paragraphs (13) and (14)

36. Sir Francis VALLAT (Special Rapporteur) suggested that consideration of paragraphs (13) and (14) should be deferred, because an additional paragraph would be introduced between them.

37. The CHAIRMAN suggested that the Commission should approve the commentary to article 10, subject to subsequent approval of paragraphs (13) and (14) and the proposed additional paragraph.

It was so agreed.

Mr. Sette Câmara took the Chair.

Commentary to article 11

(Position in respect of the treaties of the predecessor State) (A/CN.4/L.217/Add.3)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraphs (3)-(6)

38. Mr. KEARNEY said it seemed to him that paragraphs (3)-(6) needed some revision in the light of the position which the Commission had adopted in article 27, on succession of States in cases of separation of parts of a State. Many of the examples of practice quoted were not in accordance with that position.

39. Sir Francis VALLAT (Special Rapporteur) said that the provisions of article 27 were not based entirely on practice, but also on what was thought to be the correct solution in a modern context. The difficulty, of course, was to distinguish between cases of dissolution of a State and cases of separation of parts of a State. One improvement he would suggest was the replacement of the words “a new State” in the first sentence of

paragraph (6) by the words “a newly independent State”.

40. After a further discussion of the examples in paragraphs (3)-(5), in which Mr. KEARNEY, Mr. USHAKOV, Sir Francis VALLAT (Special Rapporteur) and Mr. TABIBI took part, Mr. KEARNEY said that, although he still thought the position, as stated in the commentary to article 11, ran counter to the position which the Commission had taken in article 27, he would not press his objection.

Paragraphs (3)-(5) were approved.

Paragraph (6) was approved with the change in the first sentence suggested by the Special Rapporteur.

Paragraphs (7)-(13)

Paragraphs (7)-(13) were approved.

Paragraph (14)

41. Sir Francis VALLAT (Special Rapporteur) proposed that the words “appears to be unequivocally in conflict”, in the first sentence, should be replaced by the words “is in conflict”.

Paragraph (14) was approved with that amendment.

Paragraphs (15)-(21)

Paragraphs (15)-(21) were approved with minor drafting changes.

The commentary to article 11, as amended, was approved.

Commentary to article 12

(Participation in treaties in force at the date of the succession of States) (A/CN.4/L.217/Add.4)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

42. Sir Francis VALLAT (Special Rapporteur) said that the figure 11 should be inserted in the square brackets following the word “article” in the first sentence.

Paragraph (2) was approved with that addition.

Paragraphs (3)-(5)

Paragraphs (3)-(5) were approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

43. Mr. KEARNEY said he could not agree to the statement in the second sentence that the governing principle was expressed in article 29 of the Vienna Convention on the Law of Treaties, since in his opinion article 29 of that Convention was really used as a residual rule. He suggested that the second sentence should be amended to read: “This is simply a question of the interpretation of the treaty and of the act by which the predecessor State established its consent to be bound, and of the principle expressed in article 29 of the Vienna Convention on the Law of Treaties”.

It was so agreed.

44. Sir Francis VALLAT (Special Rapporteur) pointed out that the quoted passage, beginning with the words "In ascertaining" and ending with the words "bound by it", should be in inverted commas.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8)-(12)

Paragraphs (8)-(12) were approved.

Paragraph (13)

45. Sir Francis VALLAT (Special Rapporteur) said that certain changes would be necessary in paragraph (13) to bring it into conformity with preceding decisions.

Paragraph (13) was approved subject to the necessary changes.

Paragraphs (14)-(15)

Paragraphs (14)-(15) were approved.

The commentary to article 12, as amended, was approved.

Commentary to article 13

(Participation in treaties not in force at the date of the succession of States) (A/CN.4/L.217/Add.4)

Paragraphs (1)-(8)

Paragraphs (1)-(8) were approved with editorial changes.

Paragraph (9)

46. Sir Francis VALLAT (Special Rapporteur) said that paragraph (9) would be adjusted in the light of the commentary to article 12.

Paragraph (9) was approved subject to the necessary adjustment.

Paragraph (10)

Paragraph (10) was approved, subject to correction of a typographical error.

The commentary to article 13, as amended, was approved.

The meeting rose at 6.05 p.m.

1299th MEETING

Wednesday, 24 July 1974, at 10.05 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.217/Add.4-6 and Add.8 and 9; A/CN.4/L.220; A/8710/Rev.1)

(continued)

Chapter II

SUCCESSION OF STATES IN RESPECT OF 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 treaties, beginning with article 14.

Commentary to article 14

(Participation in treaties signed by the predecessor State subject to ratification, acceptance or approval) (A/CN.4/L.217/Add.4)

The commentary to article 14 was approved.

Commentary to article 15

(Reservations) (A/CN.4/L.217/Add.6)

Paragraphs (1)-(17)

Paragraphs (1)-(17) were approved.

Paragraph (18)

2. Mr. KEARNEY proposed that the words "having regard to", in the second sentence, should be replaced by the words "in view of".

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

Paragraph (19) was approved.

Paragraph (20)

3. Mr. KEARNEY proposed that the words "anxious to continue the participation of its territory in the régime of the treaty", in the fifth sentence, should be amended to read "which wishes to continue to participate in the treaty".

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21)-(22)

Paragraphs (21)-(22) were approved.

Paragraph (23)

4. Mr. KEARNEY proposed that a full stop should be placed after the words "of the 1972 article 15", in the third sentence, and that the following word, "but", should be replaced by the word "However"; that the word "normal" at the end of the same sentence should be replaced by the word "general"; and that in the interests of clarity the words "the limitation of the reference to article 23, paragraphs 1 and 4 in the 1972 draft has been amended", in the last sentence, should be amended to read "the reference in the 1972 draft to article 23, paragraphs 1 and 4 has been amended".

It was so agreed.

Paragraph (23), as amended, was approved.

Paragraph (24)

Paragraph (24) was approved.

The commentary to article 15, as amended, was approved.

Commentary to article 16

(Consent to be bound by part of a treaty and choice between differing provisions) (A/CN.4/L.217/Add.5)

The commentary to article 16 was approved.

Commentary to article 17

(Notification of succession) (A/CN.4/L.217/Add.6)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

Paragraph (2) was approved with a minor editorial change.

Paragraphs (3)-(6)

Paragraphs (3)-(6) were approved.

Paragraph (7)

5. Mr. KEARNEY proposed that the words "very particular", in the first sentence, should be amended to read "very unusual", and that the word "must" in the fifth sentence should be replaced by the word "should".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

6. Mr. KEARNEY said he was not sure that the statement made in the third sentence of paragraph (8) was entirely accurate, since the paragraph later referred to the need for certain formal requirements to be met. Although he did not wish to press the point, he thought that any document which had to be signed by a Head of State, Head of Government or Minister for Foreign Affairs could hardly be called an informal instrument.

7. Sir Francis VALLAT (Special Rapporteur) said he thought that if the sentence was read in conjunction with the following passage, the situation was clear. Mr. Kearney's comment had, however, drawn his attention to the fact that some important words in paragraph (8) of the 1972 commentary (A/8710/Rev.1, chapter II, section C) had been omitted from the third sentence of the present text, the last part of which should read: "that assumption is fully confirmed by the analysis of the practice which has been given in the preceding paragraphs of the present commentary".

Paragraph (8) was approved with that correction.

Paragraph (9)

8. Sir Francis VALLAT (Special Rapporteur) proposed that the phrase "is inspired by", in the first sentence, should be replaced by the word "reflects".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

9. Mr. KEARNEY proposed that, in the first sentence, the word "intended" should be replaced by the words "was drafted" and the word "shall" by the word "should".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were approved.

Paragraphs (13) and (14)

10. Mr. KEARNEY said he had hoped that paragraphs (13) and (14) of the commentary would clarify certain obscurities in article 17, especially the relationship between paragraphs 3(b) and 5 of the article, but they did not seem to do so. He was concerned, in particular, about the use of the phrase "legal nexus" in the second sentence of paragraph (13), which he thought was ambiguous.

11. Sir Francis VALLAT said that the phrase "legal nexus" had been used deliberately in order to avoid referring to the date of the establishment of consent to be bound. He would, however, be glad to substitute a better expression, if one could be found. He thought that the problem of relationship raised by Mr. Kearney might be solved by adding a passage to explain that the provisions of paragraph 5 of the article had no connexion with the machinery established under paragraph 3.

12. The CHAIRMAN suggested that the Commission should approve paragraphs (13) and (14), subject to changes to be made by the Special Rapporteur and considered by the Commission at a later stage.

It was so agreed.

The commentary to article 17, as amended, was approved.

Commentary to article 19

(Conditions under which a treaty is considered as being in force in the case of a succession of States) (A/CN.4/L.217/Add.5)

The commentary to article 19 was approved with minor editorial changes.

Commentary to article 20

(The position as between the predecessor State and the newly independent State) (A/CN.4/L.217/Add.5)

Paragraph (1)

13. Mr. KEARNEY proposed that the words "by agreement" should be inserted after the words "bilateral relations" in the third sentence, the phrase "by agreement between them", at the end of the sentence, being deleted.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2)-(5)

Paragraphs (2)-(5) were approved.

The commentary to article 20, as amended, was approved.

Commentary to article 21

(Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party) (A/CN.4/L.217/Add.5)

Paragraphs (1)-(9)

Paragraphs (1)-(9) were approved.

Paragraph (10)

14. Mr. KEARNEY proposed that the last part of the first sentence should be amended to read: "...the original treaty is amended as between the predecessor State and the other State party to take account of the new air route situation resulting from the emergence of the new State".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11)-(15)

Paragraphs (11)-(15) were approved.

The commentary to article 21, as amended, was approved.

Commentary to article 22

(Multilateral treaties) (A/CN.4/L.217/Add.9)

Paragraphs (1)-(4)

Paragraphs (1)-(4) were approved.

Paragraph (5)

15. Mr. KEARNEY proposed that the word "technically" should be inserted before the words "not in force" in the second sentence.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

16. In reply to a question by Mr. KEARNEY, Sir Francis VALLAT (Special Rapporteur) said that the words "on balance", in the first sentence, had been included to meet the wishes of the Drafting Committee.

Paragraph (6) was approved.

Paragraphs (7)-(9)

Paragraphs (7)-(9) were approved.

The commentary to article 22, as amended, was approved.

Commentary to article 23

(Bilateral treaties) (A/CN.4/L.217/Add.9)

The commentary to article 23 was approved.

Commentary to article 24

(Termination of provisional application)
(A/CN.4/L.217/Add.9)

Paragraphs (1)-(5)

Paragraphs (1) to (5) were approved.

Paragraph (6)

17. Mr. RAMANGASOAVINA proposed the deletion of the last sentence of paragraph (6), which he considered unnecessary. He also proposed that the

words "or makes a notification of succession" should be added after the words "gives notice of its intention not to become a party to the treaty", at the end of the second sentence.

18. Sir Francis VALLAT (Special Rapporteur) said that, in his view, the last sentence of paragraph (6) should be retained. In order to meet Mr. Ramangasoavina's point, however, he suggested that a sentence on the following lines should be added at the end of the paragraph: "However, as the article is not intended to be exhaustive, it was not considered necessary to provide, for example, for the case where notification of succession is made, although it is apparent that when status as a party is established, provisional application will terminate".

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (6) with the addition of a sentence on the lines suggested by the Special Rapporteur.

It was so agreed.

The commentary to article 24, as amended, was approved.

Commentary to article 25

(Newly independent States formed from two or more territories) (A/CN.4/L.217/Add.9)

The commentary to article 25 was approved.

Commentary to article 29

(Boundary régimes)

and to article 30

(Other territorial régimes) (A/CN.4/L.217/Add.8)

20. Sir Francis VALLAT (Special Rapporteur) explained that paragraphs (1) to (40) reproduced the commentary to articles 29 and 30 in the 1972 report (A/8710/Rev.1, chapter II, section C) with a few amendments. Those amendments took into account the comments made by certain Governments, such as those of Ethiopia and Somalia, and the observations made by members, in particular by Mr. Tabibi,¹ during the discussion at the present session. Paragraphs (41) to (49) of the commentary dealt with the consideration of the articles at the present session.

Paragraphs (1)-(43)

Paragraphs (1) to (43) were approved.

Paragraph (44)

Paragraph (44) was approved with minor drafting changes.

Paragraphs (45)-(47)

Paragraphs (45) to (47) were approved.

Paragraph (48)

21. Mr. HAMBRO, referring to the second sentence of paragraph (48), said it was not altogether satisfactory to say that "the reference to territory must in any event be read as including the people". It would be more

¹ See 1287th meeting, paras. 11-28.

appropriate to say that in the last resort all rights applied to individuals, although all treaties were concluded between States and not between individuals.

22. Sir Francis VALLAT (Special Rapporteur) said that a reference to the fact that treaties were concluded between States would not meet the point either. He would, however, be prepared to try to improve the wording of the sentence.

23. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (48) on the understanding that a redraft of the sentence would be submitted by the Special Rapporteur at a later stage.

It was so agreed.

Paragraph (49)

Paragraph (49) was approved.

The commentary to articles 29 and 30, as amended, was approved.

Commentary to article 30 bis

(Questions relating to the validity of a treaty)
(A/CN.4/L.217/Add.8)

Paragraph (1)

24. Sir Francis VALLAT (Special Rapporteur) said that, at the end of the first sentence, the words "of the commentary to articles [29] and [30]" should be inserted before the word "above".

25. In reply to a remark by Mr. KEARNEY, he proposed that the concluding words of the third sentence, "it was necessarily cast in general form", should be replaced by the words: "it was cast in general form, as explained in paragraph (45) of the commentary to articles [29] and [30]".

Paragraph (1) was approved with the amendments proposed by the Special Rapporteur.

Paragraph (2)

Paragraph (2) was approved.

The commentary to article 30 bis, as amended, was approved.

Chapter V

LEGAL PROBLEMS RELATING TO THE NON-NAVIGATIONAL
USES OF INTERNATIONAL WATERCOURSES (A/CN.4/L.219)

Chapter V was approved.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION
(A/CN.4/L.220)

Paragraphs 1 and 2

26. Mr. BILGE said that the phrase "Owing to the lack of time", in the second sentence of paragraph 1 and the second sentence of paragraph 2, was not sufficiently explicit and might even be misleading.

27. Mr. HAMBRO suggested that in both paragraphs the phrase should be replaced by a sentence on the following lines: "Due to the recommendation made by

the General Assembly, in its resolution 3071 (XXVIII), that the Commission should complete its work on the draft articles on succession of States in respect of treaties, the International Law Commission was unable to pursue this matter further during the present session".

28. Mr. USHAKOV said the sentence proposed by Mr. Hambro should be expanded to indicate that at the present session the Commission had considered the topics of State responsibility and treaties concluded between States and international organizations or between two or more international organizations.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraphs 1 and 2 on the understanding that the phrase "Owing to the lack of time" would be replaced by a sentence on the lines indicated by Mr. Hambro and Mr. Ushakov.

It was so agreed.

Paragraphs 3-20

Paragraphs 3-20 were approved with a drafting change in paragraph 19.

Paragraphs 21-27

30. Mr. CALLE Y CALLE proposed that a new paragraph should be inserted before paragraph 21, explaining that the Inter-American Juridical Committee had invited the International Law Commission to be represented by an observer at its 1973 session, but that the then Chairman of the Commission had unfortunately been prevented at the last moment from attending the session and had not had time to request another member of the Commission to replace him.

It was so agreed.

Paragraphs 21-27 were approved.

Paragraphs 28-35

Paragraphs 28-35 were approved.

The meeting rose at 1 p.m.

1300th MEETING

Thursday, 25 July 1974, at 9.40 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.217 and Corr.1; A/CN.4/L.217/Add.10-14;
A/CN.4/L.218/Add.3; A/CN.4/L.223 and Add.1)

(continued)

Chapter III

STATE RESPONSIBILITY

(resumed from the 1297th meeting)

1. The CHAIRMAN invited the Commission to continue its examination of the commentaries to the draft articles on State responsibility.

Commentary to article 9

(Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization) (A/CN.4/L.218/Add.3)

The commentary to article 9 was approved.

Chapter III, as amended, was approved.

Chapter II

SUCCESION OF STATES IN RESPECT OF TREATIES

(resumed from the previous meeting)

2. The CHAIRMAN invited the Commission to continue its examination of the commentaries to the draft articles on succession of States in respect of treaties.

Commentary to article 18

(Effects of a notification of succession)

(A/CN.4/L.217/Add.10)

Paragraphs (1)-(14)

Paragraphs (1) to (14) were approved.

Paragraph (15)

3. The CHAIRMAN, speaking as a member of the Commission, said that paragraph (15) of the commentary should make it clear that, if the parties so agreed, the treaty could be made operative retroactively from the date of the succession of States.

4. Sir Francis VALLAT (Special Rapporteur) proposed the insertion of the following additional sentence at the end of the paragraph: "If the parties so agree, the operation of the treaty may be made retroactive to the date of the succession of States".

Paragraph (15) was approved with that addition.

Paragraph (16)

Paragraph (16) was approved.

The commentary to article 18, as amended, was approved.

New paragraph added to article 26

(Effects of a notification of succession)

force at the date of the succession of States)¹

5. Sir Francis VALLAT (Special Rapporteur) drew attention to document A/CN.4/L.223/Add.1 setting out an additional paragraph of article 26, which had been omitted from document A/CN.4/L.223 containing the draft articles as adopted in final form by the Drafting Committee. The additional paragraph, to be added at the end of the article 26, read:

3. Sub-paragraph 2(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

That paragraph served the same purpose as paragraph 3 of article 26bis and paragraph 5 of article 26ter.

Paragraph 3 of article 26 was approved.

Commentary to article 26

(Effects of a uniting of States in respect of treaties in force at the date of the succession of States),

to article 26bis

(Effects of a uniting of States in respect of treaties not in force at the date of the succession of States),

and to article 26ter

(Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval) (A/CN.4/L.217/Add.11)

6. The CHAIRMAN invited the Commission to consider the commentary to articles 26, 26bis and 26ter paragraph by paragraph.

Paragraph (1)

7. Mr. TAMMES welcomed the statement in the second sentence that the three articles covered the case in which "one State merges with another State even if the international personality of the latter continues after they have united". That statement was necessary, because the text of paragraph 1 of article 26 did not make the point at all clear. Unfortunately, the articles would ultimately be separated from the commentary, and he still had doubts about the clarity of article 26 itself.

8. The CHAIRMAN said that the views of Mr. Tammes would be placed on record. If there were no other comments, he would take it that the Commission approved paragraph (1) of the commentary to article 26.

It was so agreed.

Paragraphs (2)-(27)

Paragraphs (2) to (27) were approved.

Paragraph (28)

9. Sir Francis VALLAT (Special Rapporteur) proposed that in the last part of the first sentence the words "the effects of the change on the operation of the treaty" should be inserted after the words "resulting from it", which would be followed by a comma.

Paragraph (28) was approved with that amendment.

Paragraphs (29) and (30)

Paragraphs (29) and (30) were approved.

Paragraph (31)

10. Sir Francis VALLAT (Special Rapporteur) proposed that a sentence should be added to paragraph (31) to describe the effect of the new paragraph 3 of article 26.

¹ For previous discussion see 1295th meeting, para. 42.

Paragraph (31) was approved subject to that addition.

Paragraphs (32)-(35)

Paragraphs (32) to (35) were approved.

The commentary to articles 26, 26bis and 26ter, as amended, was approved.

Commentary to article 2

(Use of terms) (A/CN.4/L.217/Add.12)

The commentary to article 2 was approved.

Commentary to article 27

*Succession of States in cases of separation
of parts of a State)*

and to article 28

*(Position if a State continues after separation of part of
its territory) (A/CN.4/L.217/Add.13)*

11. Sir Francis VALLAT (Special Rapporteur) said that paragraphs (1) to (18) of the joint commentary to articles 27 and 28 contained fundamentally the same material as the 1972 commentary (A/8710/Rev.1, chapter II, section C). It had been found necessary, however, to alter the language to take account of the fact that the Commission had eliminated the concept of dissolution from the draft. References to the dissolution of a State had been replaced by references to separation. In addition, a passage had been inserted to the effect that Pakistan should be regarded as being in the same position as a newly independent State.

Paragraphs (1)-(31)

Paragraphs (1) to (31) were approved.

Paragraph (32)

12. Mr. TAMMES said he wished to express again the doubts he had expressed when the Commission had considered the text for article 27 proposed by the Drafting Committee.² He noted that the last sentence of paragraph (32) of the commentary referred to the idea of "dependency" as providing "the key to the meaning" of the term "newly-independent State". That statement was based on the assumption that the notion of "dependency" was a clear one. In fact, however, before becoming independent every territory was a "dependency" in the sense that it was dependent, even if it constituted an integral part of a unitary State. Consequently, he still questioned whether the provisions of article 27 would prove workable in practice.

13. The CHAIRMAN said that the views expressed by Mr. Tammes would be placed on record. If there were no further comments, he would take it that the Commission approved paragraph (32).

It was so agreed.

Paragraph (33)

Paragraph (33) was approved.

The commentary to articles 27 and 28 was approved.

Commentary to article 28bis

*(Participation in treaties not in force at the date of the
succession of States in cases of separation of parts of a
State)*

and to article 28ter

*(Participation in cases of separation of parts of
a State in treaties signed by the predecessor State
subject to ratification, acceptance or approval)
(A/CN.4/L.217/Add.13)*

14. Sir Francis VALLAT (Special Rapporteur) proposed that the single paragraph of the commentary should be divided into two paragraphs. Paragraph (2) would begin with the third sentence of the present paragraph.

The commentary to articles 28bis and 28ter was approved with that amendment.

Commentary to article 31

*(Cases of State responsibility and outbreak
of hostilities)*

and to article 31bis

(Cases of military occupation) (A/CN.4/L.217/Add.14)

*The commentary to articles 31 and 31bis was approved
with a minor drafting change in paragraph (1).*

Commentary to article 31ter

(Notification) (A/CN.4/L.217/Add.14)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2)-(6)

15. Sir Francis VALLAT (Special Rapporteur) said that the words "notification of succession" should be corrected to read "notification" throughout paragraphs (2) to (6). In paragraph (5) a sentence should be inserted to the effect that paragraph 5 of article 31ter did not affect the operation of paragraph 3 of that article.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraphs (2) to (6) with the changes indicated by the Special Rapporteur.

It was so agreed.

The commentary to article 31ter, as amended, was approved.

A. INTRODUCTION

17. The CHAIRMAN invited the Commission to consider the introduction to chapter II (A/CN.4/L.217 and Corr.1).

1. *Summary of the Commission's proceedings (paragraphs 1-27)*

Paragraphs 1-27 were approved.

2. *State practice (paragraphs 28-30)*

Paragraphs 28-30 were approved.

3. *The concept of "succession of States" which emerged
from the study of the topic (paragraphs 31-33)*

² See 1296th meeting, paras. 15 and 16.

Paragraphs 31-33 were approved.

4. *Relationship between succession in respect of treaties and the general law of treaties (paragraphs 34-37ter)*

Paragraphs 34-37bis

Paragraphs 34-37bis were approved.

Paragraph 37ter

18. After an exchange of views between Mr. KEARNEY and Sir Francis VALLAT (Special Rapporteur) on the wording of the last part of the first sentence, Sir Francis VALLAT (Special Rapporteur) proposed that that part of the sentence should be reworded to read: "in accordance with the rules of interpretation as stated in the Vienna Convention, and in particular taking into account the relevant rules of international law applicable in the relations between the parties, as provided in sub-paragraph 3(c) of article 31 of the Convention".

19. Mr. HAMBRO said that he would accept that wording, though with some reluctance, because he thought that readers might find it difficult to understand why one particular sub-paragraph of the Vienna Convention on the Law of Treaties had been singled out.

Paragraph 37ter was approved with the amendment proposed by the Special Rapporteur.

5. *The principle of self-determination and the law relating to succession in respect of treaties (paragraphs 38-41)*

Paragraph 38

Paragraph 38 was approved, subject to correction of the Spanish text.

Paragraph 39

Paragraph 39 was approved.

Paragraph 40

20. Mr. BILGE said he had already expressed the hope that the introductory commentary would explain the relationship between the clean slate principle and the continuity principle. Paragraph 40 not only said nothing about that relationship, but gave too much prominence to the clean slate principle.

21. Sir Francis VALLAT (Special Rapporteur) said that in his opinion Mr. Bilge's point was met by the penultimate sentence of the paragraph.

22. Mr. USHAKOV thought it would be useful for the commentary to emphasize that continuity was the general principle, whereas the clean slate principle was only an exception in favour of newly independent States.

23. Sir Francis VALLAT (Special Rapporteur) said he would prepare a new text which would take into account the observations made by Mr. Bilge and Mr. Ushakov.

Paragraph 40 was approved subject to revision by the Special Rapporteur.

Paragraph 41

24. Mr. KEARNEY, referring to the first sentence, said that, in his opinion, there was a difference between devolution agreements and unilateral declarations.

25. Sir Francis VALLAT (Special Rapporteur) pointed out that paragraphs 40 and 41 reproduced the text of paragraphs 37 and 38 of the 1972 introduction (A/8710/Rev.1, chapter II, section A); he questioned whether any change should be made.

Paragraph 41 was approved.

6. *General features of the draft articles*

(a) *Form of the draft (paragraphs 42-45).*

Paragraph 42

Paragraph 42 was approved.

Paragraph 43

26. In reply to a comment by Mr. KEARNEY, Sir Francis VALLAT (Special Rapporteur) proposed that the words "method of adhesion and the retroactive effect of consent" in the first sentence of the addition to paragraph 43 (A/CN.4/L.217/Corr.1) should be amended to read: "method of giving, and the retroactive effect of consent".

It was so agreed.

27. Mr. KEARNEY proposed that the word "touches" in the second sentence of the added passage should be replaced by some such expression as "deals with an aspect of" or "raises an aspect of".

28. Sir Francis VALLAT (Special Rapporteur) said that he had used the word "touches" deliberately; he thought it would be incorrect to say that the Commission was "dealing" with the problem at the present stage.

Paragraph 43, as amended, was approved.

Paragraph 44

29. Sir Francis VALLAT (Special Rapporteur) said he would expand paragraph 44 to take account of an observation by the Chairman regarding final clauses on participation.

Paragraph 44 was approved, subject to revision by the Special Rapporteur.

Paragraph 45

Paragraph 45 was approved subject to a change in the Spanish text.

(b) *Scope of the draft (paragraphs 46-51).*

Paragraph 46

Paragraph 46 was approved.

Paragraph 47

30. Mr. AGO suggested that in the third sentence of paragraph 47 the word "large", before the words "majority of cases", should be deleted, and that in the fourth sentence the phrase "In other words" should be deleted and the words "falls within" should be amended to read "then falls within".

It was so agreed.

Paragraph 47, as amended, was approved.

Paragraph 48

Paragraph 48 was approved.

Paragraph 49

31. Sir Francis VALLAT (Special Rapporteur) proposed that the third sentence should be amended to read: "Such unions might obtain an exclusive right to enter into certain types of agreement, as in the case of the European Economic Community under the Treaty of Rome".

It was so agreed.

Paragraph 49, as amended, was approved.

Paragraphs 50 and 51

Paragraphs 50 and 51 were approved.

(c) *Scheme of the draft* (paragraphs 52-63) (A/CN.4/L.217/Corr.1).

Paragraphs 52-55

Paragraphs 52-55 were approved.

Paragraph 56

Paragraph 56 was approved, with a change in the positions of the footnotes.

Paragraph 57

32. In reply to comments made by Mr. USHAKOV, Sir Francis VALLAT (Special Rapporteur) said he would amend the text of paragraph 57 to take account of the concern expressed about treaties of a general or universal character.

Paragraph 57 was approved, subject to revision by the Special Rapporteur.

Paragraph 58

33. Mr. AGO suggested that the first sentence should be divided into two sentences, the first ending with the words "Red Cross". The second sentence would begin with the words: "Unfortunately, the Commission was unable to find...".

34. Sir Francis VALLAT (Special Rapporteur) said that paragraph 58 should be divided into two paragraphs, the second beginning at the words "Nevertheless, the attention paid to this matter...".

35. After a discussion on the last sentence, in which Mr. AGO, Mr. ŠAHOVIĆ, Mr. SETTE CÂMARA, Mr. USHAKOV and Mr. KEARNEY took part, Sir FRANCIS VALLAT (Special Rapporteur) suggested that the sentence should be retained, but that the word "positive", before the word "solution", should be deleted.

Paragraph 58 was approved with the amendments suggested by Mr. Ago and the Special Rapporteur.

Paragraph 59

36. Mr. KEARNEY proposed that the last sentence should be amended to read: "The provisions are based on article 66 of the Vienna Convention on the Law of Treaties and the proposed annex is identical with the annex to the Vienna Convention."

It was so agreed.

Paragraph 59, as amended, was approved.

Paragraphs 60-63

Paragraphs 60-63 were approved.

B. RECOMMENDATION OF THE COMMISSION (A/CN.4/L.217/Corr.1)

Paragraph 64

37. Mr. KEARNEY proposed that the Secretariat should draft a text for paragraph 64 stating that the Commission recommended that the draft articles should be submitted to States for their comments and then be submitted to a diplomatic conference.

38. Mr. TSURUOKA supported that proposal.

39. The CHAIRMAN said that, as had been suggested earlier by Mr. El-Erian, the Commission wished to express its appreciation of the work done by the Special Rapporteur in so brief a period, which had enabled it to submit a much improved version of the draft articles on succession of States in respect of treaties.

40. Sir Francis VALLAT (Special Rapporteur) said he was grateful for that tribute. He wished to thank the Secretariat for the help he had received in connexion with the work of the Drafting Committee and with the preparation of the commentaries to the draft articles.

The meeting rose at 1 p.m.

1301st MEETING

Friday, 26 July 1974, at 10.20 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-sixth session

(A/CN.4/L.216/Add.1; L.220/Add.1 and 2; L.223 and Add.1; L.224)

(continued)

Chapter I

ORGANIZATION OF THE SESSION

(resumed from the 1297th meeting)

H. COMMEMORATION OF THE TWENTY-FIFTH ANNIVERSARY OF THE OPENING OF THE COMMISSION'S FIRST SESSION

1. The CHAIRMAN reminded the Commission that it had been agreed that paragraph 15 of chapter I should be revised.¹ He invited members to consider the new paragraphs 15*bis* and 15*ter* in document A/CN.4/L.216/Add.1.

2. Mr. EL-ERIAN thought that, in referring to the Commission's influence on legal opinion, para-

¹ See 1297th meeting, para. 21.

graph 15^{ter} should also mention the International Law Seminar, whose members had attended many of the Commission's meetings. The Commission was in fact the only United Nations body which had a formal working relationship with young people from universities.

3. Mr. KEARNEY said that the Seminar might also be mentioned in chapter VI, in the remarks on the report of the Joint Inspection Unit (A/CN.4/L.220/Add.2), which could include a statement to the effect that the Seminar had proved most valuable and that some of the Commission's members had lectured to it.

4. Mr. AGO said he agreed that the Seminar might be mentioned in more than one part of the report, but the most important point was to emphasize its links with the Commission's meeting place—Geneva—which enabled participants to attend the Commission's meetings.

5. The CHAIRMAN, speaking as a member of the Commission, said that, since the part of the report under consideration dealt with the commemoration of the Commission's twenty-fifth anniversary, he thought the reference to the Commission's influence should be of a more general nature. He therefore suggested the addition to paragraph 15^{ter} of a sentence to the effect that the Commission also directly helped to spread the science of international law through seminars. The International Law Seminar itself could be mentioned in connexion with the meeting place of the Commission, as suggested by Mr. Ago.

It was so agreed.

Paragraphs 15bis and 15ter of chapter I, as amended, were approved.

Chapter I as a whole, as amended, was approved.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (resumed from the 1299th meeting)

D. ORGANIZATION OF FUTURE WORK, and

F. DATE AND PLACE OF THE TWENTY-SEVENTH SESSION

6. The CHAIRMAN said that section D (A/CN.4/L.220/Add.1) contained a recommendation that the General Assembly should approve a twelve-week session as the standard period of work for the Commission, as from the next session. Since approval of that recommendation by the General Assembly would entail additional expenditure, the Secretary-General had circulated, in document A/CN.4/L.224, a statement of its financial implications. That statement was now before the Commission and he assumed that members had considered it carefully.

7. Mr. TSURUOKA asked why the Commission was asking for a twelve-week and not a fourteen-week session.

8. Mr. TABIBI said he thought the Commission should ask for a fourteen-week session.

9. Mr. AGO said that a fourteen-week session would generally be too long for some of the Commission's

members. A ten-week session had proved too short, so it seemed wise to ask for a minimum of twelve weeks. He suggested that the words "it would have been possible only" in the fourth sentence of paragraph 2 of section D should be amended to read "it would not have been possible".

It was so agreed.

10. After a brief discussion, the CHAIRMAN suggested that the word "minimum" should be inserted before the words "standard period" in the last sentence of section D, paragraph 2.

It was so agreed.

Sections D and F of chapter VI, as amended, were approved.

G bis. REMARKS ON THE REPORT OF THE JOINT INSPECTION UNIT (A/CN.4/L.200/Add.2)

Paragraphs 1 and 2

11. Mr. HAMBRO suggested that, in order to explain why the Commission had discussed in its report what was essentially an administrative question, a sentence should be added to the end of paragraph 1 to the effect that, since the report of the Joint Inspection Unit dealt with the work of the Commission, which was generally discussed by the Sixth Committee of the General Assembly, the Commission had considered it natural and necessary to include the remarks which followed. He had doubts about the phrase "The Commission was informed", at the beginning of the first sentence. If the Commission had been informed by the Secretary-General, the report should say so.

12. Mr. AGO said that, since the Secretariat had formally drawn the Commission's attention to the report of the Joint Inspection Unit and had provided a copy of the relevant passages of that report, it was right for the Commission to say what it thought of those passages in its own report, which would be circulated to all the appropriate United Nations organs.

13. Mr. RAMANGASOAVINA said he thought that the text under consideration gave a clear analysis of the points raised in the report of the Joint Inspection Unit and would dispel any misunderstanding about the Commission's work.

14. Sir Francis VALLAT suggested that the opening words of paragraph 1 should be amended to read: "The Commission learned, towards the end of the session, of the existence of a report by the Joint Inspection Unit entitled . . .".

It was so agreed.

15. Mr. QUENTIN-BAXTER suggested that, to meet the point raised by Mr. Hambro, the third sentence of paragraph 2 should be replaced by the following text:

Nevertheless, these developments give the Commission an occasion to place before the General Assembly its own estimate of the nature and requirements of the task entrusted to the Commission by the General Assembly in the process of codification and progressive development of international law.

It was so agreed.

Paragraphs 1 and 2, as amended, were approved.

Paragraphs 3-5

Paragraphs 3-5 were approved.

Paragraph 6

16. Mr. KEARNEY suggested that the phrase "over a continuous period" in the last sentence should be replaced by the words "on a continuing basis over a lengthy period".

It was so agreed.

Paragraph 6, as amended, was approved.

Paragraph 7

Paragraph 7 was approved.

Paragraph 8

17. Mr. ELIAS suggested that the following sentence should be added to the end of paragraph 8:

Several members of the Commission also give lectures to the annual seminar which is held under the auspices and during the sessions of the Commission.

It was so agreed.

Paragraph 8, as amended, was approved.

Paragraph 9

18. Mr. QUENTIN-BAXTER suggested that the word "completely" in the first sentence should be deleted.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraphs 10 and 11

Paragraphs 10 and 11 were approved.

Paragraph 12

19. Sir Francis VALLAT proposed that a reference should be made to the special character of the Commission's discussions, which consisted of exchanges of new ideas and views, whereas the deliberations of most other United Nations bodies consisted largely of statements of Governments' positions. He would submit an appropriate text for insertion in paragraph 12.

It was so agreed.

Paragraph 12 was approved, subject to the addition proposed by Sir Francis Vallat.

Paragraphs 13-17

Paragraphs 13-17 were approved.

Paragraph 18

20. Mr. AGO suggested that a sentence should be added at the end of paragraph 18 explaining that the International Law Seminar organized every year by the United Nations Office at Geneva was closely linked with the Commission's sessions, that the Commission's members took part in it, and that one of the important features of the Seminar was that it gave participants an opportunity of attending the Commission's discussions.

It was so agreed.

Paragraph 18 was approved, subject to an addition on the lines suggested by Mr. Ago.

Paragraphs 19-21

Paragraphs 19-21 were approved.

Chapter VI as a whole, as amended, was approved.

21. The CHAIRMAN suggested that, since the question of honoraria and other emoluments payable to members was not dealt with in the Commission's report, he might take up those matters when representing the Commission at the next session of the General Assembly.

It was so agreed.

Chapter II

SUCCESSION OF STATES IN RESPECT OF TREATIES

(resumed from the previous meeting)

D. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF TREATIES

22. The CHAIRMAN invited the Commission to adopt the draft articles on succession of States in respect of treaties (A/CN.4/L.223 and Add.1).

23. Mr. USHAKOV said that, in consequence of his position with regard to article 18,² he wished to go on record as having abstained from voting on the draft articles as a whole.

The draft articles on succession of States in respect of treaties were adopted.

Chapter II as a whole, as amended, was approved.

RESOLUTION ADOPTED BY THE COMMISSION

24. Mr. EL-ERIAN said that as a gesture of appreciation to the Special Rapporteur, he would like to submit the following draft resolution:

The International Law Commission,

Having adopted the draft articles on succession of States in respect of treaties,

Desires to express to the Special Rapporteur, Sir Francis Vallat, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion the important task of finalizing the draft articles on succession of States in respect of treaties.

The draft resolution was adopted by acclamation.

The draft report of the Commission on the work of its twenty-sixth session as a whole, as amended, was adopted.

Closure of the session

25. After an exchange of congratulations and thanks, the CHAIRMAN declared the twenty-sixth session of the International Law Commission closed.

The meeting rose at 1.25 p.m.

² See 1293rd meeting, paras. 41-44.

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