

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1979

Volume I

*Summary records
of the meetings
of the thirty-first session*

14 May - 3 August 1979

UNITED NATIONS



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INTRODUCTORY NOTE

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

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents. References to the *Yearbook of the International Law Commission* are in a shortened form consisting of the word *Yearbook* followed by ellipsis points, a year and a volume number, e.g. *Yearbook* . . . 1970, vol. II.

Volume II (Part One) of this *Yearbook* contains the Special Rapporteurs' reports discussed at the session and certain other documents; volume II (Part Two) contains the Commission's report to the General Assembly. All references to those documents in the present volume are to the versions printed in volume II.

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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. Julio BARBOZA	Argentina	Mr. Milan ŠAHOVIĆ	Yugoslavia
Mr. Mohammed BEDJAOUI	Algeria	Mr. Stephen M. SCHWEBEL	United States of America
Mr. Juan José CALLE Y CALLE	Peru	Mr. Sompong SUCHARITKUL	Thailand
Mr. Jorge CASTAÑEDA	Mexico	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Emmanuel Kodjoe DADZIE	Ghana	Mr. Doudou THIAM	Senegal
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Senjin TSURUOKA	Japan
Mr. Jens EVENSEN	Norway	Mr. Nikolai A. USHAKOV	Union of Soviet Socialist Republics
Mr. Laurel B. FRANCIS	Jamaica	Sir Francis VALLAT	United Kingdom of Great Britain and Northern Ireland
Mr. Boutros Boutros GHALI	Egypt	Mr. Stephan VEROSTA	Austria
Mr. S. P. JAGOTA	India	Mr. Alexander YANKOV	Bulgaria
Mr. Frank X. J. C. NJENGA	Kenya		
Mr. C. W. PINTO	Sri Lanka		
Mr. Robert Q. QUENTIN-BAXTER	New Zealand		
Mr. Paul REUTER	France		
Mr. Willem RIPHAGEN	Netherlands		

OFFICERS

<i>Chairman:</i>	Mr. Milan ŠAHOVIĆ
<i>First Vice-Chairman:</i>	Mr. C. W. PINTO
<i>Second Vice-Chairman:</i>	Mr. Leonardo DÍAZ GONZÁLEZ
<i>Chairman of the Drafting Committee:</i>	Mr. Willem RIPHAGEN
<i>Rapporteur:</i>	Mr. Emmanuel Kodjoe DADZIE

Mr. Valentin A. Romanov, 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 1530th meeting, held on 14 May 1979:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. The law of the non-navigational uses of international watercourses.
6. Review of the multilateral treaty-making process (General Assembly resolution 32/48, para. 2).
7. Status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier.
8. Relations between States and international organizations (second part of the topic).
9. International liability for injurious consequences arising out of acts not prohibited by international law.
10. Jurisdictional immunities of States and their property.
11. Long-term programme of work.
12. Organization of future work.
13. Co-operation with other bodies.
14. Date and place of the thirty-second session.
15. Other business.

ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
IMF	International Monetary Fund
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization

CHECK LIST OF DOCUMENTS OF THE THIRTY-FIRST SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/316	Provisional agenda	Mimeographed. For the agenda as adopted, see p. xi above.
A/CN.4/317	Filling of casual vacancies: note by the Secretariat	Text reproduced in vol. II (Part One).
A/CN.4/317/Add.1 and Corr.1 and Add.2	<i>Idem</i> – addenda to the note by the Secretariat: list of candidates and <i>curricula vitae</i>	Mimeographed
A/CN.4/318 and Add.1–4	Eighth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur: the internationally wrongful act of the State, source of international responsibility (<i>continued</i>)	Text reproduced in vol. II (Part One).
A/CN.4/319	Eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur: draft articles and commentary (<i>continued</i>)	<i>Idem.</i>
A/CN.4/320 and Corr.1	First report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	<i>Idem.</i>
A/CN.4/321 and Add.1–7	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: comments of States	<i>Idem.</i>
A/CN.4/322 and Corr.1 and Add.1 and 2	Eleventh report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: draft articles relating to succession to State archives, with commentary	<i>Idem.</i>
A/CN.4/323	Preliminary report on the topic of jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem.</i>
A/CN.4/324	The law of the non-navigational uses of international watercourses: replies of Governments to the Commission's questionnaire	<i>Idem.</i>
A/CN.4/325	Report of the Working Group on review of the multilateral treaty-making process	<i>Idem.</i>
A/CN.4/L.289	Draft articles on State responsibility: text of article 28 proposed by Mr. Tsuruoka	Replaced by A/CN.4/L.289/Rev.1
A/CN.4/L.289/Rev.1	<i>Idem</i>	Text reproduced in the summary record of the 1536th meeting, para. 2.
A/CN.4/L.290	<i>Idem</i> : text of article 28 proposed by Mr. Jagota	<i>Idem</i> , 1535th meeting, para. 16.
A/CN.4/L.291	<i>Idem</i> : text of article 29 proposed by Mr. Tsuruoka	<i>Idem</i> , 1540th meeting, para. 4.
A/CN.4/L.292	<i>Idem</i> : text of article 29 proposed by Mr. Jagota	<i>Idem</i> , 1542nd meeting, para. 28 (and paras. 30 and 31)
A/CN.4/L.293	<i>Idem</i> : text of article 29 proposed by Mr. Ushakov	<i>Idem</i> , 1544th meeting, para. 5.
A/CN.4/L.294	<i>Idem</i> : text of article 30 proposed by Mr. Jagota	<i>Idem</i> , 1545th meeting, para. 18.
A/CN.4/L.295	<i>Idem</i> : text of article 30 proposed by Mr. Yankov	<i>Idem</i> , 1545th meeting, para. 24.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.296	Draft articles on treaties concluded between States and international organizations or between international organizations: text of article 46 proposed by Mr. Ushakov	<i>Idem</i> , 1552nd meeting, para. 15.
A/CN.4/L.297 and Add.1	Draft articles on State responsibility – texts adopted by the Drafting Committee: articles 28–32 and title of chapter V of the draft	<i>Idem</i> , 1567th meeting, para. 1, and 1579th meeting, para. 1.
A/CN.4/L.298	Succession of States in respect of matters other than treaties – draft articles relating to succession to State archives: text of articles X, Y and Z proposed by Mr. Tsuruoka	<i>Idem</i> , 1564th meeting, para. 30.
A/CN.4/L. 299	Draft articles on succession of States in respect of matters other than treaties – Texts adopted by the Drafting Committee: articles 2–8, X and 12–25, and titles of the corresponding parts and sections of the draft	Replaced by A/CN.4/L.299/Rev.1.
A/CN.4/L.299/Rev.1	<i>Idem</i> – Texts adopted by the Drafting Committee: articles 1–23 and titles of the corresponding parts and sections of the draft	Texts reproduced in the summary record of the 1568th meeting, para. 3.
A/CN.4/L.299/Rev.1/Add.1	<i>Idem</i> – draft articles relating to succession to State archives: articles A and C adopted by the Drafting Committee	<i>Idem</i> , 1570th meeting, para. 3.
A/CN.4/L.300	Draft articles on treaties concluded between States and international organizations or between international organizations – texts adopted by the Drafting Committee: articles 39–60 and titles of the corresponding parts and sections of the draft	<i>Idem</i> , 1576th meeting, para. 2.
A/CN.4/L.301 and Corr.1	Draft report of the International Law Commission on the work of its thirty-first session: chap. I	Mimeographed. For the final text, see A/34/10 (vol. II (Part Two)).
A/CN.4/L.302 and Add.1–4	<i>Idem</i> : chap. II	<i>Idem</i> .
A/CN.4/L.303 and Add.1–6	<i>Idem</i> : chap. III	<i>Idem</i> .
A/CN.4/L.304	<i>Idem</i> : chap. IV	<i>Idem</i> .
A/CN.4/L.305	<i>Idem</i> : chap. V	<i>Idem</i> .
A/CN.4/L.306	<i>Idem</i> : chap. VI	<i>Idem</i> .
A/CN.4/L.307	<i>Idem</i> : chap. VII	<i>Idem</i> .
A/CN.4/L.308	<i>Idem</i> : chap. VIII	<i>Idem</i> .
A/CN.4/L.309 and Add.1	<i>Idem</i> : chap. IX	<i>Idem</i> .
A/CN.4/L.310	Report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	Text reproduced, as amended at the 1580th meeting, in A/34/10 (vol. II (Part Two)), chap. VI.
A/CN.4/SR.1530–SR.1583	Provisional summary records of the 1530th to 1583rd meetings of the International Law Commission	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE THIRTY-FIRST SESSION

Held at Geneva from 14 May to 3 August 1979

1530th MEETING

Monday, 14 May 1979, at 3.20 p.m.

Acting Chairman: Mr. Erik SUY
(Under-Secretary-General
for Legal Affairs)

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Opening of the session

1. The ACTING CHAIRMAN declared open the thirty-first session of the International Law Commission.

Statement by the Acting Chairman

2. The ACTING CHAIRMAN said that his first happy duty was to say how pleased he had been to learn that the outgoing Chairman, Mr. Sette Câmara, and two other members of the Commission, Mr. Ago and Mr. El-Erian, had been elected by the Security Council and the General Assembly to the highest judicial office in existence—that of Judge of the International Court of Justice—and to note that once again the Council and the Assembly had chosen judges of the Court from among the Commission's members. On behalf of the Commission he renewed to Mr. Ago, Mr. El-Erian and Mr. Sette Câmara his congratulations on their election and his best wishes for success in the performance of their new functions.

3. As a consequence of the departure of those members, vacancies had arisen in the Commission which it would not be easy to fill, but he was convinced that the Commission would be able to discharge this delicate task in its awareness of the overriding interests of the process of codification and progressive development of international law, in order that it might continue to be the codifying body in the service of the international community.

4. At the opening of the Commission's thirty-first session, which ushered in the fourth decade of its exis-

tence, he stressed that the Commission's achievements in the course of the preceding 30 years had been one of the most important factors in the process of the elaboration of modern international law in the United Nations, as was shown by the positive and lasting influence exerted by the United Nations in laying the legal foundations for peaceful coexistence and co-operation among States in accordance with the purposes and principles of the Charter. The Commission's prudent and painstaking work, supported by a patient, conscientious and balanced study of precedent, jurisprudence and doctrine, had culminated in the preparation of international instruments which, far from being scholastic exercises, were the very basis and starting point for modern international treaty law and would always remain useful and of practical value to States.

5. Since the previous session the adoption of the Vienna Convention on Succession of States in Respect of Treaties by the Plenipotentiary Conference convened for that purpose by the General Assembly had represented an important event in the progressive development and codification of international law and had provided further proof—if proof were needed—of the excellent methods laid down by the General Assembly, on the basis of the Commission's Statute, for the purpose of the efficient performance of its tasks under Article 13, paragraph 1 (a) of the United Nations Charter. Even more perhaps than in the case of earlier codification conferences, the basic draft prepared by the Commission had made it possible for States to codify at Vienna by a unanimous vote—with the abstention of only two States in the final vote—the entire body of rules governing the subject.

6. The Commission, which played a decisive part in the process of the codification and progressive development of modern international law and which was the sole standing body of the United Nations expressly responsible for making proposals in that respect, would probably enter a new phase of activities in the course of which, thanks to its acknowledged authority and in the light of the international community's current needs, it would be expected to deal with questions of ever increasing complexity and to take account of the growing importance of the generally recognized principles of international law.

7. In its resolution 2501 (XXIV) the General Assembly had emphasized the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and

to give increased importance to its role in relations among nations.

8. For very diverse reasons, States were seeking more and more, both inside and outside the United Nations, to codify, develop and strengthen international law; beyond any doubt, the fundamental reason was the connexion between the maintenance of international peace and security and the development of international co-operation in all fields, on the one hand, and the strengthening of international law, on the other. For there was a direct and basic link between the effective application of a system of international legal rules concerning the conduct of States and the codification and development of international law.

9. However, the process of codification, and in particular the progressive development of international law, was also a means of adjusting the evolution of international law to changing needs. Since the beginning of the century, the earlier political, social and economic structures had been manifestly and profoundly transformed by the emergence of States with new social and economic systems and of an impressive number of newly independent States, as well as by the important role of the various legal systems that had been superimposed on the classical systems in the formation of international law. Accordingly, the current process of codification of international law had had to take account of the need for a progressive development in order that the codified rules should reflect to the fullest possible extent the new structures of the international community. Only by making the fullest allowance for the needs and aspirations of the existing community of nations had the process of codification been able to render the principles and rules of international law more effective in international relations.

10. The reason why the Commission had successfully accomplished its task in the past 30 years was that it had invariably regarded the codification and progressive development of international law as both a stabilizing and an innovating element. At a time when the General Assembly was about to deal with new topics like the item entitled "Consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order", which was one of the items on the provisional agenda of the thirty-fourth session, the Commission in continuing to perform its function should at all times bear in mind the growing importance of the process of the constant adaptation of international law and the needs of its progressive development.

11. In that connexion he stressed the importance of the relationship between the General Assembly—the political and diplomatic executive and co-ordinating body—and the Commission as the learned body responsible for preparing basic drafts on various selected topics of international law. From that point of view, he considered that the Commission's achievements in recent years had strengthened the relationship of trust by which it was bound to the General Assembly. Accordingly, he congratulated the Commis-

sion not only on the quality and volume of the work it had carried out so far but also because it had never forgotten that the progressive development and the codification of international law should proceed with due regard to the reality of inter-State relations, including those within the United Nations. The general satisfaction with which the Commission's report on its thirtieth session had been welcomed by the General Assembly demonstrated that, as in the past, the Commission was continuing to produce work that was both excellent and viable.

Election of officers

12. The ACTING CHAIRMAN invited nominations for the office of Chairman.

13. Mr. TSURUOKA nominated Mr. Šahović, whom he described as both a scholar and a skilful diplomat and as particularly qualified for the office of Chairman on account of his sense of justice and his kindness coupled with efficiency.

14. Mr. USHAKOV, Mr. REUTER, Mr. THIAM, Sir Francis VALLAT, Mr. JAGOTA and Mr. TABIBI seconded the nomination.

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

15. The CHAIRMAN thanked the Commission for having elected him to the Chair and said that he would endeavour to show himself worthy of the trust the members had placed in him.

16. The Commission's previous session had been chaired by Mr. Sette Câmara, to whom he addressed congratulations on his election to the International Court of Justice. In addition, and together with a large number of the Commission's members, Mr. Sette Câmara had represented the Commission at the General Assembly with great distinction; in its resolution 33/139, the Assembly had expressed its appreciation of the work accomplished by the Commission in 1978. The recommendations made in that resolution were in keeping with the Commission's own intentions.

17. In consequence of the election of Mr. Ago, Mr. El-Erian and Mr. Sette Câmara to the International Court of Justice—and the Chairman wished them the fullest success in that new office—the Commission was in a delicate position. The vacancies that had arisen would have to be filled and new special rapporteurs would have to be appointed. He was sure, however, that, as on so many occasions in the past, the Commission would speedily meet the requirements of the situation.

18. Lastly, he wished to refer to the adoption, on 23 August 1978, of the Vienna Convention on Succession of States in Respect of Treaties, and to express special thanks to the two Special Rapporteurs, Sir Humphrey Waldock and Sir Francis Vallat, whose devoted work had thus been crowned with success.

19. He invited nominations for the office of first Vice-Chairman.

20. Mr. TABIBI nominated Mr. Pinto.

21. Mr. TSURUOKA and Mr. JAGOTA seconded the nomination.

Mr. Pinto was unanimously elected first Vice-Chairman.

22. Mr. PINTO thanked the members of the Commission.

23. The CHAIRMAN invited nominations for the office of second Vice-Chairman.

24. Mr. FRANCIS nominated Mr. Díaz González.

25. Mr. REUTER and Mr. TSURUOKA seconded the nomination.

Mr. Díaz González was unanimously elected second Vice-Chairman.

26. Mr. DÍAZ GONZÁLEZ thanked the members of the Commission.

27. The CHAIRMAN invited nominations for the office of Chairman of the Drafting Committee.

28. Sir Francis VALLAT nominated Mr. Riphagen.

29. Mr. REUTER seconded the nomination.

Mr. Riphagen was unanimously elected Chairman of the Drafting Committee.

30. Mr. RIPHAGEN thanked the members of the Commission.

31. The CHAIRMAN invited nominations for the office of Rapporteur.

32. Mr. THIAM nominated Mr. Dadzie.

33. Mr. SCHWEBEL, Mr. JAGOTA and Mr. USHAKOV seconded the nomination.

Mr. Dadzie was unanimously elected Rapporteur.

Adoption of the agenda (A/CN.4/316)

The provisional agenda (A/CN.4/316) was adopted unanimously.

The meeting rose at 5 p.m.

1531st MEETING

Tuesday, 15 May 1979, at 11.30 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Organization of work

1. The CHAIRMAN said that, in the absence of sufficient information about all the items on the agenda, the Enlarged Bureau was not yet in a position to recommend a general programme of work for the current session. The Bureau's only recommendation so far was that the Commission should first consider the topic "State responsibility". Since the election of Mr. Ago, Special Rapporteur on that topic, to the International Court of Justice at the thirty-third session of the General Assembly, a communication had been addressed to the President of the Court to inquire whether Mr. Ago would be able to introduce his eighth report, relating to the final articles of part I of the draft on State responsibility, and comment thereon in the Commission. By letter dated 12 March 1979, the contents of which had been brought to the attention of the Commission's members, the President of the Court had signified his consent, subject to certain conditions, in particular the condition that Mr. Ago would participate in the Commission's deliberations in his individual and personal capacity.

2. The Enlarged Bureau further recommended that the first three weeks of the session should be used for considering the relevant documents submitted by the Special Rapporteur and already circulated (A/CN.4/318 and Add.1-3) and that another addendum, to be circulated later, should be considered during one week early in July.

3. In the absence of objections, he would take it that the Commission agreed to accept those recommendations and to invite Mr. Ago to attend as from the next meeting to introduce and comment on his report.

It was so decided.

The meeting rose at 11.45 a.m.

1532nd MEETING

Wednesday, 16 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

Status of members of the Commission

1. Mr. SUY (Under-Secretary-General for Legal Affairs) recalled that at its previous session the Commission had expressed the wish that the Secretary-General

should approach the Swiss authorities for the purpose of obtaining an improvement in the status of the members of the Commission.

2. Early in the autumn of 1978, he had had a conversation with the Permanent Observer of Switzerland to the United Nations, who had promised to put the question to the Swiss authorities. A few weeks later, he had received the visit of two officials of the Federal Political Department, to whom he had voiced the concern of the Commission's members and who had left him with the impression of being favourably inclined to the idea of improving the members' status. In February 1979, the Permanent Observer of Switzerland to the United Nations Office at Geneva had informed him that the Federal Political Department had proposed to the Federal Council that the members of the Commission should be eligible for the same privileges and immunities as heads of diplomatic mission accredited in Geneva; but that proposal had still to be considered by other departments.

3. He had just been informed by the Permanent Observer of Switzerland to the United Nations office at Geneva of the decision taken by the Federal Council on 9 May 1979, the text of which was contained in a communiqué addressed to the Secretary-General and which read:

On the proposal of the Federal Political Department the Federal Council decided on 9 May 1979 to accord, by analogy, to the members of the International Law Commission, for the duration of the Commission's sessions at Geneva, the privileges and immunities to which the Judges of the International Court of Justice are entitled while present in Switzerland. These are the privileges and immunities enjoyed by the heads of mission accredited to the international organizations at Geneva. The members of the International Law Commission will be entitled to a special red identity card.

4. The CHAIRMAN thanked Mr. Suy for the efficiency with which he had acted since the previous session. The status of the members of the Commission was of special importance owing to the duration of the Commission's sessions. The way in which the problem had been settled would certainly give the members of the Commission full satisfaction. The decision of the Federal Council, to which he expressed the Commission's sincere thanks, was further evidence of the constructive co-operation between Switzerland and the United Nations, which, in the particular case, served the cause of the codification and progressive development of international law.

State responsibility (A/CN.4/318 and Add.1-3) [Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)

5. The CHAIRMAN congratulated Mr. Ago on his election to the International Court of Justice and expressed his thanks to the Court for having authorized Mr. Ago to participate in the Commission's deli-

berations on State responsibility—evidence of the Court's wish to continue to co-operate with the Commission in the codification and progressive development of international law.

6. He invited Mr. Ago to introduce the part of his eighth report on State responsibility (A/CN.4/318 and Add.1-3) dealing with the indirect responsibility of a State for an internationally wrongful act of another State (A/CN.4/318), and more specifically article 28 (*ibid.*, para. 47), which was drafted in the following terms:

Article 28. Indirect responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is not in possession of complete freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not entail the international responsibility of the State committing the wrongful act but entails the indirect international responsibility of the State which is in a position to give directions or exercise control.

2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not entail the international responsibility of the State which acted under coercion but entails the indirect international responsibility of the State which exerted it.

7. Mr. AGO said that in introducing his eighth report on State responsibility his intention had been to comply with the Commission's request, made at its thirtieth session, that he should supplement part I of the draft articles on State responsibility.

8. He recalled that chapter IV, which dealt with the implication of a State in the internationally wrongful act of another State, covered two possible situations. The first, described in section 1,¹ which the Commission had considered at its thirtieth session and which was the subject of article 27, was usually called "complicity" of a State in the commission by another State of an internationally wrongful act—in other words, the case where a State, without necessarily itself committing an internationally wrongful act, was a party to an internationally wrongful act committed by another State by giving aid or assistance to that other State for the commission of the act. The second situation, described in section 2 (A/CN.4/318 and Add.1-3, paras. 1 *et seq.*), which the Commission was about to consider and which was the subject of article 28, was that of the indirect responsibility incurred by a State for the internationally wrongful act of another State—in other words, the case where a State without being a party to the internationally wrongful act of another State in the form of providing aid or assistance for the commission of the act, found itself, in relation to that other State, placed in a situation in which the responsibility arising out of the internationally wrongful act committed by that other State was laid at its door.

¹ See *Yearbook... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, paras. 55 *et seq.*

9. In that connexion, referring to the principle laid down in article 1 of the draft,² namely, that “every internationally wrongful act of a State entails the international responsibility of that State”, he recalled that the Commission had explained in its commentary that that was a general rule applicable to the “normal situation”, but that there might be “special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed”, and had added that those exceptional cases would be covered later in the draft.³ The time had come to deal with those cases in the framework of the chapter on the implication of a State in the internationally wrongful act of another State.

10. It had taken a long time for the concept of indirect responsibility to crystallize in legal literature, for the expression “indirect responsibility” had often been misused in the past to describe various situations which in fact involved direct responsibility, for example the responsibility incurred by a State in connexion with acts of private persons or acts committed by agencies that were not competent.

11. The concept of “indirect” responsibility, or of responsibility for the “act of another”, raised a two-fold problem. It was necessary to define that concept in the light of an examination of cases where there was attribution of responsibility to a party other than that to which there was attribution of the internationally wrongful act, and to produce a justification for that exceptional occurrence.

12. The first writer to undertake to justify the existence of responsibility for the act of another in international law had been Anzilotti, who had referred in particular to the relations of dependence of one State on another. He had thought that such justification was to be found in the existence, in those relations, of a relationship of international representation.⁴ According to Anzilotti, the State which undertook to represent another State internationally was answerable for the internationally wrongful acts committed by that other State, for, inasmuch as the represented State entertained no direct international relations, a third State which had suffered some injury could not apply directly to that State for the purpose of obtaining reparation. Logically, therefore, the international responsibility for wrongful acts committed by the represented State was attributable indirectly to the representing State.

13. That theory had been accepted for a number of years, but had then been criticized by some authors, who had argued that, while according to the system of international representation a State injured by the internationally wrongful act committed by the repre-

sented State could apply to that State solely through the representing State, that was no reason why the representing State should be held answerable for the wrongful act in place of the represented State. The injured State could very well lay before the representing State the direct responsibility of the represented State, and not the indirect responsibility of the representing State, for the represented State's wrongful act. The attribution to one State of responsibility for an act committed by another State therefore had to be justified on grounds other than international representation.

14. Verdross had sought to justify Anzilotti's theory by reference to State practice and, in particular, by reference to the ruling of Judge Huber in the *British Claims in the Spanish Zone of Morocco* case, from which he had singled out the sentence which said that “the responsibility of the protecting State arises from the fact that it alone represents the protected territory in its international relations”, and that the protector was answerable “in place of the protected State”.⁵ In reality, however, Judge Huber had not intended in his ruling to justify the protector's responsibility for the act of the protected on the grounds that the former had representation of the latter, but on the grounds of what actually occurred in the protectorate relationship. He had observed that in most cases that relationship entailed so great an interference by the protecting State in the internal affairs of the protected State that the protecting State appeared to be almost sovereign in the territory of the protected State. It was therefore logical to attribute to the protecting State responsibility for acts committed in that territory, the organs of the protected State being no more than decentralized organs of the protecting State. Verdross's attempt to find a basis for Anzilotti's theory in international jurisprudence and practice had thus been unsuccessful.

15. During the subsequent evolution of doctrine, the theory of representation had thus been abandoned, and the basis for indirect responsibility had instead been sought in the very nature of certain relations existing between two States. The point of departure taken had been the observation that indirect responsibility arose in cases where there was a relationship of dependence of one State on another (vassalage, protectorate, mandate, etc.). The question had then arisen whether a relationship of dependence between States always, as such, entailed the responsibility of the dominant State for the internationally wrongful acts committed by the dependent State, or whether such an effect must be limited to the existence, in the framework of that relationship, of certain specific conditions. And it had been asked what could be the justification for the responsibility in question.

16. Initially, it had been thought that responsibility for the act committed by another State could be founded on practical considerations. According to the “Schutztheorie”, the dominant State should be held answerable for the internationally wrongful acts of the

² For the text of all the draft articles adopted so far by the Commission, see *Yearbook... 1978*, vol. II (Part Two), pp. 78 *et seq.*, document A/33/10, chapter III, section B, 1.

³ *Yearbook... 1973*, vol. II, p. 178, document A/9010/Rev.1, chapter II, section B, article 1, para. (11) of the commentary.

⁴ See A/CN.4/318 and Add.1-3, para. 5.

⁵ *Ibid.*, para. 8.

dependent State, on the grounds that third States that had suffered injury might, in resorting to coercive measures against the dependent State in order to obtain reparation, encroach on the rights and interests of the dominant State and even oblige it to intervene to protect the dependent State. Making the dominant State answerable for acts of the dependent State would be, as it were, a necessary measure to safeguard the interests of the dominant State. A variant of the "Schutztheorie" appeared in the argument of Verdross, who had justified the concept of indirect responsibility on the grounds that recourse by the injured State to enforcement measures against the dependent State would constitute inadmissible interference in the legal sphere of the dominant State.⁶

17. In 1928, Eagleton had drawn attention to the connexion between the responsibility and the freedom of decision and of action of the State that committed an internationally wrongful act. In Eagleton's opinion, "responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control or, conversely, the actual amount of control left to the respondent State".⁷ Consequently, the existence of responsibility on the part of one State for another State's internationally wrongful act was bound up, in Eagleton's opinion, with the existence of some control exercised by the former over the activities of the latter. Thus, in relations like those existing in the case of a protectorate, the protecting State could not be held answerable for the breach of an international obligation on the part of the protected State except in so far as it had control of that State. As early as 1883, F. de Martens had expressed the same idea when he had written that logic and equity would require that States that were in a situation of dependence should be "responsible for their actions towards foreign Governments only in proportion to their freedom of action".⁸ The modern theory of indirect State responsibility had evolved on those lines.

18. In cases where there was a relationship of dependence between two States, a distinction should in fact be drawn between two possible situations. The first situation was that where the interference of one State in the affairs of the other implied a substitution of the former for the latter in certain areas; in such a situation the dominant State's agencies were operating in the territory of the dependent State. If, therefore, a breach of an international obligation of the dependent State were committed in the framework of such a sphere of activity (for example, denial of justice in the territory of the protectorate by the judicial authorities directly subordinate to the protecting State), not only was the dominant State responsible, but it was directly responsible, for its responsibility flowed directly from the activities of its own agencies.

19. The second situation was that where a dependent State continued to act in certain areas through its own

agencies, but where those agencies were not free in that they were subject to the control of the dominant State. Only in that situation was it truly possible to speak of responsibility attributable to the act of another, or indirect responsibility, since the internationally wrongful acts committed by the organs of the dependent State in the exercise of an activity of the dependent State were committed by that State, and not by the dominant State which assumed responsibility for them. It was logical, however, that responsibility for those acts should be borne by the dominant State if the sphere of activity in which the said acts had been committed was under the direction or control of the dominant State.

20. On the other hand, indirect responsibility could occur not only in relations of dependence that were becoming obsolete, such as protectorates, but also in other situations, in particular military occupation. A State under military occupation retained its international sovereignty, but the interference of the occupying State in the internal affairs of the occupied State limited the latter's freedom of action. The occupying State must therefore be regarded as indirectly responsible for an internationally wrongful act committed by the occupied State in a sector of activity in which the latter State was subject to the direction or control of the occupant. Similarly, in the case of temporary dependence of one State on another resulting not from the existence of a stable and permanent relationship but, for example, from a specific act of coercion, the State that forced another State to commit an internationally wrongful act could be regarded as indirectly responsible for that act.

21. It was less certain whether a federal State should be held internationally responsible for the act of one of its constituent States, for only very rarely was a constituent State of a federal State a separate subject of international law. If it was not, then the federal State was directly answerable for the act of the constituent State, as for the acts of any other public collectivity in its territory. Only if the constituent State possessed its own international capacity could the question arise.

22. The last question was whether indirect responsibility was an exclusive responsibility or whether the responsibility of the controlled State coexisted with that of the controlling State.

23. The analysis of international practice confirmed the conclusions reached by most authors in their most modern pronouncements. In its answer to the request for information made by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930), Denmark had very pertinently remarked that the reply to the question depended "upon the nature of the relations between the two States, the extent and character of the control exercised by one State over the administration of the other State, and the degree of autonomy left to the subordinate or protected State".⁹

⁶ *Ibid.*, para. 15.

⁷ *Ibid.*, para. 17.

⁸ *Ibid.*, foot-note 33.

⁹ *Ibid.*, para. 30.

24. In cases of military occupation, the experience of the Second World War had also confirmed the distinction to be drawn between two possible situations: a situation in which the occupying State merely supervised the activities of the occupied State, and a situation in which the occupying State replaced some of the occupied State's organs by its own organs for the purpose of ensuring the safety of its armed forces or for the purpose of maintaining public order, if the occupied State was unable to do so itself. Practice had confirmed that, in a situation of the first type, an internationally wrongful act committed by an organ of the occupied State entailed the indirect responsibility of the occupying State, and that, in a situation of the second type, such an act entailed the latter's direct responsibility. Control was thus the true criterion of responsibility for the act of another in international law.

25. As for the question whether or not the indirect responsibility of the "controlling" State excluded the direct responsibility of the "controlled" State, he thought that the former should normally exclude the latter. Article 28 should therefore, in his view, state that responsibility for the act of another originated in the control exercised by one State over another State, and that such responsibility, normally at least, was exclusive in nature.

26. Mr. USHAKOV wished to ask Mr. Ago three questions. First, did the article under discussion deal with situations that were lawful or that were unlawful under modern international law? Secondly, could the relationship between the constituent members of a federation and the federal State be said to be a relationship of dependence and, if so, by what rule of international law? Thirdly, what was the connexion between the article under discussion and article 2 of the draft, under which "every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility"?

27. Mr. AGO, answering the first question, said that the situations contemplated might be either lawful or unlawful. Military occupation might be lawful in some cases but unlawful in others. Unlawful situations of dependence were fortunately tending to disappear, but the possibility that some of them might reappear could not be excluded. A case where coercion was used normally implied an unlawful situation. However, the fact that such a situation was unlawful was certainly not a reason for denying that the State resorting to coercion should be held internationally responsible for the act of the State subjected to coercion. In such a case, the unlawfulness of the coercion was an element that tended rather to corroborate, from the standpoint of simple justice, the responsibility of the coercing State. In the final analysis, there was little point in inquiring whether a particular situation was or was not lawful: what mattered was the consequence of the situation.

28. With regard to Mr. Ushakov's second question, he wished to dispel any possible misunderstanding: if,

in a federal State, a constituent State had retained a certain international personality and committed an internationally wrongful act, the situation might exceptionally be one of responsibility for the act of another, but it was certainly not a situation of dependence.

29. Mr. Ushakov's third question concerned the connexion of the article under discussion not only with article 2 but also with article 1. The first two draft articles laid down the fundamental rules. In drafting article 1, under the terms of which "every internationally wrongful act of a State entails the international responsibility of that State", the Commission had considered whether it might not be preferable to state that such an act entailed *a* responsibility, inasmuch as it was conceivable, in exceptional cases, that some other State's responsibility might be entailed. But it had preferred to lay down the general rule and to refer to possible exceptions in its commentary to the article. The same problem had arisen in connexion with article 2, according to which "every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility". In exceptional circumstances it might happen that a dependent State's decision-making power was limited in certain areas, and that an internationally wrongful act committed by it in one of those areas entailed the indirect responsibility of the dominant State.

30. He wished to make some further remarks to supplement his presentation of article 28. As he had said, and although he had argued otherwise in some of his writings, he was now inclined to defer to the prevailing opinion of learned writers that a State had exclusive indirect responsibility for the internationally wrongful act of another State if it had influenced the latter's decision-making power. In fact, learned writers had not expressed a very clear-cut opinion on that point, nor did the practice of States offer any enlightenment in support of a definitive position; accordingly, were the Commission to take the view that there could be coexistence of the two responsibilities, he would accept that view. It should be pointed out that the Commission was bound neither by the opinion of learned writers nor by State practice, and that it was free to promote the progressive development of international law.

31. Mr. REUTER said that Mr. Ago had cleared the ground and had discussed a number of legal mechanisms that did not have to be considered by the Commission and that would not have to be taken into account in the article under discussion. Very constructively, Mr. Ago had also offered certain options and even voiced some doubts for consideration by the members of the Commission.

32. The expression "indirect responsibility", which Mr. Ago, like many authors, had used, was not very satisfactory; but the expression "responsibility for the act of another" was hardly more appropriate in international law. Perhaps that was the difficulty that had given rise to Mr. Ushakov's second question; was the

concept of responsibility for the act of another really acceptable at the international level?

33. The subject-matter dealt with by Mr. Ago touched on a large number of possible situations, in each of which there was one victim and at least two States were implicated in an internationally wrongful act. One of the theories not to be accepted, as Mr. Ago had shown, was the "representation theory"—a theory which was still vague but which, in any case, was out of place in the draft. Another case that should be disregarded was that where two States had lawfully apportioned competence among themselves. It was immaterial that in the case of such an apportionment within a federal State there was also a case of representation. The Commission had already laid down the rule that the conduct of an agency of the State, whatever its position in that State's internal organization, was deemed to be the act of that State.

34. Among the other situations to be disregarded were those which, in his opinion, were reminiscent more of a real union than of the protectorate. An example was the case of the relationship between Switzerland and Liechtenstein, but there were also other economic unions of two States. In such cases the rule was simple: each State was answerable for its own acts. Theoretically the same ought to have been true of the case of a protectorate if it had operated in its genuine legal form—which had not very often been the case.

35. In theory at least, there should be no problem in the case of a *de jure* situation, even if a military occupation was involved, in which case the occupying authorities and the authorities of the occupied State could act within the limits of their competence as recognized by international law. But there were also *de facto* situations. For example, in consequence of the conclusion of the Treaty of Fez (1912) concerning the French protectorate in Morocco, France had performed certain actions in that country which had given rise to a *de facto* situation. He thought that the existing draft articles should probably be supplemented by provisions dealing with the consequences flowing from *de facto* situations.

36. *De facto* situations could be of various kinds. For example, a State might exert coercion against another State, but it could happen that there were not even two States involved. For instance, if in a territory under its control a State set up a puppet State having the mere semblance of a State, it was for the other State to determine whether that puppet State had or had not a real existence. It had such an existence in the eyes of any State that recognized it, whereas in the eyes of the other States the original State was answerable for the newly created State's actions at the international level. It was not necessary for the Commission to deal with such a case, because it was governed by the international rules concerning the recognition of States.

37. As far as military occupation was concerned, he recalled that a large part of France had been occupied

by German troops in 1940, but that the French State had continued to exist, with a government which for a number of years had been the only one to be recognized by some other States. In the northern zone, French and German authorities had coexisted and it was perfectly conceivable that the French authorities, under the pressure of the German authorities, had committed some internationally wrongful acts for the purpose of safeguarding legitimate interests. By reason of the continuing existence of the French State—and despite what successor governments had said—it was arguable that the existing French State had a share of responsibility in the commission of those acts. Situations of that kind were not beyond the scope of the general principles laid down in the draft articles already adopted. For the time being, the Commission was not concerned with determining whether two States could be regarded as joint parties to a wrong or as jointly answerable for a wrong, but it would have to consider a serious question of attribution.

38. His personal view was the following. Article 9 of the draft dealt with the reverse *de jure* situation, where a State had placed one of its organs at the disposal of another State. In the case where a State in fact took over the control of an agency of another State, the rule proposed by Mr. Ago was acceptable. However, provision should also be made for the case where all that happened was that a degree of influence, supervision or dominance was exerted on another State. In his opinion the general principles should be respected. Articles of general scope would suffice, although the special case of total *de facto* control would certainly have to be mentioned. In most cases, moreover, there was an intermediate situation, and that situation, therefore, should either be dealt with in a separate article or some reference to it should be made so that it could be considered at the time when the Commission dealt with such matters as complicity and compensation.

39. Mr. SCHWEBEL also wished to congratulate Mr. Ago on a characteristically erudite and perspicacious report.

40. In essence he fully agreed with the views expressed by Mr. Ago. However, in foot-note 99 of Mr. Ago's report, it was suggested that "coercion" should be understood in the sense in which the term was accepted in the United Nations system. It was perfectly understandable that the Commission might not want to consider the term in any depth, but the sense in which it was accepted in the United Nations system was somewhat vague and contradictory. Legal doctrine was not clear on that point and perhaps its least ambiguous expression was to be found 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.¹⁰ Yet the terms of the Declaration itself were not particularly clear and, even if doctrine could be

¹⁰ General Assembly resolution 2625 (XXV), annex.

said to be set out in the Declaration, State practice conspicuously failed to conform to doctrine. The question arose what value could be placed on doctrine when practice conflicted with it. Almost every day the newspapers reported cases of the application of coercion to a State that had lately acted in accordance with the most obvious norms of the Charter, but the United Nations none the less failed to respond by way of condemnation.

41. A more important point was whether the responsibility of the dominant State should be exclusive or joint and several. Mr. Reuter had already offered a striking example. Yet another was one in which, for instance, State A was partly occupied and substantially controlled by State B and unlawful assaults on the territory of State C were mounted from the territory of State A. State A was unable to control those assaults and State B was unwilling to control them, although it might have the ability to do so. In that case, was State C obliged to invoke the responsibility of State B alone, and was State A to be exonerated solely because State B was in a position, in the last analysis, to control the ultimate decisions, but not necessarily all the daily decisions, of State A? His own preference would be to favour the development of the law and cast the draft article in terms that would admit joint and several, rather than exclusive, responsibility.

42. Lastly, paragraph 1 of the proposed article seemed to be unnecessary and he wondered whether in fact it endeavoured to say something that was not said in paragraph 2.

The meeting rose at 1 p.m.

1533rd MEETING

Thursday, 17 May 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

Communications from former members of the Commission

1. The CHAIRMAN read out the text of two messages sent to the Commission by Mr. Sette Câmara and Mr. El-Erian, respectively, wishing it all success in the work of the session, and more generally in its

work on the codification and progressive development of international law in the cause of international peace and co-operation.

2. He would not fail to reply to those messages and to wish the senders, on behalf of the Commission, every success in their new functions as members of the International Court of Justice.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)¹ (*continued*)

3. Mr. VEROSTA said that, before studying the eighth report on State responsibility (A/CN.4/318 and Add.1-3), he had taken note of draft article 28, of which paragraph 1 alone called for four comments on his part.

4. First, by envisaging the case of a State which "is not in possession of complete freedom of decision", that provision implied that some States did have such freedom, which was hardly realistic. Even in the case of individuals, the notion of freedom of the will raised many philosophical and moral problems. In the case of a State, decisions were made by State agencies. Of course, in principle, freedom of will and freedom of action did exist, but those freedoms were limited, even for the agencies and political leaders of the great Powers, by considerations of internal policy, the economic order or international relations. Furthermore, the expression "complete freedom" denoted 100 per cent freedom. What would happen if a State which had retained 50 per cent of its free decision-making power did not exercise it in order to forestall the commission of an internationally wrongful act? Would it be exempt from international responsibility altogether?

5. Secondly, it was no doubt difficult to determine, in practice, at what point a State was "subject, in law or in fact, to the directions or the control of another State". The subordination in law of one State to another occurred mainly in the case of protectorates and other similar régimes established by treaty. Generally, subjection to the directions of the dominant State raised the question of the good or bad will shown by the subordinate State in the application of those directions. For example, Nazi Germany had directed the States dominated by it to persecute Jews and Gypsies, but the direction had been very diversely applied. Whereas Slovakia had managed for a long time to protect the Jews and the Gypsies, and Bulgaria had

¹ For text, see 1532nd meeting, para. 6.

allowed Bulgarian Jews to leave the country with all their possessions, other States had applied those directions with more zeal. If the organs of the dependent State were not favourable to the cause of the dominant State, it was always open to them to try to evade its control. Since they had the opportunity of refraining from committing certain internationally wrongful acts, they assumed a share of the responsibility if they committed such acts.

6. Thirdly, what was meant by "State which is in a position to give directions or exercise control"? Did a State which enjoyed such power exercise it lawfully, or unlawfully? Since paragraph 2 of the article in question concerned coercion, presumably paragraph 1 referred to the case where the dominant State acted within the limits of its legal competence.

7. Fourthly, and lastly, the rule stated in paragraph 1 seemed too radical in that it exempted from all responsibility a State which was subject to the directions or the control of another State and attributed the international responsibility for the wrongful acts of the dominated State exclusively to the dominant State. That rule was liable to cause weak States to apply the directions of the dominant State and accept its control without too many scruples, since full international responsibility would ultimately devolve upon that State.

8. Reading the written presentation of the article had not changed his first impressions. However, he noted that Mr. Ago, in his oral presentation (1532nd meeting), had intimated that he would be willing to accept the idea of a dual or shared responsibility. In his opinion, the solution to the problem should be sought in that direction.

9. Mr. TSURUOKA approved, in principle, draft article 28. It met a need and followed quite naturally an article dealing with aid or assistance given by one State to another for the commission of an internationally wrongful act. Mr. Ago had explained that his reason for using the expression "indirect responsibility" was that it had gained general acceptance in international law terminology and had a fairly precise meaning. But for his own part, without questioning that statement, he saw no need to make a distinction between indirect responsibility and direct responsibility for the purposes of article 28. If State A assumed vis-à-vis State C responsibility for an internationally wrongful act committed by State B, State A alone was responsible vis-à-vis State C. And if it was recognized that States A and B could both be responsible vis-à-vis State C, that responsibility should be the same for both States.

10. The concept of complete freedom of decision raised certain doubts which it would be advisable to dispel. In view of the growing interdependence of States, no country was really free to act in complete freedom.

11. Referring to paragraph 2, he pointed out that the use of coercion did not mean that the State exerting it was exclusively responsible. But the very concept of coercion was not very clear and should be clarified in

the light of the provisions of article 52 of the Vienna Convention on the Law of Treaties.²

12. For all those reasons, he announced that he would propose a text for draft article 28.³

13. Mr. USHAKOV said he did not approve of draft article 28. In the first place, there was no such thing as indirect responsibility, either in international law or in internal law. Of course, authors might have spoken of direct responsibility for acts and of indirect responsibility for omissions, but it was not possible in law to make such a distinction. Legally, a natural or legal person was civilly, penally or administratively responsible for his or its own acts or omissions. The responsibility referred to in article 28 was an international responsibility which should not be described as either direct or indirect. A natural or legal person could not in any case answer for the deeds of others. On the other hand, there were circumstances in which a person's responsibility was not involved. Sometimes there was an apparent responsibility for an act committed by others. In internal law, for example, parents were said to be responsible for the acts of their children. Actually, they were responsible, not for the acts of their children, but for failure to comply with their legal obligations in the matter of their children's conduct; they were responsible for their own omissions.

14. The draft articles under consideration were addressed to States, in other words, to some 150 Members of the United Nations and a few other countries which were not Members. All were sovereign and politically independent; none was subject to the supremacy of another State. Their sovereignty and independence were very real, which explained why the smallest of them could rid themselves of any coercion with the aid of other States, the international community or international organizations. If it were otherwise, the small States would be unable to survive. Admittedly, nothing was absolute, and there was a certain interdependence among States, particularly in the economic sphere. But it was precisely because existing States were sovereign and independent that the Commission had been able to lay down a general rule like that in article 2,⁴ whereby every State was subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

15. Draft article 28 envisaged the case of States which were not in possession of complete freedom of decision. Yet, in his view, there was no State which did not possess in law complete freedom of decision or which was subject, in law, to the directions or control of another State. Nor could the case envisaged by the draft article under consideration apply to federal States. It would be a novel conception of federalism to

² For the text of the Convention, 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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

³ Subsequently distributed as document A/CN.4/L.289.

⁴ See 1532nd meeting, foot-note 2.

affirm that the member States of a federal State did not possess complete freedom of decision and that they were subject to the control of the federal State. If they lacked competence in international relations, they were incapable of incurring any international responsibility of their own. On the other hand, if a member State of a federal State, such as a Swiss canton, was qualified to conclude international agreements, it alone was responsible for the agreements it concluded, within the limits of its competence. But that was no reason for regarding a Swiss canton as subject to the domination of Switzerland.

16. So far as occupied States were concerned, a distinction should be drawn between the military occupation of the entire territory of a State by an aggressor State—an unlawful situation—and a liberating military occupation. Only in the former case could one truly speak of occupation. Surely, the responsibility of such an occupied State could not be equated with that of the sovereign and independent States with which the draft was concerned, for an occupied State was not free to act. Similarly, if only part of a State's territory was occupied, that State was not sovereign and independent in that part of its territory, and should not be held responsible for whatever happened there. In either case, the situation was unlawful and not within the scope of the draft articles, which should in principle apply only in the context of lawful situations.

17. The earlier theory of general and compulsory international representation had been evolved with the object of giving colonial territories the semblance of States. For that purpose, the concept of partial sovereignty had been invented—a concept which ought to be rejected, for sovereignty could not be restricted. It was by pure fiction that colonies, protectorates, mandated territories or trust territories and other non-self-governing territories had been considered as so-called States whose international representation must be ensured, whereas they had not been sovereign and independent States. Consequently, dependent territories, too, were not States within the meaning of the draft articles. In short, paragraph 1 of draft article 28 did not apply to any of the situations described by Mr. Ago.

18. The coercion referred to in paragraph 2 of article 28 was not, presumably, a moral coercion; rather, he took it that the provision was meant to refer to the case of the use of force in international relations, which necessarily led to an unlawful situation. If a State exerted coercion or proposed to exert coercion by recourse to the use of armed force, it manifestly created an unlawful situation for which it was answerable. But was it arguable that a State which, under the pressure of coercion, committed an act of aggression or an act of genocide, or even resorted to force in order to maintain a situation of colonial domination, could be wholly exonerated from responsibility? Such an argument was quite untenable, and yet that was the situation provided for in paragraph 2 of draft article 28. An exception should, of course, be made for the case where a State committed an internationally wrongful act under coercion exerted by an invading

State, but that case should not be taken into consideration by the Commission since it presupposed an unlawful situation.

19. To sum up, he considered that the provisions of draft article 28 were not justified. However, he paid a tribute to Mr. Ago, whose research had thrown light on earlier theories and had made it possible to form a better idea of the problem as a whole.

20. Mr. PINTO said it was apparent from the formulation of article 28 that Mr. Ago, from a sense of justice, had tilted indirect responsibility away from the subordinate State to the dominant State and had also taken account of the right of third States that had suffered damage to claim compensation from the party best able to provide compensation, which was also most likely to be the party truly responsible for the internationally wrongful act. Normally, an article cast in such terms would have commanded his support, but he experienced some hesitation because he had sought to view article 28 in the context of the internal logic of the draft articles as a whole.

21. The basic principles enunciated in the earlier draft articles indicated that, before a State could be determined to have incurred international responsibility, it must be demonstrated that the State in question had committed an internationally wrongful act. Since the State was conceived as acting through other entities, articles 5 to 15 specified with some degree of precision whose acts could engage the responsibility of the State—for instance, not only the actual organs of the State but also other entities or persons or groups of persons empowered by the State to act on its behalf. Generally, there must be some real connexion between the entity or person perpetrating the act and the authority of the State—in other words, the entity or person must have exercised “elements of the governmental authority”, as prescribed in articles 7, 8 and 9. Accordingly, the entity or person in question was seen to be acting as the State or on behalf of the State, in which case the act was attributable to the State. In other cases, the general rule, as reflected in articles 11, 12, 13 and 14, was that the act could not be attributed to the State. If the entities or persons concerned did not exercise elements of the governmental authority, they did not act as the State or on behalf of the State, and their acts did not entail the responsibility of the State.

22. Chapter IV of the draft articles introduced a new range of circumstances which gave rise to international responsibility, circumstances in which a State was not the sole perpetrator of the act but was implicated in the internationally wrongful act of another State. Presumably, however, the same principles of attribution would apply also in the articles of chapter IV. For example, under article 27, aid or assistance by a State to another State for the commission of an internationally wrongful act must be found to be attributable to the State before its responsibility could be entailed, and such aid or assistance must be rendered by an entity or person exercising elements of the governmental authority. However, article 28, dealing with the

concept of indirect State responsibility, appeared to depart from the previous internal logic of the structure of the draft because the essential connexion between the State and its responsibility for an internationally wrongful act, namely, attribution of the act to the State on the basis of the exercise of elements of the governmental authority, was missing.

23. Under article 28, the State which was subordinate, or was not wholly free, was not exercising elements of the governmental authority and was not acting on behalf of the "dominant" State. The perpetrator of the internationally wrongful act was acting on its own behalf, with no stated power or authority to act on behalf of the dominant State, yet the latter's responsibility was entailed. Under comparable circumstances set out in article 11, the conduct of persons not acting on behalf of the State was not to be considered as entailing the responsibility of the State, although the control by the State over such individuals might well be far greater than the control envisaged in article 28 (the control by the dominant State over the subordinate State). He was not sure that there were adequate grounds for abandoning the guiding principle of the draft, which called for attribution of the act to the State, in accordance with the terms of articles 5 to 15, before the State's responsibility could be engaged.

24. Mr. Ago had furnished a wealth of documentary evidence in support of the principle formulated in article 28, but the question that arose was whether that principle, even if it had existed in the past, should be perpetuated in the draft. Indeed, the cases cited were full of expressions that unmistakably bore the imprint of a long-distant past. References were made to "superior", "subordinate", "vassal", "suzerain", "dominant" and "puppet" States—terms which, even if they were employed in the commentary, were likely to set up barriers to understanding and acceptance of a proposed rule, however well founded the rule might be. In the modern world, the doctrine of the sovereign equality of States was an axiom of international law. If an entity was a State, it was sovereign and, in theory, its freedom of action and sphere of activity were complete. It could be fettered only by agreements that were freely entered into or by military subjugation. Obviously, the facts of economic life created enormous disparities between States, but it would be inadmissible to say that those disparities created a legal or even a factual inequality. The rules proposed so far by Mr. Ago might well be adequate to resolve the kinds of difficulties involved in the formulation of article 28.

25. Nevertheless, if Mr. Ago considered that the draft did not cover certain circumstances and that account should be taken of the legal relationships envisaged in article 28, relationships which were undoubtedly very few and becoming rarer, the article could speak of "dependent States", as that term was understood in United Nations usage and in the draft articles prepared by the Commission on other topics. Again, Mr. Ushakov had pointed out that military occupation covered many different kinds of situations.

On the other hand, if it proved necessary to include a provision concerning military occupation, it should be confined to specific circumstances, and not enunciated as a general rule. Military occupation should be approached as a *de jure* situation, and the idea of *de facto* "domination" or "superiority" should not be perpetuated.

26. In addition, responsibility arising under the terms of article 28 should be considered as direct rather than indirect. The grounds for such responsibility might be found in the ideas contained in article 21, concerning a breach of an international obligation requiring the achievement of a specified result, and in article 26, relating to a breach of an international obligation to prevent a given event. Mr. Ago might also wish to consider the suggestion that the responsibility of the entity in question should not be erased but should be apportioned between it and the other entity concerned, and related to more fundamental objective factors, such as coercion or necessity, or the non-existence of coercion or necessity.

27. In paragraph 2 of article 28, the concept of coercion should be further developed in order to demonstrate the nature, degree and level of coercion that would engage the responsibility of the State exercising coercion and might act as a defence for the State perpetrating the internationally wrongful act. In that connexion, he fully agreed with Mr. Tsuruoka that article 52 of the Vienna Convention might form a sound basis for a more precise definition of the concept of coercion. Lastly, as in the case of paragraph 1, responsibility incurred under the terms of paragraph 2 should be direct responsibility, and the notion of indirect responsibility should be dropped.

28. Mr. THIAM also doubted the wisdom of introducing the concept of indirect responsibility in draft article 28. In his opinion, the distinction between direct responsibility and indirect responsibility was defensible only for analytical purposes, in other words for the purpose of determining who had committed the act giving rise to responsibility. In the first case, the State responsible had not committed the act. So far as the consequences of responsibility were concerned, however, the concept of indirect responsibility was hardly tenable, for it was relatively immaterial whether the State responsible had or had not committed the act, since, in either case, that was the State which had to make good the damage caused. Accordingly, it seemed unnecessary to deal with the case of indirect responsibility in the context of chapter IV.

29. He agreed with Mr. Ago that the representation theory relied on a legal fiction which took no account of reality. By contrast, he thought that the concept of coercion, compulsion or control better reflected the situation under consideration since, in that case, responsibility appeared to be the counterpart of the right claimed by one State to exercise some form of control or compulsion over another State. The problem, in that case, was how much freedom the dominated State retained. Clearly, if the dominated State enjoyed no freedom, it was not responsible. However, in so far as

it enjoyed some measure of freedom, it might be responsible for an act performed in the exercise of that limited freedom.

30. Since, as Mr. Ushakov had pointed out, colonial situations belonged to the past, the time had come to consider new forms of dependence. In his opinion, the situation described by Mr. Ushakov, namely, that all States were now sovereign and independent, free to act and hence responsible for their acts, was an ideal situation hardly in keeping with reality. In modern international life, the great Powers resorted to economic or political coercion, even though it might be in a concealed form, towards smaller States, and recourse to the international community did not offer the latter guarantees sufficient to preserve their independence. He considered that such a state of affairs could surely not be ignored and that it might be advisable to deal with it in a provision that would tend to limit its consequences or even to prevent it. In his opinion, an amended article 28 might meet that concern. He therefore endorsed the principle embodied in that article.

31. Mr. DÍAZ GONZALEZ said it was an established principle that all sovereign States were responsible as subjects of international law. If that sovereignty were limited *de facto* or *de jure* by another State, whether by one of the traditional forms or in one of the new forms of control that had emerged in international relations, that other State's responsibility might, however, be entailed. Furthermore, while all States were equal in principle, in practice some were "more equal than others", as could be seen from the provisions of the United Nations Charter relating to the Security Council.

32. Paragraph 1 of draft article 28 spoke of "complete freedom of decision", which implied that if such freedom were only partial the situation would be different. Freedom of decision was, however, linked to sovereignty and therefore either did or did not exist: any State subject wholly or partly to the control of another State did not possess that freedom. Consequently, the decisive issue was the extent of control. The party exercising it, *de jure* or *de facto*, must be the one responsible. If the control was exercised *de jure*, there was no problem, but, if it was *de facto*, then draft article 28 was relevant.

33. Paragraph 2 was even more specific in that regard, in that it dealt with control exercised by force. The decisive element was coercion, used by the party exercising control in order to impose its will.

34. He suggested that the draft article might be simplified. It might be reduced to a single paragraph which would reflect those two basic elements, namely, the exercise of control and the use of coercion.

35. Sir Francis VALLAT said that, in view of the complexities of the question, he would be grateful if Mr. Ago could comment at an interim stage on the various points raised thus far in the discussion. Also, with regard to Mr. Pinto's comment that one of the leading principles of the draft was missing in article

28, he thought it would be useful to know the reason why that article had dropped the requirement that certain conduct must be attributable to the State in order for that State to incur responsibility.

36. Mr. USHAKOV appreciated that, from an economic, political or cultural standpoint, probably not one single State was independent, since States were under constant pressures from other States and were never absolutely free. In law, however—and the Commission should concern itself only with the law—all States were, by definition, sovereign and independent States, and therefore responsible for their acts.

37. That being so, was it possible to speak of control exercised by a sovereign State over another sovereign State? He personally thought that, with the exception of a genuine military occupation (which was unlawful and hence outside the scope of the draft articles, which dealt only with lawful situations), the only case in which it was possible to speak of control by one or more States over another was that of a supranational system. If sovereign and independent States delegated part of their sovereignty to a supranational entity, their freedom of decision and action was restricted. It was difficult to say whether it was the supranational entity that was responsible or its member States. The problem of responsibility arose in that instance only.

38. Apart from the new supranational phenomenon, the only situation of dependence which existed in law was that of the "dependent territories", as defined by the United Nations. However, the States referred to in the draft article were not dependent territories. Economic dependence and legal dependence were quite distinct notions: a sovereign State that was independent in law might very well be economically dependent on another State, for instance, for its oil supplies. That certainly did not mean that, in law, it was subject to the control of the other State.

39. Mr. REUTER thought that the question of supranational entities mentioned by Mr. Ushakov should not be broached at that juncture. He considered, on the other hand, that the problem of coercion should be raised, for it touched on substance. If a State had committed an offence whilst under coercion, even unlawful coercion, did its responsibility disappear completely? Or did it subsist in a diminished form? Or did that State remain fully responsible?

40. Unlike Mr. Ushakov, he considered that coercion by the use of armed force was not the only form of coercion. At the time when the problem of coercion had been considered in connexion with article 52 of the Vienna Convention, it had been said that there were forms of coercion other than coercion by armed force. One State might compel another State to commit an internationally wrongful act by threatening, for instance, to interrupt its supplies of arms, thus endangering its national defence. It was true that the situation was a *de facto* one, but the problem arose precisely in connexion with *de facto* situations.

The meeting rose at 1 p.m.

1534th MEETING

Friday, 18 May 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)¹ (*continued*)

1. Mr. FRANCIS, said that, in considering the principle embodied in draft article 28, it was important, while discarding those aspects of the past that were no longer relevant, not to overlook the realities of the present and the implications for the future. That was particularly applicable to the situation unfolding in southern Africa, which was marked by the systematic creation of client States. Rhodesia was but one example, and he would raise the question whether the armed attacks on Zambia, Mozambique and other front line States in Africa were to be regarded as the theoretical responsibility of the United Kingdom or the responsibility of a *de facto* dominant partner, South Africa. Another example was Namibia which, although an entity internationally recognized by the United Nations, was likewise clearly evolving as a client State of South Africa. Both situations were an extension of the *apartheid* principle which the United Nations had condemned in countless resolutions. Another point that merited consideration in the context of the existing situation in southern Africa was the way in which the elements of aid and assistance, referred to in article 27,² and direction or control, dealt with in draft article 28, existed in reference to the dependent and dominant States, respectively.

2. With regard to the important issue of coercion, which was the subject of paragraph 2 of draft article 28, it was his view that, under Article 2, paragraph 4, of the United Nations Charter, the threat or use of force must be regarded as a breach of a peremptory norm of international law. Consequently, where one State coerced another into committing an act and thereby incurred responsibility, it was logical that it

should likewise be responsible for the consequences of the act vis-à-vis any third State.

3. Lastly, he would favour the deletion of the word "indirect" from the expression "indirect responsibility", since any such qualification might create doubt in a sensitive area.

4. Mr. QUENTIN-BAXTER noted that Mr. Ago's detailed commentary and the Commission's discussion on draft article 28 revolved upon the words "indirect" and "exclusive". Like the majority of the Commission's members, he felt that neither of the two concepts could remain in the final draft. Exclusiveness seemed to be somewhat akin to superior orders in the law of war. There was, of course, a point at which a subordinate ceased to be the actor and became a mere instrument to whom responsibility could not attach. That point was not readily reached, however, and it was certainly not for the Commission to lay down the general proposition that the lack of complete freedom of decision negated responsibility or, in the light of the general structure of the draft, to concern itself with propounding such a statement in chapter IV. What it was endeavouring to do in that chapter was to define the circumstances in which a third State's international responsibility was incurred. Chapter V of the draft, which would deal with the important question of grounds for exemption from responsibility, including *force majeure*, would have as much relevance to the matters under consideration as to the other general terms of the draft. It was therefore desirable to sever from the draft article the negative statement in both paragraphs "does not entail the international responsibility of the State". The degree of responsibility of the State implicated in another State's act could be regulated in the general context of the draft when it was completed.

5. A more difficult matter concerned the concept of indirect responsibility. It was not simply a matter of deleting the word "indirect", since the article was based on the concept of responsibility of an exceptional kind, involving as it did separation of the act from responsibility for the act. He could appreciate why some members thought that to remove the idea of indirect responsibility would divest the article of its *raison d'être*, although he would not himself go so far as that.

6. As was clear from Mr. Ago's report, jurists had had to struggle hard, in the earlier phases of international law, towards the goal of substantial justice. Their concept of the State as a sovereign entity admitting of no power beyond itself, although appropriate in its context, had been capable of being used perversely: in international law, far more than in any developed system of domestic law, it had been possible to raise as a barrier to responsibility the fact that, if an entity was admitted to be sovereign, then, whatever the legal or practical fetters on its freedom, that precluded the attribution of responsibility to any other State involved in precipitating the action. As a result, the notion of indirect responsibility had been developed with some subtlety to ensure that real responsibility was not

¹ For text, see 1532nd meeting, para. 6.

² See 1532nd meeting, foot-note 2.

avoided because of the apparently absolute nature of sovereignty. In some instances, however, a broader view had been taken, it being held in effect that, in the case of a puppet, responsibility was incurred by the party manipulating the strings. In the circumstances, it was not surprising that there was a general sense of unease about carrying forward the subtleties developed to meet the limitations of the older law and, in particular, a situation where so much emphasis was placed on form and so little on substance.

7. As Mr. Ago had rightly pointed out, the maxim *qui facit per alium facit per se* was not totally accepted in the history of international law; personally, however he thought the time was coming when it would be recognized, and should be stated as a general principle of law, that a State which acted through another was itself responsible.

8. He was not sure how much of the detail of the draft article should be retained but, as far as "coercion" was concerned, it seemed to him that it meant something much broader in that context than a resort to the use of force. Obviously, coercion would in most cases be an illegal act in itself, but in the case of economic aggression it might also extend, for example, to the payment of large sums of money to induce another to perform actions that were in themselves unlawful. Consequently, it was not necessary to postulate that coercion was always unlawful.

9. Historically, both in law and in fact, there had been situations of legal relationships in which States had been recognized as sovereign although their freedom to control their own affairs had been considerably curtailed. Happily, those situations belonged largely to the past. It would, however, be a mistake to believe that all present or future relationships were or would be simple, as could be seen by the range of circumstances covered by the term "associated State". At one extreme, it could mean a State which, constitutionally, had complete freedom of action and alone could determine its future but which chose for the time being to submerge part or all of its international personality in an association with another State. Whether such a relationship was governed by law or was one of fact depended on the approach. Constitutionally, it fell within the sphere of domestic law but, from the standpoint of international law, it was a situation of fact. The situation might perhaps be categorized by the degree of recognition accorded by other States, in which case the relationship would be more one of law than of fact.

10. Lastly, while he thought it would be advisable to shorten article 28 and make it less specific, he considered that its kernel was well worth a place in the draft articles.

11. Mr. TABIBI considered that, given the importance of the principle embodied in draft article 28, the article should be retained, even if not in the precise terms proposed. The article also provided the necessary complement to article 27, dealing with direct aid or

assistance, without which the whole concept of indirect responsibility would be incomplete.

12. That concept had passed through three main stages. The first, coinciding with the height of the colonial era, had been the period before the First World War, when a handful of States in Europe had been responsible for the affairs of all the others. In that connexion, it had rightly been said that the freedom of the latter was a fiction. It was during that period that certain jurists, including Anzilotti, had evolved the concept of indirect responsibility. The second stage, after the First World War, had seen the creation of the League of Nations and the emergence of mandates and protectorates. There had followed the third stage, marked by the creation of the United Nations and heralding an important change in the history of the times. The concept had come to be viewed within the context of the United Nations Charter, considered as an instrument of positive international law. Thenceforth, all States had been held to be equal and independent and, notwithstanding the obvious differences between the large nations and countries such as Nepal or Afghanistan, there had been no limitation in principle to their sovereignty and independence.

13. Consequently, in his view, any reformulation of draft article 28 should reflect those developments, in line with the principles of the United Nations Charter. At the same time, he considered it essential to retain the notion of coercion, dealt with in paragraph 2 of the article, since coercion, whether military, economic or political, was undeniably a feature of the times.

14. Mr. AGO, answering the comments made by members of the Commission on draft article 28, noted that Mr. Ushakov (1533rd meeting) disputed the very existence of the concept of indirect responsibility. Yet that concept was recognized, as far as internal law was concerned, in the legal doctrine of all States, and there was every reason that it should obtain recognition in international law too. For his own part, he wished to point out that the concept of indirect responsibility, or of responsibility for the act of another, had no connexion, in international law, with other concepts with which it had sometimes been confused, such as that of State responsibility "for acts of individuals", as it was known, which was in fact a responsibility incumbent upon a State for its own act on the occasion of acts committed by individuals. Indirect responsibility was the responsibility attributable to a subject of law by virtue of a pre-existing relationship between the two subjects. Under internal law, for example, an employer was answerable for what his apprentice had done, because between the employer and the apprentice there was a pre-existing legal tie by reason of which the employer was answerable in lieu of the apprentice for wrongful acts committed by the latter. The same was true of the responsibility of parents for their children's acts, a case mentioned by Mr. Ushakov. That kind of responsibility was not based on a legal fiction, for after all the act had been committed by the apprentice, not by the employer. Nor was it based on a temporary lapse of supervision, but on a

permanent relationship between two subjects. Then again, it constituted a safeguard for injured third parties.

15. The reason why the approach adopted in article 28 was different from that followed in article 27, as Mr. Pinto and Sir Francis Vallat had noted (1533rd meeting), was that the two articles dealt with different situations. The case contemplated in article 27 was that where one State aided another to commit an internationally wrongful act. Such aid might in itself constitute lawful conduct, but an act that would normally be lawful, like the sale of weapons, for example, was tainted by illegality in so far as it facilitated the commission of a wrongful act by another State. In the case envisaged in article 28, the responsible State had provided no aid, and indeed might not have done anything at all. The sole source of its responsibility was the fact that between the two States there existed a special relationship giving to one of them power of direction or control of the activities of the other.

16. As Mr. Pinto has said, article 28 satisfied a requirement of justice, and did so in two ways: first, in the relations between the two States, for it was right that the dominant State should be answerable for the consequences of acts committed by the subordinate State, and, secondly, in relation to the third State, for it was right that the third State should in any event be able to apply to a State capable of making good the injury caused, as Huber had said in his arbitral award in the *British Claims in the Spanish Zone of Morocco* case.³

17. The situations of protectorate to which he had referred earlier in his analysis were obsolete situations, as Mr. Ushakov had pointed out, for in modern times all States were equal and independent, at least in theory. It was not impossible, however, that some situations of dependency might recur in the future. Mr. Ushakov had himself mentioned a fresh situation in which the problem of indirect responsibility might arise, namely, the case of supranational entities. However, before dealing with current situations, one should also consider the existing consequences of earlier situations, for it was conceivable that arbitrators or judges might at some future time have to adjudicate in cases having their origin in situations that had become obsolete.

18. That being so, the question of indirect responsibility arose not only in connexion with past situations like those of protectorates, but also in connexion with those that were unfortunately very topical, like military occupation. It was idle to inquire, as Mr. Ushakov had done, whether the occupation was legitimate or illegitimate. There were admittedly cases of "legitimate" or "liberating" occupation, like that of the Axis countries by the Allies, and there were also cases of illegitimate occupation. But the issue was not whether the situation existing between two States was or was not legitimate: the sole issue was whether the situation existed and, if so, what were its consequences.

Besides, the occurrence of cases of illegitimate occupation was yet another reason for affirming the occupying State's responsibility for acts committed by organs of the occupied States. And even if the occupation should be legitimate, should the occupying State be exonerated of all responsibility for acts committed by the occupied State? In either case, the problem of the responsibility of the occupying State arose by reason of the position in which the occupied territory found itself vis-à-vis the occupier.

19. With regard to the question of coercion, he agreed with Mr. Tsuruoka and Mr. Pinto (1533rd meeting) that article 28 could be drafted in conformity with article 52 of the Vienna Convention,⁴ but he appreciated, like Mr. Tabibi, that there might be different forms of coercion giving rise to responsibility for the act of another. Radically opposed positions had been taken on that question. In Mr. Tsuruoka's view, the State exercising coercion must be regarded as having exclusive responsibility, whereas according to Mr. Ushakov the State subjected to coercion could not be exempted from its responsibility. Personally, he considered both those views equally justified and equally unjustified; in his view, the responsibility of the State exercising coercion was undeniable, but at the same time the State subjected to coercion must be able to retain its own share of responsibility, by virtue of the principle *coactus voluit, tamen voluit*. Thus the responsibility of the coercing State and that of the coerced State were not necessarily exclusive. They could be concurrent responsibilities.

20. As between those extreme positions, some members of the Commission, like Mr. Reuter (1532nd meeting) and Mr. Verosta (1533rd meeting), had adopted a less categorical view: they had considered that the rule in article 28 was perhaps too exclusive and had suggested a more flexible formulation. He was ready to endorse their view for, like them, he thought that the responsibility of the State which exerted control should not always be exclusive and that in certain cases the responsibility of the State under control could be held to subsist. There was yet another reason in support of a non-exclusive responsibility on the part of the occupying State: a third State could not be obliged to apply for redress to the occupying State if it did not recognize that State and preferred to apply to the occupied State. It was therefore a sound view to consider that sometimes both responsibilities coexisted.

21. Like Mr. Quentin-Baxter, he therefore thought that the negative formulation of article 28 should perhaps be dropped; that formulation had been justified by the attribution of exclusive responsibility to the dominant State. He further agreed with Mr. Quentin-Baxter that, for the purposes of international practice, it was very important that the draft article should state that the responsibility of a subject of international law for an internationally wrongful act committed by another subject of international law differed from the responsibility for the State's own act.

³ See A/CN.4/318 and Add.1-3, para. 8.

⁴ See 1533rd meeting, foot-note 2.

22. Sir Francis VALLAT said that, like most members of the Commission, he was in broad agreement with the analysis contained in Mr. Ago's report. The difficulty now was to give a modern formulation to the problem discussed in Mr. Ago's study and presentation of State practice and legal precedents. In resolving that problem, the Commission was rapidly reaching the stage at which it required the help of more detailed discussion of the text of article 28 in the Drafting Committee.

23. An examination of the draft articles as a whole, and particularly of articles 5 to 15, revealed that the case envisaged in article 28 was not covered by the attribution of conduct or of an act to the State. He was persuaded of the need to incorporate article 28 in the set of articles and was satisfied that, in the present instance, the Commission was concerned not with the attribution of conduct or of an act to a State but with the responsibility of a State for an internationally wrongful act of another State, an issue that was factually and juridically entirely different, and one that was rightly set in a different context and placed in juxtaposition with article 27. Naturally, it was still desirable to consider article 28 in relation to earlier articles of the draft. For example, it had some affinities with article 12, paragraph 1 of which specified that

The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

That provision, which dealt with what could be called a third State situation, was cast in negative form, and, whereas paragraph 2 of article 12 could be expected to be in the positive form found in article 28, it simply referred to articles 5 to 10, which did not, in his opinion, cover the situation with which the Commission was now concerned. Accordingly, it was quite clear that there was a place for article 28 in the structure of the draft.

24. Reference had been made earlier to article 1, which was to some extent inconsistent with the negative formulation of paragraph 1 of article 28, and some adjustment would certainly be needed. However, he would be extremely reluctant to tamper with the wording of article 1, which enunciated the basic principle that lay at the very root of the entire set of draft articles. Any adjustments to the other articles would therefore have to be brought into line with article 1. For instance, he would not be able to agree to the deletion from article 1 of the words "of that State". Any general principle was almost inevitably subject to some qualification, but the situation under consideration included an element of exemption from responsibility, and might perhaps be more clearly emphasized in the part of the draft that would deal with exclusions rather than in the part dealing with what might be termed the positive aspect of responsibility.

25. Straightforward elimination of the negative aspect of article 28 might well prove to be the right course, but it would not necessarily solve the problem of dual responsibility. Under private law in common-law

countries, it was clear that, in the event of damage to property or injury to life caused by the negligent act of a lorry driver employed by a company, the lorry driver incurred personal responsibility or liability for his own negligent act, and the employer also incurred vicarious responsibility or liability if the driver had been acting within the scope of his employment. The position in international law was not exactly the same, but analogous situations might nevertheless arise. He had in mind the terms of article 19, concerning international crimes and international delicts. Mention had been made earlier of breaches of peremptory norms forming part of *jus cogens*. Could a State that was under pressure and embarked on a course of genocide really shift the responsibility for its genocidal acts to the State which was exerting pressure? Obviously, the Commission could not accept such a proposition in the articles of fundamental importance that it was now formulating. Consequently, it was essential to contemplate the possibility that responsibility for an internationally wrongful act might be shared, although not necessarily to the same extent, by both the State committing the act and the State exercising pressure or control.

26. In terms of drafting, the question was plainly a very difficult one to resolve, and for the moment it was his impression that it might be better to deal with the matter in the part of the draft that would relate to exclusions from responsibility. Article 28 would have to be precise, as was essential in laying down a rule on responsibility, and also flexible, in view of the variety of situations that might arise. Indeed, since 1945 many different situations had arisen which had not fallen clearly under the terms of Article 2, paragraph 4, of the Charter of the United Nations, but it had none the less been necessary to deal with them within a legal framework. Admittedly, the world had moved on from the period of protectorates, but who was to say that, under the auspices of the United Nations, somewhat similar arrangements would not emerge in the future? It might be thought wise, for example, to give a measure of protection to a new State in its early years.

27. Article 28 included expressions, such as "field of activity" and "complete freedom of decision", that unquestionably required clarification. One of the most important points to be considered was the meaning to be attached to the words "subject... to the directions or the control". In determining where responsibility for an act ought to rest, he had been accustomed for a number of years to consider the twin factors of the right to exercise sovereign power and the actual exercise of that power. Perhaps that approach could be adopted with regard to the expressions in question, so as to arrive at a clear definition which would none the less allow for flexibility. Again, the concept of coercion, employed in paragraph 2, could not be limited to the threat or use of force. A threat to withhold the supply of a vital commodity, such as the supply of wheat to a starving population, might constitute a measure of coercion. Nevertheless, coercion was extremely difficult to define and it might be necessary to point out in the commentary that coercion, in the pre-

sent context, meant placing the State committing the wrongful act in a position in which it had no real choice as to how to act. The essence of the matter was that a State should not be able to evade responsibility simply by affirming that the act in question had been committed by another State.

28. In addition, regardless whether or not the final formulation of the article would include the phrase "in law or in fact", it was essential to cover both cases. True, the *de facto* situation was more likely to occur than the *de jure* situation, but situations were conceivable in which the dominant State had a legitimate right to act in the way it did. It was, of course, of the utmost importance to deal with *de facto* control, but in that instance responsibility should be proportionate to the extent to which such control was exercised.

29. It would be preferable to delete the word "indirect" from the whole of article 28 and not to endeavour to find a substitute for it. The word would inevitably give rise to difficulties of interpretation. The Commission was concerned solely with determining the existence of responsibility, and the use of terms such as "indirect" would merely raise questions as to whether the responsibility was qualified in some way.

30. He considered, lastly, that the proposal by Mr. Tsuruoka (A/CN.4/L.289) should certainly be taken into account by the Drafting Committee.

The meeting rose at 1 p.m.

1535th MEETING

Monday, 21 May 1979, at 3 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.289, A/CN.4/L.290)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)¹ (*continued*)

1. Mr. RIPHAGEN said that draft article 28 involved the ever-present question of the interaction of fact and law. According to any concept of justice, one set of facts—for example, a certain course of conduct on the part of a State or a given result or event—required another set of facts to be realized, for instance, *restitutio in integrum*, compensation, or even an entirely different set of facts. To categorize the first set of facts as internationally wrongful and the second as concerned with the content, form and degree of international responsibility was but a legal tool for arriving at that balance which would serve justice. Consequently, in order to determine the second set of facts, the first set had to be taken fully into account, and hence outside influences on the conduct of a State could not be entirely disregarded.

2. At the same time, all legal systems, seeking to reflect concepts of justice in a body of rules and procedures, created their own realities, which were sometimes termed legal fictions, and those realities could likewise not be disregarded with impunity. Thus the claim of States to be sovereign, with all the rights which that entailed, necessarily involved their acceptance of the obligations deriving from international responsibility, as was stated in articles 1 and 2 of the draft.²

3. Some of the debate which had arisen seemed to stem from the conflict between those two points of view, a conflict that had already been apparent during the Commission's discussion on article 27 at its thirtieth session; that article dealt with the reverse situation, namely, aid and assistance rendered by one State to enable another to commit an internationally wrongful act.

4. One similarity between article 27 and draft article 28, which had perhaps inspired the amendment submitted by Mr. Tsuruoka (A/CN.4/L.289), was that in both cases the combined conduct of two or more States created the illegal or wrongful state of affairs. It seemed reasonable, therefore, to accept combined international responsibility, whether "shared" or "joint and several". The choice between those two forms of responsibility was one illustration of the way in which the matters covered by draft article 28, as also by article 27, overlapped with part II of the draft, which would deal with the content, forms and degrees of responsibility. At some stage, therefore, the Commission would have to consider whether the international responsibility of State A arising out of its implication in an internationally wrongful act committed by State B had the same legal consequences for both States. In that connexion, it was worth noting that the International Court of Justice, in its Advisory Opinion in the Namibia case, had stated, on the one hand, that the continued illegal presence of South Africa in Namibia and the duty of other States not to recognize that presence did not divest South Africa of its international responsibility for its acts on Namibian territory and, on the other, that non-recognition of such a presence

¹ For text, see 1532nd meeting, para. 6.

² See 1532nd meeting, foot-note 2.

should not deprive the peoples of the territory of the benefits of international co-operation.³ In addition, international practice seemed to accept measures taken by a belligerent State against the interests of the nationals of an allied State who were resident in the territory of the latter when it was under occupation by an adversary belligerent State.

5. The problems which draft article 28 had in common with article 27 stemmed, in his view, from the strict separation of primary and secondary rules of international law. For example, if the intention was to deal with the breach of an obligation deriving from a primary rule of international law, such as a rule laid down in a treaty between State A and State B, the question inevitably arose how such a treaty, being *res inter alios acta*, could affect the obligations and international responsibility of State C towards State B. It might be argued that the bilateralism underlying the *res inter alios acta* concept, and even the legal relationships arising out of the wrongful act of a State, excluded the indirect international responsibility of a third State, and to that extent he would agree with Mr. Ushakov (1533rd meeting). The basis of the international responsibility of such third State must obviously lie in its own acts as they related to the breach of an international bilateral obligation by State A towards State B. But it was difficult to determine precisely what made the acts of State C wrongful, or at least what caused that State to incur international responsibility. Apparently it had to be assumed either that State C had surrendered some of the elements of its governmental authority to State A, including use of its territory, or, alternatively, that the obligation breached by State A in its relations with State B was not, after all, a purely bilateral obligation towards State B but an international obligation whose fulfilment was required in the interests not only of States A and B, but also of the international community at large or of a regional grouping.

6. Similarly, in the case of draft article 28, it would seem that the exact position in which State C was placed to give directions or exercise control and/or the special character of the obligation, and therefore of the breach by State A in its relations to State B, were highly relevant factors in the application of the article's underlying principle. In that sense, he agreed that an attempt should be made to amalgamate paragraphs 1 and 2 of the article.

7. It would be difficult to reflect all those factors in the draft article, and he therefore considered that the Commission should direct its attention to the amendments proposed by Mr. Tsuruoka (A/CN.4/L.289). The considerations he had himself raised could then perhaps be incorporated in the commentaries to articles 27 and 28.

8. Mr. JAGOTA said that the subject-matter under consideration was of professional interest to many legal advisers throughout the world and also of practical value in promoting stable and peaceful international relations and responsible conduct by States. He was deeply impressed not only by Mr. Ago's masterly analysis of a wealth of relevant doctrine and State practice but also by the conclusions reflected in the terms of article 28, which had to be read in conjunction with article 27, for the two articles together were to constitute chapter IV of part I of the set of draft articles.

9. The concept underlying article 28 was essential to the draft, and the reasons for placing articles 27 and 28 in a separate chapter had been explained in Mr. Ago's report. Part I of the draft was concerned primarily with general principles and, in its five constituent chapters, elaborated on the origin or source of international responsibility. The fundamental norm was set out in articles 1 and 3. Article 1 specified that every internationally wrongful act of a State entailed the international responsibility of that State. Article 3 then proceeded logically to affirm that there was an internationally wrongful act of a State when (a) conduct consisting of an action or omission was attributable to the State under international law, and (b) that conduct constituted a breach of an international obligation of the State. The first part of that description of a State's internationally wrongful act was amplified in chapter II, and the second part in chapter III. In those chapters Mr. Ago had dealt with the question arising in connexion with articles 27 and 28, namely, that of attribution. If certain organs were placed at the disposal of another State by a State or by an international organization, could the conduct of such organs be attributed to a State? The answer was to be found in articles 9 and 12. Under the terms of article 9, the conduct of an organ placed at the disposal of a State by another State or by an international organization was to 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 had been placed. In other words, an internationally wrongful act committed by organs made available to another State was attributable to that other State if the organs in question were acting in its territory and under its control. Conversely, under article 12, wrongful acts committed by the organs of one State could not be attributed to another State in whose territory they were operating if those organs were acting under the control of their own State. Chapter III was concerned with the breach of an international obligation, and article 19, which formed part of that chapter, made a major contribution to the development of the concept of an international crime, in other words, an international crime that would be recognized as such by the community of nations as a whole. That matter would also have some bearing on the problem now under discussion.

10. After completing chapters I to III, Mr. Ago had then been obliged to consider whether there were circumstances in which responsibility for an internationally wrongful act would be shared by another State or

³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports* 1971, pp. 54 and 56.

would be incurred exclusively by another State. The case of additional responsibility was covered by article 27, concerning situations in which aid or assistance was rendered by one State to another State for the commission of an internationally wrongful act, while article 28 covered the second aspect of the question, namely, responsibility incurred by a State other than the State in whose territory the internationally wrongful act was committed.

11. In the various cases discussed in the report, namely, dependent, vassal or protected States, States that were formally part of a federal union but had their own separate international legal personality, States under military occupation and States acting under coercion, the fundamental principles enunciated in articles 1 and 3 still applied; in other words, the entity committing the internationally wrongful act must be a State. Accordingly, a territory or an entity that was not an international legal person could not incur international responsibility or liability. In the situation envisaged in article 28, however, the international legal person would normally be one acting under certain limitations on its field of activity—for instance, limitations imposed by a constitution in the case of a federal union or limitations imposed by an agreement, as in the case of an agreement establishing a protectorate. Alternatively, the situation might relate to an entirely independent State, but one that did not enjoy freedom of action or decision and was forced by another State to adopt a certain course of conduct. Consequently article 28 could be viewed as a variant of the situation envisaged in article 1. The difference lay in the fact that, although the entity committing the internationally wrongful act was a State, additional factors required responsibility for the act to be transferred from the State committing the act to the State causing the act to be committed. Indirect responsibility was therefore simply a transfer of responsibility. The most obvious example of such a transfer of responsibility could be found in paragraph 2 of article 28, which related to an internationally wrongful act committed by a State under coercion exerted by another State. Military occupation was also a situation that could be included in paragraph 2 of the article.

12. Paragraph 1 related to the other cases cited by Mr. Ago in his report, namely, acts committed by vassal or protected States or States members of a federal union but possessing a separate international legal personality. They might involve situations in which responsibility for an internationally wrongful act lay not with the protected State but with the protecting State, because of the terms of the agreement establishing the protectorate, or situations in which, although the State was acting within its powers, it was not acting of its own volition because it was forced to take certain action under the directions and control of another State and had no option but to obey.

13. In his opinion, the use of the adjective “indirect” did not in any way diminish the degree of responsibility. It simply indicated the responsibility incurred by the State which had caused the internationally

wrongful act to be committed. Even if the adjective were omitted, the responsibility would remain indirect because it did not relate to an internationally wrongful act committed directly by the State in question. At the same time, it should be remembered that in some cases a State’s responsibility might be entailed both directly and indirectly. For example, it was possible that a country which dispatched armed forces to another country in violation of international law would not only be acting in breach of Article 2, paragraph 4, of the Charter of the United Nations but would also be committing an international crime under the terms of article 19 of the draft.

14. It was very important to have a clear picture of the framework in which, under articles 27 and 28, international responsibility would arise and which State would incur such responsibility. If, for example, a State sold arms to another State and there was no prohibition in international law on such sales of arms, no internationally wrongful act would have been committed and no State would incur responsibility. On the other hand, if the State sold arms in the full knowledge that the arms were to be used by the other State for the purposes of aggression, such an act would constitute aid or assistance to another State for the commission of an internationally wrongful act and would obviously be covered by article 27. If a State supplied armed forces to another State but those armed forces operated under the control of the recipient State, any wrongful acts committed by those forces would be covered by article 9, and only the recipient State would incur responsibility, because the wrongful acts would be attributable to that State alone. Wrongful acts committed by armed forces which were dispatched by one State to the territory of another State but remained under the control of the sending State would be covered by article 12—unless, of course, the two States were acting hand in hand, in which case they would be jointly responsible and the terms of article 27 would then apply. However, if armed forces were dispatched to another State and took over its organs in order to establish a puppet State, wrongful acts committed by those organs were technically attributable to them, but, under the terms of article 28, responsibility would rightly be transferred to the State which had dispatched the troops and had made use of those organs.

15. He had reached the conclusion that it was unnecessary to alter the basic concept of responsibility enunciated in article 28. In other words, it was not necessary in that article to make provision for additional or joint responsibility. Nevertheless, the transfer of responsibility should be defined very narrowly. The State in whose territory the wrongful act had been committed should not escape responsibility altogether. It should be exonerated only to the extent to which it had acted under the directions or the control of another State. A State might use the pretext that it had been acting under the directions of another State, yet the other State might easily claim that it had simply made certain suggestions and had exercised no control. In the *Romano-Americana Company* case,

cited by Mr. Ago (A/CN.4/318 and Add.1-3, para. 41), the British Government had declined to accept any responsibility for compensation arising out of destruction of the company's properties in Romania and the United States Government had finally agreed to address its claim to the Romanian Government, which in turn had agreed to assume responsibility for the acts committed by its own organs. The case showed that the victim was not necessarily left with no recourse if responsibility were confined solely to situations involving the use of force or control by another State. Again, it was possible to envisage cases in which one State received instructions from another but exceeded those instructions. Obviously, in such instances the State in receipt of the instructions could not be entirely absolved from responsibility.

16. In the light of all those considerations he proposed two variants for article 28 (A/CN.4/L.290), which did not, however, affect the substance of the text proposed by Mr. Ago:

“Variant A

“An internationally wrongful act committed by a State which must submit, in law or in fact, to the directions, control or coercion of another State, does not, but only to the extent of the limitation on its freedom of decision, entail the international responsibility of the State committing the wrongful act; instead it entails the international responsibility of the State under whose directions, control or coercion such wrongful act was committed.

“Variant B

“1. An internationally wrongful act committed by a State in a field of activity in which that State is not in possession of (complete) freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not, but only to the extent of this limitation, entail the international responsibility of the State committing the wrongful act; instead it entails the international responsibility of the State under whose direction or control such wrongful act was committed.

“2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not, but only to the extent of this limitation, entail the international responsibility of the State which acted under coercion; instead it entails the international responsibility of the State under whose coercion such wrongful act was committed.”

17. With regard to the placing of articles 27 and 28, he pointed out that those articles did not extinguish the internationally wrongful act; they simply established additional responsibility or provided for the transfer of responsibility. Consequently, their rightful context was clearly part I of the draft, for the internationally wrongful act was still the point of reference in determining State responsibility. They should not be shifted to chapter V, which would deal with exemptions, i.e.

circumstances which precluded wrongfulness. The choice therefore would be either to leave articles 27 and 28 to constitute chapter IV or to ally them in some way with articles 9 and 12, which dealt with situations of a similar nature and were placed in chapter II of part I. Of course, if it was decided later to alter the underlying concept of exemptions, which were to form the subject of chapter V, it might well be found appropriate to place the two articles in that chapter. Nevertheless, the matter did not require attention immediately and could well be decided later by the Drafting Committee.

18. The CHAIRMAN, speaking as a member of the Commission, said that article 28 would have to be drafted in more explicit terms, so as to answer the questions raised in the course of the debate, in particular with regard to the nature and degree of the responsibility referred to in that provision.

19. With regard to the justification for the presence of article 28 in the draft, he considered that the Commission had the duty to draft a provision that would be applicable in the various situations envisaged, for such situations did occur in international affairs. Both relationships of dependence and coercion existed and would probably continue to exist for a long time to come. Moreover, although sovereign and equal, States were living in a world of interdependence.

20. It was also important to take account of positive international law, as Mr. Riphagen had shown by emphasizing the relationship between fact and law. The Commission should therefore base its deliberations on the United Nations Charter, since the terms of the Charter offered the decisive test for saying that a given situation was lawful or unlawful. It would be necessary to formulate precise rules relying on the Charter and on positive international law, as a basis for determining the lawfulness of the situation envisaged. In that connexion, the text of article 28 proposed by Mr. Tsuruoka (A/CN.4/L.289) provided a sound basis for the drafting of language that would fit into the draft as a whole.

21. In one passage in his written presentation of article 28 (A/CN.4/318 and Add.1-3, para. 3), Mr. Ago said that the provision in question was limited to cases in which international responsibility was attributed to a State for an internationally wrongful act committed by another State, and added that

Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future.

In his own view, that reasoning was not very convincing. Since other draft articles spoke of international organizations and insurrectional movements, he doubted that that argument was tenable. Personally, he would prefer the Commission to try to work out solutions for such situations, although he realized that its work would thereby be complicated considerably.

22. Mr. USHAKOV said that he continued to hold the view that there was no such thing as indirect responsibility, not only in Soviet law, but in law in general. In internal law, admittedly, there were instances of indirect responsibility constituting exceptions to the rule. In Soviet internal law, for example, if the owner of a vehicle gave another person written permission to use his vehicle, the civil liability in the event of an accident was that of the owner. In such a case, one might speak of indirect responsibility. But in reality, it was by an act—the act of permitting another to use his vehicle—that the owner of the vehicle had assumed vicarious responsibility. In any case, he assumed only civil liability; any criminal or administrative liability was the driver's. Besides, if a person used a vehicle without the owner's permission, it was the driver who was civilly liable in the event of an accident. It followed, therefore, that any civil liability on the part of the owner of the vehicle had its source in his own act.

23. In international law, the same situation could arise, in theory, if a State accepted in advance responsibility for the acts of another State. He did not believe, however, that any such rule existed in international law. The example of master and apprentice cited by Mr. Ago (1534th meeting) was hardly pertinent, for the master was responsible for the acts of the apprentice to the extent that he was responsible for what he produced. By the same token, the manager of a factory was responsible, not for the acts of his workers, but for the production of the factory.

24. Article 28 envisaged two sorts of situations. The first, referred to in paragraph 1, was a situation of dependence of one State on another State; the second, which was the subject of paragraph 2, was a situation in which coercion was exerted by one State against another State. Mr. Ago had envisaged three possibilities in connexion with the first type of situation. He had first of all envisaged a situation of dependence of a colonial type, such as a protectorate. Actually, in such a situation, the protected State was not a State, but a "dependent territory", within the meaning of article 2, paragraph 1 (/), of the Vienna Convention on Succession of States in respect of Treaties, 1978,⁴ namely, territory for whose international relations the protecting State was responsible. The situation was therefore not one of dependence of one State upon another.

25. The next situation considered by Mr. Ago was that of the dependence of a federated State vis-à-vis the federal State. However, that situation was likewise outside the scope of article 28, since a federated State was not a subject of international law on the same footing as the federal State.

26. The third situation envisaged, that of military occupation, might come within the scope of article 28,

but only on certain conditions. For the occupied State not to be responsible for its acts, it must cease to have existed as a sovereign State. That had been the situation in Poland and Norway when they had been occupied by Nazi Germany during the Second World War. Conversely, the presence of Soviet troops in Poland at the end of the war could not be regarded as a situation of military occupation, for the control exercised by those troops had been justified by the continuance of hostilities.

27. With regard to the situation of coercion dealt with in paragraph 2 of article 28, the fact of being subjected to coercion did not, in his opinion, relieve a State of its responsibility, for a free and independent sovereign State had a duty to resist coercion and to fulfil its international obligations towards other States. In his view, the situation referred to in article 52 of the Vienna Convention⁵ was entirely different: that article dealt not with relations with a third State, but with bilateral relations. The article said in effect, that, if a State forced another State to conclude a bilateral treaty with it, that treaty was void. That situation was wholly unrelated to the one contemplated in paragraph 2 of article 28.

28. Mr. PINTO said his initial uncertainty regarding draft article 28 had been due to his inability to see the connexion between the State held ultimately responsible, in other words, the dominant State, and the constituent elements of the internationally wrongful act. However, he had been much enlightened by Mr. Ago's explanations, and possibly the problem could best be resolved by drafting.

29. At the same time, he still had the impression that the article sought to deal with two somewhat separate elements: on the one hand, the manipulation of one State by another, through coercion or some other means, with a view to the commission of an internationally wrongful act, and, on the other, the defence of necessity. The question of manipulation, which was a fact of contemporary life, clearly had its place in the draft article, and the amendments submitted by Mr. Tsuruoka and Mr. Jagota would be most useful in that connexion; but he doubted whether it was either necessary or possible to deal with such a complex issue as the defence of necessity in the same article.

30. Mr. JAGOTA said that, as he read the draft article and the relevant part of the report, it dealt not with any defence or mitigating circumstances but rather with a transfer of responsibility. Thus, if a State claimed that it had committed an internationally wrongful act under pressure, it could not raise a defence of necessity, but the concept of a transfer of responsibility would come into play.

The meeting rose at 6 p.m.

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31. The Convention is hereinafter referred to as the "1978 Vienna Convention".

⁵ See 1533rd meeting, foot-note 2.

1536th MEETING

Tuesday, 22 May 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.289/Rev.1, A/CN.4/L.290)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)¹ (*continued*)

1. Mr. TSURUOKA said that, in the light of comments made by some members of the Commission, he wished to announce two changes in the text of article 28 which he had proposed on 17 May 1979 (A/CN.4/L.289). The first was the omission of the word "exclusively" in paragraph 2, the object being to introduce the idea of a dual responsibility on the part of the State which exerted coercion and on the part of the State which had committed the internationally wrongful act. The other change was the addition of a paragraph 3.

2. The revised text (A/CN.4/L.289/Rev.1) read as follows:

"1. Directions given by one State to another State or control exercised by one State over another State in a field of activity shall, if it is established that the directions are given or the control is exercised for the purpose of the commission of an internationally wrongful act carried out by the latter, constitute an internationally wrongful act, even if those directions or that control, taken alone, would not constitute the breach of an international obligation.

"2. Coercion exerted by one State against another State by means of the threat or the use of force in violation of the principles of international law embodied in the Charter of the United Nations shall, if it is established that the coercion was exerted for the purpose of the commission of an internationally wrongful act carried out by the latter, entail the international responsibility of the State which exerted the coercion.

"3. Paragraphs 1 and 2 are without prejudice to the application of other provisions of the present

draft articles, such as article 1, concerning international responsibility to a State which commits an internationally wrongful act as a result of directions given, control exercised, or coercion exerted by another State."

3. Mr. AGO said he thought he could detect a certain softening of the extreme position taken by Mr. Ushakov in his earlier statements. Yet he had difficulty in accepting Mr. Ushakov's proposition that, while the general concept of indirect responsibility existed, it existed in the science of law rather than in positive law, for the science of law had created the concept of indirect responsibility to describe and explain certain situations for which provision was made in positive law.

4. Commenting on the cases mentioned by Mr. Ushakov as occurring in internal law, he noted that, as far as responsibility for the act of another was concerned, Soviet law did not differ greatly from the law of the common law countries or of the Roman law countries. Where the owner of a vehicle was liable in the event of an accident caused by a person whom he had permitted to use his vehicle (the case mentioned by Mr. Ushakov at the previous meeting), the liability of the owner of the vehicle arose not because he had given his permission, which was a lawful act, but because of the accident caused by the driver, which was precisely an unlawful act committed by another party. In that situation, the permission given had set up between the owner and the user of the vehicle a certain relationship in consequence of which the former was answerable for the act of the latter. Similarly, where the master was liable for damage caused by his apprentice, the master was responsible not for the fact of having employed the apprentice, which was a lawful act, but for the errors committed by the apprentice, such liability being founded on the relationship between master and apprentice. The fact of having engaged the apprentice had simply set up that relationship. Hence in both situations, as also in the case of the liability of parents for their children's actions, the responsibility was for the act of another and not for the actor's own conduct. Under article 1384 of the French Civil Code a person was answerable not only for damage he caused himself but also for damage caused by persons for whom he was responsible.

5. In international law the problem of indirect responsibility could arise in three types of situation: in relations of dependence, like protectorates; in relations between a federal and a federated State that had kept a separate international personality; and in cases of military occupation. As far as dependent relationships were concerned, he pointed out that in some cases the protectorate had in fact applied to States and not to dependent territories, as Mr. Ushakov had contended. For example, in the case of Morocco, the protectorate established by the Treaty of Fez, although created in the context of colonial policy, had applied to a State, not to a colony; the Moroccan State had remained a State with its own international personality, and the Sherifian authorities had sometimes been entirely free to act in certain internal areas. Although, as Mr. Usha-

¹ For text, see 1532nd meeting, para. 6.

kov had said, dependent relationships had become virtually obsolete, it was not impossible, as Mr. Francis had pointed out, that they might recur at some future time under a different guise.

6. The relations between a federal and a federated State should not be equated with dependent relationships between States, for the situation was quite different. The relationship varied greatly from case to case. In some cases the federal State had totally abolished the federated State's international personality, whereas in others the federated State had retained some measure of international personality. The cantons of Switzerland, for example, possessed a limited international treaty-making capacity. Normally, the federal State was answerable for any breaches committed by the canton, even for breaches of international obligations entered into by the canton. In such cases it was therefore proper to speak of international responsibility for the act of another—but those were uncommon cases.

7. The third case, that of military occupation, was the most important, because it was the most topical and the commonest. It was in respect of that case that his own views differed most from Mr. Ushakov's. In his opinion, no distinction should be drawn between partial and total occupation of a State's territory, for, contrary to what Mr. Ushakov had said, a State did not necessarily cease to exist if its entire territory was occupied. During the Second World War, for example, Belgium, the Netherlands and Denmark, although wholly occupied, had certainly not ceased to exist as States. Similarly, when Germany, after occupying the northern half of French territory, had extended its occupation to the whole of the territory, France had continued to exist as a State and, as before, to act in that capacity, although under the control of the German authorities. Hence there was no difference between the position of a partially occupied State and that of a wholly occupied State from the point of view of responsibility for internationally wrongful acts committed by organs of the occupied State while under the control of the occupying State.

8. Nor did he agree with Mr. Ushakov that a distinction could be drawn between an illegal and a liberating occupation, for, whatever the reason for the occupation, the relationship between the controlling State and the State under control existed and should have implications in the matter of responsibility.

9. As far as coercion was concerned, he considered, like Mr. Ushakov, that article 52 of the Vienna Convention² dealt with a situation totally different from that contemplated in article 28. Hence the concept of coercion would not necessarily be identical in the two articles. Under article 52 of the Vienna Convention, coercion was given as grounds for declaring a treaty void—which explained the reference in the article to the threat or use of force. Under article 28, on the other hand, it was not really necessary that the coercion should involve the use of armed force, for a State

might very well oblige another State to commit an internationally wrongful act without resorting to armed force, for example by means of economic pressure.

10. Like Mr. Riphagen (1535th meeting), he thought that the phenomenon dealt with in article 28 could occur in *de jure* situations and in *de facto* situations. He pointed out, in that connexion, that military occupation was not only a *de facto* situation but also to some extent a *de jure* situation, for the relations between the occupying State and the occupied State were governed by the international law of war under which, for example, the occupying State had a duty to maintain law and order in the occupied territory.

11. The question whether the concept of indirect responsibility belonged to part I or to part II of the draft articles had been raised by Mr. Riphagen. The question had been answered by Mr. Jagota, who had said that part I of the draft was concerned with the internationally wrongful act as a source of responsibility, whereas part II would be concerned with the content, forms and degrees of international responsibility. Accordingly, it was quite proper that part I of the draft should deal with the issue whether an internationally wrongful act entailed the responsibility of one State rather than that of another.

12. Chapter IV of the draft dealt with abnormal situations that entailed exceptions to the principles laid down in chapter I. Under article 27,³ a State that gave aid or assistance to another State for the commission of an internationally wrongful act was doing something which *per se* might be lawful, such as the sale of weapons, but which, owing to the connexion between that action and an unlawful action (for example, the sale of weapons to be used for aggression against another State), was tainted with illegality. The State that had provided such assistance was therefore answerable not for the wrongful act committed by the State receiving the assistance but for its own unlawful act in providing the assistance. A second wrongful act was thus involved—an act which entailed the responsibility of its author. Article 28, by contrast, did not envisage the commission of a second unlawful act: it was by reason of the relation of dependence between the two States that the dominant State was responsible for the dependent State's wrongful act.

13. Unlike Mr. Riphagen, he did not think that the scope of indirect responsibility should be limited to cases where the obligation breached was an obligation *erga omnes*, in other words, an obligation towards the totality of the membership of the international community.

14. He agreed with Sir Francis Vallat (1534th meeting) that the rule in article 28 should be drafted in modern terms, for although the phenomenon of indirect responsibility was traceable chiefly to obsolete situations, it continued to occur in connexion with present-day situations. He further agreed with Sir Francis

² See 1533rd meeting, foot-note 2.

³ See 1532nd meeting, foot-note 2.

Vallat that articles 1 and 2 of the draft should not be tampered with. The exceptions provided for in articles 27 and 28 to the principles laid down in articles 1 and 2 were perfectly normal; the Commission itself had anticipated them in paragraph (11) of its own commentary to article 1, by recognizing that there might be “special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed”.⁴ Nor would article 28 constitute an exception to the principle of article 1 if it confined itself to postulating the existence of a non-exclusive indirect responsibility, in other words, a responsibility that was additional to but did not necessarily rule out the responsibility of the party that had committed the internationally wrongful act.

15. He further agreed with Sir Francis Vallat that the rule in article 28 should not be cast in negative terms. With regard to the word “indirect”, which Sir Francis thought should be dropped, he shared Mr. Jagota’s opinion that it was relatively immaterial whether the adjective was or was not retained, for in any case the responsibility with which article 28 was concerned would remain a responsibility for the act of another, in other words, an indirect responsibility.

16. He agreed with Mr. Jagota’s analysis at the previous meeting of the connexion between article 28 on the one hand and articles 9 and 12 on the other. The State under control might of course exceed the directions received, as Mr. Jagota had pointed out, and he agreed with Mr. Verosta (1533rd meeting) that that State should not be encouraged to commit an internationally wrongful act by being allowed to evade its own responsibility too easily.

17. According to Mr. Šahović, (1535th meeting), the real problem was the exclusive nature of indirect responsibility, a point that would have to be clearly settled by the Commission. In Mr. Jagota’s opinion (*ibid.*), however, it was clear that, logically, if attribution of the internationally wrongful act were severed from attribution of responsibility, the responsibility should be exclusive. Other members of the Commission had countered with the argument that the responsibility of the State under control should subsist side by side with that of the controlling State; in that connexion Mr. Pinto (*ibid.*) had referred to “manipulation” of one State by another. For his own part, however, he would point out that in the circumstances contemplated by article 28 the manipulation occurred not in connexion with the actual commission of the wrongful act, but as part of the general activity in the context of which the wrongful act was committed.

18. He stressed that the issue whether *force majeure* could be a defence to the charge of an internationally wrongful act was outside the scope of article 28; the point would have to be dealt with in chapter V, concerning exceptions. The issue with which article 28

was concerned was whether there was responsibility for the act of another and whether such responsibility was or was not exclusive.

19. According to the version of article 28 proposed by Mr. Tsuruoka (para. 2 above), the dominant State’s control would constitute an internationally wrongful act superimposed on the internationally wrongful act committed by the subordinate State and directly entailing the dominant State’s responsibility. The case envisaged in that text would therefore be one of direct responsibility, closely akin to that dealt with in article 27. In the case of indirect responsibility envisaged in article 28, on the other hand, the dominant State was answerable not for its control of the subordinate State but for the wrongful act committed by the subordinate State while under that control. As Mr. Jagota had said, the real issue was the transfer of the responsibility of the party committing the international wrong to the responsibility of another State which controlled the field of activity in which the internationally wrongful act had occurred.

20. He would be prepared to endorse Mr. Jagota’s proposal (1535th meeting, para. 16), but, like its sponsor, he was not sure whether two cases—that of control and that of coercion—should be treated separately or together. The two had some aspects in common, but the traditional situations in which the issue of indirect responsibility arose—protectorate, military occupation, federal State—were situations characterized by a stable relationship between two States, whereas coercion occurred in an *ad hoc* situation in which the State directly influenced the commission of the internationally wrongful act.

21. Mr. USHAKOV completely disagreed with Mr. Ago’s treatment of the question of occupation. Unlawful military occupation, which involved the disappearance of the occupied States as sovereign and independent States, could not, as Mr. Ago claimed, be placed on the same footing as liberating occupation, the object of which was to terminate a domination. During the Second World War, Nazi Germany’s occupation of Belgium and the Netherlands, which had as a consequence disappeared as sovereign independent States, had been radically different from the liberating occupation by the allied armed forces. There was yet a third form of occupation, that of Germany after that country’s capitulation, at which time Germany had likewise not existed as a sovereign independent State. An occupation of that kind, which was lawful, could likewise not be equated with unlawful enemy occupation.

22. Mr. RIPHAGEN said it had in no way been his intention to suggest, at the previous meeting, that article 28 should be transferred to part II of the draft. On the contrary, he considered that the Commission should seek a solution along the lines suggested by Mr. Tsuruoka. His point had been that there was an overlap between article 28 and part II, inasmuch as indirect responsibility did not have the same consequences as direct responsibility. In other words, the responsibility of State A, which committed the act, might differ from that of state C, which influenced the

⁴ *Yearbook... 1973*, vol. II, p. 176, document A/9010/Rev.1, chapter II, section B, article 1, para. (11) of the commentary.

act, and any such difference could have a significant impact on the various situations that would arise in that context. His position, which fell somewhere between Mr. Ushakov's and Mr. Ago's, was that some limitation was indicated in the case of indirect responsibility.

23. Mr. SCHWEBEL said it had been established international law since the Nürnberg trials that a plea of superior orders was not available as a full defence to a person accused of a war crime, although it might be admissible in mitigation. That was a telling analogy, which cut across the proposition that there should be exclusive responsibility on the part of the dominant State; assuming the subservient State to be in the position of a person accused of violating the laws of war, such a State could not plead superior orders to relieve it entirely of responsibility, although it could enter such a plea in mitigation of the measure of damages attributable to it.

24. He did not dispute Mr. Ago's argument that there was much logic in favour of the exclusivity of responsibility on the part of the superior State, but he thought that the case in point was one where logic did not perhaps make sense, given the realities of the modern world. Bearing in mind the examples cited by certain other members, he believed that the Commission would be best advised to adopt the path of joint, rather than exclusive, responsibility.

25. Mr. VEROSTA, referring to Mr. Ushakov's remarks, said that a distinction must indeed be drawn between illegal military occupation on the one hand, and occupation of liberation and the presence of troops after the cessation of hostilities on the other. However, he could not agree that, in the case of illegal occupation, the occupied State ceased to exist. Under positive international law, the occupied State did not disappear, but remained a paralysed legal entity, since it lacked organs able to take action. He cited as evidence the Moscow Declaration on Austria of 1 November 1943,⁵ in which the Soviet Union, the United Kingdom and the United States had expressed the unanimous view that Austria had been the first free country to fall victim to Hitler's policy of aggression and that it should be liberated from German rule. If Austria had not existed at the time, there would have been no question of liberating it. However, the great Powers had treated the annexation of 1938 as null and void, and Austria had resumed its place in the international community. Unfortunately, in the control treaty, the victorious Powers had used the term "occupation", which had been appropriate during hostilities but had ceased to be appropriate after the end of hostilities. The legal personality of the militarily occupied State could therefore be said to continue until the final settlement of the situation, after which it might obviously disappear. It was impossible to place the Hitlerite military occupation on the same footing as the occupation by the liberating Powers or the station-

ing of military control authorities, which raised certain problems of shared responsibility.

26. Mr. NJENGA thought that draft article 28 should not be read as providing for exemption from responsibility for an internationally wrongful act in all cases without exception, since domination, coercion and control were matters of degree. Clearly, if one State was under the complete domination of another, then any action on the part of that State which led to an internationally wrongful act should entail the responsibility of the dominant, and not of the subservient, State.

27. That, indeed, had been the position of a number of protectorates, which had been in effect little more than colonies. Other protectorates, however, had retained a measure of international status and could not therefore be said to have been in a position to avoid responsibility for an internationally wrongful act. Likewise, where a protectorate had retained responsibility for the day-to-day administration of its affairs, it too had to be responsible for its acts. If, on the other hand, the international status of a protectorate was merely notional, so that effective power rested with the State which exercised control over it, then the acts of the authorities of the protectorate could be assimilated to those of agents acting for the State in question.

28. The same held true of a federated State. In the case of Switzerland, for example, if a canton enjoyed a degree of autonomy and consequently a certain international status, it would be wrong in principle to exempt it from responsibility simply because it was subject to a higher federal authority.

29. Again, in the case of military occupation, the question was not whether such occupation was beneficial or otherwise, but who was responsible for running the country. Thus in France, under the German occupation, the Vichy administration, which had been responsible for the daily administration of non-military matters, could not have avoided its international responsibility for making good any loss or damage incurred by alleging the fact of military occupation, since it had acted in the capacity of a State and been recognized as such.

30. A State could not, therefore, avoid its responsibility by claiming that it had acted in pursuance of the directions of a higher authority, apart from cases where the domination was so absolute that the authorities of the State committing the internationally wrongful act could be held to have acted as agents of the dominant State. He appreciated that economic coercion could be particularly compelling where a country was totally dependent on another for its economic survival, and that such a country would even be open to pressure as far as the conduct of its affairs was concerned. Nonetheless, he did not think it could be completely exonerated from responsibility, although the extent of the domination or coercion might be regarded as a mitigating factor in assessing compensation for any loss or damage caused by the internationally wrongful act.

⁵ *American Journal of International Law, Supplement of Documents* (Washington D.C.), vol. 38, No. 1 (January 1944), p. 7.

31. It was important to avoid creating a new category of States which acted as they saw fit and then claimed that they had done so under the domination of another State or that their freedom of action had been curtailed. In international relations, domination was a relative term, and exemption from responsibility should be confined to cases where the domination was so complete that the dominated State had to do as it was told for its very survival.

32. He would therefore suggest that draft article 28 be reworded, on the basis of the amendments proposed by Mr. Jagota and Mr. Tsuruoka, to reflect the situation more realistically.

33. Mr. JAGOTA said that the situations examined in the report under discussion were illustrated by examples, rather than categories, of cases and he had therefore thought it useful, in his variant A (A/CN.4/L.290), to merge the two paragraphs of article 28 in a single paragraph. However, the argument that the article should be formulated in two paragraphs was defensible and he had an open mind on that question.

34. On the other hand, the question whether the concept of indirect responsibility should be exclusive, additional or parallel called for much more careful consideration. He entirely agreed with Mr. Njenga that the wording of the article should not lead to the establishment of a new category of States that would be absolved of responsibility for internationally wrongful acts committed by them. It had also been rightly pointed out that account must be taken of different degrees of coercion, domination or control, and the article should not be cast in such broad terms that it would enable both the dominating and the dominated States to evade responsibility for their acts.

35. Mr Schwebel had referred to the prime responsibility of the wrongdoer and, in that connexion, had mentioned the principles embodied in the Charter of the Nürnberg Tribunal. The military manual issued by the United Kingdom in 1942 had specified that no liability was incurred for a wrongful act if the act was committed pursuant to superior orders. However, that view had been modified in 1944. At the Nürnberg trials, the defendants had invoked superior orders. At that time, it had been argued that the accused had had no option but to obey, for otherwise they would have been executed. The matter had been taken into account by the Commission itself in formulating the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,⁶ and had also doubtless been taken into consideration in the draft code of offences against the peace and security of mankind,⁷ which had been before the General Assembly at its last session. If the wrongdoer had a moral choice open to him, he would be held liable for the wrongful act in question. Conversely, if there was no moral choice possible to

the wrongdoer, in other words if he had no freedom of decision or action, superior orders could be invoked as a complete defence. Nevertheless, it was essential to bear in mind that that matter related to the liability of an individual under international criminal law, which was totally different from the much broader concept of State responsibility.

36. Article 19 of the draft defined certain international crimes and, for the purposes of article 28, one approach might be to specify that, where the internationally wrongful act constituted an international crime, the responsibility should be concurrent and could not be transferred from one State to another. But he was not convinced that the State committing the wrongful act should incur responsibility in cases in which it had been forced by another State to adopt a particular course of conduct and had had no option but to obey. The point to remember was that, when the State committing the act had no freedom of decision, responsibility should lie with the State that had forced the State in question to commit the wrongful act. In his proposal, he had sought to emphasize that aspect by referring to an internationally wrongful act committed by a State—and it must be a State, not a Non-Self-Governing Territory or a colony—that “must submit”, words which signified that the State had no option but to submit, in law or in fact, to the directions, control or coercion of another State. The use of the words “in law or in fact” also overcame the problem of deciding whether or not military occupation was lawful or justifiable. Consequently, responsibility would lie with the State that made the other State submit to its directions, control or coercion. However, an essential qualifying condition was the phrase “but only to the extent of the limitation on its freedom of decision”. That form of words took account of degrees of coercion, and also covered the case of excessive zeal in the execution of instructions or abuse of power on the part of local authorities.

37. If the concept of exclusive responsibility was partially dropped, the underlying philosophy of article 28 itself would be changed, for indirect responsibility would then become joint or parallel responsibility. In that case, article 28 would become similar to article 27. In his opinion, the transfer of exclusive responsibility, confined to the special cases in which the State committing the act had lost complete freedom of decision and had been compelled by another State to commit the act in question, would be completely realistic. Provision could of course be made for certain exceptions, such as the commission of internationally wrongful acts that constituted international crimes. Obviously, the question of exclusive or concurrent responsibility was too important a matter to be settled hastily. Further reflection was required so that the Commission could prescribe a rule that would promote international peace and security, eliminate situations of dominance and clearly pinpoint where the responsibility lay.

38. Sir Francis VALLAT said that the Commission had reached a stage at which matters needed to be resolved in less formal discussion, and he hoped that,

⁶ See *Yearbook... 1950*, vol. II, pp. 374 *et seq.*, document A/1316, part III, paras. 95–127.

⁷ See *Yearbook... 1971*, vol. II (Part Two), pp. 97 and 98, document A/CN.4/245, paras. 437–441.

in connexion with article 28, greater use would be made of the possibility of commenting on any text that would be produced by the Drafting Committee. Clearly, a number of difficult issues were involved and it was now necessary, in view of the statement by Mr. Jagota, to place on record exactly what the Commission had said on the question of responsibility for superior orders.

39. Principle IV of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal⁸ stated that the fact that a person acted "pursuant to order of his Government or of a superior" did "not relieve him from responsibility under international law, provided a moral choice was in fact possible to him". The presumption was that the individual was not relieved of responsibility for what he had actually done, and the reference to "a moral choice" simply qualified a general principle. With regard to sovereign States, the tendency of judicial and arbitral decisions had been to presume that a State was responsible for its own acts, and a very strong case was needed if a State was to be relieved of that responsibility. In his opinion, the point to which the Commission's attention had now been drawn strengthened the case for preserving the responsibility of the State that actually committed the international wrongful act.

40. The clarification by Mr. Jagota gave cause for fresh anxiety, since Mr. Jagota's interpretation very considerably narrowed the scope of the circumstances in which a State other than the State committing the wrongful act might be responsible for the act perpetrated. Moreover, it would still leave in the draft a lacuna that would not be covered by the other articles, particularly articles 5 to 15. He was extremely grateful to Mr. Jagota for drawing attention to the Nürnberg principles, but his conclusions in that regard were frankly different from those reached by Mr. Jagota.

41. Mr. SCHWEBEL said that a further reason for adopting a prudent approach to the interesting distinction suggested by Mr. Jagota in respect of criminal acts was that, in view of the discussion of article 19 which had taken place in the Sixth Committee, the Commission would doubtless wish to be cautious about the treatment of article 19, lest that article should make an impact on other articles of the draft. On second reading of article 19, the Commission would have to consider very carefully the debate in the Sixth Committee and any additional comments by States in order to judge whether the approach taken in article 19 was a viable one. Again, for the fundamental reasons given by Sir Francis Vallat, it was essential to avoid the danger of a lacuna in the set of draft articles.

42. Mr. USHAKOV considered, unlike Mr. Ago, that Morocco should be regarded as a newly independent State within the meaning of article 2, paragraph 1(f), of the 1978 Vienna Convention,⁹ namely, as a 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".

43. Mr. REUTER could not agree that the responsibility of the State was comparable to that of the individual. As the Statute of the Nürnberg Tribunal and the Judgment of that Tribunal made clear, leniency must be shown to the individual who had no choice other than suicide. But the position was not the same for a State; the option of suicide was always open to it, which was what made it great. That was why a State which had committed an international crime could not be exonerated, no matter how great the pressure exerted on it.

44. He might concede that, during the Second World War, the Italian police who had resisted when the Italian State had ceased to exist could be said to have acted as an organ of the German State, or that the Vichy French police force had found itself in a position where it ought to have been considered as an organ of Germany. But that was a question of attribution, which should be dealt with in another article. It was conceivable that the officers of the Vichy French police, whose acts of an international character would be attributed to the German State, should be tried according to the principles of the Nürnberg Tribunal for having obeyed orders which they should not have obeyed.

45. As far as shared responsibility was concerned, he found it difficult to agree that one State should be exonerated in the case of an international crime in which two States were implicated. Bringing pressure to bear on a State to commit a certain act was an international crime, but it was another international crime not to resist that pressure, since there was no moral consideration to prevent a State from committing suicide.

The meeting rose at 12.55 p.m.

1537th MEETING

Wednesday, 23 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

⁸ Yearbook... 1950, vol. II, p. 375, document A/1316, part III.

⁹ See 1535th meeting, foot-note 4.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.289/Rev.1, A/CN.4/L.290)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 28 (Indirect responsibility of a State for an internationally wrongful act of another State)¹ (*concluded*)

1. Mr. JAGOTA, referring to Sir Francis Vallat's statement at the previous meeting, said that he would be grateful if Sir Francis Vallat would explain where a lacuna would occur in the draft if indirect responsibility was defined restrictively in article 28 in such a way that responsibility for an internationally wrongful act was transferred to another State in certain specific instances, namely, when that other State, as a result of its directions, control or coercion, had compelled the State in question to commit the wrongful act. Acts of grave concern to the world community as a whole, like those enumerated in article 19 of the draft,² might be mentioned as exceptions to article 28. Consequently, a State committing an act of aggression, even under pressure from another State, could still be held responsible for failing to resist the pressure of that other State. Obviously, all members of the Commission wished a rule to be drafted in terms that would apply in all cases, not creating a lacuna or offering an escape clause for any wrongdoer.

2. Sir Francis VALLAT said that, at the previous meeting, Mr. Jagota had seemed to affirm that the responsibility of the controlling State would be limited to cases in which the State under control had no moral choice in the matter. In his own opinion, limitation of the scope of international responsibility to cases of that kind would create a lacuna. In fact, a lacuna was bound to occur if the responsibility was identified reciprocally, for there was a grey area in which there would be responsibility on the part of the State having the right of control but there would still be room for responsibility on the part of the State committing the internationally wrongful act. Perhaps he had misunderstood both Mr. Jagota and the intention of the article submitted by Mr. Ago, but if that was not the case a lacuna did exist.

3. Mr. JAGOTA wished to make his position perfectly clear, although he still had an open mind on the matter under discussion and would certainly consider any fair and reasonable solution that was suggested.

4. In the light of doctrine and State practice, Mr. Ago had proposed the general rule that an internationally wrongful act of a State entailed that State's international responsibility. Article 27 modified that rule by establishing additional responsibility in the case of aid or assistance rendered by a State to another State for the purposes of committing an internationally wrongful act. Article 28 further modified the rule and shifted

responsibility from the State committing the internationally wrongful act to another State which had compelled it to perpetrate the act as a result of directions or control or the use of force or coercion. In those circumstances, the State committing the act did not enjoy independence in its decision-making and, for that reason, the responsibility was transferred to the other State.

5. In his own proposal (1535th meeting, para. 16), he had narrowed the scope of article 28. The general rule, as enunciated in article 1, would normally still apply; he had interpreted exoneration from responsibility narrowly, limiting it to situations in which the State had no option but to commit the internationally wrongful act, and had also construed compulsion restrictively, by excluding situations in which the State had actually had a choice open to it or had committed wrongful acts because its authorities had exceeded the instructions received. In the latter set of circumstances, the State committing the wrongful act could not evade responsibility; in that connexion, he had referred (1535th meeting) to the *Romano-Americana Company* case cited by Mr. Ago in his report.

6. He fully agreed with Mr. Schwebel's statement, at the previous meeting, that a State should not escape responsibility on the grounds that it had acted under coercion, and considered that such cases, in which both the State committing the act and the State exerting coercion should be held responsible, might form an exception to article 28, an exception that would be established in keeping with the general terms of article 19. He had been present in the Sixth Committee during the discussion of article 19, and at that time many States had viewed it as a substantive contribution by the Commission to the progressive development and codification of international law. Naturally, article 19 would be reviewed on second reading and, if the Commission should then decide to change its position in that regard, it would still be possible to describe the exception to article 28 as an "international crime" or a "crime in international law", or to use a form of words that would reflect the essential idea that a State should not be allowed to escape its responsibility for a very grave act under the pretext that it had been acting under coercion.

7. Mr. VEROSTA drew attention to a case that had not yet been mentioned, that of military alliances, whose operation led to results similar to the operation of consular jurisdictions, which had now disappeared from international practice. Instead of a consular jurisdiction, it was a military jurisdiction that was exercised in the territory of the host State. In the territory of that State, foreign allied military units enjoyed immunity from criminal jurisdiction, being subject to the jurisdiction of the military authorities of the State to which they belonged or to the general commanding them. If a traffic accident occurred in the host State involving trucks of foreign allied military units, the criminal aspect of the case came within the competence of the general commanding those units or of an *ad hoc* military tribunal. Such situations obviously gave rise to delicate problems, with which Austria had

¹ For text, see 1532nd meeting, para. 6.

² See 1532nd meeting, foot-note 2.

more than once been confronted when the four great Powers had maintained garrisons in its territory. It would be wrong to think that treaties of alliance and related orders furnished answers to such problems. They had to be dealt with in the course of practice, and there was no doubt that the concept of shared responsibility came into play. The question might be further complicated if the alliance had common bodies whose members included a representative of the State in which the accident occurred. In that case, a co-responsibility of the joint authorities might be added to the shared responsibility of the host State and the sending State. The need for article 28 was all the more evident.

8. Mr. PINTO said he still had some doubts about article 28. The question in his mind was which State's responsibility the Commission should endeavour to deal with in that article, which appeared to be concerned not only with the responsibility of the dominant State but also, to some extent, with the responsibility of the so-called subordinate State. He feared that in the final analysis such an approach introduced the defence of necessity, too rare and complicated a matter to be handled in the way in which the Commission was now proceeding. If the aim was to establish rules for two separate responsibilities, namely, the responsibility of the dominant State and the responsibility of the subordinate State, paragraph 1 as drafted was far too condensed. Similarly, it was far too condensed if the Commission was thinking in terms of some kind of defence of necessity, a conclusion which seemed inescapable since the responsibility of the subordinate State, if such responsibility ever existed, was extinguished. So many different concepts could not be treated simultaneously in such a short paragraph. He fully realized that it was not perhaps the intention to deal with the defence of necessity or any other kind of defence, but that was certainly the impression one gained from reading paragraph 1.

9. Again, it was somewhat difficult to accept the concept of a transfer of responsibility. If paragraph 1 did in fact relate to transfer of responsibility, he wished to know what connexion between the dominant and subordinate States would allow the responsibility to be transferred. An examination of chapters II and III of the draft did not reveal the existence of any such connexion. Consequently the responsibility could not be transferred, and responsibility arose simultaneously but independently for each State and must be shared by them in varying degrees—to the point where no responsibility lay with the subordinate State and complete responsibility lay with the dominant State.

10. In his opinion, article 28 was concerned primarily with the responsibility of the dominant State and, as Mr. Njenga (1536th meeting) had pointed out, it was not the intention to create a category of States that could not be held responsible for their actions, comparable to the category of minors in private law. The very idea of a State being regarded as a minor was abhorrent. If the Commission endeavoured to deal fully with the question of the responsibility of a subordi-

nate State, it would encounter the difficult problems of elaborating a kind of defence for the subordinate State, something which, in the circumstances, it was not possible to do.

11. Lastly, with regard to the exception formed by international crimes, as enumerated in article 19, he fully shared the views expressed by Mr. Jagota.

12. Mr. AGO, replying to the further comments to which draft article 28 had given rise since the 1536th meeting, noted first that, with the exception of Mr. Ushakov, all members of the Commission who had spoken on the article had stressed the need for such an article. As Mr. Schwebel had observed, without the article under consideration there would be a lacuna in the draft. However, it would be a lacuna with respect to the attribution of responsibility, as Mr. Reuter had pointed out, not with respect to the attribution of the internationally wrongful act. It was inconceivable that an organ of a State acting under the control of another State should be transformed into an organ of the latter State; it remained the organ of the State to which it belonged.

13. The place of article 28 no longer seemed to be a source of difficulty, since Mr. Riphagen had pointed out that the rightful place for the article was in part I of the draft, even if provision had to be made, in part II, for the various degrees and forms of direct and indirect responsibility.

14. As to the scope of article 28, Mr. Njenga had spoken of obsolete forms of dependence that were of historical interest only. He had mentioned certain kinds of protectorate which should not be confused with direct colonial rule. For instance, the relations at one time established between France and Morocco, in the form of a protectorate, had remained relations between two States. Algeria's accession to independence had given rise to a new State, whereas Morocco, on becoming independent, had been a State regaining its independence. At the time of the French protectorate over Morocco, the indirect responsibility of the protecting Power for acts of the Sherifian authorities had been affirmed in a famous case.

15. The most important case appeared to be that of military occupation. In that connexion, he explained that he had never considered that a value judgement should not be made on the various cases of occupation. Of course, there were odious occupations, like those of aggressor States, whereas the purpose of others was precisely to liberate a territory occupied by the armed forces of an aggressor State. It might also happen that a State militarily occupied by an aggressor State reacted, in exercise of its right of self-defence, and occupied the territory of the aggressor State. It was none the less true that the term "occupation" had generally been applied to all those forms of occupation, even to liberating occupation.

16. In all those cases, the question was whether a State exercised control over the activities of another State. Three cases could be distinguished.

17. A State might be subject to the control of another State only in certain spheres of activity, in which case any internationally wrongful act it might commit in wholly free spheres of activity, would entail its responsibility in accordance with the draft articles so far prepared. That had been the viewpoint adopted by the Franco-Italian Conciliation Commission in its decision of 15 September 1951 in the *Heirs to the Duc de Guise* case.³

18. Conversely, there were cases in which the State controlling another State considered that the situation in that State was such that its own organs should take the place of those of that State. That had happened in Germany where, after the Second World War, the four great Powers had taken over the entire administration. In Italy and Austria, on the other hand, certain sectors had been delimited. In central Italy, for instance, a strip of territory near the front line had been placed directly under Allied administration, which meant that the great Powers would have been directly responsible for any internationally wrongful act that might have been committed by the authorities of that sector. As for the case just mentioned by Mr. Verosta, it seemed to relate to acts falling within areas of activity that were within the exclusive competence of the occupying State. If one of the military jurisdictions in question committed, for example, a denial of justice, the responsibility of the State on which that jurisdiction depended would be entailed, and the local State would be in no way responsible. The question nevertheless deserved to be studied further, because the situation might vary from case to case.

19. Lastly, there might be cases in which the State machinery subsisted but was subject to control. The Agreement on the machinery of control in Austria of 28 June 1946⁴ mentioned eight areas of activity in which the Allied administration had taken over entirely from the Austrian administration. As far as other areas of activity were concerned, however, the Agreement had provided that the Austrian Government and all subordinate Austrian authorities would carry out whatever orders the Allied Commission might give them. In yet other areas, it had provided that the Austrian administration was not to await orders but was nevertheless subject to some supervision.

20. Distinctions could also be drawn in the matter of coercion. Very strong coercion extinguished in a specific case all freedom of action and decision-making power of the State suffering the coercion. By contrast, a State might be subject to simple pressure which, although scarcely stronger than incitement, nevertheless constituted a form of coercion. It was obvious that at the time when the authority of a State subject to such pressure determined its action, it must take account of that pressure even though, once its decision had been made, the maxim *coactus voluit, tamen voluit* could be applied to it.

21. The question of exclusivity arose in the following terms: did the indirect responsibility imputable, in certain circumstances, to a State controlling or coercing another State preclude all direct responsibility of the State that had committed an internationally wrongful act while under such control or coercion, or was it, on the contrary, possible to conceive of concurrent responsibilities? The Commission would inevitably have to answer that question. Some of its members considered that, in particularly serious cases, both States concerned incurred responsibility. In his opinion, the distinguishing test should be, rather, the extent of the control or coercion. Where the State subject to control or coercion no longer had any freedom of choice, it would seem absurd to hold it responsible for its actions. In other cases, however, the responsibility of the State subject to control or coercion must subsist. In that connexion, he agreed with those members who held that States should not be encouraged—by being assured that their responsibility would not be involved—to act in breach of their international obligations. It was probably along those lines that the problem should be resolved.

22. In its existing negative formulation, article 28 precluded, in each case, the responsibility of the State committing the internationally wrongful act. The Commission would therefore have to draft a text in positive terms, but without going beyond its intentions. The article should do no more than specify in what cases a State incurred international responsibility by reason of the internationally wrongful act of another State and, possibly, indicate whether that other State might also incur a parallel responsibility. Responsibility for the act of another was as it were the counterpart of the power enjoyed by the State which, in certain circumstances, could give orders to another State, or exert control over the latter's activities.

23. Lastly, the Commission would have to settle the question whether the case of coercion could be entirely equated with that of a stable and durable relationship between two States, in which case a single provision might cover both cases. Personally, he continued to believe that they could not be treated on the same footing and that it would be preferable to deal with each in a separate paragraph.

24. The CHAIRMAN said that if there was no objection he would take it that the Commission decided to refer draft article 28 to the Drafting Committee for examination in the light of the debate, and taking into account the proposals submitted by Mr. Tsuruoka (A/CN.4/L.289/Rev.1) and Mr. Jagota (A/CN.4/L.290).

*It was so decided.*⁵

ARTICLE 29 (Consent of the injured State)

25. The CHAIRMAN invited Mr. Ago to introduce chapter V of the draft articles on State responsibility,⁶

³ See A/CN.4/318 and Add.1-3, para. 35.

⁴ United Nations, *Treaty Series*, vol. 138, p. 85.

⁵ For consideration of the text proposed by the Drafting Committee, see 1567th meeting, paras. 1-5 and 10-39.

⁶ See A/CN.4/318 and Add. 1-3, paras. 48 *et seq.*

entitled "Circumstances precluding wrongfulness", and, more particularly, article 29,⁷ drafted in the following terms:

Article 29. Consent of the injured State

The consent given by a State to the commission by another State of an act not in conformity with what the first State would have the right, pursuant to an international obligation, to require of the second State precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory rule of general international law.

26. Mr. AGO said that after stating, in an introduction, that part I of the draft articles would be entirely concerned with defining the rules for establishing the existence of an internationally wrongful act constituting the source of international responsibility, the Commission had laid down, in article 1, the basic principle that

Every internationally wrongful act of a State entails the international responsibility of that State,

and had indicated, in article 3, the two main conditions for the existence of an internationally wrongful act, namely, the existence of an act attributable to the State, and the existence, through that act of the State, of a breach of an international obligation of the State. In chapter II, the Commission had dealt with the various cases in which an act could be considered as an act of the State, and in chapter III with the cases in which an act of the State constituted a breach of an international obligation. Chapter IV dealt with two distinct cases, which had one point in common: the implication of a State in the internationally wrongful act of another State. In the first case, the implication of the State took the form of aid or assistance given by a State to another State for the commission of an internationally wrongful act (article 27); in the second, the implication of the State took the form of control over the sector of activity of another State in which the internationally wrongful act had been committed (article 28).

27. Chapter V, which the Commission was about to discuss, dealt with the case where an act that would normally be an internationally wrongful act lost its wrongfulness. The effect of the circumstances of the case was to preclude the wrongfulness of the act, and not merely to preclude the responsibility resulting from an act that was still wrongful, although at certain periods mention had been made of "circumstances precluding responsibility". If one proceeded from the premise of the principle laid down in article 1 of the draft that "Every internationally wrongful act of a State entails the international responsibility of that State", one could hardly admit that there could be circumstances precluding the responsibility resulting from an act while allowing the wrongfulness of that act to subsist.

28. The concept of circumstances precluding wrongfulness was based on international jurisprudence and

on State practice. The replies to the request for information submitted to States by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930) concerning "circumstances in which a State is entitled to disclaim international responsibility" were very clear in that respect. The British Government, in particular, had stated, in connexion with self-defence, that considerations of self-defence "may justify action on the part of a State which would otherwise have been improper".⁸

29. The first question that might be asked was whether the consent of the "injured" State was a circumstance precluding wrongfulness. In logic it was arguable that the wrongfulness of conduct by the State not in conformity with an international obligation was precluded by the consent given to such conduct by the State that had the right to demand compliance with the obligation in question, because, in that case, the consent in fact resulted in the formation of an agreement whereby the international obligation became inoperative, for the specific case, between the two subjects. The consent of the injured State to an act directed against it, which would otherwise be an internationally wrongful act, thus precluded the wrongfulness of that act. That fundamental principle had never been placed in doubt in international jurisprudence or in State practice. The divergences noted in international practice never related to the principle itself but turned on the effective existence of the consent or on the question whether the consent had been validly expressed.

30. In the case of the occupation of Austria by German troops in March 1938, for example, the International Military Tribunal at Nürnberg had found it necessary, in order to determine whether that occupation was lawful or wrongful, to establish whether or not Austria had given its consent to the entry of German troops. It had concluded that it had not been possible to establish that consent and that the occupation of Austria had therefore been internationally wrongful.⁹

31. The consent of the State whose sovereignty would otherwise have been violated had nearly always been cited as justification for the sending of troops into the territory of another State to help it to suppress internal disturbances. That justification had been invoked by the United Kingdom in connexion with the dispatch of British troops to Muscat and Oman in 1957 and to Jordan in 1958, by the United States of America with regard to the dispatch of its troops to Lebanon in 1958, by Belgium at the time of its two interventions in the Congo in 1960 and in 1964, and by the Soviet Union on the occasion of the sending of troops to Hungary in 1956 and to Czechoslovakia in 1968.¹⁰

⁷ *Ibid.*, para. 77.

⁸ *Ibid.*, para. 53.

⁹ *Ibid.*, para. 59.

¹⁰ *Ibid.*, para. 60.

32. He emphasized that, in order to be considered as a circumstance precluding wrongfulness, the consent must be validly expressed. It could be tacit or implicit, provided that it was clearly established. For instance, in the *Russian Indemnity* case, the Permanent Court of Arbitration had taken the view that Russia, by its attitude, had implicitly consented to Turkey's conduct.¹¹ In no case, however, could the consent be a "presumed" consent, for such a presumption would be an invitation to intolerable abuses.

33. Secondly, the consent must be expressed by a subject of international law, in other words, it must be given by an organ competent to express the will of the State. It was questionable, for example, whether a regional or local authority could commit the State concerning the lawfulness of an action committed with regard to that State. That was the question that had arisen in connexion with the intervention of Belgian troops in the Republic of the Congo in 1960.¹²

34. To be valid, the consent must not be vitiated by defects such as error, fraud, corruption or violence, which were also grounds for the avoidance of a treaty. Thus the principles which, according to the Vienna Convention,¹³ applied to the determination of the validity of treaties, also applied with respect to the determination of the validity of consent.

35. A final condition was that the consent must be given prior to or at the time of the conduct in question. Consent given *ex post facto* could be considered as forbearance to pursue the consequences of the wrongful act, but could not take away the wrongfulness of the act.

36. He added that if the offence which the consent was to wipe out was an offence against a rule of *jus cogens*, in other words, against a peremptory rule of international law from which no derogation was allowed by agreement between two States, the injured State's consent could not be treated as a circumstance precluding wrongfulness. That was a new element which the Commission should introduce in the traditional rule relating to circumstances precluding wrongfulness, for it had recognized that there was a category of rules from which no derogation was allowed and whose violation resulted in the avoidance of a treaty, under article 53 of the Vienna Convention. Accordingly, to determine whether the injured State's consent precluded wrongfulness, the first point to be settled was whether the obligation breached was or was not an obligation of *jus cogens*.

37. Mr. REUTER said that, in the case of a bilateral treaty, it was arguable that a State might consider, *ex post facto*, that there had been no violation by the other State of one of the obligations provided for by

the treaty, since it was possible, in bilateral relations, to formulate provisions with retrospective effect.

38. Secondly, in the case of a multilateral treaty, had a State the right to consent to a breach of that treaty? If so, did it not, by consenting thereto, itself commit a wrongful act?

The meeting rose at 12.55 p.m.

1538th MEETING

Thursday, 24 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3) [Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State)¹ (*continued*)

1. Mr. USHAKOV deeply regretted the choice of examples in paragraphs 60-62 of the report (A/CN.4/318 and Add.1-3); in his opinion, they illustrated political situations which the Commission was not competent to interpret and which it was unnecessary to mention in connexion with article 29.

2. He considered that the question of the circumstances precluding wrongfulness had been misstated in draft article 29. In his view, a wrongful act could not be interpreted by the injured State as a lawful act, for the wrongful act existed objectively, inasmuch as the two conditions of wrongfulness were fulfilled—the existence of an international obligation and the existence of an act of the State in breach of that obligation. It was open to the injured State to forbear making a claim based on responsibility arising out of the unlawful act and to waive the claim to reparations for the damage that it had suffered, but the act itself remained unlawful, since it was not in conformity with the obligation of the State committing the act.

3. On the other hand, if one of the two elements of wrongfulness disappeared—for example, if the obliga-

¹¹ *Ibid.*, para. 69.

¹² *Ibid.*, para. 70.

¹³ See 1533rd meeting, foot-note 2.

¹ For text, see 1537th meeting, para. 25.

tion no longer existed—there was no longer a wrongful act. For example, where a State relieved another State of an obligation towards it, the obligation ceased to exist and there was no longer an unlawful act. If, for instance, a State agreed to the stationing of another State's troops in its territory, it cancelled, in that specific case, the obligation on the part of the other State not to send troops into the territory of a foreign State. As the obligation no longer existed, the presence of foreign troops in the territory of the first State was not an unlawful act. If the State had authorized the presence of foreign troops in its territory only for a specific period, the obligation was simply in abeyance; on the expiry of that period, the obligation revived, and the stationing of foreign troops in the territory of that State became an unlawful act.

4. In the case of a multilateral treaty, which had been mentioned by Mr. Reuter at the previous meeting, could a State party to the treaty relieve another State party of its obligations under the treaty? He did not think so. Article 20, paragraph 2, of the Vienna Convention² stated, in respect of reservations,

When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

Consequently, in the case of a limited multilateral treaty, a State party could not unilaterally relieve another State party of its obligations under the treaty; it could do so only with the consent of all the parties to the treaty.

5. In addition to multilateral treaties, there were other cases in which a State could not relieve another State of its international obligations, namely where they were obligations of *jus cogens*.

6. The question raised in article 29 was therefore in fact that of the existence of the obligation, rather than that of responsibility.

7. Mr. AGO wished to clear up immediately any misunderstanding as to his position. He entirely agreed with Mr. Ushakov that the object of article 29 was not to preclude the responsibility arising out of an unlawful act, but to preclude the wrongfulness of that act, on the grounds that consent rendered the obligation permanently or temporarily inoperative in the particular case.

8. It was obvious that in certain cases the State could not give its consent to the non-observance of the obligation towards it, since the obligation was an obligation *erga omnes* from which no derogation was possible. That was so in the case of obligations established by rules of *jus cogens*. It could also be so in the case of obligations provided for by certain restricted multilateral treaties.

9. For example, in the case of the invasion of Austria by German troops in March 1938, Austria had itself

been bound, under the treaties of Versailles and Saint-Germain-en-Laye, by an obligation towards the Allied Powers of the First World War. Had it consented to the entry of German troops into its territory, the occupation of Austria by Germany might not have constituted an unlawful act with respect to Austria, but Austria's consent would itself have been an unlawful act, since it would have constituted a violation of Austria's obligations towards the Allies. Consequently Germany would have committed an unlawful act not against Austria, but against the signatory Powers of the treaties of Versailles and Saint-Germain-en-Laye.

10. The reason why prior consent must be given in order to preclude wrongfulness was precisely that, if it was given subsequently, the act remained wrongful, since the obligation had still been operative at the time the act had been committed. The State could not efface the wrongfulness of the act *ex post facto*; it could then only refrain from making a claim based on responsibility arising out of that act.

11. Mr. RIPHAGEN said that the provisions of chapter V of the draft might tend to break the logical link between breach of an obligation, responsibility and the content of responsibility, for in his view it was possible to provide that a breach of an obligation did not constitute an internationally wrongful act only in cases where another primary rule prevailed over the rule at the source of the international obligation that had been breached. In other words, there was always an interrelationship between the different primary rules of international law, and hence a possibility of conflict between the abstract rules applicable to a given concrete situation. Such a conflict might arise as a result of a fortuitous set of circumstances, the classical but somewhat hypothetical example being that of the conflict between the duty not to trespass on another's property and the duty to render assistance to a person in need. A conflict might also arise because different primary rules had different objects, which then had to be harmonized. Again, some abstract rules pre-empted, as it were, all other rules. For instance, under Article 103 of the United Nations Charter, an obligation arising under the Charter prevailed over all other obligations. A conflict might even arise in regard to an extremely abstract right, such as the right of a State to a continued factual existence.

12. He further considered that the choice between conflicting rules must always be made by reference to the legal consequences of the breach of the rule. It was possible, for instance, to envisage a situation where the consent of the victim of the breach of an international obligation, which was also an obligation *erga omnes*, did not preclude the wrongfulness of the act in question, but none the less discharged the State committing it from its obligation to compensate the victim. That situation did not, however, appear to be covered by the second sentence of draft article 29. In any event, he was uncertain whether it was correct to provide that consent in such cases had no effect whatsoever. It might have an effect between the consenting State and the State committing the breach, yet have no legal effect as between the other States bound by

² See 1533rd meeting, foot-note 2.

the *erga omnes* obligation. In that connexion, it would be useful for the Commission to consider the questions raised by Mr. Reuter, which were particularly relevant to the relationship between the primary rules of international law.

13. In the light of those preliminary considerations concerning draft article 29, he thought the Commission would encounter a number of difficulties in endeavouring to reflect the relationship between the various primary rules regarding obligations and rights within the context of responsibility and its consequences, which was the framework within which, in his view, the matters dealt with in chapter V were to be considered.

14. Mr. PINTO said that draft article 29 had logic on its side and was firmly rooted in concepts of private law. He agreed entirely that consent, in the sense not merely of knowledge but of acceptance of the risk involved, was required for the preclusion of wrongfulness. He also agreed that consent must be validly expressed, that it could be tacit although it must be unequivocal, that it must be given by a person or authority competent to express the will of the State and that it could be vitiated by error, fraud, corruption or duress. At the same time, he had certain doubts regarding the practical application of article 29, which related to article 28.³ Article 28 dealt with the case of a State that was responsible for another State's act. If, when exercising the rights thus devolving upon it, the dominant State caused damage to the subservient State, could it be said that the latter had consented to such damage? He thought not; nor, in his view, could it be said that the colonized nations had consented to the devastation that had ensued, although some might argue that their consent had been vitiated by such elements as duress and corruption. In his view, however, it was not enough for draft article 29 to provide that, in the presence of those and other like elements, there was in effect no consent, for the fact remained that consent had indeed been given.

15. He therefore considered that some qualifying words such as "voluntarily and freely" should be inserted in the draft article, between the words "consent" and "given", *ex abundanti cautela*, to set at rest any doubts that might arise on that score.

16. Mr. REUTER said that draft article 29 raised three types of question. First of all, it raised two questions of drafting. The first concerned the title of the article: "Consent of the injured State". In reality, the State was not injured, since it had given its consent. The second concerned the exceptions to the rule set forth in the first sentence of article 29. Although the obligations arising from a rule of *jus cogens*, referred to in the second sentence of the article, unquestionably constituted an important exception, there were nevertheless others. If the term "lawful" consent were used all exceptions would be covered and the second sentence of the draft article could be omitted.

17. The other question was whether draft article 29 was desirable. He recalled that Mr. Ago agreed with Mr. Ushakov that it was not the existence of the responsibility but the existence, or rather the effectiveness, of the obligation that was at issue in article 29. It was debatable, therefore, whether that article, together with the other articles in chapter V, which would deal with questions such as *force majeure* and self-defence, really belonged among draft articles on State responsibility; however, he would not wish to take too rigid a position on that point. The Commission had refrained from dealing with questions such as *force majeure* in the draft articles on the law of treaties because it had preferred to consider that type of question in the context of draft articles on State responsibility. It would be regrettable, therefore, if the Commission decided once again to postpone consideration of those questions.

18. In addition, draft article 29 raised questions of substance. Mr. Ago had repeatedly used the term "agreement" to describe the form taken by the consent. However, consent or waiver was not always in the form of an agreement. It might be a unilateral act, as in the *Nuclear Tests* case brought before the International Court of Justice, or even simply a mode of conduct. It was not possible, therefore, to shelter behind the Vienna Convention, which applied only to international agreements concluded in written form, although article 3 of that Convention recognized the legal force of international agreements not concluded in written form. Allowance had to be made for cases of unilateral acts, and, quite apart from agreements and unilateral acts, there might be modes of conduct capable of producing legal effects.

19. For his part, he believed that a State could give its lawful consent in a number of ways—and, occasionally, in ways not contemplated in the Vienna Convention. He considered article 29 to be necessary, although its wording could be simplified by use of the expression "lawful consent".

20. Mr. NJENGA observed that Mr. Ago had referred in his report to certain instances, including those involving *force majeure*, where wrongfulness would undoubtedly be precluded. With regard to the *volenti non fit injuria* principle, however, care should be taken not to draw too close an analogy between the position of an individual under domestic law and that of a State under international law; whereas an individual could consent to injury only to himself, in the case of a State the government, president or regional authority consented to injury on behalf of others.

21. In his view, the Commission would be ill-advised, in terms of the progressive development of international law, to provide that consent by one State could entirely exonerate the other State from responsibility. That applied in particular to the dispatch of troops to the territory of another State, and the various examples cited in Mr. Ago's report only heightened his doubts on that score. In the case of the German occupation of Austria in 1938, the dispatch of United Kingdom troops to Muscat and Oman, of United States troops to Lebanon and of Belgian troops to the

³ See 1532nd meeting, para. 6.

Congo, and indeed of the more recent dispatch of French troops to Shaba Province in Zaire, the issue of consent had been introduced to justify gross interference in the domestic affairs of another State. All those situations, moreover, had been characterized by the presence of a dominant and a subservient, or client, State, which meant that consent had invariably been a foregone conclusion. There were of course certain situations in which a State could consent to the presence of foreign troops on its soil, since the United Nations Charter itself provided for collective self-defence, as did a number of bilateral and multilateral agreements. But the dispatch of troops to prop up the régime of another country or for the purpose of colonialization—colonialization often based on so-called consent secured from chiefs who did not realize what they were signing—was totally unjustifiable. Nor was the question of State responsibility at issue in certain cases. In Africa, for example, neighbouring States often entered into agreements whereby their respective nationals could cross the border, for instance to catch cattle thieves and bring them to justice. In cases where entry into the territory of another State was permitted, there was no need for any rule; where it was not, such a rule would merely provide the justification for any mischief done.

22. In the circumstances, he felt very strongly that draft article 29 should be omitted, for its inclusion in the draft would in any event certainly make the entire draft unacceptable to the Sixth Committee of the General Assembly and to the international community as a whole. He therefore urged the Commission to proceed to the other articles dealing with circumstances that precluded wrongfulness and could be justified in logic, law and contemporary international relations.

23. Mr. VEROSTA wished to provide a clarification concerning the occupation of Austria by German troops in March 1938. At the Nürnberg proceedings, it had been the defence that had claimed that Austria had given its consent to the entry of German troops. However, the Nürnberg Tribunal had been unable to establish that such consent had been given. Even before the entry of the German troops, Austria had been subjected to threats, which had prompted the Chancellor to resign, leaving the President of the Republic practically alone and prevented, by lack of time, from convening Parliament, not then in session. Under pressure by the Germans, an Austrian Nazi, Seyss-Inquart, had succeeded the outgoing Chancellor; Seyss-Inquart had later become one of the leaders of the SS, and had been sentenced to death by the Nürnberg Tribunal and executed. It was he who should have given his consent to the entry of German troops into Austria, but because of the confusion of telephone calls from Berlin to Vienna and vice versa on that day, he had not given it.

24. Mr. JAGOTA agreed that consent could be viewed as a relevant circumstance precluding wrongfulness. As Mr. Ago explained in his report (A/CN.4/318 and Add.1-3, para. 50), he was concerned in chapter V with circumstances precluding wrongfulness,

not with circumstances precluding responsibility; that explained the difference between chapters IV and V, and that was why the substance of articles 27 and 28 could not be dealt with in exceptions precluding the wrongfulness of the act, since responsibility would then no longer be entailed.

25. Mr. Ago's extremely interesting presentation had raised a number of matters that called for clarification before a final position could be adopted with regard to the text of article 29. Indeed, a circumspect approach was required in dealing with the present subject-matter because, as Mr. Ago himself had realized, it was always possible to misuse or abuse consent and justify it for other purposes, such as those indicated by Mr. Njenga. Consent doubtless formed a sound basis for making an exception in what might be termed minor cases, but it was important to bear in mind the possible application of the concept of consent in more difficult political cases, such as those involving the use of force or involving sovereign acts committed by one State in the territory of another State. Mr. Ago had referred not only to consent but also to waiver, two concepts that were altogether different. In the present context, did the concept of consent imply the concept of waiver? It could be correctly argued that consent was one of the principal circumstances precluding the wrongfulness of an act, but a waiver was a straightforward decision, open to any sovereign State, to relinquish the exercise of certain rights.

26. As Mr. Ago had said, consent was like an agreement, and the effect of the agreement might be either to eliminate or to suspend the wrongfulness of the act. In that regard, it was important to establish the difference between elimination and suspension. Presumably, the wrongfulness of an act could be suspended if the consent were conditional or subject to withdrawal, for example if consent were given for a period of one year to the stationing of foreign troops in the territory of the State. In that case, the continued presence of those troops after that period had elapsed or after withdrawal of the consent would become wrongful. Consequently article 29 should reflect the fact that consent could be either conditional or unconditional. Consent might be given unconditionally under great provocation and, in such cases, the danger was that an act that was not wrongful would never become wrongful at any later date.

27. It had been rightly pointed out that consent must be freely given, as noted by Mr. Ago himself in his report, but that condition was not reflected in the formulation of draft article 29. Moreover, consent should be validly expressed, which implied that the person expressing the consent must be competent to do so for the purposes of international law. But the question arose who was competent to express consent for the purposes of international law. Fortunately, that aspect of the matter had already been dealt with in the Vienna Convention, and a form of words could be chosen to indicate the capacity of the organ or individual authorized to express the State's consent. Another question concerning the validity of the consent was

whether the State was competent to give consent if by so doing, it entered into conflict with a higher obligation or with higher rules that did not allow a State to abandon an obligation and thus affect the rights and obligations of other parties.

28. He entirely agreed that presumed consent was unacceptable, and that express consent and implied consent should be treated separately. Nevertheless, greater discussion was needed of whether implied consent should always be allowed as an exception that precluded the wrongfulness of an act. In grave cases where there was a possibility of abuse, as in the examples offered by Mr. Njenga, implied consent should not be admissible, and it was therefore necessary to stipulate that the consent must be express. Of course express consent did not necessarily mean consent in writing. The time for expressing consent should plainly be before the act was committed; otherwise the consent would in effect constitute a waiver. Naturally, he fully agreed with the last part of the article, concerning an obligation arising out of a peremptory rule of general international law.

29. The matters he had raised should be clarified and reflected in the text of article 29, so that it would be acceptable to the Sixth Committee. The article had therefore to be so drafted that its limits were perfectly clear, since an exception, by definition, must be restrictively interpreted and applied.

30. Mr. THIAM said it would be difficult to quarrel with the principle in draft article 29, whereby consent erased wrongfulness, particularly since an exception was provided for with regard to rules of *jus cogens*. As far as the wording was concerned, he thought that the term "injured State" should if possible be replaced by a more appropriate term.

31. Two arguments had been put forward with regard to the appropriateness of inserting an article such as article 29 in the draft. First, it had been said that the provision in question was related as much to the topic of treaties as to the topic of responsibility. Although that discussion could be prolonged indefinitely, the fact that the article under consideration was concerned with the reparation of an injury meant, in his view, that it was more closely related to the topic of responsibility. Secondly, Mr. Njenga had said that consent might be given under conditions such as to rule out the possibility of its having been given freely, and that, given the difficulties with which the question was fraught, it would be better not to take it up for fear of interfering, for example, in the affairs of a State which, for strictly internal reasons, wished to obtain the support of another State. For his own part, he thought that was not a sufficient reason for dropping article 29; it should be possible to draft it in terms ruling out such forms of interference. In that connexion, he noted that, whereas the interventions of Belgium in the Congo had provoked sharp reactions in Africa, the African countries had raised no objection to the sending of Moroccan troops into Shaba at the side of French troops—an action that had been regarded as intended to counter subversion from without.

32. In his view, the principle set forth in draft article 29 should therefore stand, but should be qualified by safeguards taken from the theory of defects of consent.

33. Mr. SCHWEBEL said that the article appeared to be essentially sound, correct in law and necessary to the set of draft articles. It might pose some drafting difficulties, but some valuable suggestions had already been made, such as those by Mr. Jagota, who had raised one question which nevertheless called for some discussion, namely, the question whether the article was speaking of consent or waiver. That point was convincingly dealt with in paragraph 72 of the report, which discussed the time at which the consent was given. The article could not be subsumed under the idea of waiver, for that would suggest that there had been an initial wrong for which the State wronged had chosen not to claim damages. In many cases, if the State had validly expressed its consent to the act in question, then no wrong had occurred. As Mr. Ago had pointed out in his report, if a wrong had taken place and the victim thereof then chose not to press for its rights, the case could be regarded as one of waiver. In that connexion, Mr. Ago had given the example of the landing of United States marines in Cuba in 1912, an occasion when the Cuban Government's consent had apparently been given after the event. Yet another example was that of the invasion of Czechoslovakia in 1968, when consent thereto, if expressed at all, had been given only after the event, as had been made plain in the proceedings in the Czechoslovak Parliament and in the Security Council. Indeed, it did not appear that valid consent had ever been given.

34. As had been so ably demonstrated by Mr. Njenga, the validity of the consent was obviously fundamental, although the issue was by no means peculiar to colonial situations. He did not reject the possibility of speaking of "genuine consent", or "consent validly expressed", or employing some other form of words, but he was somewhat sceptical as to their legal efficacy. The Commission would probably return to the fundamental concept that consent should mean solely genuine and authorized consent and not consent that was extorted or given by puppet spokesmen.

35. Mr. PINTO said that Mr. Ago, in his presentation of the draft articles, had drawn a clear distinction between international wrongfulness and international responsibility. Under the terms of article 1 of the draft, every international wrongful act of a State entailed the international responsibility of that State, but it was apparent from reading chapter V that Mr. Ago contemplated circumstances in which international responsibility could arise from acts other than acts that were internationally wrongful. In view of the title of chapter V, namely "Circumstances precluding wrongfulness", and of the fact that the Commission was working on a draft on State responsibility, he inquired whether it was Mr. Ago's intention at a later stage to tie in the two aspects and say in what instances circumstances precluding international wrongfulness would also preclude international responsibility.

36. Sir Francis VALLAT said that he experienced some doubts with regard to draft article 29, but, as in the case of article 28, he would probably gain a clearer picture of the matter as the discussion proceeded further. In his reading of the report under discussion (A/CN.4/318 and Add.1-3, paras. 56-77), the very title of chapter V had given him the impression that the Commission was now moving into a different area. Hitherto, it had been discussing responsibility for an internationally wrongful act and had operated on the assumption that a particular act was internationally wrongful. Suddenly, the Commission was considering something that was juridically altogether different. Again, the subject-matter now related to exceptions, namely circumstances precluding wrongfulness, yet the Commission had not considered the circumstances giving rise to wrongfulness and had not examined the issue of right and wrong in terms of law. Fortunately, he had found that paragraph 56 of the report referred to the principle *volenti non fit injuria*, the counterpart of which in common law systems was *damnum sine injuria*. However, it had then proved disconcerting to find that the report dealt not with the result of the act but with the nature of the act—with its wrongfulness. The Commission had in a sense taken a position on the question whether consent would preclude wrongfulness, but he still had lingering doubts whether it should proceed on the basis of that kind of fundamental classification.

37. In common law systems, the principle *damnum sine injuria* was expressed without reference to the wrongfulness of the act. For example, a person who suffered damage as a result of an act by another person had no right to compensation for that damage if he had consented to the commission of the act. For his own part, he wondered whether it was not possible to adopt a similar approach in international law. So far, the Commission had studied the matter on the basis of what might be called a civil law analysis and of the wrongfulness of the act; something that he feared would create great difficulties at a later stage for common law countries. If it were possible to find a less theoretical approach to the problem, from the point of view of drafting, it would be much easier for such countries to accept the set of articles.

38. The difficulty might be illustrated by the exception concerning *jus cogens*. He entirely agreed with the principle that a State was not entitled to commit a breach of a peremptory norm of international law. However, it was also necessary to consider the content of the norm. One of the obvious examples of a breach of *jus cogens* was the unlawful use of force, a concept that was embodied in Article 2, paragraph 4, of the Charter of the United Nations. If armed forces entered the territory of another State, characterization of that act as a breach of a peremptory norm must inevitably depend on the circumstances, which would include the question of consent by the State concerned. But the exception enunciated in article 29 specified that the act would remain wrongful if the obligation in question arose out of a peremptory rule of general international law. He very much doubted that the effect of the

consent of the State could, in those circumstances, be regarded as irrelevant. Admittedly, there might be cases in which the consent of the State was indeed irrelevant. It was only common sense that a State could not consent to the torture of its nationals by another State and thereby make such torture lawful. Nevertheless, in many instances, consent—or the absence of consent—was an integral part of the nature of the act and of the obligation itself. Naturally, a State could not normally claim compensation for damage when it had given consent to commission of the act, but it was important to consider the exception in article 29 very carefully and to examine the way in which the concept of consent was expressed.

39. Mr. AGO, replying to the comments made by Sir Francis Vallat, said that all the preceding draft articles had been intended precisely to determine the conditions under which there was an internationally wrongful act. Under article 3, there must exist conduct attributable to a State under international law and that conduct must constitute a breach of an international obligation of that State. Chapters II and III of the draft specified respectively when there was an international act of a State and when there was a breach of an international obligation. What remained to be determined was whether, in cases where all the conditions for the occurrence of an internationally wrongful act were fulfilled, the act was possibly not wrongful on account of the following special circumstance: where there was an international obligation and a State was entitled to expect observance of that obligation, but where that State gave its agreement, with the result that a special rule came into being for that specific case and the obligation in question did not apply in that case. Such an approach seemed much more general than the view that, in the event of consent, there was no right to reparation for the injury suffered, and hence no wrongful act.

The meeting rose at 12.55 p.m.

1539th MEETING

Friday, 25 May 1979, at 11.40 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Organization of work (continued) *

1. The CHAIRMAN said that the Enlarged Bureau had suggested the following approximate dates for consideration of the items of the agenda:

* Resumed from the 1531st meeting.

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| 1. State responsibility (item 2) | 16 May – 5 June (4 weeks)
13–19 July | |
| 2. Filling of casual vacancies in the Commission (article 11 of the Statute) (item 1) | 29 May | |
| 3. Question of treaties concluded between States and international organizations or between two or more international organizations (item 4) | 6–12 June (3 weeks)
27 June – 10 July | |
| 4. Succession of States in respect of matters other than treaties (item 3) | 13–26 June (2 weeks) | |
| 5. Review of the multilateral treaty-making process (General Assembly resolution 32/48, para. 2) (item 6) | 11–12 July | |
| 6. The law of the non-navigational uses of international water-courses (item 5) | 20–26 July (1 week) | |
| 7. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (General Assembly resolution 33/139, part 1, para. 5; General Assembly resolution 33/140, para. 5) (item 7) | 27 July | |
| 8. Report of the Commission and related matters | 30 July – 3 August (1 week) | |

2. If there were no objections, he would take it that the Commission agreed to adopt the above programme of work.

It was so decided.

The meeting rose at 11.45 a.m.

1540th MEETING

Monday, 28 May 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) *
(A/CN.4/318 and Add.1–3, A/CN.4/L.291)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State)¹ (*continued*)

1. Mr. TSURUOKA considered that article 29 truly dealt with the case of the preclusion of the wrongfulness of the act and not with the case of the injured State's waiver of its right to invoke the responsibility of the State committing the wrongful act. For that reason he considered that chapter V of the draft articles was the right context for article 29.

2. As Mr. Ago had said in his report, what was at issue in practice was not the principle that consent was a bar to the charge of wrongfulness; what was at issue was the actual existence of the consent and the validity of the way in which it was expressed. Accordingly, he considered that it would be advisable if the article itself stipulated that the consent must be given validly and expressly.

3. On the other hand, he considered it preferable that the article should not specify that the consent must precede or accompany the conduct, as Mr. Ago had said in paragraph 72 of his report (A/CN.4/318 and Add.1–3), for a provision on those lines might well be inconsistent with the rule laid down in article 25, paragraph 1.² It would be preferable to look to interpretation to settle that question in practice.

4. For those reasons, he proposed a redraft of article 29 (A/CN.4/L.291):

“If it is established that the valid and explicit consent has been given by a State to an act of another State which would otherwise be a breach of an international obligation of the latter State towards the former State, such consent precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory norm of general international law.”

5. Mr. FRANCIS said that under draft article 29 an act that would have been wrongful without a State's consent, could be transformed into a lawful act by virtue of that consent. The question of consent, particularly as it related to the presence of the troops of one State on the territory of another, continued to be a source of misunderstanding; most of the difficulties related to the need for consent to be genuine and validly expressed. However, there had never been any dispute about the general principle that, within certain limitations, a State could sanction a wrong done to it, a principle which, moreover, also had its application in other areas of international relations. It was therefore right and proper that the draft should reflect contemporary practice in the matter.

6. He noted that Mr. Ago, drawing widely on State practice and doctrine, had laid emphasis on the transformation of a wrongful act into a lawful act rather than on the waiver of a claim based on international responsibility. His own approach, initially, had been to test the validity of the terms of draft article 29 by reference to articles 1, 16 and 18. Article 18 provided that, for the act in question to entail the international

* Resumed from the 1538th meeting.

¹ For text, see 1537th meeting, para. 25.

² See 1532nd meeting, foot-note 2.

responsibility of the State that committed it, the act must be performed at the time when the obligation was in force for that State. Thus, if draft article 29 were read in conjunction with articles 1, 16 and 18, it seemed clear that, once a State had given its consent to the commission of an act that would otherwise have been unlawful, any previous international obligation incumbent on the performing State would cease to remain in force as far as the consenting State was concerned. That being so, it was not possible to invoke article 16, which was fundamental to the doctrine of international responsibility.

7. He had next asked himself whether it was more logical to take the approach adopted by Mr. Ago. For the answer to that question he had found it necessary to revert to the concept of consent, but in a different perspective, namely, consent as a fundamental element of State sovereignty. If the act in question involved an aspect of international relations that was of concern solely to the consenting State and the performing State, the consent could be given either before or after the commission of the act. The legal effect would remain the same in substance, since if the consent were given after the act had been committed, the international responsibility of the performing State would be waived. Not all cases were so simple, however. Implicit in the terms of Article 2, paragraph 1, of the United Nations Charter was the obligation on all Member States to respect the sovereignty of all other States. If, therefore, a State consented to the entry of troops into its territory after the act had been committed, no wrong would be done as far as that State was concerned. The other Members of the United Nations, however, might well adopt a resolution condemning the act, since the principle of State sovereignty was involved. In other words, the consent of the State directly involved would not necessarily suffice to legitimize the situation within the terms of the Charter. Viewed from that standpoint, he saw considerable justification in Mr. Ago's approach.

8. The exception provided for under the terms of article 29 in the case of a breach of a *jus cogens* rule was basically sound, in his view. Indeed, analogies were to be found in domestic law, one example being that the consent of an injured person did not avail the accused.

9. In the part of the report in which the basic elements of consent were outlined (A/CN.4/318 and Add.1-3, paras. 56-76), reference was made to a number of cases. He was not altogether sure that the *Savarkar* case was entirely relevant, since the main issue before the Commission was whether or not the consent of a State had been validly given. It was doubtful whether that had been so in the case of the French Government, and the *Hague Court Reports* did not answer the question. Nevertheless, there had been some irregularity in Savarkar's arrest and in handing him over to the British authorities.

10. Lastly, he considered that, to avoid any misunderstanding regarding the nature of consent, draft article 29 should be more narrowly drafted. In that con-

nexion, Mr. Tsuruoka's amendment, with its express reference to the valid and explicit nature of consent, would undoubtedly do much to make the article more generally acceptable.

11. Mr. TABIBI said that chapter V differed from the earlier chapters of the draft both as to its nature and as to its purpose. Whereas the first four chapters concentrated on the questions dealt with in articles 1 and 3, namely, State responsibility for an internationally wrongful act and the constituent elements of such an act, chapter V dealt with certain special circumstances, in particular the consent of the injured State, in consequence of which an intrinsically wrongful act was to be considered as lawful. The question of consent had been studied at great length in the course of the Commission's work on the law of treaties. The essence of consent was validity. If the consent were obtained through error or fraud or from an organ of the State that was not competent to express its will, or if it were contrary to the *jus cogens* rule, the act remained wrongful.

12. He shared the concern voiced by Mr. Njenga (1538th meeting), which was rooted in the fear that history would repeat itself. A dominant Power could always obtain the consent of a weaker one, whether by threat of force, by economic or political pressure, by fraud or error or by any of the other means at the disposal of powerful countries. Nevertheless, he considered article 29 useful in the draft to obviate the many problems that could otherwise arise in contemporary international relations.

13. The article and its accompanying commentary should therefore be couched in clear terms to reflect, in particular, the requirement of the validity of the consent. That would do much to dispel the concern expressed by certain members. Accordingly he welcomed the text proposed by Mr. Tsuruoka.

14. Mr. VEROSTA considered that the title "Consent of the injured State" did not correspond to the content of draft article 29; indeed, the expression "injured State" did not appear in the body of the article. It appeared only in the report, where the word "injured" appeared in quotation marks as from paragraph 71, which showed that Mr. Ago had had some doubts as to the advisability of using the expression in article 29. As was very pertinently stated in paragraph 68 of Mr. Ago's report, the circumstance precluding wrongfulness in the situation covered by article 29 was the "consent of the State in which is vested the subjective right that would, in the absence of such consent, be wrongfully injured by the conduct of another State". It followed that where there was consent there was no injured State, because there was no wrongful act. Accordingly, he proposed that the expression "injured State" should be omitted from article 29 and from the commentary.

15. He stressed that, in its relations with another State, a State could derogate from rules of customary international law provided that they were not rules of *jus cogens* and that the rights of third States were not impaired. For example, it was not permissible for a

State to agree to the passage of foreign troops through its territory unless that twofold condition was respected. There were numerous examples in support of that proposition in State practice. Between 1815 and 1878 the Ottoman Empire, which had possessed two enclaves in Dalmatia (at that time an Austrian province), had several times asked Austria for the right of passage for the purpose of moving troops from Albania to Herzegovina, but had never asked for Austria's consent when at war with other States lest it should risk a refusal, for Austria, then bound to those States by the law of neutrality, would have been committing a wrongful act with respect to them had it permitted the passage of Ottoman troops. Similarly, by authorizing British troops during the Boer War to pass through Mozambique (at that time regarded as an integral part of Portuguese territory), for the purpose of relieving a city besieged by the Boers, Portugal had breached the rule of neutrality which it had pledged to respect and had thus committed a wrongful act against the Boer Republics. It was to make amends for that wrongful act that, when the Boers, after their defeat by the English, had lost access to the sea, the Portuguese Government had authorized President Kruger to cross the territory of Mozambique and to take ship from there to Europe, where he had hoped to enlist the support of certain States for the Boer cause. By that conduct the Portuguese Government had committed a second violation of the rule of neutrality and another wrongful act — that time vis-à-vis England.

16. For a State's consent to be a circumstance precluding wrongfulness, it must not derogate from a rule of *jus cogens* or injure the rights of third States, and it must also have been given before the action taken by the other State. In that connexion, the question arose whether prior consent—normally a response to the other State's request—did not constitute an agreement between the two States. The question also arose whether in State practice there was such a thing as unilateral consent. In his opinion, in State practice unilateral consent could be given only after the commission of the wrongful act. In that case, however, consent could not erase the wrongfulness of the act that had already occurred, as Mr. Ago stated in paragraph 72 of his report. Where a State gave its consent *ex post facto*, that consent was in effect no more than a waiver by that State of any claim arising out of the wrongful act, in other words, of its right to claim reparation. Mr. Verosta gave another example to illustrate that view. In 1849, Emperor Franz-Joseph had asked for and obtained military aid from Russia to put down a republican rising in Hungary (at that time part of the Habsburg Empire); the entry of Russian troops into Hungarian territory had therefore been lawful. If, on the other hand, Nicholas I had sent troops on his own initiative to crush the Hungarian revolution, the case would have been entirely different, and the Viennese government, even if it had benefited from that intervention, could not have erased the unlawful character of the intervention *ex post facto*, even by subsequently concluding an agreement with the Tsar governing the withdrawal of troops and various material and financial questions. The inference to be drawn was

that the prior consent envisaged in article 29 was only part of a bilateral agreement that derogated from certain rights and prerogatives of the consenting State.

17. In that connexion he drew attention to the question of the diplomatic protection of aliens. Towards the end of the nineteenth century, the Latin American States, which had been much troubled by that question, had decided to abolish the reciprocal obligation to guarantee the protection of aliens by concluding *inter se* and with certain European countries (France, Spain, Italy and Germany) treaties containing a so-called "irresponsibility" clause.

18. The Institut de droit international had dealt with that question at several sessions, dating back to 1900, and had expressed the "voeu" that States should pledge themselves in advance by international convention (when such conventions did not already exist) to submit any dispute concerning the international responsibility of the State arising out of damage caused in their territory to the person or property of aliens first to an international commission of inquiry and then to a conciliation procedure. In a further "voeu", it had urged States to refrain from inserting reciprocal irresponsibility clauses in treaties, on the grounds that such clauses had the disadvantage of dispensing States from the performance of their duty to protect their nationals abroad and of their duty to protect aliens in their territory. The Institut had added that States which, owing to exceptional circumstances, considered themselves unable to provide sufficient and effective protection for aliens in their territory, could not avoid the consequences of that state of affairs except by temporarily denying aliens access to the territory.³ By its statement that States could not, even by reciprocal agreements, evade their duty to protect their nationals abroad and to protect aliens in their territory, the Institut de droit international had as early as 1898 applied the elements of the concept of *jus cogens*.

19. In conclusion, he wished to make three comments. First, the expression "injured State" did not correspond to the cases covered by article 29. Secondly, a State's consent to another State's conduct that was intrinsically wrongful made that conduct lawful and, if given in advance, formed part of a bilateral agreement. Thirdly, such a derogation from customary rules should not prejudice the rights of third States founded on other rules of customary international law, notably rules of *jus cogens*, or having their source in multilateral conventions.

20. Mr. TSURUOKA wished to explain the considerations that he had drawn from a reading of paragraph 72 of Mr. Ago's report, which dealt with the question of the time at which consent was given. The view could be taken either that the effect of consent *ex post facto* was neither to legitimize the wrongful act nor even to imply a waiver of a claim in respect of the

³ Institut de droit international, *Tableau général des résolutions (1873-1956)* (H. Wehberg, ed., Basel, Editions juridiques et sociologiques, 1957), pp. 140 and 142.

consequences of the act, or that such consent, in so far as it did not operate to legitimize the wrongful act, implied a waiver of the right to make a claim in respect of the consequences of the act. Another question was whether the effect of subsequent consent was limited in time. In Mr. Ago's opinion, the consent given at a particular time by a State continuously occupied by another State affected that situation only as from the time at which the consent was given. It would not legitimize the wrongful act except as to the future. But why then should the consent be held to imply the waiver of a claim in respect of the consequences of the wrongful act? Would the waiver be implied, or presumed? Those questions called for answers that it should be possible to give in the commentary to the article under discussion, without any need for amending the formulation of the article.

21. Mr. QUENTIN-BAXTER said that the first difficulty to be encountered in considering article 29 was that the subject-matter encompassed something far more fundamental than an exception. It was a general proposition that, unless they were of a peremptory nature, international obligations could be changed by the will of the parties. Again, primary obligations were often thought of in contexts in which the factor of consent entered into the primary obligation.

22. The famous judgement by Chief Justice Marshall in the United States Supreme Court in 1812 in the schooner *Exchange* case⁴ reflected the unquestioned right of a sovereign State to total control over its territory and entry into that territory. Only by way of an exception, in other words, by consent, whether express or implied, could a public ship of another State enter that territory. The Supreme Court had concluded that, in the case of an army, there could be no inference of consent unless it was express, but the practice of States was such that a visit by a ship belonging to a friendly State might well be supposed to have the implied consent of the State visited. Consequently, the Court had found that consent could be implied. However, once it was established that the ship was visiting the port with the consent of the State concerned, the right of the ship or the flag State to sovereign immunity was itself established. Only the absence of consent could remove that sovereign immunity, in other words, in the case in question, if it could have been supposed that the schooner had been allowed to enter United States waters on condition that it did not enjoy sovereign immunity. The Court had also found that there was nothing in State practice that allowed such consent to be presumed. Consent was therefore to be regarded as lying at the very root of the existence of international obligations, and it was very difficult, from a strictly theoretical point of view, to fit the concept of consent into the pattern of a mere exception.

23. It should be remembered that the Commission's ultimate aim was to establish a comparatively simple rule that would be of practical value, in particular to countries that had few trained international lawyers. The object of the texts and commentaries prepared by the Commission was to provide readily accessible material for practitioners in law, especially practitioners in the service of a State or of an international organization. Hence there would be a lacuna in the present set of draft articles if it failed to include, approximately in the position that article 29 now occupied in the structure of the draft, a provision dealing with consent. Indeed, the draft provided a good deal of practical guidance for legal advisers faced with the problem of examining the issue of attribution, establishing the nature of the act, determining whether the obligation was one of result or of conduct — in short, all the steps that the competent lawyer must go through in deciding on his initial approach to a legal problem. From a purely practical standpoint, the draft therefore required a provision relating to consent, even if it involved some slight divergence from strict logic.

24. On the other hand, it was one thing to state the proposition that, unless they were of a peremptory nature, international obligations could be changed at the will of the parties. It was quite another to suggest that the question of consent might provide an escape from the normal consequences of responsibility, for such a suggestion ran the risk of producing the result feared by Mr. Njenga, in other words, the tendency to justify anything that might be said as amounting to consent. It had already been pointed out that it was essential to specify that consent should be expressed before the commission of the act in question. That being so, the draft could do little to avoid an attempt by a transgressor State to justify its actions on the grounds of consent by the other State. In the present instance, it was not possible to deal effectively with the question of proof of the existence of an obligation or to lay down a rule specifying who, in particular circumstances, could give consent. In some cases, the relevant circumstances and State practice would tend to establish the likelihood of implied consent, but in many other cases they would not. In the example mentioned by Mr. Njenga, namely, pursuit of a cattle thief across international boundaries, the existence of consent would call for clear evidence from the practice and the understanding of the States concerned, but it would not flow from any general rule of law.

25. In addition, nothing could be done in the present set of draft articles to circumvent the difficulties arising out of the doctrine of recognition. It was usually regarded as the right of a sovereign State to recognize other States or Governments, and many of the difficulties inherent in cases of the kind mentioned by Mr. Njenga (1538th meeting) might occur as a result of the use of that institution of recognition. Nevertheless, it could be made perfectly clear in the commentary that, in speaking of consent, the Commission was referring to something that preceded the act. It was not referring to waiver, condonation or some kind of concession extracted after the event.

⁴ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, 3rd ed. (New York, Banks Law Publishing, 1911), vol. 7, pp. 116 *et seq.*

26. The article should focus not on the injured State but on the obligations of the State committing the act. Obviously, it was not Mr. Ago's intention to shift the focus in any significant manner, but the emphasis on the consent of the injured State rather than on the act of the State created the possibility of departing from the original intention of the article. If indeed the State was injured, then its consent was hardly a satisfactory excuse. Surely, the intention must be to specify that no injury occurred when consent was validly obtained. It was not necessary to use a form of words such as "valid consent", for it was to be taken for granted that the draft dealt with legitimate situations. As Mr. Ago had intended, the draft could be presented not as one that invited an escape from responsibility but as one that, at least to some extent, closed the avenues of escape from responsibility.

27. He would therefore prefer to bring forward the reference to a peremptory rule of international law to the beginning of the text and to start the article with the words "subject to any peremptory norm of international law". In that way, notice would be served from the outset that the purpose was not to encourage an escape from the normal consequences of the breach of an international obligation but to indicate the limitations on any legitimate possibility of escaping from such obligations.

28. It was an outstanding feature of modern international law that many international obligations, especially in questions of major importance to international relations, were more than simply bilateral. It had to be realized that, through membership in the United Nations or regional organizations or other groupings, States agreed to certain standards of conduct. Accordingly, it would be reassuring to those who were worried about the possible impact of consent if the draft stressed that the act would continue to be wrongful unless the necessary consent was obtained from all the parties to which the obligation was owed. Admittedly, the draft was concerned with the responsibility of States alone, and not with the responsibility of other subjects of international law. However, the draft was not confined exclusively to the responsibility of States towards other States. In theory at least, article 29 related to the consent of any subject of international law to which a State owed an obligation. The article might therefore specify that the obligation of a State continued to exist unless it had been removed by the consent of all States and other entities to which the obligation was owed.

29. Finally, it was his understanding that Mr. Ago's purpose in article 29 was to place consent in a limited context and not to allow it as a general exception. Such an article would make a substantial contribution to the general aim of ensuring the integrity of States themselves.

30. Mr. JAGOTA said that the concept of consent was a crucial aspect of the sovereign equality of States. It also constituted a very important concept in international law, for treaties establishing rights and obligations were concluded by mutual consent. Indeed, the

International Court of Justice could not have jurisdiction without consent. For the purposes of the draft articles, the essential problem now was to determine whether consent should constitute a basis for transforming a wrongful act into a lawful act. As revealed by the examples cited by Mr. Ago in his report, the matter was a delicate one, since the controversies almost always hinged on the question whether consent had actually been given and, if so, on the way in which it had been given. Consequently, if article 29 was to be viewed as dealing with an exception, it must be drafted in very precise terms to ensure that the exception was interpreted restrictively.

31. In the short time available to him, he had been unable to find any direct evidence of consent having been accepted as an exception to State responsibility, but the reason for the lack of such evidence might be that the question of State responsibility had not been considered in the perspective adopted by the Commission, in other words, not from the point of view of different aspects of primary rules that generated responsibility, but from that of general rules under which responsibility was entailed as a result of an internationally wrongful act. In volume 8 of the *Digest of International Law*,⁵ reference was made to State responsibility for injury to aliens and to the related question of diplomatic protection and international claims. A survey was made of the relevant literature, but no mention was made of consent as an exception. However, in a section dealing with justification in defence, consent was discussed indirectly under the concept of waiver. The effect of waiver was examined in a number of different situations, and it was apparent that waiver after injury had been caused to an alien could be used as a defence by the respondent State in respect of its responsibility. Consequently, in examining the broader canvas of State responsibility as a whole, the Commission must ensure that a general rule on consent was drafted precisely and was not open to abuse.

32. Mr. Verosta had reached the conclusion that consent, if freely and validly expressed, amounted to an agreement between the parties. The point to be considered was whether consent, as understood in the terms of article 29, was to be confined to consent constituting an agreement and *per se* applicable under international law, in which case the question arose whether it was necessary to make provision for an exception. If, however, a wider meaning was to be attached to consent, so that it might even include unilateral consent, the scope of the concept would also be wider and it would therefore have to be defined very carefully. It must also be remembered that, if consent signified agreement, it could imply an invitation to a State to intervene in the affairs of another State and to use armed force. Consequently it was essential to be clear about the precise meaning of the term "consent".

⁵ M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967).

33. Again, a distinction had to be drawn between consent and waiver. The commentary should point out that consent given after the commission of the act in effect constituted a waiver. Consent would preclude the wrongfulness of the act, whereas waiver would simply constitute a mitigating circumstance.

34. He supported the proposals made by Mr. Quentin-Baxter earlier in the meeting and by Mr. Tsuruoka (A/CN.4/L.291), but the Drafting Committee might wish to consider the advisability of retaining the phrase "if it is established", employed by Mr. Tsuruoka. Such a form of words, if used in article 29, would have to be used in every article dealing with exceptions and would become an evidentiary rule rather than a substantive norm.

The meeting rose at 6.10 p.m.

1541st MEETING

Tuesday, 29 May 1979, at 11.45 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Filling of casual vacancies of the Commission (article 11 of the Statute) (A/CN.4/317 and Add.1 and Add.1/Corr.1 and Add.2)

[Item 1 of the agenda]

1. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Jens Evensen, of Norway, Mr. Boutros Ghali, of Egypt, and Mr. Julio Barboza, of Argentina, to fill the vacancies caused by the election, on 31 October 1978, of Mr. Roberto Ago, Mr. Abdullah El-Erian and Mr. José Sette Câmara as judges of the International Court of Justice.

2. Telegrams would be sent immediately to the three new members of the Commission inviting them to take part in its work.

The meeting rose at 11.50 a.m.

1542nd MEETING

Wednesday, 30 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr.

Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318 and Add.1-3, A/CN.4/L.291, A/CN.4/L.292)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State)¹ (*continued*)

1. Mr. PINTO said that the question had been raised of the appropriateness of the term "injured State", which appeared in the title of draft article 29. For his part, he had no difficulty with that term, since, in his view, it was used in its factual, as opposed to its legal, sense to refer to a State that had been injured in fact but might not be held to have been injured in law. So far as the term "consent" was concerned, however, he continued to think that it required some qualification to make it clear that consent must be explicit and freely and lawfully given. He was prepared to accept the addition of the word "valid", provided that it was understood to cover those elements; if not, then some other wording should be found.

2. He agreed that the draft article in its present form should be restrictively interpreted and also that the order of its two provisions should be reversed, so that the exception preceded the general rule.

3. In respect of draft article 29, he had already raised a question (1538th meeting) concerning the relationship between the concepts of wrongfulness and responsibility. In that regard, he would be grateful for clarification on three points, the first of which concerned the connexion between the wrongful act and the consequences, or effects, of the wrongfulness. If consent to a wrongful act was given in accordance with the terms of article 29, should such consent, and therefore responsibility, be deemed to apply to all the consequences that flowed from the act in question, or only to such consequences as could reasonably be foreseen by the State which would otherwise have been injured? Assuming for example that State A installed a nuclear plant on the territory of State B on the specific understanding that there would be no disposal of radioactive waste on the latter's territory, and assuming that an official of State B subsequently authorized such disposal and that damage was caused thereby, it might be held that there was valid consent to the extent that the official concerned was competent in the matter, but the question remained whether, in the circumstances of the case, such consent should

* Resumed from the 1540th meeting.

¹ For text, see 1537th meeting, para. 25.

apply to all the consequences flowing from the disposal.

4. Secondly, if responsibility was extinguished, did the same apply to the wrongfulness? Supposing for instance that State A occupied State B in breach of its obligations to State B, and that State B and any other States concerned had given their consent to such occupation, could it then be said that State A was exonerated from responsibility? Supposing, moreover, that State A had gained by the occupation in terms, for instance, of securing its borders or extending its markets, should State A not be held responsible for any adverse effects on State B resulting from the occupation?

5. Lastly, he considered that the scope of the exception provided for in the second sentence of draft article 29 would be unduly narrowed by confining it specifically to peremptory rules of international law, and that it might therefore be advisable to broaden the exception somewhat. In that connexion, he drew attention to the Convention on International Liability for Damage caused by Space Objects,² which provided for absolute liability in the event of damage caused to the surface of the earth. Members would note that article VI, paragraph 2, of that Convention, which dealt with cases where exoneration from liability would not be granted, made reference to international law "including, in particular, the Charter of the United Nations".

6. Mr. SUCHARITKUL endorsed the concept underlying draft article 29 but wondered whether it would not be better to define in more precise terms the consent required to preclude the wrongfulness of an act that would otherwise be termed an internationally wrongful act. Like Mr. Jagota, he believed that the consent of the State formed the basis both of the jurisdictional competence of international bodies and of bilateral or multilateral agreements among States. In his opinion, the consent of the State was directly or indirectly the point of departure for any international obligation, and the rules of international law were founded essentially on the concept of the consent of States.

7. First of all, it was important to distinguish clearly between two closely linked legal concepts, namely, consent and waiver. Consent precluded the responsibility of the State committing the act to the extent that it precluded the wrongfulness of that act. Waiver, on the other hand, precluded neither wrongfulness nor responsibility; it was merely the expression of the injured State's intention not to invoke responsibility by taking legal action to obtain reparation.

8. Secondly, he agreed with Mr. Tsuruoka (1540th meeting) that the conditions governing the validity of the consent must be spelled out. In that connexion, the time at which the consent was expressed was of paramount importance. However, it was not always

easy to establish that time with precision, and doubts could arise as to whether the consent had been given beforehand or concurrently. For example, when Thailand had given its consent to the passage of Japanese troops through its territory during the Second World War, the Japanese troops had already landed in the southern part of the country. Nevertheless, none of the Governments that had subsequently held office in Thailand after the war had invoked that circumstance in order to claim that the consent had been invalid.

9. The scope and duration of the consent were also of great importance. For example, if a State gave its consent for the commercial aeroplanes of another State to fly over its territory, it was unlikely that that consent would also cover the air transport of troops or military equipment. In the case of consent by a State to the stationing of foreign troops on its territory, the duration of the consent was very important, since it determined the duration of the period in which troops could legally be stationed there. The Government of the Netherlands had consented to foreign troops being stationed on Indonesian territory and, when Indonesia had become independent, it had been necessary for it to give its consent, since it had not been possible to assume that the successor State would continue to consent to the presence of foreign troops as authorized by the predecessor State.

10. Finally, he believed, as did Mr. Pinto, that no difficulties arose with regard to the rules of *jus cogens*, which could not be derogated from by mutual consent. However, he wondered whether there were not other basic rules of international law which could not be derogated from either, even with the consent of the other State. He wondered, for example, whether certain resolutions of the General Assembly and the Security Council of the United Nations did not give rise, for all Member States, to obligations of such a nature that a breach of those obligations constituted an internationally wrongful act.

11. Mr. SCHWEBEL said that, as pointed out in paragraphs 57 and 74 of Mr. Ago's report (A/CN.4/318 and Add.1-3), the fact that a State consented to conduct by another State that would otherwise have been a breach of an international obligation of the latter State towards the former State led to the formation of an agreement to avoid or suspend the obligation. However, only consent given by a subject of international law could produce that effect, which was why consent given in a Calvo clause of a contract between an alien and a State did not operate to deprive the State of which the alien was a national of its right to extend diplomatic protection.

12. Fundamental to Mr. Ago's thesis was the proviso that, where a rule of international law allowed of no derogation and could not be modified by agreement between the parties, the consent of the injured State did not nullify or suspend the obligation in question. That gave rise to the dilemma to which Sir Francis Vallat had referred at the 1538th meeting: if it was agreed that the paramount rule of *jus cogens* was the rule embodied in Article 2, paragraph 4, of the Charter

² General Assembly resolution 2777 (XXVI), annex.

of the United Nations and that that rule, being *jus cogens*, permitted of no derogation, how was it possible to explain the example given in Mr. Ago's report, namely, that of consensual derogation from the rule that barred the entry of foreign troops into a State's territory? In his opinion, the answer might be that, if foreign forces entered the territory of a State with the latter's consent, they did so in support of or in keeping with the maintenance of the consenting State's territorial integrity or political independence. That would normally, although not invariably, be the case. If, therefore, such consent was genuine and authorized, there should be no problem, unless the consent violated other valid norms of international law, norms that were not perhaps recognized as core principles of *jus cogens* but none the less had status in international law.

13. To take the example cited by Mr. Verosta (1540th meeting) of the entry of Russian troops into Hungary in 1849, according to the international law of those days that entry was more defensible than the entry into Hungary of troops some 100 years later, since the sovereign power, Austria-Hungary, had given its consent. The Hungarians, however, had not done so and, to the United States, the leaders of the revolution of that day had been heroes. The term "self-determination" had not been current then, but the principle had been very much alive.

14. One of the most difficult problems of modern international law and relations was reconciling the right of the Government of a State to call in foreign troops with the right to self-determination. That was particularly so in a world where certain movements that claimed to be fighting for self-determination were actually representative of or fuelled by foreign forces, something which in itself amounted to an assault on the territorial integrity and sovereignty of the State and on the principle of self-determination. Clearly, however, the Commission could not settle such a vexed problem, and in general terms the thesis advanced by Mr. Ago in his report and reflected in draft article 29 was sound.

15. The question had rightly been raised whether the conduct to which the State consented could injure third States. That was a matter which related to the submission that responsibility could not be exclusive. If, for example, State A called on State B for assistance in repressing a persecuted racial minority, even if the consent of State A precluded any claim of aggression, the joint responsibility of States A and B for genocide could not be avoided since a violation of a rule of general international law and of a rule of *jus cogens* was involved. Paragraphs 73 and 74 of Mr. Ago's report gave further examples which supported the sound principle that the consent of the States immediately concerned should not prejudice the rights of third States.

16. Lastly, with regard to the need for consent to be genuinely and validly given, there was probably little to be gained by qualifying the word "consent". Nevertheless, the manner in which Mr. Tsuruoka's

amendment (1540th meeting, para. 4) sought to do so was acceptable, although he would suggest that it might be slightly reworded along the following lines:

"If it is established that its valid and explicit consent has been given by a State to an act of another State which, in the absence of such consent, would be a breach of an international obligation of the latter to the former State, that consent precludes the wrongfulness of the act in question. However, this effect shall not ensue if the obligation arises out of a peremptory norm of general international law."

17. Mr. USHAKOV said he still thought that the problem of responsibility did not arise in article 29. However, if there was no wrongful act, it was not, as he had thought initially, because a State released another State from an obligation towards it by waiving its right to require the fulfilment of that obligation, but because there was an agreement between the two States to derogate from the rule of international law that gave rise to the obligation. Thus, if the presence of foreign troops in the territory of a State did not constitute a wrongful act, it was not because the State had given its "consent" but because it had concluded with another State an agreement which, moreover, established in very precise terms the conditions under which the foreign troops could be stationed on that territory. Such an agreement constituted a derogation from the rule of international law whereby all States were obliged to refrain from sending troops into the territory of another State. Since that obligation no longer existed, the presence of foreign troops in the territory of the State was not wrongful.

18. Consequently, the problem posed in article 29 was not one of responsibility but one of derogation from an obligation of general international law by an agreement between two or more States. The problem was very complex, and it would be futile to try to deal with it in a single article. It was impossible to derogate from certain obligations of international law, not only when those obligations derived from rules of *jus cogens* but also, for example, when they derived from a restrictive multilateral treaty, since, in the latter case, the obligation was binding on all parties to the treaty, and, according to article 20 of the Vienna Convention,³ could be derogated from only with the agreement of all parties. The question also arose in the case of certain bilateral treaties and certain customary rules of international law. The real problem was therefore one of the validity of a derogation, by means of an agreement, from an obligation under international law.

19. Mr. VEROSTA formally proposed that the title of article 29 should be replaced by a title reading: "*Volenti non fit injuria*".

20. With regard to the article itself, he supported the text submitted by Mr. Tsuruoka, but suggested the insertion, after the first sentence of that text, of a sentence reading: "The consent so given shall not

³ See 1533rd meeting, foot-note 2.

violate the rights of third States without their consent.”

21. Mr. SCHWEBEL said he accepted entirely that the essence of the matter with which the Commission had to deal was agreement between the States immediately concerned. None the less, it seemed to him that Mr. Ago had taken the right approach in drafting an article that spoke not of agreement but of consent, and that such an article had a place in the codification of the law on State responsibility.

22. Moreover, he considered that, in that context, the word “consent” was more precise than “agreement”, since in some cases what was involved was more in the nature of a unilateral contract whereby, under municipal law, an act was exchanged for a promise rather than a promise for a promise. For example, if the customs officers of State A sought and obtained permission from the customs officers of State B to cross the border in order to apprehend a suspected drug trafficker, the act was the raising of the customs barrier by the customs officers of State B, while the promise was that of the customs officers of State A to enter the territory of State B and then leave. That comment was related to Mr. Ushakov’s point that permission to enter the territory of a foreign State must be specific and restricted. A number of other examples could be cited, some of which concerned the more sensitive area of the entry of foreign armed forces into the territory of a State. Not many years previously, the authorities of a State had sought and obtained the assistance of another State in restoring to power their president, who had been the victim of a *coup d’état* by a group of non-commissioned army officers. It was doubtful whether, in that case, there had been any written agreement setting forth the rights and responsibilities of the two States concerned; what had taken place was far more likely to have been in the nature of a unilateral contract. In his view, therefore, the nature of consent should be cast in broader terms. The consent must be explicit, but it need not invariably be written, and it was by no means certain that it must constitute the exchange of a promise for a promise.

23. If he had understood correctly, Mr. Ushakov had said that it was possible to derogate from peremptory rules of international law by means of an agreement. His own understanding, however, was that any such rule was by definition not open to derogation. He would therefore be grateful for clarification on that point.

24. Lastly, he had considered including a reference to third States in his proposed form of wording but had decided against doing so, since Mr. Tsuruoka’s amendment referred to a “breach of an international obligation of the latter State towards the former State”, which made it plain that the rights of third States were not affected. Some more explicit form of wording might, however, be desirable.

25. Mr. THIAM wondered whether it was necessary to spell out, in the text of article 29, that consent must

be valid or validly expressed, since that seemed self-evident. It was impossible to define all the conditions and circumstances under which consent could be expressed. In his opinion, the validity of the consent was a point of fact to be determined by the court.

26. He fully appreciated the distinction made by Mr. Ago, in paragraph 72 of his report, between prior consent—the only valid form of consent—and consent after the event, which was in reality simply a waiver of the right to invoke the responsibility arising from the wrongful act. However, he found it difficult to see how consent could be concurrent with the act in question.

27. Mr. JAGOTA could not agree with Mr. Thiam’s observation that it was unnecessary to qualify the term “consent” by the use of an adjective. For the guidance of Governments, legal advisers and the courts, it would be useful to spell out the elements of the consent required to be given under article 29, since such a course would help to ensure restrictive interpretation of the concept of consent in specific cases and would also facilitate consideration of the text of the article by the Sixth Committee.

28. He therefore wished to propose a new formulation of article 29 (A/CN.4/L.292), which was essentially a redraft that incorporated the proposals made by Mr. Tsuruoka (1540th meeting, para. 4) and by Mr. Verosta (para. 20 above):

Consent by the State

“The valid and explicit consent given by a State prior to the commission of an act of another State, which would otherwise be a breach of its international obligation towards the former State, precludes the wrongfulness of the act in question. The consent so given shall not violate the rights of a third State without the latter’s agreement. Nor shall such an effect ensue if the international obligation concerned arises out of a peremptory norm of general international law.”

29. In preparing his proposal, he had kept within the scope of the set of draft articles, which dealt exclusively with State responsibility for the internationally wrongful act of a State. It was not a comprehensive code covering State responsibility for acts which were not wrongful but none the less caused damage, something that was a separate subject and one which should be considered by the Commission only after it had completed the present topic. For the time being, it was not possible to examine such matters as absolute responsibility, responsibility based on fault, or the method of payment of compensation.

30. It was also extremely important that the commentary to the article should point out that consent given by a State *after* the commission of the internationally wrongful act by another State amounted to *waiver* of its rights or remedies. Of course, it was always possible for the Commission to decide at a later stage whether a separate article on waiver was required, but it was imperative that a distinction

should be drawn in the commentary between consent and waiver. Waiver was simply a renunciation of rights or remedies, and it did not affect the wrongfulness of the act. Consequently, it was not covered by the terms of draft article 29.

31. The commentary should then proceed to state that the phrase "valid and explicit consent" meant that, while giving its consent, the State was not under any duress, that the consent was not vitiated by error, fraud, corruption or other vices, that the consent was given by the proper authorities of the State competent to give such consent for the purposes of international law, that the consent would be restrictively interpreted with respect to its scope, and that there were no (well-known) constitutional or international prohibitions on the giving of that consent.

32. Mr. SCHWEBEL said that the answer to the question why a set of draft articles on State responsibility should include an article such as article 29, which did not set forth a rule of State responsibility, was surely that the article related to a vital exception from application of the principle of State responsibility, and it was therefore entirely appropriate to deal with a matter of that kind.

33. He fully agreed with the suggestions made by Mr. Jagota, with the possible exception of the reference to constitutional restrictions on consent. If such a proviso were to be included in the commentary, it would be preferable, by analogy with the Vienna Convention, to speak of "notorious" constitutional restrictions.

34. Mr. USHAKOV, referring to the first part of draft article 29, namely, "the consent given by a State to the commission by another State of an act", wondered what acts Mr. Ago had in mind. When a State issued authorizations to fishermen from another State to fish in its territorial sea, could it be said that it was giving its consent to the commission of a certain act? Such agreements, like the one between the Soviet Union and Japan, sometimes stipulated that the validity of the fishing permits was limited to certain seasons or certain catches. It was extremely doubtful whether agreements of that kind involved consent to the commission of an act; in all cases, they were delegatory agreements. Any State, in exercising its sovereignty over its territorial sea, could conclude with another State an agreement by which it authorized certain nationals from that State to fish in its territorial waters. Once such an agreement had been concluded, one could not speak of an act that might be wrongful. The obligation not to fish no longer existed, but a right to fish did exist. Thus no consent had been given to the commission of an act that might be regarded as wrongful.

35. Mr. TABIBI said that Mr. Jagota's proposal was extremely valuable, since it helped to remove some of the doubts experienced by members of the Commission, more particularly in connexion with the concept of validly expressed consent. However, the provision that consent should be given before the commission of

the act, although a very useful safeguard, might create certain problems, for in some cases it would prove very difficult to obtain prior consent. In the atomic age, the security of nations might require consent to be given only split seconds before the act was to be committed. Perhaps Mr. Jagota would like to reflect further on that point.

36. Mr. RIPHAGEN said that the Commission was dealing with three different kinds of situations. The first situation was that of an oral or even a written agreement between State A and State B which suspended or ended the obligation of State A towards State B. That case was covered by the law of treaties. The second situation was that relating to a type of conduct by so-called victim State B which might preclude the responsibility of the so-called wrongdoing State A. That case was covered by the principle *volenti non fit injuria*, and in some instances the conduct that amounted to consent might be purely unilateral. The third situation involved waiver by State B of its right of action towards State A—even an action that amounted to a reprisal. In those three situations, State B renounced some of its rights in respect of State A, but the question arose as to what rights could be renounced. Obviously State B could renounce only its own rights and never the rights of a third State. Admittedly, in situations involving breaches of peremptory rules of international law, certain rights could not be renounced even by treaty, let alone by mere consent. In other situations, however, a State could for example renounce a right to monetary compensation, and in general, although not always, a State could obviously renounce its right to the application of a sanction, within the restrictive meaning of the term "sanction" employed by Mr. Ago.

37. It was evident that the difficulties being experienced by the Commission lay in the different types of situations and the different consequences of wrongful acts that had to be dealt with in the context of article 29. In that regard, he wondered whether the proposal made by Mr. Verosta and incorporated in the proposal by Mr. Jagota really resolved the problem. Why should the consent of State B, given in violation of the right of State C *vis-à-vis* State B, not extinguish the responsibility of State A *vis-à-vis* State B? The consent of State B to the entry of armed forces into its territory might violate the rights of State C, but would it still engage the responsibility of State A, which dispatched armed forces to State B? In his opinion, the answer was certainly in the negative. Such consent would entail the responsibility of State A towards State C, and probably the responsibility of State B towards State C, under the rule concerning aid or assistance of a State to another State adopted in article 27 of the draft.⁴ For the moment, however, he failed to see why the consent of State B to the entry into its territory of armed forces of State A should entail the responsibility of State A *vis-à-vis* State B. State A had the consent of

⁴ See 1532nd meeting, foot-note 2.

State B, even though that consent violated the right of a third State.

38. Mr. JAGOTA, referring to Mr. Schwebel's suggestion, said that it might be preferable to speak of "well known" rather than "notorious" constitutional prohibitions. He would certainly incorporate the words "well known" in his proposed form of words for insertion in the commentary, but they might also be interpreted as qualifying "international prohibitions", where there were no grounds for making the distinction between "notorious" and other kinds of prohibitions. Nevertheless, that point could also be explained very easily in the commentary.

39. With regard to the question raised by Mr. Tabibi, the fundamental principle was that consent must be given before the commission of the act, and, in cases where time was of the essence, consent might have to be sought and obtained only a very few seconds beforehand, either by "hot line" telephone or some other rapid means of communication. In establishing the rule in article 29, it was essential to specify that consent obtained after the commission of the act constituted waiver, and that the wrongfulness of the act could be precluded solely by obtaining prior consent.

40. Lastly, the fears expressed by Mr. Riphagen might be overcome by the provision to the effect that valid and explicit consent could not violate the rights of a third State without the latter's agreement, so that the wrongfulness of an act would be extinguished by consent between the parties *inter se*. The question whether consent could ever be given at all when it affected the rights or obligations of a third State would be dealt with in the commentary in connexion with the validity of the consent.

41. The CHAIRMAN, speaking as a member of the Commission, said that chapter V, entitled "Circumstances precluding wrongfulness", was necessary to the draft. In his preliminary considerations (A/CN.4/318 and Add.1-3, paras. 48-55), Mr. Ago had demonstrated that need, but the discussion on the first article of chapter V, namely, article 29, gave reason to fear a Pandora's box. In tackling the question of circumstances precluding wrongfulness, the Commission was running the risk of having to take a position on certain aspects of general international law for the first time, since it had not as yet had occasion specifically to consider those special circumstances. In several of its reports on previous sessions, the Commission had already made reference to the various special circumstances that it had intended to study. It was now confronted with preliminary issues that might make the elaboration of the articles in chapter V much more complicated.

42. To overcome those difficulties, it might perhaps be advisable to draft an article that could be placed at the beginning of chapter V and would explain the context in which the circumstances precluding wrongfulness were to be considered. Since the Commission was encountering serious difficulties and must complete its study of State responsibility for internationally

wrongful acts as soon as possible, such an article would doubtless prove useful.

43. Mr. VEROSTA, referring to the amendment he had proposed earlier (para. 20 above), which had been taken up in a modified form in Mr. Jagota's proposal (para. 28 above), emphasized that the application of the exception of *jus cogens* was not confined to rules laid down in multilateral treaties. For example, in the matter of neutrality there was nothing to prevent Sweden from allowing German troops to cross its territory. The situation would be different in time of war, since Sweden's right to dispose freely of its territory would be limited by the rights of the belligerents, and Sweden would have to act in accordance with the rules of neutrality. During the Second World War, when Sweden had allowed German troops proceeding from Norway to Denmark to cross its territory, it had doubtless obtained the acquiescence of the Allies.

Organization of work (*continued*) *

44. Mr. SUCHARITKUL said that, as a result of his delayed arrival at Geneva, he had been unable to submit information on the progress of the preliminary report that he was to present in his capacity as Special Rapporteur on the topic of jurisdictional immunities of States and their property. He hoped that the suggestions by the Enlarged Bureau for the consideration of topics on the agenda (1539th meeting, para. 1) did not rule out the possibility that he might submit his preliminary report within three or four weeks' time and that the topic might be discussed at one or two meetings towards the end of the session.

45. The CHAIRMAN said that the topic of jurisdictional immunities of States and their property was included as item 10 of the agenda, and would certainly be discussed when the report became available. The suggestions by the Enlarged Bureau for the consideration of topics gave only approximate dates and simply represented the over-all framework for the Commission's discussions.

The meeting rose at 1 p.m.

* Resumed from the 1539th meeting

1543rd MEETING

Thursday, 31 May 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam,

Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.291, A/CN.4/L.292)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State)¹ (*continued*)

1. Mr. AGO, replying to the comments made on draft article 29, began by emphasizing that that provision was one of the simplest in the draft and that, although it had given rise to some misunderstanding, it did not present the difficulties suggested by the Chairman, when speaking as a member of the Commission at the preceding meeting. He was reluctant to subscribe to the Chairman's suggestion that an article should be inserted at the beginning of chapter V, specifying the circumstances precluding wrongfulness. The Commission had always been careful not to draft articles which did not state rules, but were merely explanatory. The proposed article seemed to fall within the sphere of legal science rather than that of the codification of law. Moreover, chapter V had quite solid foundations, since the circumstances precluding wrongfulness had been established both by doctrine, and by State practice and judicial decisions.

2. Some of the comments on article 29 related more particularly to the theoretical aspect of the question how a circumstance precluding wrongfulness operated. From that point of view, there was no need to make a distinction according to whether the circumstance on which a State intended to rely in claiming that there was no wrongful act was the consent of the injured State, the legitimate exercise of a sanction, *force majeure*, a fortuitous event, self-defence, or even a state of emergency. In practice, the situation was that a rule was in force between two States, requiring one of them to perform a certain act or, conversely, to refrain from it. If the State under that obligation wished not to perform the act required of it, or to perform the act from which it ought to refrain, it requested the consent of the other State to its acting, in a specific case, in a manner not in conformity with its obligation. The consent given to it had a precise content; it was valid for only one particular case. As the consent was given in response to a request, it could no doubt be maintained, in theory, that an agreement had been formed between the two States. He declined, however, to go too far in that direction. Such an agreement related only to the commission or omission of a specific act. It was not a treaty having the effect of changing the

rules. In reality, the rule from which the obligation derived remained in force. The State that was the beneficiary of the obligation was consenting, not to amendment, but to non-application. Admittedly, in exceptional cases the rules and obligations in question might be such that they no longer existed once it had been decided not to apply them. But normally, a State asking to be allowed to act, in a certain situation, otherwise than was required by an obligation, did not wish to amend the rule from which that obligation derived. The rule remained in force, and consent must be obtained again whenever the State under the obligation wished to act contrary to what the obligation required of it. Thus the consent merely made the obligation inoperative in a specific case.

3. When a State approached another State with a view to amending a rule in force between them, it was not a question of responsibility that arose, but a question relating to the law of treaties and, more particularly, to the amendment of treaty provisions. In the context of the draft under consideration, however, the Commission must confine itself to the question whether a State could consent to the non-application of a rule in a specific case, so that the act committed as a result of such consent would not be considered as wrongful.

4. The reason why he had referred in his report to politically controversial cases was that they were generally known. It had not been his intention to settle such cases, or to examine, for example, whether the consent had been real or not in a given case. What he had wished to be noted was that in all those cases the question of the reality of the consent had been debated, but that the principle itself, namely, that validly given consent to commission of conduct not in keeping with an obligation constituted a circumstance precluding the wrongfulness of such conduct, had not been challenged. Mr. Ushakov (1538th meeting) had very rightly said that the State which gave its consent released the other State from its obligation. Indeed, all that the first State did was to release the second State from observance of its obligation in the specific case. Contrary to what some of the examples mentioned in the report might appear to suggest, a State often gave its consent to another State acting in derogation of an international obligation in a specific case. If a smuggler pursued by an Italian police officer crossed the Italian-Swiss border and a Swiss police officer allowed the Italian police officer to pursue the offender on Swiss soil, there was agreement between the two States as to the lawfulness of the action taken in the specific case, but there was certainly no conclusion of a treaty or modification of existing rules. Mr. Reuter (*ibid.*) had taken the view that a rule could also be rendered inoperative by a unilateral act. However, in the case covered by article 29, it was in response to the request of one State that another State gave its consent, even if it gave that consent at the last moment. There was still agreement between the two parties. Furthermore, every case was different, and it would have to be determined in practice whether the operativeness of the obligation had simply been suspended in respect of

¹ For text, see 1537th meeting, para. 25.

a specific case or whether perhaps the obligation had thereby ceased to exist.

5. While it was true that in all cases there was formation of an agreement, as Mr. Verosta (1540th meeting) had pointed out, it would be wrong to go to extremes and maintain that a new rule had been established and that the obligation had been modified. As the obligation remained unchanged, the question was one of State responsibility, not of the law of treaties. Moreover, that had always been the conclusion reached by judges, States and writers. So far, the Commission had concentrated on establishing when there was an internationally wrongful act and on studying the two objective elements of such an act. It was logical for it now to consider situations in which one of those two elements was lacking. In that connexion, Mr. Francis (*ibid.*) had rightly referred to article 18 of the draft (Requirement that the international obligation be in force for the State).² In the case contemplated in draft article 29, the obligation could be considered as not having been in force in the specific case, so that the objective element was lacking.

6. As Mr. Riphagen (1542nd meeting) had observed, the real question was to determine how consent could be given to the execution of an act in spite of the existence of a primary obligation requiring a different act. One of the distinctions made by Mr. Riphagen was precisely one he had made himself, namely, that a State could ask another State for its consent either to the amendment of a certain rule and of the obligation deriving from it, or only to the commission or omission of an act in a specific case in derogation of an obligation. In the latter case, the consent did not affect the obligation and had the effect only of relieving the act in question of its wrongful character.

7. Many members of the Commission had emphasized the distinction between preclusion of wrongfulness and preclusion of responsibility. Some members had raised the question where the line of demarcation was to be drawn, or what became of responsibility when wrongfulness was eliminated. Others had thought that consent given *ex post facto* could produce its effects on responsibility, but not on wrongfulness. A number of English-speaking members had stressed the difference between the concepts of "consent" and "waiver". They had pointed out that, if consent were given before the commission of the act, the act could not be wrongful, since there was no violation of the obligation. As Mr. Jagota (*ibid.*) had observed, a really concurrent consent was inconceivable. The reason why he himself had used that expression was that it appeared in State practice, although in its general rather than its legal sense. It applied to situations in which consent seemed to have been given at the time of commission of the act. However, it was true that, ideally, it had been given in advance, and that it was on that condition that it could have the effect of precluding the wrongfulness of the act in question. If it were given subsequently, there could be no doubt

that the obligation had been operative at the time of commission of the act, which was therefore wrongful. Of course, the State affected by the act was always free not to treat it as wrongful, which generally meant that it would not invoke the consequences to claim reparation. In that connexion, Mr. Sucharitkul (*ibid.*) had referred to the consent given by the Thai Government after the landing of Japanese troops on Thai territory, and the Government's subsequent renunciation of the right to invoke the consequences of an act which had begun before it had given its consent. Mr. Tsuruoka (1540th meeting) had raised the question whether consent given at a certain moment during the commission of a continuous act relieved that act of its wrongful character. The answer must be in the negative³ with regard to the part of the act committed before the consent, since there had been no consent at the time when the continuous act generating responsibility had begun. That part of the act therefore remained wrongful, even though the subsequent consent could mean that no reparation would be claimed. In short, logic required the conclusion that in the case of subsequent consent there was an internationally wrongful act, even if the right to invoke the consequences was renounced. It was in that direction that the line of demarcation should be drawn.

8. Mr. Pinto (1542nd meeting) had raised the question whether all possibility of responsibility was precluded when a State consented to the commission of an act which, without its consent, would be wrongful. In that connexion, it should be noted that consent could be given in very diverse circumstances. A State might consent to the commission of a certain act by another State, but on condition, for example, that the latter State agreed to compensate any persons who might suffer injury as a result. In that case, the right to compensation derived not from responsibility for an internationally wrongful act, but from the agreement reached between the two States. It might also happen that a State consented to a particular action by removing from it any character of wrongfulness, but that such action nevertheless involved risks entailing responsibility on other grounds, namely, for the injurious consequences of activities not prohibited by international law.

9. The term "injured", which he had generally taken the precaution of placing in quotation marks, was currently used in legal theory and State practice. Actually, the State was not "injured" in the legal sense of the term. The State that gave its consent agreed not to exercise its subjective right to require the other State to act in conformity with an obligation. The legal nature of the act of that State was changed, since it was no longer wrongful, but the physical act remained, and could entail physical injury to the State subjected to it. The expression "injured State" was a practical expression used to designate the State which, by virtue of an international obligation, would have had the right to require that certain conduct was not adopted with respect to it. He had been able to avoid using that term in the body of article 29, but had found it more difficult to avoid in the title, which

² See 1532nd meeting, foot-note 2.

must necessarily be brief. Draft article 29 could be entitled "*Volenti non fit injuria*", as Mr. Verosta (*ibid.*, para. 19) had suggested, but it would also be possible to call it simply "Consent". As the members of the Commission all seemed to agree that the use of the term "injured State" should be avoided, the question could be settled by the Drafting Committee.

10. The problem of the limitations to be included in the rule laid down in draft article 29 had been discussed at length. In his view, it was quite consistent with the line taken by the Commission in preparing the draft to make an exception for peremptory norms of general international law. As to the historical example of the intervention of foreign troops in the Austrian Empire cited by Mr. Verosta (1540th meeting), an intervention that had taken place at the time of the outbreak of insurrectionary movements in Hungary, he said that, even in the case of a foreign initiative, it could be held that the Vienna government had given its consent, albeit implicitly, since in fact that intervention had corresponded to its wishes. However, if such a situation were to recur at the present time, an intervention of that kind would probably be considered wrongful despite any consent given, since it would be contrary to the right of peoples to self-determination, which formed part of *jus cogens*. After pointing out that, under the terms of article 19, paragraph 3 (b), of the draft, an international crime could result for example from a serious breach of an international obligation such as that prohibiting the establishment or maintenance by force of colonial domination, he referred to the case of a newly independent State which was in such a weak position that it would consent to the restoration of the colonial régime. In such a case, the obligation that the colonial Power would claim to be inoperative in the specific instance would be an obligation of *jus cogens*. The consent of the newly independent State would not relieve the act in question of its wrongful character, since consent to the violation of an obligation of *jus cogens* was invalid.

11. Some members of the Commission had wondered whether limitations other than those of *jus cogens* should not be imposed on the application of article 29. Mr. Ushakov (1542nd meeting) had mentioned the case of restricted multilateral treaties, which could be amended only with the consent of all the parties. In that connexion, two points should be borne in mind. First, draft article 29 had nothing to do with the amendment of treaties, and, secondly, wrongfulness must be distinguished from invalidity. If a treaty imposing a certain obligation had been concluded by five States, and one of those States asked another to consent to its acting contrary to that obligation, the consent, if given, would be invalid only if it derogated from an obligation of *jus cogens*. But the giving of the consent and the action taken in accordance with it constituted internationally wrongful acts with respect to the other States parties to the treaty. Such a situation should therefore be mentioned, but it should be distinguished from the case of *jus cogens*, since in the latter case the consent was invalid, whereas in the former case the wrongfulness of the consent and of

the ensuing act subsisted with respect to the other States parties. As all the members of the Commission seemed to be in agreement on that point, it would be sufficient to find appropriate wording. Referring to Mr. Jagota's statement (1540th meeting) that he had found no specific example in volume 8 of the *Digest of International Law*, he explained that that was because that collection dealt only with responsibility for damage caused to private individuals. It would be inconceivable for a State to give its consent to an act that injured, not its own right, but that of a private individual. In such cases, negotiations could take place between the States concerned with a view to amending the rule in question.

12. As far as consent proper was concerned, he agreed that article 29 should be drafted in very strict terms that allowed of no abuse. History was full of abuses based on nonexistent consent. The rules of the Vienna Convention³ relating to the defects of consent obviously applied to the cases referred to in article 29. Consent was not valid if there was error, fraud, corruption or violence. It remained to be decided whether the Commission should opt for brevity and proceed simply from the idea that, for there to be consent, that consent must not be vitiated—must have been "validly" given. But since future readers of article 29 would not necessarily have in mind the legal rules relating to the validity of consent, the Commission might also prefer to qualify consent in that provision. The latter solution, which thus offered certain advantages, could be adopted while taking into account the useful proposals submitted by Mr. Tsuruoka (1540th meeting, para. 4) and Mr. Jagota (1542nd meeting, para. 28). In any case, the essential point was not to presume consent. On the other hand, the possibility of implicit consent should not be entirely ruled out, since the conduct of a State sometimes constituted evidence of consent implicitly given. In short, consent must be real, freely given and free from defects. Appropriate wording should be sought in the light of those three considerations and drawing on the many expressions suggested by members of the Commission. As Mr. Quentin-Baxter (1540th meeting) had pointed out, it must not be possible to invoke the rule stated in article 29 to justify failure to fulfil an obligation not to commit certain wrongful acts.

13. There was a danger that the words "if it is established", which began the text of article 29 proposed by Mr. Tsuruoka, might make the rule stated appear to be a rule of evidence rather than a substantive rule. If those words were retained, the Commission would be obliged to insert them in many other provisions of the draft, which might otherwise be interpreted *a contrario* as not implying that certain facts were established.

14. Finally, as to the placing of the exception of *jus cogens* in the article under consideration, he would prefer it to follow the enunciation of the rule.

³ See 1533rd meeting, foot-note 2.

15. Mr. USHAKOV said he was not entirely convinced by Mr. Ago's explanations. Why continue to use the term "consent" if it was really more a matter of agreement between two States? Moreover, Mr. Ago had stated that the rule and the obligation subsisted when there was an agreement relating to a specific case. In his own view, it was unimportant whether the agreement related to one or more cases. If a State authorized fishermen from another State to fish in its territorial sea for one day, one year or 10 years, no matter whether its consent was given orally or in writing, well in advance or at the last moment, there was in any case an agreement, in spite of which the rule subsisted. In that particular instance, the rule was that of the sovereignty of States over their territorial sea. Similarly, if the head of a diplomatic mission agreed to allow police officers of the receiving State to enter the premises of the mission, in derogation of article 22 of the Vienna Convention on Diplomatic Relations,⁴ because of the presence of terrorists in the mission, the situation was the same as if the receiving State and the sending State concluded a treaty under which the police forces of the former were authorized for one year, or for an indefinite period, to enter the premises of the mission of the latter if terrorists found their way in. In either case, the pertinent rule of the Vienna Convention subsisted.

16. With regard to restricted multilateral treaties, he thought the subjective right which such a treaty conferred on one party was no different from the subjective right of the other parties. The rights and obligations deriving from such treaties were shared by the parties: one of them could not renounce one of those rights without the consent of the others.

17. Mr. FRANCIS said that the question of the expression of consent by an organ of the State continued to cause him some difficulties, particularly as it related to the *Savarkar* case (see A/CN.4/318 and Add.1-3, para. 63). From the report on that case, it seemed that the arbitral tribunal, although only asked to decide whether Great Britain should have returned Savarkar to France, had in fact recognized that there had been irregularity in his arrest. However, the French and British authorities had been in touch, and the French *préfet* had been authorized to carry out the necessary surveillance measures, which clearly showed that Savarkar's arrest should not have been questioned. In any event, he doubted whether an escape from a British ship, which was at anchor in a French port and therefore under French jurisdiction, could be equated with, for example, the pursuit of an offender by the police of one State across the borders of another State with its consent. He wondered, therefore, whether the irregularity found by the tribunal related to the presence of British police on French territory and whether the French police officer's consent to that presence and to the assistance of the British police in arresting Savarkar was not an element of the irregular-

ity. That directly raised the question whether a State organ, having exceeded the strict limits of its authority, could thereby render an unlawful act lawful. In the light of those considerations, and since the tribunal had found irregularity in the arrest, he did not see the direct relevance of the *Savarkar* case to the issue with which the Commission was concerned.

18. Mr. NJENGA said that he too was not altogether satisfied with the draft article in its existing form, as he thought it left the way open for abuses. In particular, he believed that, once consent had been given, it was no longer possible to speak of an injured State. That applied equally to cases of the *Savarkar* type and to those in which a State authorized the troops of another State to stay in or pass through its territory. He therefore considered that the article should be more narrowly drafted, possibly on the lines of Mr. Jagota's proposal (A/CN.4/L.292), and suggested that the two texts be referred to the Drafting Committee for consideration.

19. Alternatively, the matter could be approached from the standpoint of the consequences of the consent of a State to violation of its rights, rather than from that of consent alone. In that case, the Drafting Committee might perhaps consider some wording along the following lines:

"Infraction of the rights of a State inflicted with its consent shall not be actionable at the instance of that State except where such infraction relates to a peremptory rule of general international law. Such consent shall be vitiated if it is obtained through fraud, error, corruption, coercion or violence, and shall in no case affect the rights of a third State."

20. Mr. USHAKOV wished to explain his position once again. He did not dispute the principle on which article 29 was based: that, if there was consent, there was no wrongful act. But he questioned whether it was necessary to state it expressly in an article and, if so, whether it was possible to describe the situation exactly in such an article. He hoped the Drafting Committee would be able to resolve that problem.

21. Mr. AGO observed that in common usage the terms "agreement" and "consent" were equivalent, and were both used in two different ways. One could speak of agreement or consent in a unilateral sense, when a subject gave its agreement or consent to something, but also in a bilateral or multilateral sense, to designate the consensus that was formed between parties. He thought it would be better not to depart too far from ordinary language, and to continue to speak of "consent", since that was the term used in legal theory and judicial decisions.

22. Furthermore, the consent of the State that precluded the wrongfulness of the act of another State was in most cases simple consent, not a formal agreement. For instance, if a criminal pursued by the police of a State took refuge in an embassy and the ambassador allowed the police to enter the embassy to arrest him, that was a case of consent rather than of true agreement between two States.

⁴ United Nations, *Treaty Series*, vol. 500, p. 95.

23. In the *Savarkar* case referred to by Mr. Francis, the arbitral tribunal had not said that there had been no irregularity. It had only said that the British authorities had been under no obligation to return Savarkar, since a French police officer had consented to his arrest. Whether the police officer had been right or wrong in giving his consent was another matter.

24. He quite understood what was worrying Mr. Njenga, but he thought it would be more dangerous to remain silent than to try to prevent abuses by a well-drafted article. The second part of Mr. Njenga's proposal had convinced him that it was possible to qualify consent rigorously in order to prevent improper interpretations. On the other hand, it seemed difficult to say that the consequences of a wrongful act were not actionable, since it was not the consequences of the wrongful act that were precluded by consent, but the wrongfulness itself.

25. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 29 to the Drafting Committee.

*It was so decided.*⁵

Drafting Committee

26. Mr. RIPHAGEN (Chairman of the Drafting Committee) proposed that the Drafting Committee should consist of the following members: Mr. Barbosa, Mr. Francis, Mr. Njenga, Mr. Ushakov, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Verosta and Mr. Yankov, it being understood that Mr. Dadzie, as Rapporteur of the Commission, was an *ex officio* member of the Committee.

27. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to accept Mr. Riphagen's proposal.

It was so decided.

The meeting rose at 12.40 p.m.

⁵ For consideration of the text proposed by the Drafting Committee, see 1567th meeting, paras. 1, 6, 7 and 40-49.

1544th MEETING

Friday, 1 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Also present: Mr. Ago.

Fifteenth session of the Seminar on International Law

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

2. Mr. RATON (Secretariat) said that the International Law Seminar would hold its fifteenth session from 5 to 22 June 1979. The Selection Committee, which had met at the end of April, had chosen 22 candidates, and two further participants were being sent by UNITAR.

3. In 15 years, 330 participants from 102 different countries had attended the Seminar, and 137 of them had been awarded fellowships by various Governments. For 1979, the Governments of Austria, Denmark, the Federal Republic of Germany, Finland, Kuwait, the Netherlands, Norway and Sweden had awarded fellowships in amounts ranging from \$815 to \$10,260. Partly as a result of the generosity of the Norwegian Government, which had more than trebled its usual contribution, the sum of \$32,000 was available to the Seminar that year for distribution among about 10 candidates.

4. As every year, the Seminar would be organizing a series of lectures, which would be delivered by Sir Francis Vallat (The Vienna Convention on Succession of States in respect of Treaties); Mr. Ushakov (The most-favoured-nation clause); Mr. van Boven, Director of the Division of Human Rights (United Nations efforts to promote and protect human rights); Mr. Reuter (Narcotics and international law); Mr. Pinto (The development of customary international law through United Nations conferences); Mr. Sucharitkul (The crystallization of norms relating to the jurisdictional immunities of States and their property); Mr. Ferrari Bravo, Chairman of the Sixth Committee of the General Assembly (The work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization); Mr. Bedjaoui (Legal aspects of the New International Economic Order); Mr. Francis (The Commodity Producers' Association within the framework of the New International Economic Order); and Mr. Njenga (The United Nations Conference on the Law of the Sea).

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.291, A/CN.4/L.292, A/CN.4/L.293)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State)¹ (*concluded*)

5. Mr. USHAKOV proposed that draft article 29 should be replaced by the following text (A/CN.4/L.293):

¹ For text, see 1537th meeting, para. 25.

“Lawfulness by consent”

“The consent of a State, valid in accordance with international law, to a particular act of another State not in conformity with the obligation of the latter State towards the former State precludes the wrongfulness of the act in question if it is in conformity with the said consent.”

6. The expression “valid in accordance with international law” made it possible to exclude all cases in which consent was not valid (consent given under duress, consent to the violation of an obligation deriving from a *jus cogens* rule or from a restricted multilateral treaty, etc.) without enumerating them, for the Commission was not at present required to define the conditions for validity of consent.

7. Sir Francis VALLAT trusted that Mr. Ushakov’s proposal, which might do much to dispel his own concern in regard to draft article 29, would receive the Drafting Committee’s careful consideration.

ARTICLE 30 (Legitimate application of a sanction)

8. The CHAIRMAN invited Mr. Ago to introduce Article 30 (A/CN.4/318 and Add.1–3, para. 99), which read:

Article 30. Legitimate application of a sanction

The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State.

9. Mr. AGO said that the second circumstance to be considered among possible grounds for precluding the wrongfulness of an act of the State was the legitimate exercise or application of a sanction. In other words, an act of the State which was not in conformity with what would be required of it by a binding international obligation towards another State was not internationally wrongful if it constituted the application to that other State of a measure admissible in international law as a sanction in response to an international offence committed by the latter.

10. The term “sanction” should not be understood in too narrow or too broad a sense. The idea of a sanction should not be reduced to the use of armed force in the context of a legal system regarded as repressive; but neither should it cover every possible legal consequence of an internationally wrongful act, including the right to obtain reparation for damage sustained.

11. The application of the sanction must also be “legitimate”. Admittedly, that adjective might seem superfluous, since it was obvious that a sanction whose application was not legitimate could not be described as a sanction in accordance with international law. But to avoid abuses, he thought it necessary to specify in the body of the article that, to preclude wrongfulness, the application of the sanction must be legitimate in the specific case considered. It was in

the same spirit that he had proposed, in article 29, that it should be stressed that consent must be “valid” (1543rd meeting). A whole series of internationally wrongful acts in fact existed which, under international law, did not justify recourse to sanctions, but only created the right to claim reparation for the damage sustained. In such cases, the injured State could legitimately resort to measures of sanction only if it had not succeeded in obtaining reparation.

12. Moreover, some kinds of measures, such as armed reprisals, which had been admissible under “classical” international law, were no longer tolerated by contemporary international law, or only within strict limits. The present tendency was to leave decisions on the application of measures involving the use of armed force to subjects other than the “injured” State—generally to an international organization that could entrust the application of the sanction to a member State, which then acted by virtue of a responsibility entrusted to it by the organization and not in its individual capacity. The use of armed force by the injured State would then remain wrongful, even if it was a response to an internationally wrongful act.

13. Moreover, armed reprisals, even if legitimate, would cease to be a legitimate form of sanction if they were not proportionate to the injury caused by the offence and if the rules of the humanitarian conventions were not observed. However, it was only in part II of the draft, when it sought to determine the forms, modalities and consequences of an internationally wrongful act, that the Commission would consider in which cases a sanction was to be regarded as legitimate or illegitimate.

14. In international case law between the two world wars, reprisals had been deemed legitimate provided they constituted a reaction to an internationally wrongful act and remained within certain limits. For example, in the award relating to the responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa (Naulillaa incident), rendered on 31 July 1928, the Portugal-Germany arbitration tribunal had held that an act of reprisal was “an act of taking the law into its own hands by the injured State, ... in response—after an unfulfilled demand—to an act contrary to the law of nations by the offending State”, the effect of which was “to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations”, and that the reprisal “was limited by the experience of mankind and the rules of good faith applicable in the relations between States” and “would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive”. The tribunal had concluded that “the first requirement—the *sine qua non*—of the right to take reprisals is a motive furnished by an earlier act contrary to the law of nations”.²

15. In its award relating to the responsibility of Germany for acts committed subsequent to 31 July 1914

² See A/CN.4/318 and Add.1–3, para. 86.

and before Portugal entered into the war (Cysne case), rendered on 30 June 1930, the tribunal had also held that "an act contrary to international law may be justified, by way of reprisals, if motivated by a like act."³

16. That position corresponded to the one revealed by State practice. The replies of States to the question: "What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?" formulated by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930), were particularly revealing in that regard. In the "Bases of discussion" it had drafted in the light of those replies, the Preparatory Committee had stated:

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs.⁴

17. It was the Institut de droit international which, as far back as 1934, had first declared, in its resolution concerning the régime of reprisals in peace time, that "armed reprisals are prohibited in the same way as recourse to war",⁵ thus initiating the development of international law in the matter. That development had culminated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁶ of 24 October 1970 by the General Assembly, according to which "States have a duty to refrain from acts of reprisal involving the use of force" (first principle).

18. Consequently, a State which was the victim of a breach of an international obligation towards it could no longer react legitimately by using armed force against the State which had committed the breach, since international law now prohibited States from taking armed reprisals individually against other States, and reserved that right to international organizations.

19. The prohibition of "armed reprisals" did not however extend to "unarmed" reprisals, recourse to which remained lawful in principle. But even in the case of reprisals not involving the use of armed force, the right to apply measures of sanction was no longer the monopoly of the State directly injured, and the progressive intervention of international organizations in that area was to be anticipated. According to Article 41 of the Charter of the United Nations, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures", which "may include complete or partial interruption of economic relations and of rail, sea, air... and other

means of communication, and the severance of diplomatic relations".

20. In cases where an international body such as the United Nations decided on economic sanctions, if a State bound to another State by a trade treaty broke off its economic relations with that other State in pursuance of a United Nations decision, the rupture, although in breach of a treaty concluded between the two States, was not an internationally wrongful act, because it had been decided on as a sanction for an internationally wrongful act committed by the other State. In such a case, there was no violation of an international obligation under a treaty, since the obligation had been made inoperative with regard to the specific case.

21. Similarly, if the United Nations imposed an embargo on arms deliveries to a State with which other States had concluded treaties providing for the sale of arms, those other States did not commit an internationally wrongful act by applying the embargo since, in such a case, the interruption of arms deliveries was a legitimate measure of sanction for an internationally wrongful act committed by the State against which the embargo was directed.

22. Moreover, where it was adopted pursuant to Article 41 of the United Nations Charter, conduct not in conformity with an earlier obligation was not only lawful but compulsory; a State that did not adopt such conduct was in breach of an international obligation imposed by the Charter and thus committed an internationally wrongful act against the United Nations and its Members.

23. An international organization could itself apply a sanction not in conformity with an international obligation which it had itself assumed. For example, if ILO suspended its technical assistance to one of its member States as a sanction for an internationally wrongful act of that State, it would not commit an internationally wrongful act by deciding not to fulfil the commitments it had entered into vis-à-vis that State in regard to technical assistance.

24. Doctrine confirmed the principle that action taken as a legitimate sanction against a State which had committed an earlier internationally wrongful act was not wrongful. However, the question arose whether the legitimate exercise of a sanction against a State which had committed an internationally wrongful act might not injure the interests of third States. His own view, based on practice and doctrine, was that any infringement of a substantive right of a third State remained wrongful and required reparation.

25. Mr. SCHWEBEL said that, in the current state of international law and international life, it was regrettable, but none the less inevitable, that States must retain a right to take reprisals in response to acts committed in violation of their legal rights, with the vital exception of armed reprisals. A recent arbitral award, in which two members of the Commission had played a prominent part, analysed in a most interesting fashion the state of the law in regard to reprisals

³ *Ibid.*, para. 87.

⁴ *Ibid.*, para. 88.

⁵ See *Annuaire de l'Institut de droit international*, 1934 (Brussels), vol. 38, p. 709.

⁶ General Assembly resolution 2625 (XXV), annex.

and the essential justification for them. He was not sure whether the award in question had been published, but he hoped that it would be brought to the attention of members of the Commission. The fact that armed reprisals were quite properly excluded from modern international law did not detract from the right of a State to take legitimate measures in the exercise of its right of self-defence, a matter which was taken into account in Mr. Ago's report, in which examples were cited to illustrate the distinction between acts of reprisal and acts of self-defence.

26. He very much agreed with Mr. Ago's cogent analysis and with the proposed article, but he would welcome enlightenment on a particular question. What was the difference, if any, in terms of legal effects, between cases in which, under Article 41 of the Charter, the Security Council required States Members of the United Nations to apply sanctions against a given State, and cases in which the Security Council, or alternatively the General Assembly, simply recommended the application of sanctions against the State in question? In the case of a recommendation, Member States would not be bound, under Article 25 or under Chapter VII of the Charter, to apply the sanctions. If they had certain obligations towards the State concerned, which would be breached as a result of the application of the sanctions, would the authorization of a mere recommendation of the Security Council or the General Assembly—as opposed to a decision under Article 41—constitute sufficient legal defence? The answer might simply be that if a State, by virtue of a unilateral right of reprisal or a right to apply sanctions, could do what was recommended in a United Nations resolution, then surely States acting together could implement the recommendation of the Security Council or the General Assembly.

27. On the other hand, he wondered whether there were circumstances in which an individual State that was not entitled to apply sanctions would nevertheless become so entitled as a result of a recommendation of a United Nations organ, or whether in fact no such circumstances existed, and a State would become entitled to take action that would otherwise be illegal solely as a result of a binding resolution adopted by the Security Council. When the question of sanctions against Rhodesia had first arisen in the Security Council, the latter had adopted a resolution which had been viewed by the United States as recommendatory, and therefore as one that did not entitle the President of the United States of America to issue an executive order imposing sanctions against Rhodesia. Such an order had not been issued until later, upon the adoption by the Security Council of a resolution that had been clearly binding.

28. Mr. USHAKOV supported article 30, but had some reservations about the expression "legitimate application of a sanction". It was probably premature to describe as "sanctions" the measures whose application against a State which had committed a wrongful act would be deemed legitimate under part II of the draft articles. Moreover, it would be better to speak of an act by a State against another State, rather than of

measures. With those considerations in mind, he suggested that article 30 should be worded to read:

"The commission by a State, against another State which has committed a wrongful act, of an act as a measure provided for as legitimate in part II of the present draft articles, precludes the wrongfulness of the latter act in cases where it is not in conformity with the obligation of the former State towards the State which has committed the said wrongful act".

That wording would obviate the need to describe acts committed by a State against a State which had committed a wrongful act as sanctions, reprisals, retaliatory measures or coercive measures. In paragraph 83 of his eighth report (A/CN.4/318 and Add.1-3), Mr. Ago had made it clear that for the time being the Commission should not enter into the question of measures that could be taken in response to an internationally wrongful act. In his own view, the Commission would certainly be entering into that matter if it retained the concept of a sanction in article 30.

29. Mr. YANKOV agreed in general with the conclusions reached in the report—a lucid and learned document which was yet another example of Mr. Ago's monumental contribution to the work of the Commission. More particularly, he shared Mr. Ago's view on the two very important parameters of responsive action by States, namely, the requirement for the action to be legitimate and the definition of the action itself. Like Mr. Ushakov, however, he was somewhat apprehensive about the use of the term "sanction", for the sole reason that the trend in the development of modern international law was to regard sanctions as measures adopted by an international organization that were legally binding on the members of the organization. That trend would almost certainly have crystallized by the time the set of draft articles was completed and came to be adopted in the form of convention. Indeed, Mr. Ago himself had on several occasions pointed to the differences in the concept of sanctions in "classical" international law and in modern international law.

30. Obviously, Mr. Ago had not intended to comment on the recent practice of the Security Council, which had taken a clear-cut position in some instances of reprisals carried out by a State against the population of another State on the pretext of self-defence, or even of "preventive" action of a punitive nature involving the use of sophisticated modern weapons. Plainly, the action must be provoked, in other words, it must be taken in response to an internationally wrongful act committed earlier by another State; but it might be more appropriate, in the context of article 30, to use wording such as "responsive measures taken by a State in accordance with international law" and "sanctions applied by virtue of a valid decision of an international organization". A formulation of that kind would cover the different types of case that might arise.

31. He could not but agree with the view that, if the action were to be legitimate, a prior claim must have

been made for reparation. Moreover, the concept of a "prior claim" should be taken to signify that the application procedure had been exhausted, particularly in the case of coercive action. As early as the United Nations Conference on International Organization (San Francisco), the term "action" had been regarded as meaning enforcement or preventive measures. The glossary published at that time,⁷ and now sometimes used for the purposes of interpretation of the Charter, differentiated between the acts of the General Assembly and the Security Council and clearly stated that, in conformity with the jurisprudence of the United Nations, the organ competent to take "action" was the Security Council. In that connexion, it might be justifiable to insert in the commentary the Commission's understanding that all other means must be exhausted before action of a punitive character could be undertaken.

32. Lastly, it was only common sense that there should be proportionality between the internationally wrongful act and the corresponding responsive action or sanction.

33. Mr. NJENGA said that nobody could question Mr. Ago's impeccable analysis of doctrine and State practice establishing features of what constituted a legitimate sanction under modern international law. However, he would have preferred a more detailed explanation of the grounds for suggesting that article 30 should omit any reference to the illegitimate use of sanctions. Since the end of the Second World War, States had once again been slipping into illegality in their international relations, and there were all too many instances of States using force for actions which purported to be legitimate sanctions. In Africa alone, there were numerous cases of clearly illegal acts in which States resorted to the use of force against peoples which were fighting for self-determination, and even against neighbouring countries. For example, the newspapers frequently reported incursions of Rhodesian troops into Zambia. The States in question employed the new concept of so-called "legitimate hot pursuit", or reprisals against other countries for harbouring guerillas or "terrorists". Cases of that kind, which were clearly illegal, were likely to increase in number until the struggle for liberation was finally won. Article 30 should therefore take account of contemporary situations, and it failed to deal with the possibility of a State alleging that its act had been lawful when it pursued guerillas beyond its frontiers.

34. Unfortunately, article 30 could be misinterpreted if it were not read in conjunction with the commentary. So in order to rule out any possible misinterpretation, the article might well include the principle set out in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States which had been cited by Mr. Ago in paragraph 89 of his report, namely: "States have a

duty to refrain from acts of reprisal involving the use of force". The inclusion of that principle would make the terms of article 30 much more positive.

35. In addition, Mr. Yankov had suggested a very useful formulation. In certain circumstances, an individual State could legitimately apply a sanction; but it was undoubtedly true that the trend in modern international law was to regard a "sanction" as action taken in pursuance of a decision by an international organization. Unquestionably, the sanction must be commensurate with the internationally wrongful act, and the obvious *sine qua non* for the legitimacy of the sanction, as pointed out by Mr. Ago in his oral presentation, was that the sanction must be applied in consequence of an internationally wrongful act committed earlier by the other State. The Drafting Committee might wish to take that into consideration, since a reference to "an internationally wrongful act committed earlier" would clarify the situation covered by article 30.

36. In his opinion, the answer to Mr. Schwebel's question, namely, whether the fact that a sanction applied by an individual State was in conformity with a recommendation of the Security Council or the General Assembly would be an adequate legal defence for the breach by that State of an international obligation towards another State, must be in the affirmative. The Security Council or the General Assembly did not adopt a recommendation to impose sanctions against a particular State unless that State had committed a serious breach of international law. Very recently the General Assembly had adopted resolution 33/182B, strongly urging the imposition of sanctions against South Africa because of the latter's failure to comply with its obligations regarding the plan for the decolonization of Namibia. The resolution was recommendatory and any State acting in conformity with it would clearly be proceeding in a lawful manner. For his part, he would like to pose the question whether, in the case of the binding resolution 33/38B, concerning sanctions against Southern Rhodesia, a State would be acting lawfully if it unilaterally decided to lift the sanctions because, in view of the recent situation, it considered that the Rhodesian government was legitimate. In his opinion, once the United Nations Security Council had imposed mandatory sanctions, no State could legally lift such sanctions unilaterally.

The meeting rose at 12.55 p.m.

1545th MEETING

Tuesday, 5 June 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam,

⁷ L. M. Goodrich and E. Hambro, *Charter of the United Nations—Commentary and documents*, 2nd rev. ed. (Boston, World Peace Foundation, 1949).

Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Welcome to Mr. Evensen

1. The CHAIRMAN congratulated Mr. Evensen on his election and, on behalf of the Commission, bade him a warm welcome.

2. Mr. EVENSEN thanked the Chairman and the members for the great honour they had bestowed on him by electing him to such an august body of the United Nations as the International Law Commission. He would endeavour to contribute to the best of his ability to the work of the Commission.

State responsibility (*continued*) (A/CN.4/318 and Add.1-3, A/CN.4/L.294, A/CN.4/L.295)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 30 (Legitimate application of a sanction)¹ (*concluded*)

3. Mr. FRANCIS said that article 30 took account, in positive form, of the eventuality of a sanction imposed by an individual State or by the international community of States on a State which had breached an international obligation and had therefore committed an internationally wrongful act. Indeed, the article seemed to go even further, for it also characterized the reaction of an individual State or of the international community of States by specifying that that reaction, which would itself have been unlawful, lost its wrongful character. It was possible to see a logical connexion between article 30 and article 29, a connexion which lay in the concept of consent. If a State which had an international obligation towards another State or towards the international community as a result of a convention or of the customary rules of international law intentionally repudiated that obligation, it could be deemed to have acted contrary to the law not only because it had performed a wrongful act but also because it could be said to have done two other things: first, it had withdrawn its own consent to be bound by the existing obligation, at least momentarily, for the purpose of committing the wrongful act in question, and, secondly, it had by its wrongful conduct given its consent to any reaction on the part of the other State or of the international community as a whole. Such was the fundamental *raison d'être* of the premise underlying article 30.

4. The substance of the article, as pertaining to sanctions by the international community, was an extension

of the classical international right of self-help in the form of retortion or reprisals recognized in customary international law. In that connexion, he mentioned the concept of retortion or reprisals not because of its juridical significance but because it established the historical context in which retortion or reprisals, as a unilateral act of a State, could be regarded as legitimate.

5. His main concern regarding the formulation of the draft article had been whether or not a distinction should be made between cases in which punitive action was taken by a State in response to a wrongful act committed by another State and cases in which sanctions were applied by the international community for a breach of an obligation which had serious implications for the international community as a whole. In view of the very convincing argument advanced by Mr. Yankov at the previous meeting, he considered that the wording of article 30 should indeed draw such a distinction.

6. The question also arose whether, in its present form, the article would not by implication appear to abandon the concept of reprisals, which was frequently discussed in Mr. Ago's report and had a place in modern international law and practice. Admittedly, the concept of reprisals had previously had a pejorative connotation, but as a result of the efforts to restrict the use of force that had started in the days of the League of Nations and had culminated in the provisions of Article 2, paragraph 4, and of Article 51 of the Charter, the concept had ceased to have any odious elements and there were good grounds for retaining it in the present endeavour to codify international law. As Mr. Ago had pointed out in paragraph 89 of his report (A/CN.4/318 and Add.1-3), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations proclaimed the unlawfulness of reprisals involving the use of force, the implication being that reprisals in other forms were lawful. An important point to remember was that, by virtue of Article 51 of the Charter, self-defence had nothing in common with reprisals. Under the terms of article 30 of the draft, a State would be required to demand reparation before it could take punitive measures, which ruled out any possibility of comparison with the right of self-defence.

7. There were a number of reasons for distinguishing between sanctions applied unilaterally by a State in response to a wrongful act committed by another State and sanctions applied within the institutional framework of, say, the Charter of the United Nations. To begin with, a State could respond to an internationally wrongful act by means of another act that would formerly have been internationally wrongful but would no longer be wrongful under the rule laid down in article 30. Again, a case of international sanctions applied under the terms of Article 41 of the Charter was not comparable in scope or range with a case of punishment meted out unilaterally by one State for an internationally wrongful act committed against it by another State. Yet another reason for making the

¹ For text, see 1544th meeting, para. 8.

necessary distinction was that, as he had already noted, in order to be able to take punitive action under article 30 the injured State would be required to make a prior demand for reparation. On the other hand, it was possible to envisage situations in which the Security Council or the General Assembly, in pursuance of the Charter, might not even demand a return to the *status quo ante* before it took punitive action. Consequently, the application of multilateral sanctions might not necessarily be preceded by a demand for reparation. In addition, it was doubtful whether the principle of proportionality could be applied in a case of sanctions taken against one State by the international community as a whole.

8. Mr. Ago had properly emphasized that a State reacting to a wrongful act committed against it by another State should not, regardless of its rights, exercise those rights in a manner that was prejudicial to the interests of a third State—something that was wholly in keeping with the maxim *sic utere tuo ut alienum non laedes*. In that respect, it was fortunate that Mr. Ago had not yet come to any firm conclusion on the question of necessity as a circumstance that might preclude the wrongfulness of an act. For his own part, he was of the view that the Commission should confine the exceptions to *force majeure* and to other relevant situations, since the concept of necessity was obviously open to abuse. The reaction to an internationally wrongful act might in certain circumstances require the use of force, as in the case of self-defence, but once the concept of armed force came into play one could not fail to recall the despicable interpretation which the Nazis had placed on military necessity during the Second World War.

9. With regard to Mr. Schwebel's question (1544th meeting) whether compliance with a recommendatory resolution of the Security Council or the General Assembly might not in certain instances be regarded as a wrongful act, he fully agreed with the comments made in that connexion by Mr. Njenga (*ibid.*). Naturally, in interpreting the provisions of the Charter, account must be taken of differences of perspective and of the consequent differences of opinion. However, it could be affirmed that on certain issues a recommendation of the General Assembly was of sufficient importance for failure to comply with that recommendation to be regarded as a wrongful act. Article 18 of the Charter listed certain important questions, and the decisions thereon were plainly of a binding nature, notwithstanding the generally recommendatory nature of General Assembly resolutions. For example, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* had been adopted and opened for signature and ratification by means of General Assembly resolution 3068 (XXVIII), and had entered into force in 1976. True, the Convention had been ratified by many States, but he was convinced that, even if the overwhelming majority of States had not ratified it, the resolution in question could be deemed to be obligatory in character. Furthermore, although there was room for disagreement regarding the nature of recommendations by the Gen-

eral Assembly, there was far less leeway for disagreement regarding the resolutions of the Security Council. Other than in the case of recommendations relating to Articles 4, 5 and 6 of the Charter, it would indeed be difficult for the Security Council to make recommendations that did not constitute decisions within the meaning of Article 27, paragraph 3, of the Charter. Consequently, the resolutions of the General Assembly and the Security Council must be examined very carefully before it could be asserted that they did not constitute binding legal obligations on States.

10. Lastly, he considered that, for drafting purposes, it was immaterial whether the article spoke of "sanctions" or "measures", but it was important that it should reflect three core elements: legitimate application of reprisals, self-defence and the application of international sanctions.

11. Mr. TABIBI endorsed the principle underlying article 30. The title, "Legitimate application of a sanction", was particularly pertinent, for the question how a sanction was applied was of the utmost importance. As Mr. Njenga had pointed out at the previous meeting, many nations had in the past suffered greatly from the illegitimate application of sanctions. Consequently it was essential that the title should make it clear that the article related to the legitimate application of sanctions or, as in the case of Mr. Ushakov's proposal (1544th meeting, para. 28) to "a measure provided for as legitimate".

12. Another principle of great significance was that of proportionality between the wrongful act and the corresponding sanction. If the sanction failed to remain commensurate with the wrongful act, the sanction itself became a violation of the obligation of the State applying the sanction. The modern jurist must, as had Mr. Ago in his report, consider sanctions from a completely different angle. In the past, sanctions had been used as a tool by the colonial Powers in order to take punitive measures against the weaker nations. In establishing the present rule, the Commission must not provide any loopholes for the use of sanctions involving armed force. The use of sophisticated modern weaponry was not acceptable in applying sanctions and it should also be remembered that economic, political and other sanctions could be as effective as the use of force, which could be employed only pursuant to a decision by the relevant organs of the United Nations in accordance with positive international law, in other words, in accordance with the Charter of the United Nations. Obviously, such action could be taken solely when it met with the consent of the world community and only to punish the international crimes referred to in article 19 of the draft.² In elaborating the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the States Members had adopted the position that States had a duty to refrain from acts of reprisal involving the use of force. Hence it was more

² See 1532nd meeting, foot-note 2.

than evident that sanctions involving the use of force could be applied only when they were in the interests of the international community as a whole and only when they were authorized by the United Nations itself, something that should be reflected in the wording of the article.

13. In his opinion, if a third State was injured as a result of the application of sanctions, that State too was entitled to demand reparation and, where no reparation was made, to apply sanctions. It was plain that no State or States should inflict injury on a third State in the course of applying sanctions to punish one member of the international community.

14. Mr. JAGOTA considered that the proper place for draft article 30 was at the end of chapter V, since it would be more logical to deal first with the circumstances precluding wrongfulness in the initial act, such as consent and *force majeure*, and only then with those precluding wrongfulness in retaliatory action, such as legitimate sanctions.

15. As far as the substance of the draft article was concerned, he considered that the concept of legitimate sanction required amplification with special reference to the source and type of wrongfulness involved. For instance, the initial wrongful act could be a breach of a treaty or a non-treaty obligation; the resultant sanction might involve the use of armed force, which was permissible in contemporary international law only in pursuance of a decision of a competent international organization such as the United Nations, or other measures taken pursuant to such a decision, or again measures taken at the initiative of the State concerned. There was a wealth of literature and State practice on the subject and, in the specific case of a breach of a treaty obligation, some of it might profitably be reflected in part II of the draft. As far as draft article 30 was concerned, however, a legitimate sanction meant a sanction that was in conformity with the Vienna Convention³ and with State practice developed on the basis of that Convention. There were many cases in point, including that between Pakistan and India concerning the suspension of air flights after 1971, in which he had himself been concerned, when all the elements of legitimacy had been considered in detail.⁴

16. He was not entirely in favour of the word “sanction”, since it had acquired a somewhat unfortunate connotation and was now largely associated with the use of force in one form or another. It was of course also used in the sense of “measures”, and, where self-defence was concerned, in the sense of measures of self-protection. A sanction, however, was not legitimate if applied by one or more States; it had to be applied by a body such as the United Nations. Like Mr. Schwebel, therefore, he thought that it would be preferable, within the context of draft article 30, to use

the word “measure” rather than “sanction”. Alternatively, both words could be used, in which case the former could perhaps be understood as action taken by the State concerned on its own initiative and the latter as action taken pursuant to the decision of a competent international organization. Thus action sanctioned by the United Nations but applied by a State would be lawful. He was not suggesting that the Commission should enter into the question of the lawfulness or otherwise of action taken by the United Nations, since that matter did not come within the scope of the draft articles clearly delineated by Mr. Ago. However, if the retaliatory action were out of all proportion to the original wrong (if, for example, it totally crippled the economy of the other State); then such action would be unlawful and would be covered by the concept of the legitimacy of the sanction.

17. A further question to be considered concerned the areas of priority for claims for reparation, since in some cases that would determine whether the sanction was legitimate.

18. In view of those considerations, he proposed that draft article 30 should be slightly amended so as to read (A/CN.4/L.294):

“Legitimate measure or sanction

“The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as a legitimate measure or sanction, whether on its own initiative or pursuant to a decision of a competent international organization, against that other State, in consequence of an internationally wrongful act committed by that other State.”

19. Sir Francis VALLAT said that, broadly speaking, he supported the principle set forth in draft article 30. Two points, however, caused him some difficulty, the first of which concerned the word “sanction”. It seemed to him that the sense in which that word was used in the French text of the draft article was nearer to the meaning that should be attributed to it in the English text. Unfortunately, in English usage, the word “sanction” had come to have a much narrower meaning, particularly in international legal circles, and tended to be used for action taken by or on the decision of the Security Council. His concern was that such usage would perhaps unduly limit the scope of the draft article, bearing in mind the need to take account of cases where action was taken not for the purpose of maintaining international peace and security but simply to ensure that a State was not injured by the unlawful act of another State. For example, in the event of a breach of a treaty, it was perfectly legitimate in certain circumstances for one State to take action against another. Consequently, he considered that some additional word was needed to amplify the meaning of “sanction” or, alternatively, that some other phraseology should be found to cover the situation.

³ See 1533rd meeting, foot-note 2.

⁴ See Appeal relating to the jurisdiction of the ICAO Council (India v. Pakistan), Judgment: *I.C.J. Reports 1972*, p. 46.

20. Secondly, he had some doubts about the advisability of limiting the draft article to the consequences "of an internationally wrongful act committed by that other State". In his view, provision should be made at some point, and preferably within the context of the draft article, for the preventive measures that might be taken by or under the authority of the Security Council and that would necessarily precede the illegal act in question. In that connexion, he recalled that the measures required by the Security Council in the case of Rhodesia had been based on the provisions of Articles 39 *et seq.* of the Charter, pertaining to prevention of a breach of the peace, and that resolution 217 (1965) had in fact stated that the situation in Rhodesia involved a threat to peace. Article 40 of the Charter, moreover, provided that, before making the recommendations or deciding upon the measures provided for in Article 39, the Security Council could call upon the parties concerned to comply with provisional measures. Such provisional measures could involve, for example, a breach of a treaty requiring the supply of arms. Article 41 then vested in the Security Council the power to decide what measures not involving the use of armed force were to be employed to give effect to its decisions. In the light of those provisions, it seemed quite clear that it was the Security Council's practice to take decisions before a breach of the peace actually occurred. Possibly Mr. Ago could consider that point and offer some solution.

21. Mr. VEROSTA said that draft article 30 should be retained, but not necessarily in its present place in chapter V. Again, if the word "sanction" was to be retained, it would be preferable to speak in the French version of legitimate "application" rather than "exercise" of a sanction. He thought that Mr. Ushakov's proposal (1544th meeting, para. 28) was very interesting, but he was not in favour of referring to part II of the draft in the actual text of the article.

22. In his opinion, Mr. Jagota's proposal (para. 18 above) had the great merit of covering the two instances in which application of a sanction was legitimate: the case in which the State acted on its own initiative and the case in which it acted pursuant to a decision of a competent international organization.

23. Lastly, he thought that the word "decision", in the text proposed by Mr. Jagota, could be replaced by a more neutral term, for, as Sir Francis Vallat had pointed out, Article 40 of the Charter specified that: "In order to prevent an aggravation of the situation, the Security Council, may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."

24. Mr. YANKOV, referring to his statement at the previous meeting regarding the distinction to be made between legitimate responsive measures undertaken by the State and sanctions imposed by a decision of an international organization, proposed the following new wording for the title and the text of draft article 30 (A/CN.4/L.295):

*"Legitimate responsive measures or
application of a sanction"*

"The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as a legitimate responsive measure under international law or in application of a sanction imposed by a decision of a competent organ of an international organization against that other State, in consequence of an internationally wrongful act committed by that other State."

25. Noting that there appeared to be general agreement in principle, he proposed that the Drafting Committee should be requested to find a suitable wording in the light of the views expressed within the Commission.

26. Mr. SCHWEBEL welcomed the formulations proposed by Mr. Jagota and Mr. Yankov, which merited careful consideration by the Drafting Committee.

27. As to the question of the decisions of a competent international organization, he wondered whether the formulations were belied to some extent by Article 40 of the Charter, concerning the measures that the Security Council might deem necessary or advisable. Admittedly, that Article referred to both recommendations and decisions by the Security Council, and the Security Council could make recommendations in lieu of taking decisions. It had done so even in cases of the application of a sanction involving the use of armed force, as when it had recommended that Members should assist the Republic of Korea (resolution 83 (1950)). No decision had been taken by the Council requiring them to do so. There were certain areas in which the General Assembly might take decisions relating to sanctions, for example, in application of Articles 5, 6 and 19 of the Charter, but generally speaking it could do no more than issue recommendations. It should be noted that Article 40 provided that the provisional measures which the Security Council might deem necessary or desirable should be "without prejudice to the rights, claims or position of the parties concerned". The situation that the Commission was considering was precisely one where the rights of the parties concerned would in fact be prejudiced, which was why the Commission was seeking to provide that a State might in certain circumstances act in a manner that would otherwise be in violation of the rights of another State, provided that it did so in pursuance of a measure undertaken by an appropriate international organ or on its own appropriate initiative. Accordingly, it might well be that Article 40 of the Charter was precluded by its own terms from the ambit of the Commission's discussion.

28. Mr. AGO noted that the principle underlying article 30 seemed to have met with general approval and that the members of the Commission had commented essentially on drafting matters or points of detail. He emphasized that it was not the task of the

Commission at the present time to determine the instances in which sanctions were legitimate or illegitimate, for it would not be taking up that question until it came to part II of the draft. For the moment, it was sufficient to affirm that an infringement of a subjective right of a State that would normally be an internationally wrongful act was not wrongful if it represented a legitimate reaction to an internationally wrongful act committed by that State.

29. As to the placing of article 30, it was logical to consider the case of legitimate application of a sanction after that of consent by the injured State, for the two cases had a common denominator, namely, the participation of the State in respect of which action was taken. In the first case, the State participated because it gave its consent to an act that would otherwise be wrongful, and, in the second case, because it had itself previously committed an internationally wrongful act. That element of participation did not exist in other cases, such as *force majeure* and fortuitous event, for example.

30. Some members of the Commission had wondered whether an actual decision and not simply a recommendation was required in the case of a sanction applied pursuant to a decision of an international organization. He preferred the word "decision", proposed by Mr. Jagota, since it seemed to be the most neutral term. It did not fall within the purview of the Commission to determine in what instances a decision or a recommendation of the United Nations was binding on the Member States. In his opinion, it sufficed to say that a measure would no longer be internationally wrongful if it was carried out in implementation of a decision of a competent international organization, even if the measure in question was not obligatory for the member States of the organization and it had simply been recommended. Obviously, it could well be asked whether that rule was also applicable in the case of States that were not members of the international organization that had adopted the particular decision or recommendation.

31. As to the term "sanction", which some members of the Commission appeared to interpret in a restrictive manner, he would have no objection if it were replaced by the expression "retaliatory measure", or "countermeasure".

32. It should be noted that, in the two instances of legitimate application of a sanction, namely, where the sanction was applied directly by the injured State against the State that had committed an internationally wrongful act against it, and where the sanction was applied on the basis of a decision taken by a competent international organization (which might entrust application of the sanction to the injured State itself, to another State, to a number of States or even to all of the States members of the organization), the internationally wrongful act had been committed *beforehand*. Sir Francis Vallat considered, however, that it was possible to take preventive measures. But it was difficult to accept that an international organization would go so far as to undertake a measure which infringed

an international subjective right of a State for purely preventive reasons. Even if that hypothesis were admissible, it should not be implied that an individual State could take preventive measures. In any case, if the Commission decided to take account of that type of measure, it should do so in a paragraph separate from the paragraph enunciating the general rule.

33. With regard to the wording of article 30, he welcomed the proposal by Mr. Jagota (para. 18 above), but was also ready to consider the proposals by Mr. Ushakov (1544th meeting, para. 28) and Mr. Yankov (para. 24 above). Unlike Mr. Ushakov, however, he thought it preferable not to include a reference to part II of the draft articles.

34. Mr. VEROSTA proposed that the title of article 30 should be replaced by the following: "Legitimate reaction against a wrongful act of the State".

35. The CHAIRMAN said that if there was no objection he would take it that the Commission agreed to refer draft article 30 and the proposals by members of the Commission to the Drafting Committee.

*It was so decided.*⁵

The meeting rose at 6 p.m.

⁵ For consideration of the text proposed by the Drafting Committee, see 1567th meeting, paras. 1, 8, and 50-52.

1546th MEETING

Wednesday, 6 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Visit of members of the International Court of Justice

1. The CHAIRMAN welcomed Sir Humphrey Waldock, President of the International Court of Justice, Mr. Elias, Vice-President of the Court, and Mr. Morozov, a judge of the Court. He reminded members that Sir Humphrey Waldock and Mr. Elias had each been chairman of the International Law Commission and, for many years, had made outstanding contributions to its work: Sir Humphrey by his role in the codification of the law of treaties and of succession of States in respect of treaties, both as Special Rapporteur and as

expert consultant to the United Nations Conference on the Law of Treaties; Mr. Elias by his participation in the codification of various topics under study by the Commission and the decisive part he had played as Chairman of the Committee of the Whole at the Conference on the Law of Treaties.

2. Mr. Morosov, who for 20 years had represented his country in the Sixth Committee of the General Assembly, was one of the jurists who had most influenced the general direction of the codification work of the United Nations, by constantly stressing the need to codify a law adapted to the realities of the modern world. He had very often played a decisive part in the adoption of pertinent recommendations submitted by the Sixth Committee to the General Assembly, including the recommendations which had led to the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and those which, in the early 1960s, had established the broad outline of the programme of codification by which the work of the Commission was still largely directed. Mr. Morozov had also made an important contribution to the work of several special committees of the United Nations on questions relating to international law, and to the work of the Commission on Human Rights, of which he had been a member for 20 years.

3. An examination of the individual tasks of the Court and of the Commission naturally revealed certain differences. The Commission had an essentially legislative role, since it was responsible for drafting and formulating legal rules and proposing them to States for adoption as codified international law. The Court, on the other hand, performed a judicial function and, in doing so, was called upon to interpret and apply international legal rules when hearing the cases submitted to it. The work of the Commission was thus of a more general nature, whereas that of the Court consisted in giving judgements in specific cases, taking into account the concrete problems raised by the dispute in question. But the basic distinction between the elaboration of law and its interpretation and application certainly did not mean that those two legal operations could be conducted separately.

4. Indeed, the work of the Court in interpreting and applying the law was an essential complement to the Commission's work of progressive development and codification of international law. The judgements and opinions of the Court and other judicial organs, in so far as they reflected international law and its development, were, together with State practice and doctrine, constantly taken into consideration by the Commission in preparing its draft. The Commission was even required to proceed in the way by the provisions of its own Statute. Furthermore, in performing its judicial function, the Court was frequently called upon, and would probably be increasingly called upon in the future, to interpret and apply multilateral conventions to the specific disputes brought before it, in particular the codification conventions adopted by States on the basis of the drafts prepared by the Commission.

5. There was thus complementarity between the functions of the two bodies and interlocking of the results of their work. But the natural bond between the Court and the Commission really derived from something still more fundamental, namely, their ultimate object. For the Court and the Commission both pursued the same purpose, which was to promote peace and security, and international co-operation based on the rule of law. It was there, above all, that the true *raison d'être* of the bond uniting the Court and the Commission, and of the relations that had been established between them, was to be found.

6. He also wished to stress the major contribution made to the development of those relations by the fact that many members of the Commission, as well as representatives appointed to other bodies participating in the work of codification and progressive development of international law undertaken by the United Nations, had subsequently become members of the Court. At the present time, more than half the members of the Court were former members of the Commission. Other members of the Court were former representatives of their countries on bodies such as the Sixth Committee of the General Assembly. There were also many who, in the past, had taken part in codification conferences convened under the auspices of the United Nations. The members of the Court were thus well acquainted with all the details of the results of the codification process, and, having been personally involved in that process, were quite familiar with its methods and needs.

7. The Court had accordingly shown understanding to the Commission by allowing it to avail itself of the assistance, in an individual and personal capacity, of Mr. Ago, who had recently been elected a judge of the Court, to complete, without troublesome interruption, the work in progress on the first part of the draft articles on State responsibility. He wished to take that opportunity to express, once again, his gratitude to the Court and to Mr. Ago.

8. Sir Humphrey WALDOCK (President of the International Court of Justice), thanking the Chairman for his words of welcome, said that Judge Elias and Judge Morozov joined him in conveying to the Commission the greetings of the Court.

9. Five years earlier, when he had been entrusted by the Court with the task of congratulating the Commission on the celebration of its silver jubilee, the Commission had already had to its credit the adoption of several important conventions by States at diplomatic conferences. Since that time it had drafted further conventions—on succession of States in respect of treaties and on the representation of States in their relations with international organizations of a universal character—as well as an impressive number of reports on other topics. The success of the Commission's work was not to be measured solely in terms of the conventions it produced: at a time when not only the rules of international law, but the very structure of the international community, were undergoing an unprecedented evolution, the importance of the Commis-

sion's reports in consolidating legal opinion and furthering the general consensus in many branches of international law was a factor of the greatest consequence for the future security of international law.

10. The Chairman had rightly remarked on the complementary character of the work of the Commission and the Court; the importance of that relationship for the Court, particularly in regard to the law of the sea and the law of treaties, was clearly to be seen not only in its judgements but also in the pleadings of counsel before it. There had in fact been a certain interplay between the two bodies. Just as the Commission had helped to point the way for the Court on such matters as the continental shelf and certain aspects of the law of treaties, so the pronouncements of the Court had provided the basis for the Commission's codification and development of some important areas of the law. Among the examples that could be cited were its pronouncements on the régime of international straits in the *Corfu Channel* case, and on base lines in the *Fisheries* case; its treatment of the law of reservations to multilateral treaties in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*; and its exposition, in a number of its judgements, of the principles governing the interpretation of treaties. That interplay, although inherent in the special functions of the Commission and the Court, was perhaps also due to the fact that nearly two thirds of the Court's present membership, including both its President and Vice-President, had formerly been members of the Commission. In his view, it was a source of strength to the Court that such a large proportion of its members had had the experience of working together in the arduous forum of the Commission's deliberations and he, for one, gladly acknowledged the debt he owed to the Commission for all he had learnt from participation in its work. He was sure that his feeling was shared by those of his colleagues who had had the same privilege, so in voicing the Court's good wishes for the success of the Commission's session, he would also convey their special greetings to the Commission.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR

ARTICLE 42 (Validity and continuance in force of treaties)

11. The CHAIRMAN invited the Special Rapporteur to introduce his eighth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/319) and, in particular, draft article 42, which read:

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present draft articles.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present draft articles. The same rule applies to suspension of the operation of a treaty.

3. The preceding provisions are without prejudice to the obligations that may derive from the Charter, and particularly from Article 103.

12. Mr. REUTER (Special Rapporteur) said that part V of the draft articles on treaties concluded between States and international organizations or between two or more international organizations, which the Commission was now called upon to consider, corresponded to part V of the Vienna Convention on the Law of Treaties¹ concerning the invalidity, termination or suspension of the operation of a treaty. For many delegations at the United Nations Conference on the Law of Treaties, that part of the Vienna Convention had been, if not the most important, at least the most debatable part of the Convention; for some had seen in the attempt to eliminate the main defects of legal instruments a promise of more human and more equitable law, while others had feared that the examination of those defects might seriously endanger the stability of treaties.

13. Although the Vienna Convention had not yet entered into force, it was now known that those fears had been unfounded. Moreover, it mattered little that the Convention was not yet in force, since it was already gaining recognition in customary law. In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*² and in its judgement concerning the jurisdiction of the Court in the *Fisheries Jurisdiction* case (*United Kingdom v. Iceland*),³ the International Court of Justice had relied on two of the most important articles in part V of the Vienna convention: article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach) and article 62 (Fundamental change of circumstances).

14. He did not think the Commission would have any particular difficulties in adapting the articles in part V of the Vienna Convention to treaties concluded between States and international organization or between two or more international organizations. For it was the consensual concept of treaties that had triumphed in the Vienna Convention; and the Commission had taken the view that, if international

¹ For the text of the Convention, 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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

² *I.C.J. Reports 1971*, p. 16.

³ *I.C.J. Reports 1973*, p. 3.

organizations could conclude treaties, the general principles of consensus that governed the whole of the Vienna Convention could also apply to those treaties. It had therefore instructed the Special Rapporteur to follow the text of the Vienna Convention as closely as possible.

15. However, international organizations were not States: they had no sovereignty and were competent only in limited fields. As was stated in article 6 of the draft:⁴

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

From that basic principle another difference derived: whereas all States were equal in law and there were general rules valid for all States without exception, the same was not true of international organizations. It could therefore be argued that there was no law of international organizations, in so far as each international organization had its own individual status, and the rules applicable to one organization could not necessarily be extended to the others.

16. Thus if international organizations were to be able to conclude treaties, general rules must be applied to them which, *a priori*, should be the same as those applicable to States. But it was also necessary to take the special nature of international organizations into account. A middle way must therefore be sought which would accommodate those two facts.

17. Part V, section 1, of the draft, which contained four articles (articles 42 to 45), was devoted, as in the Vienna Convention, to general provisions. Article 42 of the draft corresponded to article 42 of the Vienna Convention and dealt with the validity and continuance in force of treaties.

18. In its commentary to article 39 of its draft articles on the law of treaties (which had become article 42 of the Vienna Convention), the Commission had stated very clearly that the purpose of the provisions of that article was

... as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for...⁵

The Commission had indeed been well aware that part V of the Vienna Convention, which was to enumerate the defects of treaties, might give rise to fears as to the validity of the *pacta sunt servanda* rule. It had therefore set out to state a general principle guaranteeing the validity of treaties.

19. That objective was equally valid for treaties concluded between States and international organizations or between international organizations, and he had therefore followed article 42 of the Vienna Conven-

tion. But in that connexion he had asked himself two questions. He thought he could settle the first, and would only submit the second to the Commission.

20. Within the framework of its draft articles on the law of treaties, the Commission had considered the question whether the disappearance of a State could entail the disappearance of a treaty. That question did not generally arise in regard to multilateral treaties, except in the case of a restricted multilateral treaty, when the disappearance of one of the parties would jeopardize its object and purpose, but it certainly arose in regard to bilateral treaties. The Commission had decided to leave that case aside, however, as it had considered that the disappearance of a State raised a question of succession of States, and that all the problems arising out of a succession of States should be reserved in a special article (article 73) of the Convention.

21. The same question could arise when an international organization disappeared. It might well be asked what would become of a bilateral treaty if an international organization which was a party to it disappeared, as had the League of Nations, or if an international organization party to the treaty become a supranational organization or a State—a case already considered in the context of the succession of States in respect of treaties. Would the treaty then purely and simply disappear? He was not sure. But he thought that the Commission should exclude that question from its discussions and, when it came to consider article 73, should broaden the reservation made in that article concerning succession of States to exclude not only questions relating to a succession of States, but also questions relating to succession of an organization by another organization or succession of an organization by a State.

22. The second question, which arose out of the United Nations Charter, was more difficult to settle and had led him to add a third paragraph to article 42. Article 103 of the Charter provided that

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 30 of the Vienna Convention (Application of successive treaties relating to the same subject-matter) began with a reservation relating to Article 103 of the Charter. When drawing up article 30 of the draft under consideration, the Commission had also formulated a reservation concerning Article 103 of the Charter, but it had transferred that reservation to the end of the article and had drafted it rather differently, so as to avoid taking a position on the question whether Article 103 could be interpreted as applying to agreements concluded by international organizations.

23. It had already become apparent, in connexion with article 27, that the principle stated in Article 103, namely, that in contemporary international society absolute priority must be given to the provisions of the Charter, should be extended not only to treaties

⁴ For the text of all the articles adopted so far by the Commission, see *Yearbook*... 1978, vol. II (Part Two), pp. 124 *et seq.*, document A/33/10, chap. V, sect. B.1.

⁵ *Yearbook*... 1966, vol. II, p. 236, document A/6309/Rev.I, part II, chap. II, article 39, para. (1) of the commentary.

concluded by States but also, in many cases, to treaties concluded by international organizations and even to treaties concluded by the United Nations itself. It had been pointed out, by way of an example, that, in order to implement a Security Council resolution, the United Nations might be obliged to conclude an agreement that would be subordinate to that resolution, since the sole purpose of the agreement would be to facilitate the implementation of the resolution. Such an agreement would remain in force only if the resolution on which it was based remained in force. Thus the conclusion of an implementation agreement did not bind the Security Council, which could review and amend its resolution, thereby bringing the agreement to an end.

24. Article 103 of the Charter applied not only to the provisions of the Charter but also to instruments creating obligations under the Charter, namely, certain Security Council resolutions and certain judgements of the International Court of Justice. Article 103 was therefore of exceptional importance, and the problem it posed could arise in regard to several articles. Consequently he thought that, for the sake of harmony, it would be better to mention Article 103 once and for all in a single article, rather than refer to it several times in the draft. The Commission could consider that solution when it came to review the draft articles as a whole.

25. The reason why he had proposed adding to draft article 42 a paragraph 3 reading:

The preceding provisions are without prejudice to the obligations that may derive from the Charter, and particularly from Article 103,

was not only to emphasize that the problem posed by Article 103 of the Charter also arose in regard to article 42, but also to go a little further than in article 30, paragraph 6, which merely stated that

The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

The problems raised by article 42 were not, in fact, unrelated to those raised by the articles on State responsibility which the Commission had examined at the current session, particularly the article on the consent of the injured State. With regard to that article, some members of the Commission had found it hard to accept that certain obligations could arise for States from a mere agreement, or even from mere consent. The same problem arose in regard to international organizations. He was aware of that problem, but he thought the Commission was obliged to take account of the fact that the United Nations was not like other organizations.

26. Mr. USHAKOV, referring to paragraph 1 of draft article 42, urged the need to devote separate provisions to the two broad categories of treaties to which the draft applied in accordance with article 1, namely, treaties concluded between one or more States and one or more international organizations, and treaties concluded between international organizations. In the case of article 42, that distinction should be made purely for reasons of form.

27. It was difficult to take a position on the general rule stated in paragraph 1 of article 42, since it affected other articles of the draft, not all of which had yet been formulated. It would be useful to know, for example, whether the draft would contain an article corresponding to article 52 of the Vienna Convention, which concerned coercion of a State by the threat or use of force. It was difficult to see how an international organization could have recourse to the threat or use of force against another international organization, or even how a State could take such action against an international organization.

28. According to article 42, paragraph 1, of the Vienna Convention, the consent of a State to be bound by a treaty could be impeached only through the application of that Convention. Hence the State in question must be a party to the Vienna Convention. According to paragraph 1 of the article under consideration, the consent of a State or an international organization to be bound by a treaty could be impeached only through the application of the draft articles. So far, however, the Commission had wisely left aside the question whether international organizations would be able to become parties to the international convention that might be adopted on the basis of the draft articles.

29. Paragraph 2 of the article under consideration raised a problem of terminology, in the first place. When referring to international organizations, would the Commission really use the expression "denunciation of a treaty", which was in common use with reference to States?

30. With regard to the words "as a result of the application of the provisions of the treaty", in the same paragraph, he pointed out that, whereas every State had the capacity to conclude treaties, that of an organization was limited by the rules of its constitution, as provided in article 6. Consequently the termination or denunciation of a treaty by an international organization, or the withdrawal of that organization, could not take place through the application of the provisions of the treaty if those provisions were not in conformity with the rules of the organization's constituent instrument. With regard to the relationship between the provisions of the treaty and the relevant rules of an organization, the Special Rapporteur had referred to article 27, entitled "Internal law of a State, rules of an international organization and observance of treaties". He had considered the case in which an international organization disappeared; but what would happen if an organization amended its rules on the conclusion of treaties? When the internal law of a State was not in conformity with its international commitments, that State was free to amend its internal law accordingly; for it was the same will that determined the content of its internal law and that of its obligations under international law. An international organization, on the other hand, was in a different position, since amendment of its rules was the prerogative of its member States. If they amended the rules in such a way that they were no longer in conformity with the provisions of a treaty concluded by the organization, would those rules prevail over the provisions of the

treaty? And even if the rules of the organization were not amended, the consent of that organisation to be bound by a treaty could be impeached, not through the application of the draft articles, but by reference to the existing rules of the organization. That case was provided for in article 27, paragraph 2. But what would happen if the rules were amended after the conclusion of the treaty? Could the consent of the organization be impeached through application of the new rules? That question was not dealt with in the Vienna Convention, because it could not arise for States.

31. With regard to paragraph 3 of article 42, it was not clear why the United Nations Charter should apply to all international organizations indiscriminately. He also wondered what was meant by "obligations that may derive from the Charter". And did paragraph 3 apply to the validity of treaties or to their termination, their denunciation or the withdrawal of a party? There did not appear to be any real relation between Article 103 of the Charter and the validity of treaties, their termination, denunciation or the withdrawal of a party. For Article 103 presupposed, in addition to the Charter, another valid treaty, and in that case obligations under the Charter prevailed over those under the treaty. Hence there appeared to be no direct link between paragraph 3 and the two preceding paragraphs.

32. Mr. YANKOV said that part V of the draft was an innovation as far as both international organizations and the law of treaties in general were concerned. Indeed, the parallel provisions of the Vienna Convention were described by the Special Rapporteur as "the most original and the most debated component" (A/CN.4/319, para. 1) of that Convention. There would of course be other innovations in the draft to meet the challenge of the increasingly important role of international organizations, especially as it involved their treaty-making capacity and their contribution to the international legal order. Part V was also concerned with providing for greater flexibility in regard to multilateral treaties in general and, in particular, to treaties to which not only States but also international organizations were parties. That did not mean, however, that the differences between States and international organizations in regard to treaty-making were disappearing. On the contrary, the more closely the role of international organizations was examined, the more apparent it became that they had a special capacity of their own. He therefore considered that the provisions of part V were well justified within the over-all scheme of the draft.

33. Draft article 42 laid down the general rule on the invalidity and termination of treaties, and was therefore of an essentially introductory nature. Such a provision was necessary in order to determine the machinery and procedures required in the event of the invalidity, termination or suspension of treaties to which international organizations were parties. At the same time, it was essential to avoid any facile analogy with the treaty-making capacity of States or with treaties between States. He agreed entirely that the main pur-

pose of draft article 42 was to provide for the stability of treaties, including treaties to which international organizations were parties.

34. There were sound reasons for introducing paragraph 3 at that point in the draft, as the Special Rapporteur had explained in paragraphs (6) to (12) of his commentary. None the less, it might perhaps be preferable, for the structure of the draft, to introduce a more general provision at an appropriate point, after the Commission had considered the remaining provisions of part V, to cover other instances of relationships between treaties and the United Nations Charter, in particular Article 103 of the Charter.

35. He would therefore suggest that the Commission accept paragraph 3 of draft article 42 provisionally, on the understanding that it could be reconsidered later in the light of any other provisions requiring such a reference.

36. Sir Francis VALLAT saw no reason, in the case of international organizations, to depart from the provisions of the Vienna Convention, on which paragraphs 1 and 2 of draft article 42 were based. He would therefore support those paragraphs.

37. Paragraph 3, on the other hand, was new and raised rather different questions. It could perhaps be argued that the paragraph was unnecessary since, as far as States Members of the United Nations were concerned, they would remain bound by Article 103 of the Charter irrespective of the terms of draft article 42; and as far as international organizations were concerned, they were not members of the United Nations and were unlikely to become so. Yet he could envisage the possibility of some marginal circumstances in which there might be doubts whether the situation differed because an international organization was a party to a treaty. His reaction to paragraph 3 was therefore akin to Mr. Yankov's: he thought it should be kept in mental square brackets, as it were, to indicate that there was a problem. At the same time, no harm would be done if at that point the paragraph was deleted, subject to any views that members might express later.

38. The question of succession, and more particularly of succession of States, was one which, in his view, should be considered later, in the context of the draft article corresponding to article 73 of the Vienna Convention. There was indeed a problem there but, in so far as it related to international organizations, it was of a different nature. In the Vienna Convention on Succession of States in respect of Treaties,⁶ succession of States was defined as "the replacement of one State by another in the responsibility for the international

⁶ For the text of the Convention, see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31.

relations of territory". That could hardly be held to apply in the case of international organizations at the present stage in the development of international relations, although it was possible to envisage certain cases touching on the problem, such as the disappearance of an international organization. There again, however, the concept was somewhat different, and his reaction, generally speaking, would be that, if an international organization was dissolved, that party to the treaty had disappeared.

39. He doubted whether a change in the rules of the organization would have any direct effect on the situation, since article 6 of the draft, which dealt with the capacity of international organizations to conclude treaties, must surely be governed by the rules in force at the time when the organization concluded the treaty, not by any subsequent change in those rules. On the other hand, there would be a very real problem if there were a change in the essential nature of the organization (for instance, if its functions were restricted in some way), but that problem would have to be resolved not in the context of the draft articles but in the light of the situation as it developed. Conversely, if the powers of the organization were extended, that would not, in his view, give rise to any particular difficulty as far as the treaty was concerned.

40. All those points could be examined when the Commission took up the provision corresponding to article 73 of the Vienna Convention, so they should not delay consideration of draft article 42.

41. Mr. VEROSTA said that paragraphs 1 and 2 of article 42 were acceptable, subject to some clarification, particularly in regard to the denunciation of a treaty by an international organization.

42. Paragraph 3 came somewhat unexpectedly. As its scope was fairly wide, it might perhaps be better to find another place for it in the draft.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (General Assembly resolution 33/139, part I, para. 5; General Assembly resolution 33/140, para. 5)

[Item 7 of the agenda]

MEMBERSHIP OF THE WORKING GROUP

43. The Chairman said that, having held consultations, he suggested that the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should be composed of the following members: Mr. Yankov (Chairman), Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam and Mr. Ushakov.

44. If there were no objections he would take it that the Commission decided to accept that proposal.

It was so decided.

Review of the multilateral treaty-making process (General Assembly resolution 32/48, para. 2)

[Item 6 of the agenda]

MEMBERSHIP OF THE WORKING GROUP

45. The CHAIRMAN reminded the Commission that the Working Group on review of the multilateral treaty-making process, set up at the previous session, had been a small one. That Group had been entrusted with the preliminary study of the question. Among the recommendations formulated by the Working Group in its report and approved by the Commission had been a recommendation that the Group should be reconstituted at the beginning of the thirty-first session, taking into account as far as possible the need for continuity of membership, and that it be asked to present a final report to the Commission not later than 30 June 1979.⁷

46. In view of the importance of the topic and the need to draft a report reflecting the views of all the members of the Commission, it had been agreed, during consultations, to enlarge the Group. He suggested the following membership: Mr. Quentin-Baxter (Chairman), Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov.

47. If there were no objections, he would take it that the Commission decided to accept that proposal.

It was so decided.

The meeting rose at 1 p.m.

⁷ See *Yearbook... 1978*, vol. II (Part Two), p. 149, document A/33/10, para. 169.

1547th MEETING

Thursday, 7 June 1979, at 10.20 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur (continued)

ARTICLE 42 (Validity and continuance in force of treaties)¹ (*concluded*)

1. Mr. PINTO said that paragraph 3 of article 42 could be regarded as dealing with two sets of treaty obligations. One set consisted of international obligations deriving from the Charter of the United Nations, which was viewed as a kind of "higher" treaty and which, in principle, was binding on Members of the United Nations alone. The other set consisted of obligations arising under a treaty between States and an international organization or between international organizations alone. Again, paragraph 3 could be interpreted in two ways. First, it embodied a provision on the application of successive treaties, and the Commission's understanding on that matter was expressed in draft article 30,² which in turn reflected a similar understanding expressed in article 30 of the 1969 Vienna Convention.³ Secondly, the paragraph could be taken as relating to a conflict between international obligations under Article 103 of the Charter and international obligations under a treaty of the kind covered by the present draft—a conflict that did not simply involve a principle of hierarchy but struck at the very foundations of the validity of the treaty, as, for example, in the case, specifically covered by draft article 53, of treaties conflicting with a peremptory norm of general international law. In such a case, the relevant provision of the Charter would be regarded as a peremptory norm of general international law, and the conflict could of course affect the validity of the treaty in question; the treaty would not only be voidable at the instance of an aggrieved party but might also, in certain circumstances, be void *ab initio*. Consequently there were good grounds for considering such a matter in the part of the draft relating to the validity and continuance in force of treaties.

2. For those reasons, he fully appreciated why the Special Rapporteur had tentatively included in paragraph 3 a reference to Article 103 of the Charter. But the difficult question arose where to place such a reference in the draft, since the relevance of Article 103 of the Charter to the validity of treaties was not particularly clear, and in some cases there was an overlap with the provisions of draft article 53. For example, an international financial institution established to make loans to its member States exclusively on the basis of economic criteria might, by an agreement, make a loan to a member State which was violating a peremptory norm of general international law, for example, by pursuing a policy of racial discrimination. The loan agreement might be considered incompatible with Article 103 of the Charter, or the Security Council might have decided that no international institution should make loans to the State in question, in which case the matter would fall under the provisions of draft article 53. Obviously, it was difficult to pinpoint in written terms the way in which Article 103 of the

Charter operated in relation to the validity of treaties.

3. Another problem was that, in principle, international organizations were not governed by the provisions of Article 103 of the Charter, which applied exclusively to States Members of the United Nations, although non-member States might be affected by the terms of Article 2, paragraph 6, of the Charter, and international organizations by the terms of Article 48, paragraph 2. He had therefore reached the conclusion that the relevance of Article 103 of the Charter to the validity or invalidity of treaties was too complicated a matter to be dealt with in draft article 42, paragraph 3, or indeed in draft article 30, paragraph 6. It should have a separate place of its own in the set of draft articles.

4. The adaptation of the Vienna Convention to the special case of treaties to which international organizations were parties was a difficult task. For instance, Mr. Ushakov (1546th meeting) had mentioned draft article 52 and had rightly questioned whether it was appropriate to speak of coercion in connexion with international organizations. Coercion did not necessarily imply the use of armed force, however; it was easy to envisage situations involving economic coercion—but that would lead the Commission into an extremely difficult and delicate area. Some international financial organizations could exercise very great influence in their dealings with States and were capable of taking action that might be described as economic coercion or pressure. For instance, such an organization might seek to dictate a State's economic policies.

5. Lastly, he would like to know whether the Special Rapporteur had considered the possibility that special circumstances might affect the validity of a treaty concluded between an international organization and one of its member States. One might think, for example, of an agreement between a State and the future International Sea-Bed Authority, which would be concluded within the framework of the normal activities of that Authority and would be subject to certain rules.

6. Mr. TSURUOKA said that, in the absence of specific examples, and hence of material for codification and development, it would be better to leave aside the case of the disappearance of an international organization. Moreover, the diversity of international organizations would make it difficult to draft a general rule. If the Commission rejected that case, it was unlikely to be blamed for leaving a gap in its work; rather, it would be praised for allowing practice to develop in the matter.

7. As to the advisability of referring to Article 103 of the Charter, it should be borne in mind that, although the Charter was applicable to nearly all States, it was not certain that it was applicable to international organizations. Nevertheless, it was unlikely that international organizations would not consider themselves bound by that instrument, so it seemed unnecessary to refer expressly, in article 42, to "the obligations that may derive from the Charter and particularly from

¹ For text, see 1546th meeting, para. 11.

² See 1546th meeting, foot-note 4.

³ *Ibid.*, foot-note 1.

Article 103". Perhaps it would be possible to make such a reference subsequently in one of the general provisions of the draft, but for the time being the Commission could confine itself to raising the problem in its commentary to the article.

8. Mr. FRANCIS said that his position on draft article 42 was very close to that of Mr. Yankov and Sir Francis Vallat.

9. As to the question of the disappearance of international organizations, it should be remembered that some organizations might leave long-enduring traces of their earlier existence. He would therefore be dismayed if no opportunity were provided subsequently to consider the question of succession of international organizations in a wider context. Fortunately, he had gained the impression from the Special Rapporteur's introduction that he envisaged such a possibility at a later stage in the preparation of the draft articles.

10. Mr. NJENGA said he had some difficulties with draft articles 42, difficulties that necessarily arose in discussing the treaty-making capacity of international organizations, since those organizations could not be equated with States in every respect. Consequently the present draft could not in all instances follow the terms of the Vienna Convention.

11. He entirely agreed with the views expressed by Mr. Pinto on the applicability of paragraph 3 of draft article 42. It was extremely difficult to see how Article 103 of the Charter could apply to international organizations, since that Article dealt with the obligations of Members of the United Nations, which were in all cases States. He therefore urged the Special Rapporteur to delete paragraph 3, especially as that would not prejudice the application of Article 103 of the Charter in cases where States entered into agreements with international organizations, since States would still be required to fulfil their obligations under the Charter.

12. With regard to the effect of the disappearance of an international organization on the validity or continuance in force of a treaty, it should be noted that some international organizations, although they had not disappeared, were none the less moribund. In other words, they had ceased to operate as international organizations competent to perform obligations they had incurred earlier in their existence.

13. For example, the East African Community had not yet disappeared, but it could no longer be regarded as a going concern. The treaties it had entered into could not be said to be effective at the present time, and obviously a treaty was valid only when it could be performed. In its earlier and more active days, the Community had concluded a number of treaties, some of them of major importance, such as treaties on tariffs and a treaty with EEC; but in every instance the Community itself and its members had been parties to those treaties. Subsequently, the members had tended to assume, on their own territory, the obligations assumed by the Community, and had thus avoided the possibility of a lacuna when the Community became less active. That approach had worked quite

successfully and no legal problems had arisen because the other States parties to the treaties in question had taken account of the real situation.

14. Accordingly, in the matter of the validity and continuance in force of treaties, he was not convinced of the need to cast article 42 in such strong terms. A treaty might well be in force in theory, but not have any practical application. An attempt could perhaps be made to improve the wording of the article by making provision for situations of that kind.

15. Mr. SCHWEBEL agreed with the substance of paragraphs 1 and 2 of draft article 42, and despite some initial perplexity he none the less appreciated the relevance of paragraph 3. It was true that, if a treaty establishing a regional organization was concluded for the purpose of destroying a Member of the United Nations, the obligations arising under that treaty would conflict with the obligations deriving from Article 103 of the Charter; but they would also conflict with the provisions of draft article 53, inasmuch as they would be incompatible with a peremptory norm of general international law. Hence it could be claimed that the provision contained in paragraph 3 of draft article 42 was not necessary. On the other hand, it was possible to imagine a conflict between treaty obligations and obligations under the Charter which did not involve a peremptory norm of international law. For example, performance of an obligation under a treaty might conflict with a decision of the Security Council that was binding on all Member States but did not involve a peremptory norm of international law. In such instances, the terms of paragraph 3 of the draft article would indeed be relevant.

16. With regard to paragraphs 1 and 2, the question had been raised at the previous meeting whether the validity of a treaty, or the consent of a State or of an international organization to be bound by a treaty, could be impeached only through the application of the present draft articles. He could not subscribe to the thesis that an international organization, by the application of its own rules, might be able to alter its obligations under a treaty, or even affect the validity of the treaty or the consent that it had given to be bound by the treaty. The norm was that international organizations were bound by the treaties they concluded in exactly the same way as other subjects of international law which had treaty-making capacity. Draft article 27, paragraph 2, which dealt not with the validity of a treaty, but with failure to perform a treaty, in no sense detracted from that view. It specified that an international organization party to a treaty might not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, in other words, of all the parties, was subject to the exercise of the functions and powers of the organization. That meant that the rules of the organization could not be invoked as justification for failure to perform the treaty unless it was the understanding of the parties that the organization might indeed invoke its rules. Plainly, the phrase "functions and powers of the organization" signified the func-

tions and powers of the organization as they were understood by the parties at the time of the conclusion of the treaty, not the functions and powers of the organization as subsequently amended by the rules of the organization.

17. In that connexion, he endorsed Sir Francis Valat's comment (1546th meeting) concerning draft article 6, namely, that the capacity of an international organization to conclude treaties—which was surely connected with the question of the validity of the organization's consent—was governed by the relevant rules of that organization at the time when the treaty was concluded. He failed to see how one could reasonably maintain otherwise.

18. Mr. REUTER (Special Rapporteur), summarizing the discussion on article 42, noted that the members of the Commission as a whole thought that paragraphs 1 and 2 of the provision were acceptable, subject to some clarification, but that paragraph 3 could be omitted, either provisionally or definitively. The question whether a distinction should be made in article 42 between treaties concluded between States and international organizations and treaties concluded between international organizations only could be decided by the Drafting Committee. As to the difficulty of taking a decision on article 42 without knowing the content of the subsequent articles, it should be made clear that the Commission would never adopt that article without reservations. The purpose of paragraphs 1 and 2 of article 42 was not to endorse the subsequent articles in advance, but to endorse the principle that the Commission would deal with all grounds for invalidating, terminating or suspending the operation of treaties that might supplement those provided for in the Vienna Convention. For it was inconceivable that the Commission should agree that a provision concerning the disappearance of international organizations was necessary, but decide that it would be better not to include one because of the difficulty of the subject.

19. The question raised by Mr. Ushakov at the previous meeting, and developed by Mr. Pinto, whether the prohibition of coercion applied to international organizations, did not arise for the Commission at the moment. Even when it came to deal with the use of force in violation of the Charter, the Commission would not have to decide whether forms of coercion other than the use of armed force, such as economic coercion, need be considered. That was a question of interpretation of the Charter. It would be advisable to adopt the same view as had the United Nations Conference on the Law of Treaties, which had taken the concept of coercion as certainly including armed force, and perhaps other forms of coercion as well.

20. While it was true that an international organization was hardly in a position to apply coercion to another organization, it was quite conceivable that a State might apply coercion to an organization. In the event of riots in France, if the French armed forces had to intervene and suspects took refuge in the UNESCO building, it was not inconceivable that the French authorities, under the threat of armed force,

might persuade the Director of UNESCO to amend the headquarters agreement between that organization and France in such a way as to allow the French armed forces to coerce UNESCO in a manner contrary to the United Nations Charter. The existence of peace-keeping forces suggested other examples. If a detachment of such forces became the object of an act of violence contrary to the Charter, it did not seem that military honour would require their commanding officer to allow all his men to be massacred rather than capitulate in open country; he might perhaps decide to sign an agreement with the aggressor consenting to evacuate certain positions. Would such an agreement between an international organization and an aggressor State be valid? It was to cases of that kind that the Commission would have to revert when it came to draft an article on coercion.

21. As to the words "through the application of the present draft articles", Mr. Ushakov had observed that the Commission had not yet settled the question whether international organizations would be able to become parties to the convention that might result from the draft articles. But the Commission would not even have to decide how the articles might be made binding on international organizations. There would seem to be several means of achieving that end, even without the participation of international organizations as parties. For example, the 1971 Convention on International Liability for Damage caused by Space Objects,⁴ which was open for signature to States only, could under certain conditions apply to international organizations. The same was true of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.⁵

22. Contrary to what Mr. Ushakov might have thought, there was indeed a link between paragraph 3 and paragraphs 1 and 2 of the article under consideration. While it was true that neither the provisions of the Charter nor the obligations deriving from it had any bearing on the validity or invalidity of treaties, the fact remained that part V of the Vienna Convention also dealt with suspension of the operation of treaties. It was precisely the case of suspension of a treaty that he had had in mind in proposing paragraph 3 of article 42. For it was possible that, even if the Security Council had decided that States Members of the United Nations must abstain from economic relations with a certain State, one of the Member States might conclude a commercial treaty with that State. What, then, would be the effect of the Security Council's decision on that treaty? And what would be its effect on private contracts concluded between buyers and sellers of each State? On the latter point, international tribunals had had occasion to pronounce judgement following the sanctions applied against Italy from 1936 to 1938. In the case of treaties concluded between States, such

⁴ General Assembly resolution 2777 (XXVI), annex.

⁵ United Nations, *Treaty Series*, vol. 33, p. 261.

a decision by the Security Council should have a suspensive effect.

23. The writers who had commented on the Vienna Convention had sometimes wondered why the Commission had devoted so much attention to the rather unlikely case of suspension of a treaty. One could easily imagine, however, that the operation of a treaty might be suspended as the result of a Security Council decision. That was why he had referred, in paragraph 3 of article 42, not only to the Charter but also to obligations deriving from the Charter, such as those that the Security Council might impose. It was therefore important to include a reference to article 103 of the Charter in a general provision of the draft. Furthermore, it was not even certain that such a reference would have no effect in respect of third States, as had been suggested. For although the Vienna Convention stressed the absence of effect of treaties with respect to third States, the International Court of Justice, in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*,⁶ had taken the view that, when Member States of the United Nations were concerned, even third States were required to conform to what it regarded as a valid decision. But it was certainly possible to maintain the contrary, as had several members of the Court.

24. With regard to the disappearance of international organizations, Sir Francis Vallat (1546th meeting) had held that, in view of the definition of the expression "succession of States" in the Vienna Convention on Succession of States in Respect of Treaties,⁷ it would be difficult now to use the expression "succession of international organizations", and that the question should be re-examined when article 73 was taken up. Like Mr. Ushakov, he had asked what would happen if an international organization, after concluding a valid treaty, were to amend its own rules in such a way that it could no longer perform the treaty. Mr. Schwebel believed that, if it was the rules on capacity to conclude treaties that were amended in that way, the treaty must be regarded as valid if it had been concluded in conformity with the rules applicable at the time of its conclusion.

25. However, it was necessary to consider another case: that of independent States which had set up an international organization with the object of forming a customs union. The association, which was competent to do so, concluded tariff agreements with third States. Later, however, the member States decided that a free-trade area between them would be sufficient, and withdrew from the association its capacity to conclude external agreements. What would then become of the tariff agreements already concluded? It could be maintained that the States members of the association continued to be bound individually by those treaties, each

of them being required to negotiate a revision. It was also possible to distinguish between the personality of the organization and that of its member States, and maintain that those treaties had become null and void; it was then a question of State responsibility that arose. In fact it was not possible, by concluding the treaty, to render the constituent treaty of an international organization inexecutable. It might well be considered that the first treaty had become null, but a certain responsibility then arose, which required the initiation of negotiations with a view to concluding a new treaty. In the first case, the standpoint adopted was similar to that of succession of States; in the second, it was that of State responsibility. Moreover, it would be preferable to use the term "change of organization" rather than "succession of organizations". An organization whose functions completely changed or whose membership suddenly increased enormously was no longer the same organization, even if its name remained unchanged.

26. It was obvious that all those questions could not be settled during the consideration of article 42. They could be discussed, but he would have to receive specific instructions enabling him to prepare a draft article. In what had become article 73 of the Vienna Convention, however, the Commission had cautiously left those questions aside, and it might perhaps be preferable to do the same in the present case. It might be answered, however, that in that case no draft articles on changes of international organizations with respect to treaties would ever be prepared, and that the question ought to be settled.

27. Mr. Pinto had pointed out that there might be agreements between an international organization and its member States that were somewhat different from the agreements it concluded with other States. He himself had envisaged precisely such a case in an article that the Commission had not yet considered, article 46, in drafting which he had considered that a plea of ignorance of the law of the organization by a member State was not easily admissible. Consequently, evaluation of the manifest nature of a violation of the Charter could not be defined in the same terms for a member State as for a third State. Hence he had no objection to considering that each international organization made its own law, and that certain agreements between such organizations and their member States were subject to such special international law rather than to general international law. It would be wise to accept that conclusion, in order better to respect the characteristics of each organization. It could be noted, however, that not all international organizations had developed their practice to the point of establishing such a legal rule.

28. Mr. SUCHARITKUL thought the reservation regarding Article 103 of the Charter, which established a hierarchy of the international obligations incumbent upon States, was necessary, but he was not sure that it should appear in paragraph 3 of draft article 42.

29. With regard to the problem raised by the disappearance of an international organization, he pointed

⁶ *I.C.J. Reports 1971*, p. 16.

⁷ See 1546th meeting, foot-note 6.

out that South-East Asia, which had a large number of international organizations, provided many examples of the appearance, disappearance and change or succession of international or regional organizations.

30. An organization could be formally dissolved, as in the case of the South-East Asia Treaty Organization, which had disappeared as an organization, although the Manila Agreement (Pacific Charter) subsisted. Certain institutions that had come into being by agreement between that organization and its member States had disappeared, such as the Cholera Research Laboratory, established at Dacca, whereas others, such as the Asian Institute of Technology, still existed.

31. An organization could also disappear by tacit agreement. That was how the Asian and Pacific Council had disappeared, as a result of the fundamental change in Asia which had altered the essential nature of that organization. Several centres established under its auspices had been dissolved, but the Asian and Pacific Cultural Association, in Seoul, still existed.

32. Lastly, there could be succession between two international organizations. Thus the Association of South-East Asian Nations, which comprised Thailand, Malaysia, the Philippines, Singapore and Indonesia, had succeeded the Association of South-East Asia, which had comprised only Thailand, Malaysia and the Philippines. An agreement had been concluded between the two organizations for the transfer of projects in progress.

33. With regard to the legal personality of international organizations, he stressed that in South-East Asia there was no international or regional organization with supranational or supra-State power, like EEC.

34. Mr. USHAKOV explained that what he had said in his last statement (1546th meeting) applied not only to article 42 but also to the whole of part V of the draft. In his view, there was a certain relationship between the invalidity, termination and suspension of the operation of treaties and the relevant rules of the organization, particularly its constituent instrument. For example, if the statute of an international organization provided that the organization had its headquarters in a certain State, what would become of the headquarters agreement concluded between that State and the organization if the latter decided to transfer its headquarters to another State? In such a case, amendment of the statute of the organization resulted in the termination of a treaty.

35. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 42 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 43 (Obligations imposed by international law or independently of a treaty)

36. The CHAIRMAN invited the Special Rapporteur to introduce draft article 43 (A/CN.4/319), which read:

Article 43. Obligations imposed by international law or independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

37. Mr. REUTER (Special Rapporteur) said that, as the commentary indicated, except for minor drafting changes draft article 43 was the same as the corresponding article of the Vienna Convention. He wished to stress, however, that, in recalling "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", article 43 of the Vienna Convention implied that States were bound by customary rules. Transposed into the context of relations between international organizations or between States and international organizations, the rule stated in article 43 of the Vienna Convention thus implied that international organizations could also be bound by general customary rules. That problem had already been raised and had caused some concern. He himself thought it was impossible to deny the existence of general customary rules that applied not only to States but also, in certain circumstances, to international organizations.

38. For instance, in the definition of aggression given by the General Assembly in 1974,⁹ the term "State" included the concept of a "group of States" where appropriate and, consequently, that of an international organization. Furthermore, the Charter of Economic Rights and Duties of States¹⁰ contained certain customary rules and stated in article 12, paragraph 2, that those rules were also applicable to groupings of States. Lastly, although the capacity of the United Nations to become a party to a humanitarian treaty had been questioned, it was stated in the regulations governing peace-keeping forces that United Nations forces were subject to the general rules of humanitarian law, which meant customary humanitarian law.

39. Thus, in so far as it constituted a group of States, the United Nations was subject to general customary rules. It was moreover difficult to accept that States bound by a general customary rule could, by establishing an international organization, free themselves from that rule through the mechanism of the separate legal personality. He pointed out in that connexion that,

⁸ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

⁹ General Assembly resolution 3314 (XXIX), annex.

¹⁰ General Assembly resolution 3281 (XXIX).

when the Commission, and subsequently the United Nations Conference on Succession of States in Respect of Treaties, had examined the problems raised by the uniting of States, they had taken the position that States could not free themselves from an international obligation by the expedient of a legal mechanism.

40. Mr. USHAKOV was in favour of article 43, but would prefer it to be divided into two separate paragraphs, one dealing with treaties between States and international organizations, the other with treaties between international organizations. The second paragraph would then state the obligation of an international organization to respect the rules of customary law existing between international organizations. He wondered whether that would be possible.

41. Mr. VEROSTA was also in favour of article 43. He had no doubt that international organizations were subject to customary law, in view of their special status.

42. Mr. REUTER (Special Rapporteur) observed that the division of article 43 into two paragraphs involved either a question of drafting, which it was for the Drafting Committee to settle, or a question of substance. In latter case, he was not in a position to affirm that there were customary rules pertaining to international organizations only, but he thought there were customary rules common to States and international organizations.

43. Mr. USHAKOV pointed out that that remark also applied to the text under consideration, since the treaty referred to in article 43 could be a treaty concluded between international organizations only.

44. Mr. TABIBI supported the draft article and recommended that it be referred to the Drafting Committee. He agreed on the need to take account of the fact that certain customary rules applied in the case of international organizations.

45. Sir Francis VALLAT supported the draft article, despite one or two minor points of drafting that did not call for comment at that stage. In his view, the draft article was to be read as implying a phrase similar to that customarily inserted in English pleadings when pleading to the facts, namely, "if any, which is not admitted".

46. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 43 to the Drafting Committee.

*It was so decided.*¹¹

The meeting rose at 1 p.m.

¹¹ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1548th MEETING

Friday, 8 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsu-ruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (*continued*)

ARTICLE 44 (Separability of treaty provisions)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 44 (A/CN.4/319), which read:

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under [article 56], to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in [article 60].

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under [articles 49 and 50] the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under [articles 51, 52 and 53], no separation of the provisions of the treaty is permitted.

2. Mr. REUTER (Special Rapporteur) pointed out that article 44 of the Vienna Convention¹ was a technical article, which stated general rules (paragraphs 1

¹ See 1546th meeting, foot-note 1.

and 2), attenuated by exceptions (paragraph 3), and special rules concerning certain cases of invalidity that raised problems of responsibility (paragraphs 4 and 5).

3. Since it was an article dealing mainly with the internal balance of a treaty, he thought the rules of the Vienna Convention could be applied as they stood to the treaties being considered by the Commission. He had therefore confined himself to adding the words "or the international organization" after the word "State" in paragraph 4.

4. As article 44 referred to other draft articles which the Commission had not yet examined (articles 49, 50, 51, 52, 53, 56 and 60), the latter had been placed in square brackets, since the final text of article 44 could not be established until the Commission had decided on those articles.

5. After a brief procedural discussion in which Mr. Njenga, Mr. Verosta, Mr. Ushakov, Sir Francis Vallat, Mr. Tabibi, Mr. Francis and the Special Rapporteur took part, the CHAIRMAN proposed that draft article 44 be referred to the Drafting Committee provisionally, subject to whatever decisions the Commission might take concerning the articles mentioned in it.

*It was so decided.*²

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

6. The CHAIRMAN invited the Special Rapporteur to introduce draft article 45, which read:

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

VARIANT A

A State or an international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

VARIANT B

A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] may no longer be invoked by:

(a) a State if, after becoming aware of the facts:

(i) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(ii) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

(b) an international organization if, after becoming aware of the facts, it has, in accordance with the relevant rules of the organiza-

tion, agreed that the treaty is valid or remains in force or continues in operation, as the case may be.

7. Mr. REUTER (Special Rapporteur) said that draft article 45 also referred to articles which the Commission had not yet examined (articles 46 to 50, 60 and 62), but that in addition it raised important questions of principle which should be considered at once.

8. Article 45 of the Vienna Convention was intended simply to specify the effects of the positions taken by States in regard to a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. It laid down two rules on the subject. The first, which was not contested, was that a State might agree to consider that, as far as it was concerned, the treaty was valid, or remained in force, or continued in operation. The second, which had been strongly opposed at the United Nations Conference on the Law of Treaties, raised problems which the Commission had already encountered and would meet again in other articles. The words "by reason of its conduct", in subparagraph (b), did not indeed belong to the sphere of treaties but pertained to the principle of good faith, since they referred to the case of acquiescence, which was a passive attitude. Some delegations at the Conference on the Law of Treaties had therefore feared that subparagraph (b) would give States too much freedom. The Conference had rejected, against the Commission's advice, a draft article 38³ based on an award by an arbitral tribunal concerning a dispute between France and the United States of America, in which the tribunal had recognized that there had been a real change in the treaty by reason of the attitude of certain French authorities.

9. With regard to States, the Commission was obliged to follow the rule stated in the Vienna Convention. But should it adopt the same rule for international organizations? If so, it would suffice to take article 45 of the Vienna Convention and merely add the words "or an international organization" after the word "State". That was what he had proposed in variant A.

10. However, another approach might be adopted, which would be to distinguish between the case of States and that of international organizations. That was the approach proposed in variant B, which retained the text of the Vienna Convention for States, but changed it for international organizations by adopting a more treaty-oriented viewpoint. That had been done in two ways: first, by eliminating the concept of conduct and replacing it by that of agreement, which implied a more formal consent; and secondly, by referring to the relevant rules of the international organization. The distinction thus made between the case of States and that of international organizations

² For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

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. 158, document A/CONF.39/14, paras. 342-348.

was therefore manifest both at the theoretical and at the practical level, because, in the case of organizations, their conduct must take the form of agreement—which meant the positive expression of consent—and must conform to the relevant rules of the organization. Variant B thus provided better protection for international organizations than for States.

11. Article 39 of the Vienna Convention provided that “A treaty may be amended by agreement between the parties”. The word “agreement”, however, seemed to refer to any form of consent whatsoever, including oral consent, or even tacit or implied consent. Had the Conference on the Law of Treaties intended to go so far as to say that a treaty could be amended by oral agreement? He did not think so, for the Conference had rejected draft article 38 proposed by the Commission, which permitted the modification of a treaty by subsequent practice of the parties. In taking that position, it might be supposed that the Conference had meant to say, in article 39, that amendments were not subject to the same formal conditions as treaties, but that they nevertheless required formal agreement. That was why the new draft article 39 adopted by the Drafting Committee, and not yet submitted to the Commission, provided that “a treaty may be amended by the conclusion of an agreement between the parties”. That position taken by the Drafting Committee militated in favour of variant B, which was calculated to prevent international organizations from entering into treaty commitments too lightly.

12. The problem, however, arose not only in the context of treaties; it also related to the question of responsibility. In spite of the efforts made to avoid the problem of responsibility in the Vienna Convention, it still arose in connexion with several articles of that Convention, particularly articles 49, 50 and 60. He had pointed out, in paragraph (3) of his commentary to draft article 45, that “international organizations are, like States, subject to the rules of international relations which render the subjects of international law responsible for their conduct”.

13. Thus although variant B protected an international organization in regard to treaties, it did not relieve it of all responsibility. For under that variant, if an international organization behaved as though it had acquiesced in the validity of a treaty, it was not bound by its conduct in regard to the treaty, since mere conduct on its part was not regarded as acquiescence, although it might incur responsibility by reason of its conduct.

14. He therefore emphasized that variant B did not exclude the possible responsibility of an international organization for its conduct, if that conduct caused damage to the co-contracting parties.

15. Mr. USHAKOV was not sure how the phrase “after becoming aware of the facts”, which appeared in both variant A and variant B, should be interpreted when it applied to an international organization. With regard to variant B, he could also imagine a case in which an international organization, after becoming aware of the fact that a treaty it had concluded was

contrary to its constituent instrument, agreed, in conformity with its relevant rules, to consider the treaty valid. The decision to do so was taken by a two-thirds majority, while a change in the constituent instrument required not only acceptance by a two-thirds majority but also ratification by two thirds of the member States. If, in accordance with its rules on competence to conclude treaties, the international organization recognized as valid a treaty that was contrary to its constituent instrument, could it thus amend that instrument?

16. Mr. REUTER (Special Rapporteur), replying to the first question put by Mr. Ushakov, explained that the facts of which an international organization might have become aware were those which made it possible to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. The question who must have become aware of those facts was decided by the relevant rules of the organization: it would be the organs empowered to invoke the grounds or reasons in question—they might be supreme organs, non-permanent organs, or even the member States in their entirety.

17. The case envisaged by Mr. Ushakov concerned one of the grounds for invalidity of treaties: violation of provisions regarding competence to conclude treaties, which would be dealt with in article 46. Having concluded a treaty contrary to its constituent instrument, which was consequently invalid, an international organization might wish to remove that invalidity. It would then be the relevant rules of the organization that would determine how that aim could be achieved. But in order to achieve it, some of the rules would have to be amended. The amendment would be made in accordance with the rules themselves. If there was a particularly serious breach of a rule, which involved an amendment requiring ratification by two thirds of the member States and, for example, ratification by certain specified member States, renunciation of the particular ground for invalidity could take place only in conformity with that procedure.

18. Mr. PINTO said that, in considering draft article 45, it was necessary to draw a distinction between States and international organizations, since the structure of the former differed from that of the latter in respect of the decision-making process. That was the basis for his preference for variant B.

19. Because of its governmental structure and organization, a State was better equipped than an international organization to take immediate decisions, although obviously the speed of such decisions varied according to the State concerned and its special circumstances. An international organization, on the other hand, although perhaps better equipped than many States in terms of resources and staff, had a more cumbersome decision-making process, one example being the requirement that a decision be taken by a two-thirds majority vote. He could not, however, accept that an organization should be regarded as a weaker subject of international law. It was merely different, and that difference should be reflected in the

draft article. Moreover, an international organization, particularly if it were of a universal character, represented a community of interests requiring protection. It could perhaps be said that such an organization should be judged by its weakest member, and to that extent there was an element of social interest providing the basis for the organization's protection which was reflected in variant B.

20. There was of course little practice in the case of international organizations to support the Vienna Convention formulation, although he wished to draw attention to one possible area of practice reflected in the Loan Regulations of IBRD. Article VII, section 7.03 of Loan Regulation No. 4, of 15 June 1946, relating to failure to exercise rights, read:

No delay in exercising, or omission to exercise, any right, power or remedy accruing to any party under the Loan Agreement or Guarantee Agreement upon any default shall impair any such right, power or remedy or be construed to be a waiver thereof or an acquiescence in such default; nor shall the action of such party in respect of any default, or any acquiescence in any default, affect or impair any right, power or remedy of such party in respect of any other or subsequent default.⁴

That provision seemed to him to militate in favour of variant B.

21. Lastly, he recognized that international organizations were deemed to be responsible for their acts, but he thought the rules governing such responsibility would perhaps differ slightly from those governing State responsibility.

22. Mr. JAGOTA agreed that there was a fundamental difference between a State and an international organization, but, unlike Mr. Pinto, his preference was for variant A. In the first place, he saw neither reason nor logic in providing an organization with greater protection than a State against the abandonment of certain rights, and that would be the effect of variant B. Indeed, the Special Rapporteur had himself pointed out, in paragraph (3) of his commentary, that it would have "the effect, if not the purpose, of protecting the organization against its own conduct".

23. Secondly, with regard to the substance of the draft article, it was necessary to reflect on what was meant by the words "conduct" and "acquiesced" as used in subparagraph (a) (ii) of variant B. Conduct could, of course, take several forms. It might, for example, relate to the material breach of a treaty, whereby the interests of one of the other States parties were affected. If that State expressly agreed that the treaty should none the less remain in force, the position would be covered by variant A. But if it did not do so and, in addition, failed to make a formal protest against the infringement of its rights, that would amount to acquiescence by conduct. The aggrieved State could not then invoke as a ground for suspending or terminating the treaty a material breach of its terms. Again, an international organization might fulfil

its obligations under a treaty in regard to some States but not to others, or, for instance, one or two of the parties to a loan agreement, but not others, might be allowed to default on it. In such a case, it would not be possible to invoke a breach of the terms of the treaty or agreement because a breach had already been accepted. Or again, one party might conclude a treaty believing that one of its clauses was invalid. Signature of that treaty would constitute acquiescence, through conduct, in its legal validity. In all such cases, acquiescence through conduct with reference to the same treaty involved loss of the right to invoke the ground in question to terminate or suspend that treaty. If that applied to a State, then it should also apply to an international organization, and to the same extent.

24. The next point that arose was to whom the conduct of an international organization should be attributed. That, however, pertained to the question of competence to conclude treaties, which was governed by draft article 46. Consequently, for the purposes of draft article 45, it had to be assumed that the international organization had competence in the matter, failing which subparagraph (b) of variant B could obviously not be invoked.

25. In the light of those considerations, he thought that States and international organizations should be placed on the same footing, and that organizations should not enjoy a privileged position as compared with States.

26. Lastly, he failed to understand the distinction referred to in foot-note 8 of the Special Rapporteur's report. Variant A should apply to both sets of articles: articles 46 to 50 and articles 60 and 62.

27. Mr. REUTER (Special Rapporteur) said that the foot-note in question was doubtless not explicit enough. It proposed a compromise between his own position, supporting variant A, and the conclusion resulting from examination of the Drafting Committee's text of article 39. The solution consisting in distinguishing between certain groups of articles was perhaps not a very good one, but it might be accepted that it was necessary to give more protection to international organizations in the very serious cases covered by articles 46 to 50, concerning the validity of agreement, than in the cases covered by articles 60 and 62, which did not involve consent as such but concerned the occurrence of external events. Thus article 60 raised a question of responsibility. As Mr. Pinto had observed, the question of the responsibility of international organizations, which was different from that of States, had not been studied by the Commission, but it nevertheless came within the same general scheme. Questions of responsibility were in any case much less serious than those of invalidity. The same might be said of article 62, concerning fundamental change of circumstances.

28. Mr. NJENGA said he could see good reason for discriminating between States and international organizations for the purposes of draft article 45, although he recognized that it would give rise to some difficul-

⁴ United Nations, *Treaty Series*, vol. 260, p. 396.

ties if international organizations were to lose certain rights by acquiescence through conduct. Indeed, he was not altogether in favour of such a rule even in the case of States.

29. One of the many practical problems involved was that it was difficult to determine to whom the conduct of an international organization should be attributed. For example, to take the case of a loan from IBRD, it could be argued that failure by the local representative to press for repayment by the due date amounted to acquiescence, so that the Bank forfeited its right. But what would be the position when the matter came up before member States, and who would be responsible for meeting the loss? Similarly, although under most headquarters agreements with the host State international organizations enjoyed exemption from taxation, in some instances taxes might be levied initially but subsequently refunded. If, however, an international organization failed to request such a refund, that could be construed as conduct indicating that it had decided to forgo its right. Again, what would the position be when such an international organization had to justify its conduct, and the considerable amounts of money involved, before its member States?

30. In that respect, he could only agree that organizations differed in their decision-making process and structure from States, and should therefore not be equated with the latter for the purposes of draft article 45. He therefore supported variant B.

The meeting rose at 11.35 a.m.

1549th MEETING

Monday, 11 June 1979, at 3.5 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN informed the meeting of the Enlarged Bureau's recommendation that the Commission should again, for the current session, set up a Planning Group of the Enlarged Bureau to consider the future programme and methods of work of the

Commission and report thereon to the Enlarged Bureau. The Group would be composed of Mr. Pinto (Chairman), Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, M. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov. As usual, any member of the Commission wishing to do so could attend the meetings of the Planning Group.

2. If there was no objection, he would take it that the Commission decided to accept the recommendation of the Enlarged Bureau.

It was so decided.

3. The CHAIRMAN said that the question of treaties concluded between States and international organizations or between two or more international organizations, which the Commission had taken up on 6 June, would be examined until 26 June. The Special Rapporteur for that topic would be away on 18 and 19 June and the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses would be away for a few days during the period 20-26 July originally scheduled for consideration of the latter topic. The Enlarged Bureau therefore recommended that the meetings of 18 and 19 June should be reserved for the second of those topics. The meetings in the period 20-26 July, which the Rapporteur for that topic could not attend, might be reserved for considering the first report of the Special Rapporteur for the topic of jurisdictional immunities of States and their property.

4. If there was no objection, he would take it that the Commission decided to accept the proposal of the Enlarged Bureau, in which case the programme of work adopted by the Commission at its 1539th meeting on the proposal of the Enlarged Bureau would be amended accordingly.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)¹ (*continued*)

5. Mr. DÍAZ GONZALEZ said that, in view of the logical sequence followed by the Special Rapporteur throughout the draft articles, he favoured the text of variant A for article 45.

6. In the case of an international organization, the treaty agreement machinery provided for in the rele-

* Resumed from the 1539th meeting.

¹ For text, see 1548th meeting, para. 6.

vant rules of the organization was necessarily brought into play in both variant A and variant B, implicitly in the former and explicitly in the latter. Article 2, paragraph 1 (j),² defined the term "rules of the organization", and as early as article 6 the draft indicated that the rules in question were the rules in force in respect of the organization's treaty-making capacity. Also, article 36, paragraph 3, indicated what was necessary for expressing the assent of a third organization, by referring specifically to "the relevant rules of that organization".

7. As pointed out in the Special Rapporteur's report (A/CN.4/319), the rights of an international organization were better protected than those of a State. The rules of the organization were to be followed because in principle the organization could act only in accordance with those rules; but the weakness of international organizations was in fact more apparent than real, since an organization's conduct was dictated by its rules alone, regardless of whether article 45 referred to them.

8. Because of the fundamental differences between them, an international organization and a State could not be equated as subjects of international law. An international organization had no more privileges than those granted to it by its member States under the organization's constituent instrument. Many of the differences had of course grown less marked over the years. In that connexion, it was sufficient to recall that, in its advisory opinion of 11 April 1949 on *Reparation for injuries suffered in the service of the United Nations*, the International Court of Justice had acknowledged that the existence of the United Nations was inescapable for all States throughout the world, whether or not they had recognized the Organization.³ Moreover, it was interesting to note the Court's opinion that 50 States, representing the vast majority of the members of the international community at that time, had had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.⁴

9. Mr. SUCHARITKUL said that there was a considerable difference of views among the Commission. Some members wished to protect international organizations because they were weaker than States, whereas others were reluctant to give organizations a privileged status and, in order to preserve equality between States and international organizations, proposed that it should not be open to States to acquiesce by reason of their conduct.

10. No doubt the protection of the weak, which was a fundamental principle of international law, should be placed in the forefront. But the notion of weakness could be understood more clearly in terms of another

principle of international law, that of the equality of States. In that connexion, he recalled the Buddha's reply to a disciple who had asked him why absolute equality did not exist among human beings: "Observe your two hands; each has five fingers. But look carefully again. Are they equal?" There was certainly no equality in the world, either among States or among international organizations, or between States and international organizations. However, in an era when States could appeal to international institutions, inequalities and injustices were doubtless less blatant than in the past.

11. Because the scope of acquiescence was vague, the weak must be protected against its operation. A distinction must be drawn between acquiescence and subsequent conduct or positive behaviour. Acquiescence might consist of mere tacit consent. It should therefore be made clear in what well-defined circumstances international law considered that there was agreement by acquiescence. Various General Assembly resolutions, such as those concerning the permanent sovereignty of States over their natural resources, decolonization and friendly relations among States, helped to narrow down the notion of acquiescence, which was so dangerous for the weak.

12. It was certainly difficult to compare a State's weakness with that of another State or the weakness of an international organization with that of another international organization or of a State. Nevertheless, some subjects of international law were weaker than others and they should not all be placed on an equal footing, with the idea of agreement by acquiescence excluded even in the case of States, as proposed by Mr. Jagota.

13. Mr. FRANCIS had no hesitation in endorsing the text of variant B. Articles 46 to 50 and articles 60 and 62, referred to in article 45, would give every State and international organization the right to be released from treaty obligations in certain circumstances; article 45 itself sought to establish a rule whereby that right could not be invoked. At the previous meeting, Mr. Pinto had pointed to the differences of basic organization and structure between international organizations and States. International organizations and States were alike only to the extent that they were subjects of international law; it should always be remembered that international organizations were the creations of States and operated within specific areas of competence in accordance with the rules imposed on them. It was therefore essential to bear in mind at all times the basic differences between international organizations and States and to emphasize the consequences of those differences, as had been done, for example, in articles 19 and 19 *bis*, concerning the formulation of reservations.

14. The differences were apparent from the terms of article 7, concerning full powers and powers, and must be reflected in article 45 as well. If, in the course of treaty negotiations, the Minister for Foreign Affairs of a State and the executive head of an international organization informed each other of the limitations

² See 1546th meeting, foot-note 4.

³ *I.C.J. Reports 1949*, p. 174.

⁴ *Ibid.*, p. 185.

imposed upon them but then proceeded to go beyond their mandate and conclude a treaty, the State in question could normally refuse to be bound by the treaty, which would come into force upon signature, because the limitations imposed on the Minister for Foreign Affairs had been communicated to the other party. However, if the State in question did not assert its right to repudiate the treaty within the requisite period, it would be bound by the treaty under subparagraph (b) of article 45. The situation would not be the same in the case of the executive head of the international organization, which would not be bound by the treaty as rapidly as the State, for the simple reason that it was accepted in practice that international organizations and States operated in different ways. The international organization, even though it might wish to support the good intentions of its executive head, would necessarily find that the latter had failed to act in conformity with the rules of the organization in signing the particular treaty. In that instance, the act of the Minister for Foreign Affairs would be binding on the State, but the act of the executive head of the international organization would not be binding on the organization, because his competence was circumscribed by the relevant rules of the organization.

15. Reference had already been made to the weakness of international organizations, which might lie in the seeming inflexibility of their rules. If it was assumed, for instance, that a State and an international organization were represented in treaty negotiations at a lower level than that of the Minister for Foreign Affairs of the State and the executive head of the international organization, and the negotiations involved fraud, as provided in draft article 49, or corruption of a representative, as provided in draft article 50, the Minister for Foreign Affairs might none the less decide that the treaty should be honoured. It was quite clear that, under article 45, the State would be bound by that treaty. On the other hand, if the executive head of the international organization decided, notwithstanding the fraud or corruption, to authorize approval of the treaty, the international organization would not be bound by the decision of its executive head—despite the fact that he undoubtedly represented it—because the relevant rules of the organization would not have been complied with.

16. Those examples showed that article 45 should make allowance for the differences between States and international organizations in their decision-making processes.

17. Mr. USHAKOV preferred variant B, but it did not resolve all the problems. He stressed the need to spell out the meaning of the phrase “after becoming aware of the facts”, which applied both to States and to international organizations in the article under consideration. If an organ of a State was aware of a certain fact, that State was assumed to be aware of it, since the sovereign authority was one. For example, if a State concluded a treaty of financial assistance with another State and subsequently learned that the latter had acted fraudulently, then, if the Ministry for Foreign Affairs of the Former State continued to furnish

the agreed financial assistance, it was bound by the conduct of its Ministry even if the latter had acted *ultra vires*. On the other hand, if the general assembly of an international organization decided to grant financial assistance to a State and the financial services of that organization continued to provide the assistance even though it had been established that the beneficiary State had behaved fraudulently, it was not possible to invoke the conduct of the organization or of its general assembly. There was no equivalent, for an international organization, of the sovereign authority of States. Each organ of an international organization acted within the strict limits of its competence, and was not bound by the conduct of its financial services. The conduct of an international organization was expressed more in its deliberations, its documents and above all the decisions of its organs.

18. Article 45 of the Vienna Convention⁵ enabled a State, by express agreement or by conduct, to derogate from certain of the provisions concerning the invalidity of treaties, namely articles 46 to 50, but not articles 51 to 53. Consequently, through the operation of article 46 (Provisions of internal law regarding competence to conclude treaties), a State could waive a rule of its internal law of fundamental importance, such as a rule of constitutional law. He did not think such a possibility should be allowed for an international organization. The relevant rules referred to in subparagraph (b) of variant B were those that concerned the conclusion of treaties, and they should not be placed on the same footing as the rules relating to the amendment of the constituent instrument of an organization. Accordingly, not only articles 51 to 53 but also article 46 should be excluded from the operation of article 45.

19. Instead of regarding international organizations as weaker than States, or conversely, as equal to States, it would be better to acknowledge that they were in quite a different situation from States. If that were not so, the Vienna Convention would apply to them and the draft in course of preparation would serve no purpose. With regard to treaty-making capacity, for example, organizations differed from States since, under draft article 6, that capacity was governed by the relevant rules of the organization. An organization might not be authorized to conclude treaties, but every State could do so, not because of its internal law but because of the general principle stated in article 6 of the Vienna Convention. Account should therefore be taken of the fact that international organizations could act only in conformity with their relevant rules. To say that an international organization could act contrary to its regulations, whether by its express agreement or by acquiescence, would jeopardize its very existence, since the constituent instrument of an organization represented the basis of its functions and powers.

20. Mr. SCHWEBEL said that his philosophy with respect to the draft articles was to minimize the differ-

⁵ See 1546th meeting, foot-note 1.

ences between States and international organizations in their treaty-making capacity and procedures; he adopted that approach because he was in favour of strengthening international organizations and their role in international life. He doubted whether international organizations would be strengthened by draft articles which sought to place restrictions on their capacity to conclude treaties which were not placed on States. He did not believe that the weaker-party criterion could be applied with consistency. There might be cases in which an international organization was stronger than a State. Was a debtor State in dire need of foreign exchange stronger or weaker than IMF? He was not sure that he agreed with Mr. Ushakov that the representative of an international organization could not bind that organization within the scope of his apparent as well as of his actual authority. Similarly, he doubted the validity of the argument that international organizations were restricted, in their treaty-making capacity, to their rules. The powers of international organizations were not simply those expressly set forth in their constitutions. It had to be borne in mind that, through practice, through liberal and constructive interpretation of their constituent instruments, international organizations could grow and acquire power, and it should be possible for that power to be used in the sphere of treaty-making as well as in other spheres.

21. For those reasons, he was in favour of variant A, although he realized that a substantial case could be, and had been, made for variant B.

22. Mr. VEROSTA said that it served no purpose to compare international organizations with States in an attempt to determine whether they were weaker than States. International organizations were never anything but what States wished them to be, and their founding States remained their masters. The treaty-making capacity of States derived from express rules of their constitutional law, whereas international organizations had had to struggle for treaty-making capacity, which States had granted them for reasons of convenience alone. There was no reason to fear that making a distinction between States and international organizations placed the latter in a position of inferiority, as they would always have the powers conferred on them by their constituent instruments or by the decisions of their organs, which meant, in the final analysis, by their member States. Moreover, no provision of the draft could prevent States from giving an organ extremely wide powers.

23. All in all, variant B was the only acceptable solution, but it might be amended on the lines indicated by Mr. Ushakov. It was impossible to go against the wishes of the member States of an organization and prevent them, for example, from authorizing an organ freely to conclude any treaty whatsoever. Yet it was important to alert certain organizations to the dangers threatening them, which the consideration of article 45 had served to highlight.

24. Mr. QUENTIN-BAXTER said that it could be argued in favour of variant B that article 45 of the Vienna Convention reflected the sovereignty of States,

and that the simple fact of the non-sovereignty of international organizations justified differentiating between States and international organizations. It could also be pointed out that articles 46 to 50 all concerned aspects of the treaty-making process, and that precisely in relation to that process there was a tendency to require a greater degree of formality from international organizations than from States. Variant B implied that, in regard to the issues that might arise under articles 46 to 50, States were forewarned that in their dealings with international organizations they should protect their own interests by ensuring that the organization which was their treaty partner observed all the formalities required by the conclusion of the treaty.

25. Looking further than that, however, it might be thought that the problem before the Commission with respect to article 45 was only a forerunner to the quite fundamental problem of the formulation of article 46. If organizations could be regarded as mere mechanisms, it was clear that the Commission must, in articles 45 and 46, provide much more restrictively for organizations than for States. He had doubts, however, about the extent to which that view corresponded to the realities of contemporary international life.

26. He had a certain regard for the middle way, suggested in foot-note 8 of the Special Rapporteur's report (A/CN.4/319), which would provide one solution in relation to articles 46 to 50 and another in relation to articles 60 and 62. Article 60 dealt with a situation in which there was a material breach of a treaty. According to the Vienna Convention, a material breach of a treaty consisted, *inter alia*, in the violation of a provision essential to the accomplishment of the object or purpose of the treaty. In relations between States, article 45 would clearly have a beneficial effect in such a case, since, apart from any question of responsibilities, it would allow the relationship between the States parties to continue as if the breach had not occurred. The same considerations might be important in relations between a State and an international organization. Even in relations with international organizations, it would seem to be in the interests of co-operation and respect for treaties that the parties, including international organizations, should be able to continue as if the breach had not occurred, making provision for such penalties for a breach as they thought appropriate, and that, after a period, practice of that kind should be as binding in the case of international organizations as it was in the case of States.

27. In conclusion, although he appreciated the arguments in favour of variant B, he had some doubts about its appropriateness, at least in relation to articles 60 and 62.

28. Mr. REUTER (Special Rapporteur) said that the Commission had approached the question dealt with in article 45 from the point of view of the resemblances and differences between States and international organizations. None of the members had maintained that the situation of international organizations was exactly the same as that of States, but some—

Mr. Jagota, Mr. Díaz González and, to a certain extent, Mr. Schwebel—had been more conscious of the resemblances and had favoured the solution proposed in variant A, which was based on an assimilation of the two situations; others had paid more attention to the differences and had opted for the solution proposed in variant B, which posed the principle of different treatment for international organizations and for States.

29. There was however, yet a third possibility, which neither he himself nor members of the Commission had mentioned, namely, to narrow the gap between States and international organizations by deleting subparagraph (b) of the Vienna Convention text, for States and international organizations alike.

30. In that connexion, he recalled that the United Nations Conference on the Law of Treaties had considered a proposal to delete subparagraph (b) of the text of the future article 45, and that the proposal had been rejected by only 48 votes to 19, with 27 abstentions, at the 67th meeting of the Committee of the Whole.⁶ Moreover, in rejecting the International Law Commission's draft article 38,⁷ which would have allowed a treaty between States to be modified by State practice, the Conference had shown a certain reluctance to recognize that, no matter what the conduct, it could be considered as acquiescence. Also, some of the States which had ratified the Vienna Convention had entered reservations on subparagraph (b) of article 45. Lastly, under the constitution of all South American States, international agreements could not enter into force without approval by the parliaments of those States. That rule was doubtless violated in practice, but it nevertheless existed.

31. Consequently, even if the Commission rejected that third solution in favour of variant B, it should bear it in mind and beware in its commentary of going too far in its attempts to justify the changes made with regard to international organizations in the rule set forth in article 45 of the Vienna Convention. For it would be dangerous to base those changes on too great a difference between States and international organizations by setting the weakness of some against the strength of others, since such an argument would imply the existence of rules or interpretations which at present were not recognized by all States.

32. Personally, he did not think it would be wise to adopt the third approach, but he had felt obliged to draw attention to it on account of its importance.

33. As Mr. Verosta had pointed out, the real political problem did not lie in the weakness of international organizations, but in the disparity between the secretariats of those organizations and their organs com-

posed of government representatives. But secretariats of international organizations tried to help Governments to find compromises and resolve their problems. It would therefore be dangerous, in his opinion, to adopt provisions that might stifle any initiative on the part of secretariats of international organizations.

34. As Mr. Quentin-Baxter had pointed out, articles 60 and 62 differed in character from articles 46 to 50, for they touched on the question of responsibility. It was conceivable that, contractually, a ground for invalidating a treaty might be maintained despite a particular conduct, but that did not dispose of the question of responsibility.

35. Like Mr. Ushakov, he considered that article 46 contained the crux of the problem, which emerged in advance in connexion with article 45. He also agreed with Mr. Ushakov that it was the organs competent to bind the State or international organization that must become aware of the facts and acquiesce. In that respect it was surprising that, in the decision given in 1963 concerning the interpretation of the aviation agreement of 27 March 1946 between France and the United States of America,⁸ the arbitral tribunal had expressed the view that, by their conduct, minor officials of technical services could modify an agreement concluded by State organs empowered to conclude treaties. It was therefore necessary to specify, with regard to international organizations, which organ must become aware of the facts and at what level the conduct must be situated. He shared Mr. Ushakov's way of thinking on that point, but differed from him concerning the importance to be attached to the conduct of the organization.

36. Thus, if an international organization concluded a treaty incompatible with a fundamental rule of its constitution and if one of its principal organs, composed of representatives of the member States, became aware of the fact and decided not to amend the constitution and the relevant rules of the organization and not to raise the matter, the organization would continue to apply the treaty. One could say, as Mr. Ushakov did, that such an approach did not change anything and that the treaty remained invalid since, in order for it to be valid, the organization would have to modify its constituent instrument so as to adapt it to the treaty.

37. If the Commission adopted that extreme position, however, it would come up against another problem, that of prescription. In that connexion, he recalled that at the Conference on the Law of Treaties, Guyana and the United States of America had proposed an amendment to the future article 45 providing for a time-limit beyond which a State would no longer have the right to invoke a ground for invalidating a treaty.⁹ It was the provision in subparagraph (b) which

⁶ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 164 and 165, document A/CONF.39/14, para. 382, sect. (i), (b), and para. 386(a).

⁷ *Ibid.*, p. 158, document A/CONF.39/14, paras. 342–348.

⁸ See *United Nations, Reports of International Arbitral Awards*, vol. XVI (United Nations publication, Sales No. E/F.69.V.1), p. 5.

⁹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 164, document A/CONF.39/14, para. 382, sect. (ii), (a).

had enabled that amendment to be rejected, for the rule that the conduct of the State amounted to acquiescence produced the same effect as prescription.

38. With regard to international organizations, if the Commission decided that the grounds for invalidating a treaty, and in particular the reason dealt with in article 46, should remain operative even where the organization had behaved as if it had acquiesced in the validity of the treaty, it would be necessary to introduce a rule on prescription, in order to compensate for the disappearance of the rule concerning conduct which had appeared in subparagraph (b) of the article of the Vienna Convention.

39. It was also necessary to take account of another situation, concerning which the Commission should enter a proviso in its commentary. If the competent organ of an international organization, having become aware of a ground for invalidating a treaty, decided by a majority vote not to raise the matter and to continue to perform the treaty, and then suddenly altered its policy owing to a change of majority resulting from the admission of new member States, the question of the responsibility of the international organization would arise. The Commission should therefore reserve that question, since it could not resolve it either in the draft articles under consideration or elsewhere, given the fact that it was not at present examining any set of draft articles on the responsibility of international organizations. The same problem would arise in connexion with article 46.

40. With regard to the question of security of international relations, the Constitution of the Fifth French Republic contained a rule that France could ratify a treaty at variance with its Constitution, but only if it amended the text of the Constitution before ratifying the treaty. The treaty establishing EEC contained a similar provision, whereby the Community could conclude a treaty that was incompatible with its charter, but only on certain conditions: on the initiative of certain of its organs, the opinion of the Court of Justice could be requested and, in the case of a negative opinion, the treaty could enter into force only after the constituent instrument was amended.¹⁰

41. In conclusion, if the Commission decided, in choosing variant B, not to apply to international organizations the rule in subparagraph (b) of the article of the Vienna Convention, it would have to provide a clause relating to prescription. But it would not be able to resolve that problem until it had considered article 46.

42. Mr. USHAKOV said he was aware that some international organizations indulged in practice which conflicted with their rules. But that state of affairs could be acknowledged without there being a general

rule asserting that an international organization could, by its practice, contravene its own rules.

43. Mr. REUTER (Special Rapporteur) observed that, although some international organizations had a very rigid constituent instrument, others might have more flexible rules. While recognizing, like Mr. Ushakov, that it was impossible to lay down a general rule expressing that flexibility, he nevertheless thought it possible to draft a carefully worded rule that would leave each international organization free to allow for a customary practice in its relevant rules. Custom should not be excluded for all international organizations, and the Commission should guard against adopting an excessively rigid formula that would hamper their development.

The meeting rose at 6 p.m.

1550th MEETING

Tuesday, 12 June 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)¹ (*concluded*)

1. Mr. JAGOTA observed that at the previous meeting the Special Rapporteur had suggested the possibility of a third solution for article 45, which would consist of variant A without subparagraph (b). That third solution was attractive, since the deletion of subparagraph (b) would mean that, if States and international organizations that were parties to a treaty wished to ignore a fact that could be invoked as a ground for invalidating the treaty and to maintain the treaty in force, they must so agree expressly through an exchange of notes or letters, rather than implicitly by conduct or acquiescence. The Drafting Committee

¹⁰ See Treaty establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 3), article 228.

¹ For text, see 1548th meeting, para. 6.

should endeavour to determine whether that text would provide a feasible solution.

2. The Special Rapporteur had also mentioned that, at the United Nations Conference on the Law of Treaties, a proposal to delete subparagraph (b) of article 42 (later article 45 of the Vienna Convention)² had been rejected.³ Consequently, if the Commission decided to delete subparagraph (b) of variant A, it would have to give reasons for that decision. It could explain its position by stating that, whereas the Vienna Convention concerned treaties to which only States were parties, so that the conduct of States *inter se* was material to the question of the loss of a right to invoke a ground for invalidating a treaty, the draft articles before the Commission concerned treaties between States and international organizations or between international organizations only. A further justification could be that it was necessary to establish equality between the parties to a treaty. It would be improper for a State that was a party to a treaty to lose its right to invoke a ground for invalidating the treaty as a result of its conduct or acquiescence, while an international organization that was a party to the same treaty did not.

3. There was also the question how an international organization was to express its agreement to continuance of a treaty. Many international organizations did not have detailed rules on treaty-making procedure. In such cases, the governing body of the organization could determine who was to adopt or confirm a treaty on behalf of the organization. There would therefore be a fair amount of flexibility, depending on the practice followed by the various organizations. However, to say that an organization must express agreement in accordance with such practice was different from saying that its conduct would bind it or cause it to lose its right to invoke a ground for invalidating a treaty. While flexibility should be maintained, the parties should be treated equally.

4. He therefore suggested that the Drafting Committee should consider retaining the opening phrase and subparagraph (a) of variant A, and deleting subparagraph (b), which could be replaced by the following text, modelled on paragraph 7 of article 37:⁴

“The agreement of an international organization, as provided for in the preceding clause, shall be governed by the relevant rules of that organization.”

5. Mr. SUCHARITKUL supported Mr. Jagota's proposal. To his mind, the purpose of international law should be to protect the weak—a purpose that had not always been achieved in the past. But circumstances had greatly changed, and it was now possible to imagine an international society in which legal protection would be better guaranteed.

6. It seemed to him that the concept of acquiescence was obsolete, since it derived from the theory of acquisitive and extinctive prescription. It should not be forgotten that draft article 45 concerned not only international organizations but also States. Protection must therefore be provided for all weak entities, whether they were international organizations or States.

7. Mr. TABIBI said that all the arguments put forward by the Special Rapporteur, in his report and orally, in favour of variants A and B, were equally convincing. In the light of the comments made by members of the Commission, however, he supported Mr. Jagota's proposal, which he thought would meet the objections raised during the debate and would be a sound alternative text for submission to the Sixth Committee of the General Assembly. But even if the Drafting Committee finally decided in favour of the third solution, the other two should also be included in the report to the General Assembly, to enable members of the Sixth Committee to express their views.

8. Mr. FRANCIS said that his initial reaction to Mr. Jagota's proposal was one of caution, since it raised the fundamental question whether, given the existence of article 45, subparagraph (b), of the Vienna Convention, the deletion of the corresponding subparagraph from draft article 45 would suggest that, as between States, if questions of conduct did not bind States in a legal relationship, it was only because that relationship was affected by the presence of one or more international organizations. Furthermore, the “rules of the organization”, as defined in draft article 2, paragraph 1 (j), included the established practice of the organization, which, in his view, included conduct. Consequently, in subparagraph (b) of variant B, parity of treatment of organizations and States would be maintained.

9. At the Conference on the Law of Treaties, one of the objections to deleting subparagraph (b) of the future article 45 had been that under that provision certain treaties could be regarded as being binding, which they would not be in the absence of the provision. But much had happened since that Conference; the Vienna Convention was on the point of entering into force, and the Convention on Succession of States in Respect of Treaties,⁵ which established the “clean-slate” principle, had been negotiated. He wondered, therefore, whether, in view of the existence of the latter instrument, States which had found it difficult to accept that conduct could have effects on the validity of treaties might now see the matter in a different light. While he had no rigid objection to Mr. Jagota's proposal, he would like to be convinced that those points need not be taken into account.

10. Mr. TSURUOKA said that, subject to a few drafting changes, he was in favour of variant B. If the Commission adopted variant A, however, it would be

² See 1546th meeting, foot-note 1.

³ See 1549th meeting, para. 30.

⁴ See 1546th meeting, foot-note 4.

⁵ *Ibid.*, foot-note 6.

advisable to add to the existing text a new paragraph, reading:

"In any case, a State or an international organization which invokes a ground for invalidating a treaty under [articles 46 to 50] or [articles 60 and 62] shall be considered as having acquiesced in the validity of the treaty if a period of twelve months has elapsed since the date on which such State or international organization first exercised rights or obtained the performance of obligations pursuant to the treaty."

That suggestion was based on the amendment to article 42 (later article 45), which Guyana and the United States of America had proposed at the Conference on the Law of Treaties.⁶

11. Mr. VEROSTA agreed that Mr. Jagota's proposal might serve as a basis for discussion by the Drafting Committee, since it maintained the distinction between States and international organizations which the Commission had made in all the important articles of the draft already adopted.

12. The wording "governed by the relevant rules of that organization", which Mr. Jagota had proposed, was acceptable. However, the Commission should bear in mind the definition given in article 2, paragraph 1 (j), which read:

"rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

It should also consider article 7, paragraph 3 (b) and paragraph 4 (b), according to which a person was considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty or of communicating the consent of that organization to be bound by a treaty if

it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

It seemed to him that the practice of international organizations was construed in a more restrictive sense in article 2, paragraph 1 (j), than in article 7, paragraphs 3 (b) and 4 (b).

13. Mr. PINTO said that his preference for variant B was based not on considerations of the relative strength or weakness of international organizations and States, or on considerations of logic or legality, but on the most important criterion of social interest in a particular case. On that basis, he favoured variant B because of the practical circumstances surrounding the structure, organization and decision-making systems of international organizations, as opposed to those of States.

14. He had no objection to the approach adopted by Mr. Jagota (para. 4 above). If it was considered unsatisfactory to place the two parties on obviously different footings, Mr. Jagota's proposal could be considered by the Drafting Committee.

15. With regard to Mr. Tsuruoka's proposal (para. 10 above), the social interest in favour of stability of treaties must be weighed against the social interest that prescribed change when circumstances so required. The proposal seemed to be based on a final and irrefutable presumption that rights, when not exercised, would be considered to have been lost. He would be glad to consider that possibility if the presumption were not so categorical. If provision were made for the possibility of proof that the non-exercise of rights for a period of 12 months was due not to any intention on the part of a State not to exercise those rights but to unrelated reasons, that would allow for any necessary social change to take place, and the stability of treaties would not be interfered with.

16. Mr. JAGOTA wished to make clear the difference between established practice and conduct. Established practice, although it might be reflected in conduct, was a procedural matter relating to competence to express agreement on behalf of a State or an international organization. The provision concerning conduct, on the other hand, was a substantive provision concerning the loss of a right through acquiescence. But although established practice served only to indicate whether agreement had been properly expressed on behalf of a State or an international organization, it still had some element of formality, since the agreement must be stated expressly. If, on the other hand, the provision concerning conduct were retained, the agreement of the State or international organization would be considered as being implied by that conduct.

17. Mr. REUTER (Special Rapporteur) said that there appeared to be agreement among members of the Commission that draft article 45 should be sent to the Drafting Committee. The Committee would have to decide what should be put in the text of the article and what should be said only in the commentary, for some important things could be said in the commentary that need not necessarily be included in the body of the article.

18. He did not think Mr. Jagota was right in saying that, by adopting a provision that would modify the text of article 45 of the Vienna Convention in regard to the conduct of States, the Commission would not be weakening that Convention because the provision would be valid only for the special category of treaties covered by the draft articles. For it should be noted that there were treaties open to all States to which only one or two international organizations were parties. By modifying the text of the Vienna Convention in regard to the position of the States parties to such treaties, the Commission would be adopting a provision that would produce effects on relations between States.

19. The meaning of the text of the Vienna Convention depended on the way in which it was interpreted. The word "conduct" in article 45, subparagraph (b), was very vague and did not exclude the formation of a certain practice. It might refer to a practice, but also to conduct alone. For example, if a State or an interna-

⁶ See 1549th meeting, foot-note 9.

tional organization did not invoke a ground for invalidating a treaty that was contrary to its constitution, that did not in itself constitute a practice, but a simple act. There might be reluctance to accept that a single instance of conduct could modify a treaty, but State practice had to be taken into account, and international organizations could not be denied the right to have their own practice, in the same way as States.

20. In short, he believed that the solution of the problem presented by article 45 depended on the interpretation given to the word "conduct" in the Vienna Convention. On that interpretation depended the answer to the question whether or not the text of the Vienna Convention should be modified in the case of international organizations. The Commission could therefore submit several variants to the Sixth Committee of the General Assembly.

21. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 45 to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)

22. The CHAIRMAN invited the Special Rapporteur to introduce draft article 46 (A/CN.4/319), which read:

Article 46. Violation of provisions regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

VARIANT A

2. An international organization may not invoke the fact that its consent has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of the organization of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State and any organization conducting itself in the matter in accordance with normal practice and in good faith.

VARIANT B

2. In the case referred to in the preceding paragraph, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned as a rule of the organization of fundamental importance.

4. In the case referred to in paragraph 3, a violation is manifest if it would be objectively evident to any State not a member of the

organization concerned and any international organization conducting itself in the matter in accordance with the normal practice relating to that organization and in good faith.

23. Mr. REUTER (Special Rapporteur) proposed two minor corrections to the text of variant B, which consisted in adding the words "or any international organization" after the words "any State", in paragraphs 2 and 4.

24. He pointed out that, while the question dealt with in article 46 of the Vienna Convention had occasioned much theoretical discussion, both the Commission and the United Nations Conference on the Law of Treaties had been guided mainly by practical considerations, for they had considered it essential to ensure the stability of international relations where treaties were concerned. They had held that, when a State's consent to be bound by a treaty had been expressed in violation of a provision of its internal law regarding competence to conclude treaties, that State could invoke the fact as invalidating its consent only on two conditions: the violation must have been manifest, and it must have concerned a rule of the State's internal law that was of fundamental importance.

25. The Conference on the Law of Treaties had added to that rule a provision specifying what was meant by a "manifest violation"⁸ which it had taken from the Commission's commentary to article 43 (later article 46). That provision had been adopted by 94 votes to none, with only 3 abstentions.⁹

26. Should the Vienna Convention rule simply be applied without change to international organizations, should it be set aside in their case, or should it be adapted to their situation?

27. He had decided against setting aside the rule in article 46 of the Vienna Convention in the case of international organizations, because he had thought it impossible to give them an absolutely unrestricted right to invoke, as a ground for invalidity, a breach of their own rules regarding competence to conclude treaties. After all, a violation of a relevant rule of an international organization was in most cases a breach of a treaty, since international organizations were established by treaties. Consequently a co-contracting State could not refuse to recognize the consent of an international organization because it did not accept that organization's interpretation of its internal rules, for such a State was a third State in relation to the treaty. Thus an international organization could not be permitted to invoke the violation of one of its rules without restriction, for that would allow it to withdraw from all the treaties it concluded.

⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5, p. 166, document A/CONF.39/14, para. 394 (f)).

⁹ *Ibid.*, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.70.V.6), p. 88, 18th plenary meeting, para. 38.

⁷ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

28. He had therefore submitted two proposals: the first (variant A) was purely and simply to extend to international organizations the compromise adopted for States by the Vienna Conference; the second (variant B) was to maintain the Vienna Convention rule for States and to modify it for international organizations.

29. He believed that, even if it were decided to modify the Vienna Convention rule, it would be necessary to retain the condition that the rule broken must be of "fundamental importance", for he did not think it necessary to grant international organizations protection going beyond their fundamental rules. There might of course be some doubt as to what constituted a "fundamental" rule; but perhaps the Commission could make that clear in the text of the article or in the commentary.

30. He also considered it necessary to retain the condition that the violation must be "manifest". But that condition raised several problems. When the Vienna Convention provided, in article 46, paragraph 2, that

A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith,

it was referring to any State whatsoever, without distinction.

31. There was, however, a case peculiar to the draft articles, which was that of States members of an international organization. That was a special case, because the personality of the international organization did not completely obliterate that of its member States. It would be recalled that members of the Commission had raised objections when he had suggested, in connexion with article 36, that member States were not always third States in relation to an international organization.

32. If an international organization concluded a treaty with one of its member States, had that State a right to say that it did not know the organization's relevant rules? He thought it would be going too far to say that it had, since it was the member States which drew up the rules of an organization and which made up the organs that concluded its treaties. States members of an international organization were therefore bound to know whether a treaty was contrary to its relevant rules.

33. In his view the stability of international relations did not require, for agreements between an international organization and its member States, a rule as strict as that stated in article 46, paragraph 2, of the Vienna Convention. Hence he had excluded member States from the text of variant B, paragraph 4. He had also excluded international organizations that were members of the organization concerned, which should be assimilated to member States, for he had thought that the case of an international organization that was a member of another organization must not be left out of account.

34. As to the rules concerning the invalidity of treaties concluded between an international organization and its member States, the commentary to the article under consideration clearly showed that it was normally the relevant rules and practice of the organization that determined the conditions in which invalidity could be invoked.

35. It would be dangerous to claim that article 46 could resolve such a delicate question, since it was for each organization to determine the conditions in which the invalidity of a treaty concluded between itself and its member States could be invoked. Draft article 46 governed only the external relations of international organizations, in which there must be stability; it did not seek to regulate their internal relations with their member States, which varied from one organization to another. It should be noted that excluding member States from the test proposed in variant B, paragraph 4, for determining whether a violation was manifest, also meant excluding from the scope of article 46 all treaties concluded by international organizations with their member States, including treaties concluded between the United Nations and its specialized agencies.

36. Mr. USHAKOV said that, in general, he shared the views expressed by the Special Rapporteur in his commentary and oral introduction. For a clear understanding of how the situation of an international organization differed from that of a State under article 46 it was necessary first to refer to the corresponding article of the Vienna Convention. Under that provision, a State could not invoke the fact that its consent to be bound by a treaty had been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent, unless that violation had been manifest and concerned a rule of its internal law of fundamental importance. That article was justified by four considerations, which applied only to States, not to international organizations.

37. First, every State was master of its internal law: under article 45 of the Vienna Convention, a State could even derogate expressly or tacitly from fundamental rules of its internal law regarding the conclusion of treaties, since the international obligations of the State and the content of its internal law were established by the same will. An international organization was also master of its constituent instrument and its other relevant rules, but in a different way. For the organ of an international organization that was empowered to conclude treaties was bound by the relevant rules of the organization, which it was not competent to modify, their amendment being subject to a procedure laid down in other rules—which might, for example, require a decision by another organ and ratification by the member States.

38. Secondly, as the Special Rapporteur had pointed out in paragraph 1 of his commentary to article 46, it was "for each State to take the necessary steps to ensure that there is no violation of its internal law

regarding competence to conclude treaties". A State could take such steps because of the unity of the governmental authority: there was a hierarchy of organs of the State, and the conduct of a treaty-making organ could be supervised by a superior organ. But the situation was not the same in international organizations, the organs of which were independent of each other. Even though one organ of an organization was sometimes able to control another in some way, there was no real hierarchy of the organs of international organizations.

39. Thirdly, the provisions of the internal law of States on competence to conclude treaties were sometimes very complicated. How could one tell, for example, whether the meteorological service of the Soviet Union was empowered to conclude agreements with the meteorological service of France? That was why article 46 of the Vienna Convention referred only to rules of internal law of fundamental importance, on the assumption that a State was bound to be familiar with, for example, the constitutions of the States with which it concluded treaties. Similarly, States were bound to know within what limits the President of the United States of America could conclude agreements in simplified form, or what was the content of the law on the conclusion and denunciation of agreements promulgated in the Soviet Union in 1978. On the other hand, a State could not be expected to examine the internal law of another State to determine whether its meteorological service was competent to conclude treaties. It was precisely because knowledge of the provisions of a State's internal law on competence to conclude treaties was often difficult to acquire that article 46 expressly mentioned rules of fundamental importance. The situation in regard to an international organization was different, for it was relatively easy for a State or another international organization to ascertain the organization's relevant rules. As could be seen from the opinions that had been expressed by international organizations and examined by the Special Rapporteur in paragraph (4) of his commentary to article 46, an organization's partner was regularly informed, in particular through administrative correspondence, of the development of a situation affecting any stage in the conclusion of an agreement. There was nothing to prevent a State or an international organization from asking an international organization with which an agreement was being negotiated for particulars of its relevant rules. On the other hand, it might be considered out of place to ask a State whether a department which had proposed the conclusion of a treaty was really competent to conclude it.

40. Fourthly, article 46, paragraph 2, of the Vienna Convention specified that:

A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

For the conclusion of treaties by States, the existing practice was centuries old, and article 7, paragraph 2(a), of the Vienna Convention, according to which

Heads of State, Heads of Government and Ministers for Foreign Affairs were competent to perform all acts pertaining to the conclusion of a treaty, merely confirmed an old-established situation. Similarly, it was established practice that peace treaties were never concluded by subordinate authorities. It could also be agreed that it was now accepted practice, and not merely repeated conduct, for Ministers of Civil Aviation to conclude agreements in their sphere of competence. In the case of international organizations, however, there was no normal and still less an age-old practice in regard to the conclusion of treaties. It could not be said, for example, that it was always the head of the secretariat of an international organization who concluded the organization's agreements. It would therefore be premature to refer to the "normal practice" of international organizations.

41. It was not to the organization's rules of fundamental importance that the draft article should refer, but to any of its rules regarding competence to conclude treaties. If necessary, the reference might be confined to the rules in the organization's constituent instrument and other essential relevant rules.

42. The question which the Special Rapporteur had put in paragraph (6) of his commentary, namely, whether an organization, after having "communicated" its will to its partner, itself lost the right to deprive that communication of all effect by invoking a violation of the rules of the organization regarding competence to conclude treaties, was irrelevant. Where States were concerned, article 46 did not relate to the case in which a parliament, after having ratified a treaty and communicated its ratification to the partner State, claimed that its decision was contrary to the Constitution, but to the case in which a higher organ invoked a defect in the consent of a lower organ. That was what would happen if a Government claimed that a treaty had been concluded by one of its departments which was not competent for that purpose. Similarly, a higher organ of an international organization could invoke a defect in the consent of a lower organ which had concluded a treaty. For example, the agreements referred to in Article 43 of the United Nations Charter could be concluded only by the Security Council. If the Secretary-General concluded such agreements without special authorization, the Security Council would be able to claim that he had acted in breach of the Charter and that his consent was defective. But neither the draft article under study nor the corresponding article of the Vienna Convention covered the case in which an organ found, after the event, that it had acted contrary to the rules regarding capacity to conclude treaties.

43. With regard to the drafting of the article, he doubted whether the Special Rapporteur's oral amendments to variant B, paragraphs 2 and 4, were appropriate. The proposed new wording suggested that all States must conform to the normal practice of international organizations and, *vice versa*, that all organizations must conform to the normal practice of States. In short, the previous wording was preferable.

44. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov seemed to believe that only States, in the final analysis, determined what was normal practice, but that knowledge of such practice reached international organizations, which were supposed to refer to it. He could see no objection to expressing that nuance in paragraph 2, and even in paragraph 4, of variant B.

45. Speaking as a member of the Commission, he agreed with Mr. Ushakov that there was no normal practice common to all international organizations, although there was an incipient tendency, for example, to entrust certain functions to a permanent and single representative of an organization, in the person of its secretary-general. In the case of States, however, the practice specified in article 7 of the Vienna Convention was established. While it was true that it would be dangerous to look for constitutional similarities between international organizations to identify a general practice, the fact remained that each organization could have its own normal practice. There were admittedly international organizations whose constituent instruments contained no provisions concerning competence to conclude treaties, but a practice generally developed from which a rule emerged, and it was on that basis that a normal practice could be considered to exist. A State that relied on such practice on the part of an international organization was therefore in a position requiring some degree of protection.

46. For instance, an economic organization might conclude economic assistance agreements with States, even though its constituent instrument made no provision for such agreements. If, after concluding six agreements of that kind with different States, it concluded another with a seventh State, that State would rely on that practice. Even if the preceding agreements had been concluded by a director of the organization, and the governing council noticed, at the time of conclusion of the seventh agreement, that the director was not competent for that purpose, there would already be a certain practice of the organization, especially if some time had elapsed before the governing council had become aware of the situation. That practice might be changed, but, out of consideration for the partner States, the six earlier agreements could not be held to be invalid.

47. The Commission had already recognized that the practice of an international organization was not born in a day, and it could not now deny the existence of such practice. Of course, international organizations might commit abuses; but it was also possible that an organization's normal practice might make good the shortcomings of its constitutional instrument and enable it to carry on and perform its functions. Hence to consider the agreements concluded by virtue of such practice invalid would be to strike the organization a mortal blow.

The meeting rose at 1 p.m.

1551st MEETING

Wednesday, 13 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319, A/CN.4/L.296)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (*continued*)

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)¹ (*continued*)

1. Mr. PINTO said that verification of the constitutionality of treaties was a matter for each individual State. It was not for a treaty partner to ascertain the constitutionality of a State's expression of consent. That did not mean, however, that the law did not require a basic minimum of prudence and circumspection on the part of the treaty partners. The treaty partner must behave with a normal degree of caution and care to be able to claim reliance on a State's competence to conclude a treaty. The treaty partner did not have to go beyond what normal prudent practice in such a case demanded. It might, for example, ask to see the full powers of the person expressing the State's consent, or ask that a high governmental legal official should testify that all necessary validations, consents and constitutional approvals had been given. Whatever practice was considered normal for relations between the parties concerned would be sufficient, and the treaty partner was not required to go into the details of the legal system of the co-contracting State. The other requirement was that a treaty partner should act in good faith and should not avail itself of prior knowledge of the fact of incompetence in order to accomplish some illegal purpose of its own. If the normal practice had been observed and good faith was not in question, a treaty partner was entitled to rely on a State's implied representation that its expression of consent to be bound by the treaty was valid, and a State could not deny the validity of the treaty on the ground that some aspect of its internal law had not been complied with.

2. Article 46 of the Vienna Convention² stated an exception to that rule, and the Special Rapporteur pro-

¹ For text, see 1550th meeting, para. 22.

² See 1546th meeting, foot-note 1.

posed that draft article 46 should preserve that exception. Article 46 of the Convention was very concise. The rule and the exception were telescoped, and the rule had to be deduced from the statement of the exception. The Special Rapporteur proposed that draft article 46 should follow the same lines. To promote the stability of treaty relationships, the treaty partner was entitled to rely on the implied representation by a State of the constitutionality of its expression of consent, unless the violation of its internal law was both manifest and fundamental. If the violation of internal law should have been known to the treaty partner, in other words, if it was "objectively evident" because it was both readily apparent and of a fundamental nature, the State could claim that the non-fulfilment of its internal law vitiated its consent to be bound and that the treaty partner should have known, and did in fact know, and could not take advantage of the State, which was then at a genuine disadvantage. Before such a situation could occur, however, the violation of internal law must be very clearly evident, by reason both of its form and of its substance.

3. The question before the Commission was whether such a rule and such an exception existed, and should be provided for, in treaty relations between States and international organizations or between international organizations. The view had been expressed that the rule and the exception confirmed in article 46 of the Vienna Convention, while reasonable in the case of inter-State relations, could not be applied directly to treaty relations with international organizations. It had also been pointed out that the State was master of its own internal law, and therefore had some flexibility in the way consent would be legally expressed or amended and in remedying violations of internal law and maintaining the validity of treaties to protect third parties. International organizations, on the other hand, had no such flexibility and were rigidly bound in their actions by the scope of the competence given them by their constituent instruments. The term "manifest" did not have the same value in relation to States and organizations, since facts became "manifest" to States in a more comprehensive way than they did to international organizations. He fully agreed with those comments, and had stated on previous occasions that there were fundamental differences between States and international organizations which prevented them, as a general rule from being treated on the same footing. Those differences related to their internal organization, the scope of their competence and their decision-making procedures. But the most fundamental factor that set an international organization apart was that it was the creature of its members, and that it had a clearly defined and paramount social function and purpose which it was created, designed and required to fulfil.

4. In the light of those considerations, it would be preferable not to transpose article 46 of the Vienna Convention, as it stood, into the context of relations between States and international organizations or between international organizations, but to take due account of the special nature of those relations, bearing in mind the social character and purpose of the

organization as a treaty partner. Consequently, while a rule on the lines of article 46 should certainly be included in the draft, it should be a differential rule for States and organizations. His preference was therefore for variant B.

5. However, variant B as it stood had gaps and ambiguities which the Drafting Committee would no doubt eliminate. As Mr. Ushakov (1550th meeting) had shown, the content of the term "normal practice" was not clear. It was possible, nevertheless, to speak of normal practice between a State and an organization of which it was a member. A whole body of firm procedures had been developed to ensure that negotiations between organizations and their members for the conclusion of a treaty would produce maximum disclosure of information on both sides. In fact, variant B seemed designed to apply to relations between organizations and non-member States, as was suggested by the definition of a "manifest" violation in paragraph 4.

6. If the differential approach represented by variant B were adopted, it would be necessary, first, to clarify the reference to "normal practice", making it fit each individual case; secondly, to make some reference, however general, to the rules that might apply to the great number of agreements between States and international organizations of which they were members; and thirdly, having regard to the social purpose of international organizations, further to restrict the application of the rule in paragraph 3, so as to cover not only cases where the violation was "manifest" and "fundamental" but also those cases where invalidation of the treaty would result in a situation incompatible with the object and purpose of the organization.

7. Mr. EVENSEN shared many of the doubts about article 46 expressed by Mr. Ushakov and Mr. Pinto. The differences between international organizations and States were such that the Commission should adopt a rather cautious approach in drawing a parallel between them in respect of the matters contemplated in article 47 (A/CN.4/319). Yet it was clear that, although the value of the provisions of article 47 was more theoretical than practical, it would none the less be useful for international organizations to be able to rely on rules that would make it easier for them to conclude international treaties and to gain the acceptance of States as treaty partners. A balance should therefore be struck between those considerations in establishing the terms of article 46, and he considered that variant B would best serve that purpose.

8. Nevertheless, he was concerned about the rather ambiguous fashion in which paragraph 4 of variant B was drafted. The criterion of "normal practice" might prove difficult to apply to an international organization, especially in regard to its treaty-making capacity. Again, the rule to be applied to States was not particularly clear, since it was not expressly specified—nor was it perhaps even intended to be specified—that paragraph 4 related solely to States that were not members of the organization concerned. From the present wording of the paragraph it might well be inferred that the knowledge available to a State that was not a

member of the organization was to be the criterion for determining whether a violation was manifest or not. Obviously, despite the wording of paragraph 4, another criterion should apply in the case of States that were members of the organization concerned.

9. Lastly, the requirement of good faith obviously applied to all the parties to a treaty. Unfortunately, that requirement was mentioned at the end of the paragraph, in such a way that it could be taken to apply only to international organizations and not to States.

10. Mr. REUTER (Special Rapporteur) pointed out that the article under consideration dealt separately with the consent of States and that of international organizations. Not only paragraph 1, but also paragraph 2 of variant B concerned the consent of States. The reference to good faith, which appeared in both variants A and B, accordingly applied to States, as it came at the end of paragraph 3 of variant A and at the end of paragraph 2 of variant B. If the Commission considered that it should not depart from the Vienna Convention in regard to the consent of States, it would be enough to refrain from adding the words "or any international organization", which he had proposed orally (1550th meeting, para. 23), in variant B. But it was obvious that, when an organization approached a State with a view to concluding an agreement, it was in the same position as any State with regard to evaluation of the consent of States.

11. Mr. SCHWEBEL was inclined to favour variant A. The basic rule stated in article 46 of the Vienna Convention was sound, and should obviously be reproduced in the present draft insofar as States were concerned. It should also apply in some measure to international organizations; otherwise, as the Special Rapporteur had eloquently emphasized, the commitments assumed by international organizations would be subject to recall as a result of a violation of a provision of the rules of the international organization concerned, regardless of how unreasonable it might have been to consider that the State with which the organization entered into the treaty had been on notice of the violation. The treaties concluded by international organizations could not be aleatory and they must be no less binding on international organizations than they were on States.

12. Naturally, that fundamental approach called for further refinement. Fortunately, variant A did in fact go further, since it restricted the authority of an international organization, like that of a State, to repudiate a treaty on the ground of violation of provisions concerning its capacity to conclude the treaty in question to instances in which the rule violated was of fundamental importance and the violation itself was manifest. The rules of an international organization were broadly, but correctly, defined in article 2, paragraph 1(j),³ as the constituent instruments, relevant deci-

sions and resolutions, and established practice of the organization. He could imagine a case in which an international organization concluded a treaty, not in violation of its constituent instrument or even of its relevant decisions and resolutions, which meant, presumably, its rules of procedure or rules of like formality, but in violation of an established practice which, however, was not a practice that was notorious or even noteworthy. In that event, the international organization concerned should not be able to plead the invalidity of the treaty if the violation of its authority to conclude the treaty had not been manifest and had not involved a rule of fundamental importance.

13. The difficulty with regard to variant B was that it would restrict the thrust of article 46 to cases in which the violation of the international organization's authority would be objectively evident to any State that was not a member of the organization and to another contracting international organization. Admittedly, that might be the very purpose for suggesting variant B. But if a small member State of a United Nations agency, a State that was rich neither in legal nor other resources, concluded a technical assistance agreement with that agency in accordance with the agency's practice, should the agency be able to void the agreement on the ground that, even if the violation of its authority was not manifest and even if it did not concern a rule of fundamental importance, all the members of the agency must be presumed to be on notice of all of its rules? The merit of so exigent a rule was obvious in the case of organizations with restricted membership, such as EEC, since every member could reasonably be expected to have actual or presumed knowledge of the Community's rules on treaty making. But such an approach was far less reasonable in the case of universal organizations. He very much doubted whether every State in the world could be regarded as having so intimate a knowledge of the rules and practice of every universal organization to which it belonged. It should be remembered that even States with large foreign services were not always in full control of their treaty making. It was something of a myth to claim that treaty making was under cohesive control and to say that a State, if it had waived one of its constitutional rules, had done so deliberately. Many treaties were concluded not by foreign services but by State agencies that were very ill-acquainted with the rules on treaty making. Could smaller States, which barely managed to maintain a permanent mission at the headquarters of the organization concerned, be presumed to have full knowledge of the rules of technical agencies such as ICAO, WMO or WHO, or even of the United Nations?

14. If international organizations were afforded exceptional opportunities to avoid their treaty commitments, such a course would not be conducive to the achievement of their objects, which after all represented the reason why they were established by States. The treaty-making capacity of international organizations should be given full scope for development, in keeping with the rules of the organizations. Nevertheless those rules themselves, as had been recognized in the Com-

³ See 1546th meeting, foot-note 4.

mission's definition of them, must also be capable of some development. Jefferson, as the first President of the Senate of the United States of America, had written a remarkable set of parliamentary rules and commentaries, which had for many decades played a most influential role in the workings of the Senate. He had perceptively considered the scope of treaty-making power, but some of the restrictions he had placed on it had been overtaken by the events of history and the liberal interpretation of the Constitution that was characteristic of the United States Supreme Court. For example, Jefferson had maintained that treaties could be made only on the accepted subjects of treaties. It was inconceivable that the treaty-making capacity of the United States could now be restricted to the subjects of treaty making in the eighteenth century; it would not be possible, for instance, to conclude treaties on the non-proliferation of nuclear weapons. Obviously, it could be rightly claimed that an international organization was not the same as a State, which possessed plenary and residual powers. It was more than likely that, if the United Nations survived for 200 years, the objects and purposes of the Charter were broad enough to accommodate treaties on a wide variety of subjects, but that might not hold true for other international organizations, which would have greater need for a liberal interpretation of their rules.

15. Accordingly, the Commission should take the longer view, as the United States Supreme Court had done after Jefferson's time, when Justice Holmes had written that the Court had been interpreting a Constitution whose development could not have been foreseen by the most gifted of its begetters. The constitutions of international organizations should be viewed in a similar spirit. Clearly, that did not mean that international organizations should be permitted, or required, to void treaties which they concluded in an arbitrary manner, which would not be conducive either to the integrity of the treaty-making process or to the growth of international organizations.

16. Mr. JAGOTA favoured variant A, the formulation for which the Special Rapporteur had courageously expressed his own preference.

17. Of course, he recognized that there were basic differences between States and international organizations. As Mr. Ushakov had pointed out, the present draft articles would not be necessary if such differences did not exist, for the provisions of the Vienna Convention could then be applied *mutatis mutandis* to international organizations. In fact, those differences had already been borne in mind in preparing the draft articles and, in some instances, different provisions had been made for international organizations. For example, article 7 spoke of "full powers" for States and of "powers" for international organizations. At the previous session, the Commission had also drawn a distinction when it had dealt with the rights and obligations of third States and third international organizations in connexion with treaties between States and international organizations or between international organizations, so that the granting of a

right would depend in one case on agreement or on implied consent, but in the other case exclusively on agreement given in accordance with the rules of the international organization.⁴

18. In the matter of the stability of treaty relations or the continued validity of treaties, it was essential to take account of those differences. He considered, however, that the necessary distinction should not be made in article 45⁵ or in article 46. The terms of article 46 could be invoked by a State which, having violated a provision of its internal law regarding competence to conclude treaties, could assert that the treaty was void because the person who had expressed consent to be bound by the treaty had not been competent to do so or had acted unconstitutionally. Similarly, the article could be invoked by an international organization, which could claim that the person who had expressed consent had not been competent or had violated a basic rule of the organization. Obviously, it must be a rule of fundamental importance, for otherwise the article would entitle the organization to change its mind about the treaty at any time. Article 7, paragraphs 3 (b) and 4 (b), determined who could be considered as representing an international organization for the purposes of authenticating the text of a treaty and of communicating consent to be bound by a treaty. Nevertheless, an international organization still had an opportunity, under article 8 of the draft, to confirm a treaty, notwithstanding the fact that the person representing the organization had not acted in accordance with its rules. On the other hand, in regard to any violation covered by article 46, could an international organization say that it was not ready to confirm the treaty in accordance with article 8 and that, in fact, it wished the treaty to be void *ab initio* because the person representing the organization had not been competent to do so?

19. It was impossible for States to ascertain fully the "rules" of an international organization, which were defined in article 2, paragraph 1 (j), as consisting not only of the organization's constituent instruments, but also of its relevant decisions and resolutions and established practice. Consequently, a State could not ensure compliance with all the relevant rules of an international organization, but the organization itself could invoke failure to comply with those rules as a ground for invalidating a treaty.

20. Hence it was important that article 46 should lay down strict rules. Such rules were set out for States in paragraph 1, and for international organizations in paragraph 2 of variant A. In the latter instance, the rule of the organization must be of fundamental importance and the violation must be manifest. The Special Rapporteur had indicated that the violation must be manifest in terms of practice, something that

⁴ See *Yearbook... 1978*, vol. II (Part Two), p. 124, document A/33/10, para. 132.

⁵ See 1548th meeting, para. 6.

was relatively easy to determine in the case of State practice in treaty making, but altogether more difficult in the case of the practice of international organizations. Should it be the practice of international organizations in general, or simply the practice of the particular organization invoking the terms of article 46? And if the violation was to be manifest to a State, should a distinction be made between non-member States and member States of the organization concerned? Presumably, the member States were better acquainted with the rules of the organization and in a better position to know whether the rule in question was of fundamental importance. The problem in that case was to determine whether the evidence of the violation to a member State should be deemed relevant or should be excluded. If it were to be excluded, the organization could at any time repudiate a treaty concluded with one of its member States. However, in paragraph (18) of his commentary (A/CN.4/319), the Special Rapporteur had provided an answer to the problem that might arise in EEC, for instance. The fate of a treaty concluded between the Community and one of its members would be determined by the special system of law governing the relations between EEC and its member States, not by the provisions of draft article 46. However, the Special Rapporteur had noted, in foot-note 30 of his report, that the definition of the evidence proposed in article 46, paragraph 4, would not apply to treaties between universal organizations and their member States, which would mean that it would be easier for the United Nations to invoke any violation of a fundamental rule in connexion with treaties concluded with member States.

21. His own view was that article 46, paragraph 4, was neither necessary nor useful and that it would create difficulties; for the United Nations could invoke it by claiming that the rule violated was of fundamental importance, even though the other treaty partners considered the rule to be of minor importance. Naturally, if a fundamental rule of the United Nations were violated, the treaty should be declared void; but even in other situations the United Nations itself would not suffer, because, under Article 103 of the Charter, the obligations of Member States under the Charter would prevail over their obligations under the treaty in question. Hence paragraph 4 of article 46 could simply be deleted.

22. He fully agreed with the Special Rapporteur that, for the purposes of article 46, the question whether a rule of an international organization was of fundamental importance or not should be determined with reference to the practice of that organization alone.

23. In conclusion, he considered that article 46 should consist of paragraph 1, in its present form, and paragraphs 2 and 3 of variant A. In the latter paragraph, it would be advisable to insert, after the word "practice", the words "among States and of that organization, respectively,". The inclusion of commas before and after the word "respectively" would cover Mr. Evensen's point concerning the requirement of good faith.

24. Mr. REUTER (Special Rapporteur), replying to the comments made so far on draft article 46, noted that there was almost general agreement on two points.

25. First, the members of the Commission seemed to be in favour of keeping to the rules of the Vienna Convention in regard to the consent of States. If a decision were taken to that effect, it would obviously have implications for the preceding articles of the draft. It would therefore be advisable for the Drafting Committee to consider article 46 before article 45. It followed logically that the Commission should also approve paragraph 2 of variant B, since that paragraph related only to the consent of States. The wording used might be improved to make it clear that the normal practice referred to was not that of States, but that which could be deduced from relations with States. It did not seem that the practice of an international organization in regard to the consent of a State differed from that of States.

26. Secondly, the members of the Commission as a whole seemed to think that it would be dangerous to refer to a general practice of international organizations. There were so many differences between international organizations that each one should be left to define its own practice.

27. On other points, there were misunderstandings between him and certain members of the Commission. For instance, when the fundamental difference between States and international organizations was emphasized, as it had been by Mr. Ushakov, there was some temptation to consider that variant A assimilated organizations to States, whereas variant B took the difference into account. In reality, both variants were based on assimilation, as was clear from the resemblance between paragraph 3 of variant A and paragraph 2 of variant B, and between paragraph 2 of variant A and paragraph 3 of variant B. Those members of the Commission who, like Mr. Schwebel and Mr. Jagota, had favoured variant A, had thus been opting for assimilation, while those who had spoken in favour of variant B had probably been advocating a greater degree of differentiation.

28. He had originally opted for assimilation, but had found that the idea of a manifest violation differed according to whether it related to an agreement concluded between an organization and one or more of its members, or an agreement concluded with non-member States. For the member States could be expected to know the rules of the organization better than other States. True, in taking the United Nations as an example, he had not made a felicitous choice, as Mr. Schwebel had demonstrated. He had also had to admit that, in the case of a treaty between an organization and one or more of its members, the question of invalidity was not subject to rules of general international law, and in particular to the rules set out in draft article 46. Cases of that kind must be settled by the special law and practice of the organization. That idea had both theoretical and practical advantages; not only did it take into account the particular nature of

each organization, but it obviated the need to draft rules that would be equally applicable to the United Nations and to a regional bank or a specialized agency with practice covering so long a period as that of ILO. In view of Mr. Evensen's appeals for caution, it might be wondered whether as many questions as possible should not be left to the law of each organization.

29. There had, however, been several criticisms of that position. It had been pointed out that it was impossible to take the same position with regard to a large international organization like the United Nations as to small organizations, and that the text of article 46 was not clear. He had already explained his views on those two points. It had also been observed that at the end of variant B, which tended towards assimilation, he had included a paragraph making an important exception, while recognizing that the concept of fundamental rules was acceptable. Mr. Ushakov seemed inclined to think that for an organization all rules were fundamental, which would make it necessary to amend paragraph 3. Other members of the Commission, like Mr. Pinto, had emphasized the importance of the purposes of each individual organization. It might well be thought that the Commission would seek to define the fundamental rules of international organizations in general, and to attribute special importance to the purposes of each of them. In that connexion, the Commission should bear in mind the advisory opinion of the International Court of Justice concerning *Certain expenses of the United Nations*, which made it clear that the expenses in question had been expenses of the United Nations because they had been consistent with the general purposes of the Organization. Personally, he feared that any definition of the fundamental nature of the rules would lead to abandoning the attempt to lay down valid rules for all international organizations. In the case of treaties between States, the Commission had not specified which rules of internal law were of fundamental importance, and it should follow the same line with regard to international organizations.

30. Both Mr. Jagota and Mr. Schwebel had been in favour of complete assimilation of the rules concerning the consent of international organizations to those concerning the consent of States. Mr. Jagota had gone even further than the Special Rapporteur himself, since he had thought it unnecessary to distinguish between agreements concluded by an organization with its member States and agreements concluded with non-member States. Mr. Schwebel had shown that the practice of States in regard to the conclusion of treaties was not simple, and that the rule in article 46 was flexible enough. Moreover, Mr. Jagota had shown how much the Commission was bound by the preceding articles, particularly article 7. The new wording he had proposed for paragraph 3 of variant A (see para. 23 above) would be excellent if the Commission followed the line he had indicated.

31. Mr. Ushakov thought that a distinction should be made between the consent of international organizations and that of States, because the fundamental rules of international organizations could not be determined

in advance. The wording he proposed for article 46 (A/CN.4/L.296)⁶ differed in more than one respect from the corresponding article of the Vienna Convention.

32. Mr. QUENTIN-BAXTER said that draft article 46 was the necessary counterpart to draft article 6. For fundamental reasons, the competence of States was different from that of international organizations. Even if the same words were used in draft article 46 in respect of States and international organizations, article 46 would not play the same part in the draft as it did in the Vienna Convention. In the Vienna Convention, the rule in question derived from, and gave precision to, the fundamental rule that States had a general competence, which they were not permitted to deny in ordinary circumstances, whereas the rule in the text under consideration was the necessary counterpart to the restricted competence of international organizations.

33. The aim should be to provide for as great a degree of assimilation as possible between the positions of States and international organizations, since the latter had become actors, as well as instruments, in the world of States and must as far as possible take account of, and ally themselves with, the rules made by States to govern their relations.

34. It was possible to adopt a common text for States and international organizations, with some changes. First, whereas the Vienna Convention spoke of the "internal law" of a State, the draft articles contained in addition the defined term "rules of the organization". It was not possible to ignore that term by referring simply to the internal law of the organization. Furthermore, the expression "normal practice" could not be used generically in relation to organizations. Even with the amendment proposed by Mr. Jagota, he would find it difficult to accept variant A.

35. He wondered whether, given the context, it was necessary for the Commission to concern itself very much in the text with distinguishing between States that were members of an organization and those that were not. The expression "any State" could not possibly be interpreted as meaning only States that were members of an organization, except in the case of treaties to which only States members of an organization could be parties. While he could not agree with Mr. Schwebel that variant A was adequate, he shared the view that in many contexts it would be unrealistic to draw too clear a distinction between States that were members of an organization and those that were not.

36. Another point to be considered was that persons acting on behalf of an organization did not necessarily have a conspectus of its rules, but tended to be guided largely by the negotiating officials of the organization concerned. It was to be hoped that the principle of good faith would be sufficient to ensure that organiza-

⁶ Text reproduced in the summary record of the 1552nd meeting, para. 15.

tions stood by their bargains. As the Special Rapporteur had noted in his commentary, from what was known of the practice of international organizations there was no indication that sharp differences of opinion commonly arose between States and organizations in questions of that kind, for the very obvious reason that organizations were the creatures of States, and that it was their purpose to serve them rather than to seek to reduce their responsibilities towards them. Furthermore, policy provided a major safeguard for both parties. If it was considered that something had been done incorrectly, at least States that were members of the organization concerned would be in a position to urge the organization to follow a proper course. It was not necessary to make a sharp distinction between law and policy, and efforts should be made to assimilate the position of States to that of international organizations, as the Special Rapporteur had tried to do in variant B.

37. Part of the essential difference between States and international organizations was that the constitutions and rules of organizations were public property and that States dealing with them were notified of the nature of those rules. However, the expression "rules of the organization", used in paragraph 3 of variant B, went beyond what was meant by the established practice of an organization. As a practical matter, organizations dealing with States under treaties should accept some limitation on the degree to which they could rely on the intricacies of their own rules in disclaiming obligations. That was the condition on which they enjoyed the privilege of entering into treaty relations with States.

38. Another pertinent factor was the importance attached to the term "manifest". In the context of paragraph 3 of variant B alone, the difficulty of determining what constituted a rule of fundamental importance would usually be overcome by the use of the term "manifest". Anything that was contained in the constitution, or that had been promulgated in decisions of which all had been given notice, would be manifest. Much else would not be manifest. However, in paragraph 4 of variant B a different balance existed. In paragraph 3, the condition relating to a rule of fundamental importance was coextensive with the term "manifest", so that the test of what was manifest remained unchanged. In paragraph 4, on the other hand, a knowledge of the normal practice of an organization seemed to be imputed to the other organization concerned, so that the term "manifest" had built into it an imputed knowledge. That distinction between established practice, as defined under "rules of the organization" in article 2, paragraph 1 (*j*), and normal practice, as used in draft article 46, was probably not intentional. But if the meaning of the term "manifest" was to be governed by the expression "normal practice", then the advantage of using the term "manifest" would be lost.

The meeting rose at 12.55 p.m.

1552nd MEETING

Thursday, 14 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Ghali, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Welcome to Mr. Ghali

1. The CHAIRMAN congratulated Mr. Ghali on his election and welcomed him on behalf of the Commission.

2. Mr. Ghali thanked the members of the Commission for electing him. He had been able to appreciate to the full the practical importance of international law, especially the principle of *pacta sunt servanda*, during the difficult negotiations that had led up to the conclusion, at Washington, of the Peace Treaty between Egypt and Israel. That Treaty was based on the rules of international law, and when there had been differences of opinion concerning the interpretation of its provisions, it had always been to international law that the parties had turned. He considered that international law was an essential instrument for overcoming political difficulties.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319, A/CN.4/L.296)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)¹ (*concluded*)

3. Mr. TABIBI said that, in the contemporary community of nations, the role of international organizations had become a fact of everyday life. The constituent instruments of those organizations reflected the collective opinion of sovereign States, and all the decisions made in international organizations, such as the United Nations, were made by sovereign States. Moreover, those organizations derived their power from their member States, through their constituent instruments. Consequently, although there were obvious differences between them, the same trends could be observed in international organizations as in sovereign

¹ For text, see 1550th meeting, para. 22.

States. Variant B proposed by the Special Rapporteur, which he was inclined to support, took account of both the differences and the similarities between States and international organizations.

4. As to the question of normal practice, he could not agree with Mr. Jagota (1551st meeting) that the practice of international organizations was not on the same level as that of States. The normal practice of States in regard to treaty relations could not be relied on. In the past, treaties had been imposed by strong States on weak States. The present normal practice, whereby States negotiated treaties on an equal footing, had developed only recently, with the creation of positive international law, which included the United Nations Charter. Consequently experience of the normal practice of international organizations and of States could be considered to have started at about the same time. Attention should therefore be given not only to the classical principles of international law but also to the new law of international organizations.

5. Variant B proposed by the Special Rapporteur provided the necessary flexibility, which he hoped would be maintained in the final draft articles.

6. Mr. SUCHARITKUL found both variants A and B acceptable, although he preferred variant B. He did not dispute the principle that, in the matters covered by article 46, international organizations should be assimilated to States as far as possible; but he had some difficulty with the expression "normal practice", which appeared in variant A, paragraph 3, and in variant B, paragraph 4, of the article under consideration and in paragraph 2 of the text proposed by Mr. Ushakov (para. 15 below). That expression could not be taken to mean a single act or an isolated event, since a whole series of actions was needed to establish a normal practice. What was meant was the normal practice followed in relations between the parties to a treaty, in other words, between States or between States and international organizations.

7. He was grateful to Mr. Ushakov for having underlined at the 1550th meeting the difference between States and international organizations in that regard. For while there might be a normal practice of States, there was no normal practice common to international organizations.

8. In fact, he even wondered whether it was really possible to speak of the normal practice of a State; on that point he shared the view of Mr. Schwebel, who had expressed doubts about the practice of his own country. In the case of a country such as Thailand, although practice was well established, owing to the development of the State's activities in all spheres there had been changes in the practice relating to competence to conclude treaties. The Ministry for Foreign Affairs was no longer exclusively competent to conclude treaties; while it was still responsible for the most important treaties, secondary treaties now came within the competence of other ministries. It could be seen, therefore, that a State's practice was not constant, but was continually evolving.

9. With regard to the normal practice of international organizations, account must be taken of the new organizations that were set up each year. It was difficult to determine in advance what their normal practice would be, however, so that, as the Special Rapporteur proposed, the Commission should confine itself to the existing practice of States and international organizations.

10. Even in the case of international organizations that were already long established, such as EEC, practice did not always provide a solution to the problems that might arise. For example, in connexion with the Regional Office Agreement it had just signed with EEC, Thailand had had to adopt a law recognizing the legal personality and capacity of that entity, for the Community had asked that its legal personality should be recognized not only under international law but also under the national law of Thailand. Recourse had been had to precedents such as the agreements the Community had concluded with Belgium and Japan, for there was no normal practice of the Community. Indeed, while States always recognized the Community's legal personality under international law, they did not always recognize it under their internal law.

11. With regard to variant B, paragraph 4, which stated that "a violation is manifest if it would be objectively evident to any State or any international organization not a member of the organization concerned", he wondered whether a distinction could not also be made between the different categories of members of an international organization. ESCAP, for example, had several categories of members: founder members, such as France, the Netherlands, the USSR, the United Kingdom and the United States of America; regional members, extra-regional members; and associate members, like Hong Kong. The Asian Development Bank also had several categories of members: founder members; members which contributed to the Asian Development Fund, such as Japan and the United States of America; and members which borrowed from the Fund. The question he wished to put to the Commission was whether different competence to conclude treaties should be attributed to different categories of members.

12. Mr. RIPHAGEN thought article 46 of the Vienna Convention² was sufficiently flexible to be applicable to the consent of international organizations to be bound by a treaty. The most formidable obstacle to invoking invalidity under that article was the condition that the violation of internal rules regarding competence must be manifest to the other party or parties. It was particularly formidable if the limitations of internal law were of a substantive rather than a procedural nature. In many cases, it might be unclear which organ of the State was competent to conclude a particular treaty. And there was often a genuine difference of opinion between the member States of an organization as to the treaty-making capacity of the organiza-

² See 1546th meeting, foot-note 1.

tion. Given such differences of opinion, it could hardly be said that the effect of the limitations in question was sufficiently evident to be manifest to third States.

13. The influence of internal rules and procedures was such that it was often difficult to imagine cases in which article 46 could be invoked. For example, under the constitutional law of the Netherlands, the approval of Parliament was needed before the conclusion of a treaty by the Head of State, unless the treaty was considered to be of paramount importance to the interests of the State, in which case prior approval was not necessary. In such cases, there was no objective criterion that could be manifest to a third State. Conversely, EEC had internal rules under which any State could ask the Court of Justice of the European Communities whether the Community had the power to conclude a given treaty. If the treaty was concluded despite a negative ruling of the Court, an obvious objective criterion would exist that would be manifest to all.

14. There was therefore some interplay between internal constitutional rules, the application of article 46 of the Vienna Convention, and the draft article before the Commission. Since article 46 of the Vienna Convention was sufficiently flexible to take account of that interplay, it could be applied to the consent of international organizations to be bound by a treaty without any need for amendment.

15. Mr. USHAKOV read out the text he proposed for article 46 (A/CN.4/L.296):

"1. A State may not invoke the fact that its consent to be bound by a treaty between one or more States and one or more international organizations has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

"2. A violation as indicated in paragraph 1 is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and is therefore also manifest for any international organization.

"3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the relevant rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.

"4. A violation as indicated in paragraph 3 of a relevant rule of the organization in question concerning competence to conclude treaties is manifest if the rule, interpreted in good faith, is clear."

16. He pointed out that paragraph 1 of that text followed the text of the Vienna Convention, since it dealt with States. Under the Vienna Convention, a State could invoke its internal law as invalidating its consent only within certain limits intended to protect

the other parties to the treaty: the rule of internal law violated must be of "fundamental importance" and the violation must be "manifest". Paragraph 2 of the relevant article of the Vienna Convention specified:

A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

In his view, a violation was manifest if the rule broken was manifest—in other words, if it was a rule of international law based on the normal practice of States, namely, a customary rule. Thus paragraph 2 of the Vienna Convention text had introduced, alongside the reference to the internal law of the States, a reference to the customary rules of international law. But the customary rules of international law must be known to every international organization, and that was why he had added, in paragraph 2 of his proposal, the words "and is therefore also manifest for any international organization".

17. If, for example, a customary rule of international law provided that a State's representative to an international organization could conduct negotiations with that organization for the conclusion of a treaty, but was not competent to bind the State by his signature, a State whose representative broke that rule by giving his signature could invoke that violation of a customary rule of international law as invalidating its consent to be bound by the treaty, since the international organization must have known the rule.

18. In addition to the customary rules of international law, however, there were fundamentally important rules of internal law that must be known to the other parties to the treaty. A State could therefore invoke a violation of those fundamental rules to claim that a treaty was invalid. On the other hand, there were also, in the internal law of every State, rather obscure rules which even lawyers of the State concerned did not always know very well, and with which other States or international organizations could not be expected to be familiar. That was why it was necessary to stipulate, with regard to the internal law of States, that the rule violated must have been "of fundamental importance".

19. No such stipulation was necessary in the case of international organizations, however, since it was easy to know what their rules were. He had therefore considered it sufficient to provide, in paragraph 3 of his amendment, that the violation of the relevant rules of the organization must have been manifest, without adding that it must have concerned a rule of fundamental importance.

20. In the case of international organizations, as in that of States, a violation was manifest if the rule violated was manifest, in other words, objectively evident to all when interpreted in good faith. But according to the definition given in article 2, paragraph 1 (j), of the draft,³ the expression "rules of the organiza-

³ See 1546th meeting, foot-note 4.

tion” meant not only the organization’s constituent instruments, which were presumed to be evident, but also its relevant decisions and resolutions and its practice, which might be ambiguous or obscure. An international organization could not invoke its practice or resolutions if they were obscure; it could invoke only practice or resolutions that were evident when interpreted in good faith, for the resolutions and practice invoked must be known to its treaty partners. Thus the partners of the international organization would be sufficiently protected if it were provided that the rule violated must have been “clear”. It was not necessary to specify that the rule must have been clear “to any State or any international organization not a member of the organization concerned”. If the rule was clear, it would be clear to all States and all organizations, whether they were members or not.

21. Mr. VEROSTA said that he had at first favoured variant B, but that in the light of the Commission’s discussion he now believed, like Mr. Riphagen, that variant A was preferable, because it was more flexible.

22. He thought Mr. Ushakov was right in saying that international organizations, as subjects of international law, were also bound by customary international law. But he doubted whether it could be said, as in paragraph 2 of Mr. Ushakov’s proposal, that a violation that was evident to any State was “therefore also manifest for any international organization”, for that would mean that international organizations were bound by customary law in regard to certain activities of States. He also wondered whether it was possible to speak of a “règle évidente”, and whether it was helpful to introduce that new concept beside that of a “manifest violation”.

23. He proposed that draft article 46 should be referred to the Drafting Committee.

24. Mr. CASTAÑEDA favoured variant A, for the basic reason that it provided a better guarantee for the maintenance of the stability of treaties and took sufficient account of the difference between the respective positions of international organizations and States in regard to consent to be bound by a treaty. For the same reasons, in paragraph 4 of variant B it would be better to eliminate the distinction between States that were members and States that were not members of the organization concerned, although he attached some importance to the comments made by the Special Rapporteur in foot-note 30 of his report.

25. The primary concern of the Commission should be to ensure greater stability of treaties. Even in connexion with paragraph 1 of draft article 46, problems could arise concerning agreements in simplified form. The relevant provisions of the Vienna Convention itself were open to different interpretations in that regard. While the constitutions of some countries, such as the United States of America, distinguished between treaties that must be ratified by the legislative body and those that needed no such ratification, the

constitutions of many other countries contained no such provisions. Nevertheless, for practical purposes, those countries, which included Mexico and many other Latin American States, found it necessary to conclude numerous international agreements that were not ratified by their respective legislatures. In such cases, paragraph 1 of draft article 46 could be invoked to invalidate consent. That was a serious problem, especially since doctrine provided no acceptable definition of what constituted an agreement in simplified form, as opposed to a treaty requiring ratification.

26. Similar cases could also arise in regard to international organizations, so that every effort should be made to maintain the stability of treaties and to minimize the possibility of their being invalidated by reason of a defect in consent. It would therefore be preferable to adopt the principle proposed by Mr. Ushakov, namely, that a violation must be manifest to any international organization, rather than the criterion of the fundamental importance of the rule violated for the organization concerned. The latter test could be difficult to apply where the rule in question was not embodied in the constituent instrument or in a clear decision taken by the principal organ of the organization.

27. Mr. REUTER (Special Rapporteur), reviewing the further comments made on article 46, noted that, with regard to the consent of States, the members of the Commission were for the most part in favour of keeping to the wording of the corresponding article of the Vienna Convention. The question whether a reference to international organizations should be retained in a paragraph dealing with the consent of States should be settled by the Drafting Committee.

28. The members of the Commission also seemed to find that paragraph 4 of variant B was not convincing. Hence the question of member and non-member States should not be dealt with in the article under consideration, but might at most be mentioned in the commentary. In that connexion, he pointed out that, if paragraph 4 were dropped, variant B would disappear completely, as it would no longer differ substantially from variant A.

29. Two trends were emerging from the debate. The first was in favour of variant A, paragraph 3 of which could be examined by the Drafting Committee in the light of the wording proposed by Mr. Jagota (1551st meeting, para. 23). The second was expressed in the text of article 46 proposed by Mr. Ushakov (see above, para. 15). Those members of the Commission who were inclined to favour variant B would prefer, for the consent of organizations, a provision based on Mr. Ushakov’s proposal. That proposal was characterized by the omission of any reference to the fundamental importance of the relevant rules of the organization; hence the violation of any relevant rule of the organization came within the scope of the provision. The proposal also defined a manifest violation, without referring to practice regarding the consent of international organizations. As each of the two trends was represented by a draft article, the Drafting Committee

could itself decide whether the Commission should put forward two variants or only a single text, the alternative version being mentioned in the commentary.

30. It was clear from Mr. Ushakov's comments that the deletion of the reference to the fundamental importance of the rule would in principle provide better protection for international organizations. There was in fact a tendency to consider that the manifest character of the violation was the essential criterion and that, in order to simplify matters, the reference to the fundamental importance of the rule violated could be omitted; the requirement that the violation must be manifest would provide sufficient protection for third parties. In developing that view, Mr. Ushakov had put forward ideas more liberal than those embodied in variant A: he had gone so far as to maintain that not only the violation but also the rule must be manifest.

31. Other members of the Commission, such as Mr. Castañeda and Mr. Riphagen, thought that the rules of the internal law of States regarding competence to conclude treaties were not evident. He fully agreed with them, but could not accept, *a contrario*, that the rules of international organizations on the subject were clear. The constituent instruments of international organizations were generally badly drafted, and the Charter of the United Nations, which ought to serve as a model, was almost entirely silent on the question of competence to conclude treaties, except for a few allusions to treaties that could be concluded by the Security Council. In that sphere, everything followed from practice. It was true that some organizations had rules on the conclusion of treaties, but those rules were so complicated that they were constantly disputed, everyone interpreting them in his own way. If the Commission opted for Mr. Ushakov's proposal, it would be adopting a text that went further than variant A and could secure general approval only in so far as everyone interpreted it in his own fashion. To sum up, the Commission should have the choice between variant A with minor amendments, the text proposed by Mr. Ushakov with some changes, and that text as it stood, which would be interpreted in different ways.

32. Speaking as a member of the Commission, he said he was inclined to favour variant A, and had two observations to make. First, although he could abandon paragraph 4 of variant B without regret, it should be remembered that the rules set out in the draft articles were residuary rules. During the discussion of article 42,⁴ it had been specified that the subsequent articles would cover all grounds for invalidity, termination of or suspension of the operation of a treaty. Article 42, paragraph 3, reserved the obligations that might derive from Article 103 of the Charter. He was becoming more and more convinced that the Drafting Committee would have to consider inserting in that

provision a reference to the relevant rules of the organization in regard to treaties concerning relations between members. He would therefore be prepared to drop paragraph 4 of variant B, provided that the relevant rules of the organization were reserved. Moreover, according to article 5 of the Vienna Convention, that instrument applied to any treaty that was the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.

33. Secondly, there was no general normal practice of international organizations, but an individual organization could have its own normal practice. A practice might already exist and have some value before it became part of the rules of an organization and constituted established practice within the meaning of article 2, paragraph 1(j), of the draft. The Drafting Committee might therefore consider inserting in article 46 a reference to the normal practice of the organization concerned. As only established practice formed part of the rules of an organization, it could not be objected that such a reference was unnecessary because the relevant rules of the organization were already mentioned. In any case, that question should be dealt with in the commentary.

34. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 46 to the Drafting Committee, for consideration in the light of the comments and proposals made during the debate.

*It was so decided.*⁵

ARTICLE 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty)

35. The CHAIRMAN invited the Special Rapporteur to introduce article 47 (A/CN.4/319), which read:

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating international organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the negotiating States and other negotiating organizations prior to his expressing such consent.

36. Mr. REUTER (Special Rapporteur) said that the rule stated in draft article 47 was a common-sense rule that should raise no difficulties. It related to cases in

⁴ See 1546th meeting, paras. 11 *et seq.*

⁵ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

which the representative of a State or an international organization received, together with full powers, instructions that restricted those powers. If those instructions had not been notified to the other States or organizations concerned before the consent of the State or organization in question had been expressed or communicated, they could not be invoked as invalidating its consent.

37. As in other provisions of the draft, the verb "communicate" had been used rather than the verb "express", when referring to the representatives of international organizations. The article accordingly differed slightly in wording from the corresponding article of the Vienna Convention, both in the title and in the text, in addition to the fact that it consisted of not one but two paragraphs, dealing respectively with the representative of a State and the representative of an international organization.

38. To cover all the types of treaty contemplated in the draft, the words "to the negotiating States and other negotiating organizations", at the end of article 47, paragraph 2, should be replaced by the words "to the negotiating States, to the negotiating States and other negotiating organizations, or to the other negotiating organizations, as the case may be".

The meeting rose at 12.50 p.m.

1553rd MEETING

Friday, 15 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Ghali, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty)¹ (*concluded*)

1. Mr. USHAKOV doubted whether paragraph 2 of draft article 47 was necessary. There was indeed a

great difference between authority to bind a State by expressing its consent and authority to communicate the consent of an international organization. In accordance with the practice of States and in conformity with article 7 of the Vienna Convention² and with the corresponding article of the draft, certain persons were considered as representing the State *ex officio* and as authorized to express the consent of the State to be bound by a treaty without having to produce full powers. That did not apply to international organizations, because the decision of an organization to be bound by a treaty emanated, in all cases, from the competent organ. That was why article 7, paragraph 4, of the draft³ referred to communication of the consent of an international organization, not to expression of its consent. Paragraph 2 of article 47 referred to that same communication. He wondered what restriction there could be on authority to communicate consent emanating from an organ of an organization. A representative having such authority might or might not communicate the consent, but he could not communicate it partially or provisionally. That being so, paragraph 2 of article 47 seemed to be superfluous.

2. The article under consideration also raised the question of the relationship between articles 7 and 11 of the draft. The two paragraphs of article 11, entitled "Means of establishing consent to be bound by a treaty", referred respectively to the consent of a State and the consent of an international organization. Under the terms of paragraph 2, the consent of an international organization to be bound by a treaty was established "by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed". Those different means, with the exception of signature, involved a decision by the competent organ of the organization. There was no question of a representative of an international organization being able to bind the organization directly and finally by his signature, but unless that possibility existed under article 11 there was no justification for article 47, paragraph 2. He concluded that the Commission had perhaps been wrong in providing, in article 11, that the consent of an international organization to be bound by a treaty could be established by signature.

3. Mr. REUTER (Special Rapporteur) said he did not share Mr. Ushakov's concern at all. As to the possibility of placing a specific restriction on authority to communicate the consent of an international organization, he gave the following example: after taking cognizance of the text of a treaty, the permanent organ of a customs union might give its representative authority to sign the treaty *ad referendum* if he could not persuade one of the other signatories to withdraw a reservation made when the text had been adopted; if the representative then signed the treaty and finally bound the organization without having obtained the desired withdrawal, and if his instructions had been kept secret, article 47 would apply.

¹ For text, see 1552nd meeting, para. 35.

² See 1546th meeting, foot-note 1.

³ *Ibid.*, foot-note 4.

4. With regard to the relationship between draft articles 7 and 11, he pointed out that in article 7, paragraph 4, the Commission had not specified the means of communication that might be used. It had been at Mr. Ushakov's request, and in spite of fairly strong opposition, that the word "communicate" had been used, not in order to exclude the possibility of an international organization binding itself by signature—since that possibility was provided in article 11, paragraph 2—but in order to reserve the hierarchy of powers of international organizations. Thus Mr. Ushakov's demonstration would conduce either to amendment of articles preceding the article under consideration, or to showing that the commission had been wrong to use the word "communicate". In the latter case, it would be better to persist in the error, in order to preserve the logical sequence with the preceding articles.

5. Mr. USHAKOV pointed out that the concept of communication was not peculiar to representatives of international organizations. The representative of a State, for instance, might communicate the ratification of a treaty by that State. If the decision he transmitted was signed by the head of State, he would not be required to produce powers, but if it was not, he would be required to do so. It was because an organization was not itself able to sign its decisions that article 7 provided that its consent should be communicated by a representative. In the case of States, a person might be given general authority to sign treaties, whereas in the case of international organizations the competent organ had to take a decision on the text of a treaty before authorizing a representative to sign it. Article 7 was drafted accordingly. But article 11 provided that an organization could be bound by the signature of its representative. Either article 7 should be brought into line with article 11 or, better, the reference to signature should be deleted from article 11.

6. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov's comments raised questions of both substance and form. With regard to substance, Mr. Ushakov wished to prohibit international organizations from concluding treaties that would bind them solely as a result of signature by their representative. But practice showed that many organizations authorized their executive secretaries or secretaries-general to sign agreements, which thus became final. Taking that practice into account, the Commission had included signature among the means of establishing the consent of an international organization to be bound by a treaty. Mr. Ushakov was now reopening the whole question on a purely terminological argument. The word "communicate" had been used in draft article 47 rather than the word "express", purely in the interests of consistency with articles already adopted. That being so, the Commission could only note Mr. Ushakov's position and decide to consider it during the second reading of the draft.

7. Mr. JAGOTA said it appeared to be Mr. Ushakov's view that the treaty-making procedures of international organizations differed from those of States in

that they were of a more formal character. In other words, authorization for an international organization to be bound by a treaty depended on a decision by the competent organ of that organization, and only after that decision had been taken could consent to be bound by the treaty be communicated. Mr. Ushakov therefore concluded that there could be no secret restrictions on authority to communicate the consent of an international organization to be bound by a particular treaty. Nevertheless, it was necessary to take account of the normal course of treaty-making by States and international organizations. In that respect, the Special Rapporteur had made a valid distinction between States and international organizations in article 47 by providing that the consent of a State was expressed whereas the consent of an international organization was communicated.

8. Article 7 of the draft specified who had authority to express or communicate consent to be bound by a treaty, and article 11 dealt with the manner in which such consent was to be expressed or communicated. Article 47, however, was concerned not with authority to express or communicate consent, but with the entirely different question of restrictions on such authority. The article provided, in effect, that, regardless whether the restrictions imposed on the representative of a State or an international organization were confidential, they must have been notified to the other negotiating partner in order to be invoked by the State or organization if its representative had failed to observe them. Where a negotiating State was made aware, either formally or informally, that the representative of the other negotiating State was required to enter a reservation to a particular clause of the treaty but had failed to do so and proceeded to sign the treaty as a whole, it must endeavour to make sure that the representative in question had meanwhile obtained authorization to sign the treaty without reservation. Otherwise, the matter would come under the provisions of article 47, paragraph 1. The same held true, *mutatis mutandis*, for international organizations.

9. The draft rightly differentiated between the question of the competence of the person authorized to express or communicate consent to be bound by a treaty, which was dealt with in articles 7 and 11, and the question of restrictions on his authority, which was dealt with in article 47. The latter article differentiated between States and international organizations solely for drafting purposes, since the same rule would apply both to a State and to an international organization. If article 47 were to be regarded as simply another aspect of the question of competence to express or communicate consent to be bound by a treaty, then articles 7, 11 and 47 would all have to be reconsidered.

10. Mr. USHAKOV said he did not see how it could be maintained that article 7, paragraph 4 (b), authorized a person to express rather than to communicate the consent of an organization. He could not conceive that practice or other circumstances could show that a person was considered as representing an organization

for the purpose of expressing its consent without having to produce powers. It was quite impossible to maintain that practice empowered certain persons to bind international organizations directly, in the same way as it empowered heads of State, heads of Government and ministers for foreign affairs to bind States. In reality, article 7, paragraph 4, was concerned with quite a different idea—that of communication, which also applied to States. For instance, the Secretary-General of the United Nations had general authority to transmit the decisions of the General Assembly and the Security Council; any other person had to be specially authorized to do so. In either case, it was only a matter of transmitting instruments or decisions. Authority to sign could be conferred on the representative of an organization only by a decision of the competent organ, and never in advance, as in the case of States.

11. Mr. FRANCIS said he had no difficulties with the substance of the formulation proposed by the Special Rapporteur. The conclusion of treaties by an international organization had to be considered in the light of the provisions of article 6 and other articles of the draft, in particular articles 7 and 11. Mr. Ushakov's argument was valid if, for example, the consent related to a matter that required a decision by the international organization. But under article 2, paragraph 1 (j), the rules of the organization included not only its decisions but also its established practice. It was the established practice of the United Nations to establish UNDP offices in Member countries, and he believed that the appropriate UNDP officials had the authority to conclude binding agreements with those countries. The legal efficacy of that established practice could not easily be challenged.

12. If the powers of the Secretary-General of the United Nations were made subject to a restriction that was at variance with normal practice in regard to the conclusion of agreements, and if that restriction were not notified to the other negotiating State, the case would clearly fall within the scope of article 47. On the other hand, the established practice of an international organization might be such that it was unnecessary to produce appropriate powers in written form on every occasion. With regard to the application of article 47, it was especially important to make it clear that any change in the established practice of an international organization should be communicated to the other parties concerned. In his opinion, it was not enough for the organization to claim that it had instructed its executive head to notify the other parties of any change: the organization must itself make sure that the parties had in fact been notified.

13. Mr. SCHWEBEL said it was not difficult to think of cases in which the Secretary-General of the United Nations might be able, through an agreement by letters equivalent to a treaty, to make binding arrangements in respect of a resident representative in a Member State, without any need for approval by the General Assembly. Such arrangements might be in keeping with established guidelines or with an earlier arrangement approved by an appropriate organ of the

United Nations. However, the Secretary-General might alter the arrangements to meet local requirements, and impose restrictions on his representative, who represented him and, in turn, the Organization. Such practice was doubtless followed in connexion with the United Nations public information offices established in many countries.

14. Even in matters of more serious import he wondered whether, for example, agreements concluded between the United Nations and host States for the maintenance of peace-keeping forces were in fact regularly approved by the Security Council or the General Assembly. The practice might simply be for the Secretary-General to submit a report containing a description of his activities and intentions; the appropriate organ, in approving the report, would thus approve the actions of the Secretary-General. Similarly, if the commander of a United Nations peace-keeping force entered into a cease-fire agreement in order to give his troops the freedom of movement envisaged in the pertinent resolution of the Security Council, that agreement was in effect a treaty, although it might not have been approved in advance by the United Nations. It would form the subject of a report by the commander to the Secretary-General, who would then report to the appropriate United Nations organ.

15. Many situations could obviously fall within the ambit of article 47, even in the context of the United Nations, and particularly in the case of customs unions, to which the Special Rapporteur had referred. Consequently he was prepared to accept the substance of article 47, and he doubted whether any change was required in the wording.

16. Mr. SUCHARITKUL was satisfied with article 47, which seemed perfectly in keeping with practice. The authority of a representative was often restricted in respect of time or for budgetary reasons, and it was right that, if the co-contracting party were not notified of those restrictions, non-compliance with the instructions thus given should not be able to be invoked by the State or organization represented.

17. Mr. VEROSTA thought draft article 47 was in conformity with the practice of States and of international organizations. As a matter of drafting, it might be better to specify that the organizations referred to in paragraph 2 were "international" organizations. Moreover, if the Commission came to the conclusion that the word "express" might be restored in certain articles, that word would also have to be used in paragraph 2 of the article under consideration.

18. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 47 to the Drafting Committee for consideration in the light of the discussion.

*It was so decided.*⁴

The meeting rose at 11.30 a.m.

⁴ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1554th MEETING

Monday, 18 June 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

The law of the non-navigational uses of international watercourses (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited Mr. Schwebel, Special Rapporteur, to introduce his first report on the law of the non-navigational uses of international watercourses (A/CN.4/320 and Corr.1).

2. Mr. SCHWEBEL said that he had approached the topic without preconceived views. Despite its evident scientific and engineering aspects, it had a solid legal content, as illustrated by a large body of State practice and treaties. A study by FAO¹ listed over 2,000 international legal instruments on water resources, dating from the year 805 to 1977. The multiple international legal problems posed by the use of international watercourses were of the utmost interest and practical importance. Water was as vital for life as air, and it was also a universal substance, moving over, through and under national boundaries. In the particular case, water was subject to depletion and degradation. Demand for water would continue to grow with the upsurge in world population, the spread of industrialization and urbanization, the expansion of agriculture and increasing needs for power. In some cases water supplies could be expanded, but in others they might become polluted or exhausted, or simply be inadequate. If unregulated, water could flood, disrupting the lives of thousands.

3. The problems of fresh water were among the most serious confronting mankind. Its importance in the economic and social development of all countries, and even in the very maintenance of life, could not be overstated. The ecological management of water supply was a crucial issue too.

4. Salt-water problems were essentially international, as were some problems relating to fresh water. The problems of fresh and salt water were interrelated through the hydrologic cycle, the interaction of fresh watercourses and salt water, and the fact that fish were

creatures of both. A further connexion might be seen in the important role played by the Commission in the United Nations Conferences on the Law of the Sea. He looked to the Commission, with the wealth of experience it had gained in that process of codification and progressive development, for guidance on the extent to which the present codification process must also respond to physical realities, and the extent to which the product of that process should embody co-operative procedures. Certain provisions of the law of the sea treaty now under negotiation might have a significant bearing on the Commission's work on the non-navigational uses of international watercourses.

5. Not all aspects of water problems were of international concern, and so even the scope of the Commission's mandate, which did not extend to fresh water in general, was a matter of contention. Yet if mankind was to manage its enormous water problems effectively, the international community must progressively develop and codify the appropriate principles of international law, lay down procedures for its application and establish institutions for its continuing development. Such a need had been spelt out in recommendation 92 of the 1977 United Nations Water Conference, held in March 1977.²

6. The Commission faced a difficult task in progressively developing and codifying the principles of international law relating to the non-navigational uses of international watercourses, for two main reasons. First, the topographical and political configurations of individual watercourses varied, as did the pattern of their uses. That had led such scholars as Brierly and Sauser-Hall, as cited in paragraph 65 of his report, to doubt the feasibility of a universal law of international watercourses. But the diverse nature and uses of international watercourses should not be exaggerated, for they displayed common characteristics as well. It was for the Commission to prove its ingenuity by striking the necessary balance between the particular and the general which it had advocated in its comments on the topic in the report on its twenty-eighth session.³ It would probably find that certain principles and procedures were already extant, either lying unarticulated in a large body of State practice or, to some extent, forming part of accepted international law.

7. The second main problem facing the Commission was that, although water was a moving unity, States exercised exclusive jurisdiction over their respective territories. They regarded the water that flowed through, over and under their territories as their own. They were cautious about sharing their waters and reluctant to enter into international obligations in respect of them. At times, some States had even supported the Harmon doctrine, which asserted that international law imposed no obligation upon a State

¹ *Systematic index of international water resources, treaties, declarations, acts and cases by basin*, Legislative Study No. 15 (Rome, FAO, 1978).

² *Report of the United Nations Water Conference* (United Nations publication, Sales No. E.77.II.A.12), p. 53.

³ *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

towards other States in its exercise of sovereign power over waters within its jurisdiction, even though those waters also flowed through the territory of another State. But the Harmon doctrine was now recognized to be obsolete. It had been repudiated by the United States of America, for instance, and a leading international jurist had severely criticized it, emphasizing that territory not only conferred rights but also imposed obligations on a State.⁴ That writer espoused the principles of the community of interests and equality of rights of all riparian States and the duty of a State to prevent substantial injury to the rights of a neighbouring State; along with other modern authorities, he looked to the equitable apportionment of the benefits of the waters of international watercourses.⁵

8. The sensitivity of States with regard to waters found in their territories brought the Commission to the crux of its second main problem: how to define an international watercourse. The replies to the Commission's questionnaire⁶ made it clear that a significant number of States rejected the geographical concept of the international drainage basin as being the appropriate basis for the Commission's study, notwithstanding the fact that the waters of a drainage basin interacted to comprise ground as well as surface waters, and the fact that a substantial number of other States—as evidenced by various modern treaties and by bodies such as the Institute of International Law and the International Law Association—regarded the drainage basin as fundamentally characteristic of the international watercourse. The States in question relied on the definition of an international river given in the Final Act of the Congress of Vienna, namely, "a river that separates or traverses the territory of two or more States".⁷ But that definition, drawn up when knowledge of the hydrologic cycle was in its infancy, did not meet the needs of the present-day international community, with its unprecedented demands for fresh water. If the Commission relied on such an outdated concept, it would lay itself open to the charge of regressive rather than progressive development of the law.

9. A further argument advanced by a number of States, including major riparian countries, was that a large body of treaties, admittedly dealing mainly with navigation alone, treated international watercourses as contiguous and successive international rivers. Relying once again on the Congress of Vienna definition, which they claimed was generally accepted as customary international law, those States contended that to adopt a drainage basin approach would or could sub-

ject large areas of both water and land to international obligations that were not only unacceptable but also unnecessary. A State into which water drained from a foreign part of the basin need complain only if the quantity or properties of the water actually were adversely affected by activities in that part of the basin; there was no certainty that such was the case. The arbitral award in the *Lac Lanoux* case⁸ had been cited in support of that contention.

10. Between the positions of States which either espoused or rejected the drainage basin view were other approaches. One was that the international watercourse should be defined in terms of the river basin, namely, the river and its tributaries, excluding groundwater. That concept had much to commend it, and had been supported by the previous Special Rapporteur for the topic.⁹ Another approach, discernible from the replies of countries such as Canada, France and Nicaragua, was to accept contiguous and successive international rivers as a minimum working definition, but to supplement it by the concept of the drainage basin in respect of specific uses or abuses of water. Yet another approach was that of States which objected to any obligation being imposed on them through a definition based on the drainage basin, but would not necessarily object to the idea of obligations that they could enter into freely regarding a specific drainage basin. That was a persuasive point, well put in the Polish reply, and the Commission might wish to pursue it. The draft articles had been so cast that advantage could be taken of that approach.

11. A further possibility was to provide States with a kind of framework convention supplemented by additional articles stipulating how they could undertake specific obligations relating to a particular watercourse, and to combine that with an optional clause whereby States parties to the convention could define the scope of their watercourse obligations under the convention by reference either to successive and contiguous international rivers, lakes and canals, or to the foregoing plus their tributaries, including tributaries found wholly in the territory of one State, namely, the river system, or to the foregoing plus groundwater, namely, the drainage basin. At all events, the Commission must fully heed the differences of opinion among States about taking the concept of the drainage basin as the foundation for its work, which would be to no avail if its draft articles failed to attract support from a significant group of riparians. There were many other areas on which States could agree, and in any case the Commission had decided at its twenty-eighth session that it would proceed without tackling the definition question at the outset.¹⁰

⁴ E. Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours de l'Académie de droit international de La Haye*, 1978-1 (Alphen aan den Rijn, Sijthoff and Noordhoff, 1979), vol. 159, p. 192.

⁵ *Ibid.*, pp. 192-200.

⁶ See *Yearbook... 1976*, vol. II (Part One), pp. 147 *et seq.*, document A/CN.4/294 and Add.1; and *Yearbook... 1978*, vol. II (Part One), document A/CN.4/314.

⁷ See A/CN.4/320, para. 43.

⁸ See United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 281.

⁹ See A/CN.4/320, para. 47.

¹⁰ *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

12. Turning to the report itself, he said that its purpose was to set out a conceptual and tactical framework for dealing with the law of the non-navigational uses of international watercourses, but not to deal with the substance of that law except in connexion with draft articles 8, 9 and 10, relating to data. If the basic approach of the report and draft articles were found acceptable, further articles might be prepared on the categories of uses of international watercourses; on specialized questions such as flood control, erosion, sedimentation, salt water intrusion, coastal waters and estuaries, and possibly drought; on interrelationship and priorities among categories of uses; and on the interrelationships between questions such as flood control and erosion and between specific uses such as irrigation and specialized problems like erosion. Pollution might be dealt with in connexion with particular uses. General principles of the law of international watercourses should find their place, but they would be best addressed and derived from prior consideration of particular uses.

13. The Commission would have to consider institutional arrangements for the co-operative use of international watercourses and provisions for the settlement of disputes. With regard to institutional arrangements, it might seek the views of the interested institutions; reactions to the present and subsequent reports might usefully be sought from bodies such as the international river commissions, international banks, like the World Bank and the Inter-American Development Bank, and such United Nations or regional institutions as UNDP, ESCAP, ECE and OECD. A promising study on the operations of international river commissions was in course of preparation under the auspices of a Canadian foundation.

14. Dealing with chapter I of his report, he said that civilization had initially grown up around rivers like the Nile, the Tigris, the Euphrates, the Indus, the Yellow River and the rivers of Persia and Peru. Important areas of water law had been developed by ancient civilizations and their considerable efforts to regulate rivers had been widely successful. Not until the seventeenth and eighteenth centuries, however, had man begun to understand the hydrologic cycle, and it had taken modern science to demonstrate fully the relationship between surface and groundwater and the unity of the drainage basin.

15. Paragraphs 8-31 of the report outlined some of the salient characteristics of water with a view to providing the basis for a scientifically informed approach by the Commission to the problems of international watercourses. The draft articles must respond to the physical realities of fresh water, and therefore the Commission should know what those realities were. It would need technical advice, but the basic facts were set forth in standard works, quotations from which he had cited in the report.

16. Paragraphs 9-21 of the report summarized the hydrologic cycle, which was the process whereby water fell from the atmosphere to the earth, ultimately returned to the atmosphere and then fell again as

precipitation. According to scientific estimates, the water in the atmosphere was released to the earth and replaced once in every 12 days. The cycle was maintained in a variety of ways: water could be absorbed into the earth, eventually merging with groundwater; it could be channelled into streams or rivers; or it could return to the atmosphere through transpiration or evaporation. It replenished surface streams and lakes by falling directly upon a watercourse, by travelling over or through the soil as run-off, or by percolating into the earth until it reached groundwater. Groundwater was found beneath the earth, retained by layers of impermeable bedrock, and was normally characterized by a slow, steady flow. The role of the watercourse in the hydrologic cycle was to channel surface water and groundwater to the sea. Surface run-off was the most visible course of moisture for watercourses, but it was less important than groundwater, which was believed to constitute some 97 per cent of the water on earth, excluding oceans, ice-caps and glaciers; if groundwater were to cease moving, the quantity of water in watercourses would be drastically reduced. As explained further in paragraph 21 of the report, there was a compelling case for including groundwater as well as surface water in the scope of the international watercourses to be considered by the Commission. Processes of evaporation, aeration, filtration and dilution enabled water to cleanse itself. Individual watercourses were marked by differences in quantity, quality and rate of flow and registered seasonal variations.

17. The international consequences of the physical characteristics of water were clear: first, water was not confined within political boundaries and, secondly, its nature was to transmit to one region changes occurring in another. The extent of the transnational impact of water had already been described in a United Nations study.¹¹

18. Chapter I of the report thus laid the scientific basis for the Commission's consideration of the topic, it emphasized the first main point requiring the Commission's attention, namely, the contrast between the common characteristics and the diversity of watercourses, but at the same time it looked ahead to the second, namely, the definition of an international watercourse. Chapter II dealt specifically with that second problem. States had been asked whether the concept of the drainage basin was the appropriate basis for a study of the legal aspects of the uses and pollution of international watercourses. Although hydrologic facts appeared to favour the drainage basin approach, some States took the classical view that an international watercourse was a river that separated or traversed the territory of two or more States. A refined form of the drainage basin concept known to water

¹¹ See United Nations, *Management of international water resources: institutional and legal aspects—Report of the Panel of Experts on the legal and institutional aspects of international water resources development*, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2), paras. 21 and 22.

specialists as the “international water resources system” took account of the fundamental role of water in the atmosphere and the effect on water supplies of weather modification activities. However, the report did not examine that idea, and stayed within the confines of the Commission’s earlier consideration of the matter.

19. He would be grateful for the Commission’s views on his understanding of the scientific facts relating to the extent of international watercourses, and also on the Asian-African Legal Consultative Committee’s draft proposals on the law of international rivers.¹² Those proposals incorporated the definition of an international drainage basin given in the Helsinki Rules on the Uses of Waters of International Rivers, adopted by the International Law Association in 1966.¹³ He hoped the Commission would give due weight to the Helsinki Rules, which applied the concept of the international drainage basin, and to the principles concerning utilization of non-maritime international waters formulated in 1961 by the Institut de droit international.¹⁴ He likewise hoped the Commission would fully heed the fact that the drainage basin concept was embodied in a number of modern treaties, including the Treaty for Amazonian Co-operation,¹⁵ the Act regarding navigation and economic co-operation between the States of the Niger basin,¹⁶ the Convention relating to the general development of the Senegal river basin,¹⁷ the Mekong basin Treaty¹⁸ and the Treaty between China and the Soviet Union on the Argun and Amur rivers.¹⁹

20. The Commission would however realize from what he had said earlier, and from paragraph 55 of his report, that he had felt bound to take account in his draft not only of the divided views of States on what constituted an international watercourse but also of the Commission’s decision at its twenty-eighth session to defer the question of a definition of an international watercourse.²⁰

21. Nevertheless, he had thought it advisable to propose in chapter II of the report an initial article on the scope of the draft, for a number of reasons. In the first place, the history of the topic revealed the existence of

significant differences among States on that point. Failure to establish a common point of departure would therefore impede the development of a coherent body of rules. Secondly, a statement indicating that the draft articles would deal with international watercourses, even though that term was not defined, would make it clear that rain, water in the oceans, clouds, fog, snow-fall and hail were excluded. The formulation of paragraph 1 of the opening article took account of certain problems related to water use, and in doing so reflected suggestions made by States in their replies to the Commission’s questionnaire. The article might be expanded to deal with the effect of international watercourses on estuaries and coastal waters, perhaps along lines compatible with allied provisions of the articles on the law of the sea. An article on the scope of the draft was also needed to establish that it was the fact of water use and not the person of the user that would bring the draft articles into play, as explained in paragraph 59 of the report.

22. Draft article 1 opened with a reference to “uses” rather than “non-navigational uses”, because the replies of States to the Commission’s questionnaire had rightly indicated that the draft articles must take account of interactions between non-navigational uses and navigation. Navigational requirements affected the quantity and quality of water available for other uses. That was the basis for the terms of paragraph 2 of the article.

23. Chapter III of the report grappled squarely with the Commission’s first main problem, that of the diversity of watercourses. The general rules drafted in that connexion by the Institut de droit international and the International Law Association, particularly the latter’s Helsinki Rules, were discussed in the report (paras. 66–84) for the sole purpose, at the present stage, of illustrating that such general rules might have to be supplemented by rules tailored to a particular watercourse. The Commission had already recognized that at its twenty-eighth session.²¹

24. In paragraphs 86 *et seq.*, the report reviewed the first modern treaty which implemented the concept of watercourse development on the basis of the basin, namely, the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923).²² That Convention was of particular interest in that it contemplated further agreements to be entered into by States jointly concerned in the development of hydraulic power, agreements that could be termed “implementing” or “user” or “system” agreements, which would give pointed obligation to the general commitments under the Convention and might deal with any of the eight subjects enumerated in paragraph 89 of his report. Supplementary agreements of that kind concerning specific uses of particular watercourses could complement articles setting forth general principles in regard to international

¹² Asian-African Legal Consultative Committee, *Report of the Twelfth Session, held in Colombo from 18th to 27th January 1971* (New Delhi, 1972), chap. IV, annex 1.

¹³ See A/CN.4/320, para. 34.

¹⁴ *Annuaire de l’Institut de droit international*, 1961 (Basel), vol. 49, t. II, pp. 370-372.

¹⁵ American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5, September 1978, p. 1045.

¹⁶ See A/CN.4/320, para. 98.

¹⁷ See *Yearbook... 1976*, vol. II (Part One), p. 188, document A/CN.4/295, para. 33.

¹⁸ *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation* (United Nations publication, Sales No. 63.V.4), p. 267.

¹⁹ *Ibid.*, p. 280.

²⁰ See *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

²¹ *Ibid.*

²² See A/CN.4/320, para. 86.

watercourses. With that in mind—in other words, blending the approach of the Helsinki Rules and the principles formulated by the Institut de droit international with that of the 1923 Geneva Convention, without prejudice to whether the question at issue was rivers, river systems or drainage basins—he had proposed draft articles 2, 3 and 4 as a solution to the major problem of the diversity of watercourses.

25. In article 2, the words “State which contributes to” meant a State from which water of an international watercourse derived; the question whether it derived from surface waters alone or from groundwater as well was not answered, nor was the question which surface waters were dealt with, in other words, whether tributaries were involved. The phrase “a State which... makes use of water of an international watercourse” also referred to the inhabitants, both individuals and legal entities, of that State. The expression “user State” had been adopted because it was neutral in terms of the scope of the draft articles, although in his view a better term would be “system State”, indicating that States concerned in an international watercourse were involved in an interconnected system. Still better might be the expression “basin State”, which would connote basin-wide regulation of international watercourses. He hoped the Commission would see its way to using one of those two latter terms.

26. Article 3 laid down a straightforward proposition which, if need be, could be elaborated in subsequent draft articles.

27. Article 4, which did not purport to be exhaustive, gave three fundamental definitions. A State could become a party to the articles provided it was a user State, as defined in article 2, but that would exclude States which did not both contribute to and make use of an international watercourse. Possibly, therefore, article 2 should be redrafted to read:

“For the purposes of these articles, a State which contributes to or makes use of, or which contributes to and makes use of water of, an international watercourse shall be termed a user State.”

But even if that broader formulation were used, States which neither contributed to nor made use of the water of any watercourse could not become parties to the articles, and it might be desirable to have as many members of the international community as possible lend their support to an instrument of codification. It would be seen from article 4 that a “contracting State” was free to adhere to the general and residual principles and procedures of the articles without entering into the more specific obligations entailed under a user agreement.

28. With regard to the term “co-operating State”, it could normally be assumed that, if a user State were prepared to become party to a user agreement, as defined in the draft articles, it would also be prepared to be a party to the articles, since an agreement could be considered a user agreement under the articles only if it were linked with them, as provided in draft article 5. If, however, a user State preferred to act only in the

context of a specific international watercourse, there should be no objection to allowing it to become a party to a user agreement, subject to two qualifications; first, there must be one or more other user States parties both to the articles and to the user agreement to ensure that the user agreement was entered into within the framework of the articles; secondly, the user agreement should reinforce the basic, if residual, principles of the articles by stipulating that they were applicable to the relations of the parties to the user agreement in regard to matters not regulated under the user agreement. Draft articles 5 and 6 had been prepared in the light of those considerations, which were explained more fully in paragraphs 92–101 of the report. Perhaps the words “and shall so provide” should be added at the end of article 6, paragraph 1, *ex abundanti cautela*.

29. Paragraph 2 of article 6, in keeping with the Commission's intention that the draft articles should be residual in scope, afforded the parties to a user agreement the possibility of varying the obligations contained in the articles for their particular purposes. A different approach would be to require the parties to a user agreement concluded within the framework of the articles to apply the principles and procedures set out in the articles, regardless of the provisions of the user agreement. Although that might strengthen the effect of the articles, it might also dissuade user States from entering into user agreements within the framework of the articles, and it would have the effect of imposing on States not parties to the articles obligations to which they had not agreed contractually. It might even be desirable for the States on a particular international watercourse to contract in terms that did not conform to those of the articles. The Commission would realize that the draft did not deprive such States of the possibility of concluding among themselves user agreements not related to the articles. All article 5 signified was that a user agreement would not be such for the purposes of the articles unless at least one party to the agreement was also a party to the articles. Under article 6, such a user agreement would be entered into within the framework of the articles, which would then apply residually to the user States not parties to the articles. Naturally, the articles would not apply to user agreements concluded completely outside their ambit.

30. Article 7 was the last of the articles pertaining to the question of reconciling the need for general principles with the diversity of watercourses. At first sight, the small number of ratifications or accessions required might seem surprising, for quite rightly the conventions based on draft articles approved by the Commission had generally stipulated a substantial number of ratifications or accessions for their entry into force. Article 7, however, was designed to bring the articles into force for a particular international watercourse, and not in regard to all the parties to the articles. In dealing with international watercourses, the Commission was treating a novel situation: it was seeking to establish worldwide principles and procedures of a residual character which, if they were to be

effective, must operate within the confines of each individual watercourse. In such a situation, safety in numbers was not a workable principle; the articles, even with 35 or more accessions, but without a provision such as article 7, would have no practical impact if no two of the 35 acceding States were on the same watercourse. That had essentially been the fate of the 1923 Geneva Convention he had mentioned earlier. He had explained the position more fully in paragraphs 102–109 of the report. In particular, the thought that the contents of paragraphs 108 and 109 justified his taking such a low number of States as two for the purpose of bringing the articles into force for a particular watercourse. As noted in paragraph 110, the question whether the articles should contain a provision concerning their general entry into force might be deferred.

31. The Commission might by now consider that the scheme of the draft did through the back door what it avoided doing through the front, in other words, that in effect it adopted the drainage basin approach even though his report and his present introduction did not admit it. His plea to that charge would be that he was not necessarily guilty. First, the draft articles spoke not of basins but of international watercourses. Secondly, hydrologists, engineers and the consultants who had prepared studies for the United Nations Secretariat thought in terms of the drainage basin; thus references to their work could hardly avoid that concept. Thirdly, he did not believe that the articles as they stood required a commitment by the Commission to one approach or another.

32. That conclusion could be illustrated by an example of the use of an optional clause, a possibility he had mentioned earlier. Let it be assumed that there were three States lying on the waters of a drainage basin through which ran the Sinuous river. State A was traversed by a section of the river. State B was traversed by a section of the river and also by tributaries of it that were located exclusively within State B's territory. State C gave rise to groundwater that percolated into State B and then flowed, via tributaries, into the Sinuous river itself. State C was not a riparian State, but it was a basin State. If States A, B and C all adopted the drainage basin approach and all wished to be parties to the articles, or to a user agreement entered into within the framework of the articles, or both, all three could so opt. The articles would enter into force for the Sinuous river and be binding on States A, B and C. Alternatively, if State A, taking a riparian approach, wished to enter into relations under the articles and a user agreement with State B, it might specify, under the optional clause, that it regarded the articles and the user agreement as applicable only to riparians. Having so specified, its relations would be only with State B, provided that State B accepted State A's terms. In that event, there would be a treaty relationship between States A and B and, pursuant to article 7, the articles would enter into force between them in respect of the Sinuous river watercourse. However, State B might take the same approach as State A vis-à-vis State C, namely, the

riparian approach. If it did so, State C could not become a party to the articles in respect of that watercourse. On the other hand, State B could say that it was willing to apply the articles, and for that matter another user agreement, to its relations with State C, the non-riparian basin neighbour, and to include tributaries and groundwater flowing into the Sinuous river. In that event, a treaty relationship would arise between States B and C.

33. In his opinion, such an approach was consonant with the Vienna Convention on the Law of Treaties,²³ but it might present considerable complexity and would require close examination. He did not necessarily recommend the use of an optional clause, and merely wished to point out that the draft did not prejudice the question what definitional approach should be adopted.

34. Chapter IV of the report was important for two reasons. First, the draft articles it proposed set out substantive obligations to be undertaken by contracting States and also provided that those States might assume further such obligations through user agreements. Moreover, room was left for co-operating States to assume data collection and exchange obligations. The obligations of that kind assumed by a co-operating State and a contracting State under a user agreement might be wider than the minimum data collection and exchange obligations undertaken by a contracting State under the articles. Secondly, the obligations in articles 8 to 10 were substantive; as stressed in paragraph 131 of the United Nations study already cited,²⁴ data collection and exchange were vital to the regulation of international watercourses, and thus to any meaningful international law on the subject.

35. A significant number of treaties contained provisions on the collection and exchange of water information as basic principles. Commissions formed to administer river régimes, such as the Danube Commission, the Central Commission for the Navigation of the Rhine and the International Joint Commission on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River, performed a vital data collection function. International declarations and resolutions also acknowledged the importance of data collection, among them the Charter of Economic Rights and Duties of States²⁵ (article 3), recommendation 51 adopted by the United Nations Conference on the Human Environment²⁶ and the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared

²³ *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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

²⁴ See foot-note 11 above.

²⁵ General Assembly resolution 3281 (XXIX).

²⁶ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. II, sect. B.

by two or more States, approved in 1978 by the UNEP Intergovernmental Working Group of Experts on natural resources shared by two or more States.²⁷ State practice and declarations by international organs supporting an obligation to collect and exchange data on international watercourses were so substantial that some observers had concluded that a rule of international law to that effect had already emerged. A pertinent statement in that regard had recently been made by Mr. Erik Suy, the Legal Counsel, in an article written in a private capacity.²⁸

36. Articles 8 and 9 took account of the potential variation in the quantity of data required for a particular watercourse. Article 8, paragraph 1, required the collection of a minimum amount of information common to all watercourses. In view of his limited technical knowledge of the subject, however, he had not attempted precise delineation of the elements pertinent to data collection. The blanks in article 8, and also the blank in article 9, paragraph 1, illustrated the Commission's need for expert advice. Article 8, paragraph 2, contained no more than a "best efforts" obligation, because of the diversity in the pertinent methods and resources of States. Paragraph 3 related to the special problem posed by water quality and other data. The need for water quality information was undeniable, but the desirability of establishing uniform, universal requirements might be questioned. The collection of water quality data was a matter on which user agreements could be of particular value.

37. Article 9, paragraph 1, dealt with the sharing of data collected pursuant to paragraphs 1 and 2 of article 8. Contracting States ought perhaps to be obliged to share that minimum information not only with other contracting States and co-operating States but also with non-contracting States as well, or even with all States that wished to have it, but such a provision, among other drawbacks, would lessen the incentive for States to become parties to the articles and to user agreements entered into within the framework of the articles.

38. Paragraph 2 of article 9 called only for "best efforts" in relation to the supply of data other than the minimum data. The Commission would note that it imposed an obligation on co-operating States, even though by definition they were not parties to the articles. It obviously was desirable that a co-operating State should likewise be under a "best efforts" obligation to collect and provide the data covered by article 8, paragraph 1, as well. He envisaged that co-operating States would undertake both obligations through the medium of user agreements concluded within the framework of the articles. The articles concerning data collection, exchange and costs might need reworking in order to express that situation more clearly. Arti-

cle 10, dealing with costs of data collection and exchange, was self-explanatory.

39. It was plain that the Commission could not yet deal with the draft articles, still less dispose of them. However, he hoped the Commission would indicate whether or not it believed that his basic approach made sense. He also hoped it would be possible to discuss the articles later in the session.

40. The CHAIRMAN congratulated the Special Rapporteur on his first report, which dealt with a complex subject requiring much reflection on the part of the Commission. He hoped that even at the present stage the Commission would be able to indicate its basic views on the subject and so assist the Special Rapporteur in his further work on the topic.

41. Mr. RIPHAGEN said it was abundantly clear from the Special Rapporteur's lucid and detailed report that, as a result of modern scientific knowledge and technology, the international system of dividing the whole human environment into separate so-called territories of separate so-called sovereign States was in many respects outdated. That was particularly true in the case of water, whether sea or fresh water, for it was in constant movement. It could rightly be said to be characteristic of the territories of States that they were not watertight compartments. Even human movements across international boundaries, although States could prevent them physically or legislate against them through the exercise of sovereign powers, were considered under international law to be the object of rules that limited such restrictions. Those rules resulted from *jus communicationis*, which, although some writers claimed that it did not exist, none the less underpinned many rules of positive international law. The system of division of the world among States must therefore be complemented by a system of co-operation among States in respect of the natural paths of communication considered to form part of their separate territories.

42. A set of rules of international law concerning the non-navigational uses of international watercourses was a necessity, and such rules implied limitations on the sovereignty of States over their territories. Many pertinent international rules already existed, although they were mostly conventional rules relating in the main to specific uses of particular watercourses, and more particularly to navigational uses of the watercourses that were termed international rivers. However, the conventions in question included rules on other uses of territory, such as the building of bridges wholly within the territory of one State across the river in question, or the construction of other installations that were outside the actual river but nevertheless affected its navigational uses. International rules also dealt with the impact of the navigational uses of rivers on other matters; for instance, to prevent pollution, there were rules relating to the construction and design of vessels carrying dangerous goods. Hence the subject called for a broad approach, not only to the scope of the uses of water and watercourses but also to natural phenomena such as floods, erosion, sedimentation and salt-water

²⁷ UNEP/GC.6/17.

²⁸ E. Suy, "Innovations in international law-making processes", *The International Law and Policy of Human Welfare*, eds. R. St. John MacDonald, D. M. Johnston and G. L. Morris (Alphen aan den Rijn, Sijthoff and Noordhoff, 1978), p. 187.

intrusion. Nevertheless, any wide set of rules of general international law that the Commission might devise could serve only as a framework for more specific conventional rules to be established between the States most directly concerned.

43. The task of formulating such a framework was formidable; it had to include a careful analysis of the many existing conventional rules in order to deduce their common legal elements and distinguish the latter from purely organizational and regulatory matters.

44. The approach adopted by the Special Rapporteur in his draft articles was generally most acceptable, although a few questions obviously arose. The first concerned the relationship between the draft articles and the existing rules of general customary international law. Naturally, the draft was intended to form a convention, as was clear from the use of terms such as "State party to these articles", in article 4. Accordingly, the Commission should at some stage make it clear that the articles were without prejudice to the rules of general customary law relating to the uses of the water of international watercourses, since it was generally recognized that, under modern international law, a State did not enjoy complete freedom in determining the use of such water within its territory.

45. A similar question arose regarding the relationship between the draft articles and existing and future user agreements between States. In that context, the definitions of "user agreement" and "user State" for the purposes of the draft articles were particularly relevant. It was to be inferred from article 5 that the draft articles would apply only to user agreements to which at least one party was also a party to the articles, and only to future user agreements. It was therefore necessary to determine at some point the relationship between the draft articles and existing conventional rules of international law.

46. Article 6, paragraph 2, suggested that the draft articles would apply also to States that were not parties to the articles, provided they were parties to a user agreement. Those States would be third States in respect of the articles, and it had therefore to be determined whether or not that paragraph would be subject to the rules in articles 34 to 38 of the Vienna Convention. In his view, the situation regarding the uses of international watercourses was somewhat different from the situations envisaged in those articles. Nevertheless, if a user State entering into a user agreement with another user State in the knowledge that the latter was a party to the articles could be said to accept the application of the articles to itself in respect of matters not regulated by the agreement, the articles might be interpreted as codifying existing customary international law—a situation to which article 38 of the Vienna Convention applied. Such an interpretation could certainly be justified by the necessity for rules of international law to regulate the use of a shared natural resource such as an international watercourse, but the matter called for a less consensual approach than that of the Vienna Convention. Also, the contracting and co-operating States concerned would have to be

user States in respect of one and the same international watercourse; if, by entering into a user agreement, they recognized that they shared a particular resource, it seemed right that the articles should apply to all of them, even if they were not all parties to the articles.

47. With regard to the definition of a user State in article 2, a State that made use of the water of an international watercourse was clearly a user State in relation to that watercourse, but it was legitimate to ask whether a State that used electricity generated in another State from the water of an international watercourse thus became a user State in respect of that international watercourse. A similar question was whether a State that used the water of an international watercourse solely for navigation could be regarded as a user State in respect of that watercourse. In some cases it obviously could, since it must bear the same obligations—for example, to refrain from pollution—as other States using the watercourse for navigational purposes. Yet in other cases it was clearly not a user State. Suitable wording would therefore have to be found to define the term "user State". A further point was that article 2 specified that a user State was one that contributed to and made use of water of an international watercourse, but he felt sure that the requirement that the State should contribute to the water of a watercourse was not intended to exclude downstream States from the category of user States. Nor did the definition in article 2 seem designed to exclude *a priori* a State in whose territory a watercourse originated but that did not actually use the water of that watercourse.

48. It would be most useful to hear the view of the Special Rapporteur on those matters.

49. Mr. SUCHARITKUL said that for the moment he would make a few preliminary remarks and not discuss in detail the articles presented in the illuminating report of the Special Rapporteur, to whom he was grateful for emphasizing the scientific and technical aspects of the problem.

50. The Commission's approach to the subject must obviously take account of the contributions of science. He therefore welcomed chapter IV of the report, on regulation of data collection and exchange, a matter that had created serious problems in the Committee for the co-ordination of investigations of the Lower Mekong basin. Another problem was that some rivers crossed the territories or formed the boundaries of many States, and in some instances downstream riparian States appeared to be at the mercy of upstream riparian States. It was therefore important to determine the status of countries in relation to a user agreement.

51. The non-navigational uses of international watercourses involved not only numerous technical problems relating to the harnessing of river resources but also many legal problems. As long ago as 1968, the United Nations had sponsored a Panel of Experts on the legal and institutional aspects of international water resources development. In South-East Asia, a num-

ber of river projects had given rise to user agreements, for example for the use of electric power, but dam projects on main rivers had led to serious legal, economic, social and other problems. Legal difficulties could of course be overcome if States displayed the necessary political will. The draft articles could well serve as a model for States wishing to enter into user agreements. The world was entering a new era in international law, in which a balanced approach had to be maintained in all cases.

The meeting rose at 6 p.m.

1555th MEETING

Tuesday, 19 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Tribute to the memory of Professor D. P. O'Connell

1. The CHAIRMAN informed the Commission of the sad news of the recent death of Professor D. P. O'Connell, a scholar who had been well known to the Commission and had made a great contribution in particular to the study of the topic of State succession. He suggested that the Commission send a message of condolence to Professor O'Connell's family.

It was so decided.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPporteur (continued)

2. Mr. FRANCIS said that the Special Rapporteur's preliminary but none the less masterly report would doubtless prove of great interest to jurists throughout the world. He had in mind, for instance, the interest shown in the topic at the nineteenth session (1978) of the Asian-African Legal Consultative Committee, which he had attended as an observer for the Commission. For the first time in its history, the Commission was embarking on a task of codification on the basis not of abstract legal theories but of scientific and technical data. Moreover, it was dealing with the

international regulation of one of the most important aspects of national development, namely, resource management.

3. It was apparent from the replies of States to the Commission's questionnaire¹ that no decision could be taken immediately as to whether the geographical concept of an international drainage basin should be adopted as the basis for studying the legal aspects of the non-navigational uses of international watercourses. In addition, it was evident that any draft articles adopted by the Commission must be residual in character and widely acceptable to States, and also take account of the relationship between non-navigational and navigational uses of international watercourses and of such matters as flood control and soil erosion.

4. Certain fundamental issues would have to be tackled from the outset. To give an example, let it be assumed that a major watercourse, used *inter alia* for navigation, traversed several States and had an important tributary which lay entirely in another State, whose territory abutted the major watercourse solely at the confluence of the latter and the tributary. What should be the international obligations of the latter State in respect of navigation and other uses of the dominant watercourse towards the riparian States downstream from the confluence? Again, where a watercourse abutted more than one State and, because of rainfall in an upstream State, caused floods in a downstream State, what should be the international obligations of the former State towards the latter? Those were some of his reflections on the Special Rapporteur's report. He had little hesitation in endorsing the Special Rapporteur's general approach.

5. Mr. TABIBI said that the topic had important economic, social and political implications and should be examined with the utmost care. The Commission was fortunate to have a Special Rapporteur from a country that not only had great technical and scientific experience but that was also fully alive to the problems involved, being an upper riparian State in relation to Mexico and a lower riparian State in relation to Canada.

6. In view of the increase in world population and advances in science and technology, the Commission's consideration of the non-navigational uses of international watercourses was a matter of very great importance. In recent years, bodies in the United Nations system and private institutions such as the International Law Association and the Institut de droit international had been seeking ways to regulate and improve the use of water, but they seemed to have approached the matter in differing terms, on a regional and geographical basis, as a result of which there were no clear and universal principles of international law on the subject. One writer had stated that it was doubtful whether international law recognized any ser-

¹ See 1554th meeting, foot-note 6.

vitute conferring a right to the uninterrupted flow of streams, as did civil and common law; upstream States had not acknowledged any general obligation to refrain from diverting water and had thereby denied downstream States the benefits of the rivers they shared. Only by treaty had upstream States accepted restrictions in that respect. Other writers had similarly concluded that there were no generally recognized rules of international law concerning the economic uses of international rivers. No international tribunal had delivered a decision directly touching on the legal principles affecting diversion of international watercourses. The Permanent Court of International Justice, in its judgement on the *Diversion of Water from the Meuse* case,² had explicitly confined itself to the provisions of the treaty concerned and had refused to consider the customary rules of international law concerning international watercourses.

7. The set of rules proposed by the Institut de droit international as far back as 1911, and the various and sometimes contradictory drafts adopted since 1954 by the International Law Association, had been premature attempts at codification. Some decisions of the Supreme Court of the United States of America had contributed to the case law governing the rights and duties of riparian States, but the States concerned formed part of a federation, and no judgement of that Court had referred to a particular rule of international law that was applicable to the use of waters of a river. One commentator had observed that the United States Supreme Court had not been obliged to seek light from the law of nations in enunciating the rules to be applied, and that it had not hesitated to deny that an American Commonwealth might rightfully divert and use, as it chose, the waters flowing within its borders in an interstate stream, regardless of any prejudice that such action might cause to other countries having rights in the stream below its boundaries.

8. It was clear that the law on the non-navigational uses of rivers had not been fully developed. Each river had historical, social, geographical and hydrologic peculiarities of its own. Views on the uses of international rivers had been subject to much change; one Austrian author had stated that most writers, from Grotius to the end of the nineteenth century, had simply treated the subject in accordance with their own general ideological concept of international law. Harmon, the United States Attorney-General at the time of the dispute in 1895 between the United States and Mexico over the waters of the Rio Grande, had taken the view that international law imposed no obligation upon the United States to share its waters with Mexico, since the United States had sovereignty over the Rio Grande in its own territory. Although the United States was unlikely to defend the Harmon doctrine at the present time, in view of the importance it attached to its interests as a lower riparian State, many still invoked the argument of sovereignty. General

Assembly resolution 3171 (XXVIII), concerning permanent sovereignty over natural resources, could in some respects be regarded as a revival of the Harmon doctrine.

9. The ineffectiveness of that doctrine could perhaps be ascribed to the emergence in international law of the involuntary obligation. One writer had rightly said that all good laws, whether national or international, must be the fruit of practical experience. Others believed that nations must negotiate in order to resolve particular problems relating to international rivers. If international river basins were considered as constituting a single *res* jointly owned by the riparian States concerned, the first duty of those States was to consult one another. Although a duty to negotiate without any legal rules to govern the subject-matter of the negotiations might seem somewhat problematic, satisfactory results had none the less been achieved in regard to international rivers through negotiation. In some cases, however, a negotiating State might attempt to extort a heavy price for giving a consent which, if broad and generally recognized principles existed, it could not reasonably withhold.

10. To some extent, the subject of the non-navigational uses of watercourses was not ripe for codification. Every river had unique features; furthermore, little was known about return flow, subterranean water and the cyclical nature of stream flows. Experience indicated that, although certain principles were applicable to all nations, it was difficult to move rapidly beyond that minimum body of rules. The Commission should therefore proceed carefully, taking account of the principle of national sovereignty and also of the right of peoples over their natural resources, a right that called for observance of the rule that every State must behave in such a way as not to damage the rights and interests of others.

11. The principle of equitable apportionment of water, mentioned by the Special Rapporteur, had been accepted by the International Law Association. The best way of determining equitable apportionment was for the parties concerned to engage in direct consultations. In that connexion, he wondered whether the Helsinki Rules adopted by the International Law Association in 1966³ did not contradict the principles adopted by the Association at Dubrovnik in 1956⁴ and in New York in 1958.⁵

12. The settlement of disputes relating to international watercourses by voluntary agreement could best be assisted by recommendations from impartial technical commissions. One writer had expressed the view that international lawyers should be cautious about enouncing principles of substantive international law,

³ See A/CN.4/320, para. 34.

⁴ ILA, *Report of the Forty-seventh Conference held at Dubrovnik, August 26th to September 1st, 1956* (London, 1957), p. x, resolution 3.

⁵ ILA, *Report of the Forty-eighth Conference held at New York, September 1st to September 7th, 1958* (London, 1959), p. viii, resolution 1.

² P.C.I.J., Series A/B, No. 70, p. 4.

but should lead the way in suggesting procedures likely to produce voluntary agreement and voluntary procedures for the settlement of disputes.

13. With regard to the definition of an international watercourse, he considered that the General Assembly had been wrong to adopt the concept of a watercourse enunciated in the Helsinki Rules. The Final Act of the Congress of Vienna had simply stated that an international river was a river that separated or traversed the territory of two or more States.⁶ It might of course be successive or contiguous where it served as a boundary between States; if successive, it was under national jurisdiction; if contiguous, sovereignty was shared and prior agreement was required for the water to be used. The term "drainage basin" was suitable for use in an engineering and technical context, but vague, and it was better, for the purposes of a study of the legal aspects of fresh water uses to employ the term "watercourses" or "international rivers" or "waters".

14. Before adopting a position with regard to the draft articles, he would be grateful for clarification from the Special Rapporteur on a number of points. First, had the General Assembly been correct in adopting the concept of non-navigational uses of international watercourses, instead of the clear historical concept of watercourses used for irrigation? Secondly, should the Commission pay greater attention to the Helsinki Rules than to other texts adopted by the International Law Association, bearing in mind that many of those rules had been formulated to protect the special interests of certain States? Thirdly, was the Commission dealing in the present topic with watercourses or with the entire national territory of States in possession of lakes or rivers? It should be remembered that a drainage basin might in some cases cover the whole of a State's territory. Should a riparian State lay its watercourses open to inspection by a neighbouring riparian State simply for the sake of co-operation, bearing in mind the concepts of territorial integrity and the right of nations to sovereignty over their natural resources? If the Commission went so far as to endorse the drainage basin approach, it should also recognize that all coastal States should be ready to share the wealth of their continental shelf and of their territorial waters with the other countries on the continent in question, especially the land-locked and geographically disadvantaged States. Also, an obligation concerning data collection and exchange might prove extremely burdensome for certain countries.

15. Unfortunately, the Commission had little time to consider the present report, but it should make its views on the topic known in order to assist the Special Rapporteur in his future work. A further questionnaire should be sent to Member States, as the number of States that had replied to the previous questionnaire accounted for only a small proportion of the total membership of the United Nations.

16. Mr. DÍAZ GONZÁLEZ agreed with the Special Rapporteur that a relationship existed between the law of the sea currently in process of elaboration and the question of the non-navigational uses of international watercourses, which involved a new international right to development. For developing countries, particularly the countries of Latin America, water was of fundamental importance; it was regarded as a natural resource, and both upstream and downstream riparian States therefore had a duty to preserve and protect it.

17. Hitherto, international watercourses had been dealt with in law as a part of *jus communicationis*, but the use of a watercourse as a means of transport involved a number of factors prejudicial to the use of the watercourse for mankind's other purposes. Hence the Commission's aim must be to regulate the use of international watercourses for the benefit of all, in an equitable manner. A body of legal rules governing the use of international watercourses had in fact emerged, but those rules lay in bilateral and multilateral agreements between the States directly concerned. Some of those agreements were of major importance. For example, the agreement concluded in 1978 between riparian States of the Amazon River⁷ covered an area of 4,787,000 square kilometres. However, the existing agreements did not point the way to general rules that would be valid in all cases.

18. The Special Rapporteur's report was therefore of great importance. Its introductory part was acceptable, but with regard to the draft itself he saw little point in speaking of "associated problems" in article 1, paragraph 1, when the purpose of the articles was precisely to deal with those problems, together with other matters such as pollution. Article 5 was incompatible with article 6 of the Vienna Convention.⁸ The freely expressed will of the parties to a treaty constituted the law; article 5 of the draft should reflect that fundamental principle and specify that the draft articles would govern the relations between user States in the absence of an agreement between the parties. Failing that, the Commission would be restricting the capacity of States to conclude agreements freely.

19. Yet the report, which contained important scientific and technical data, constituted a suitable point of departure for the Commission's consideration of the topic, although it was essential to adopt a cautious approach to the formulation of articles on a matter of such magnitude as the preservation and use of international watercourses. Upstream riparian States obviously had a right to use the waters in their territory, but they must not use them in such a way as to prejudice the rights of downstream riparian States, for the waters concerned represented a shared natural resource that must be protected by all the States concerned. Such an approach was now adopted in the increasing number of agreements being concluded on regional integration.

⁶ See A/CN.4/320, para. 43.

⁷ *Ibid.*, para. 98.

⁸ See 1554th meeting, foot-note 23.

20. Mr. JAGOTA said that in dealing with international watercourses the Commission could make a significant contribution to an important and challenging subject. Given the special characteristics of the subject, however, it must fully understand the scientific and technical data involved.

21. The central issue that the Commission was required to consider, under General Assembly resolution 2669 (XXV), was the non-navigational uses of international watercourses, for that was the area where the law had yet to be developed and codified. Navigational uses, by contrast, were already largely regulated. Non-navigational uses included uses for domestic purposes, irrigation, agriculture, industry, generation of hydroelectric power, and fisheries, all of which were particularly important for developing countries. The question, therefore, was how to promote the co-operative and equitable use of water for the social and economic development of those countries without disregarding the needs of developed countries. He was not opposed to the Commission considering navigational uses, but that might take place later. Mr. Francis had rightly drawn attention to the question of the obligations of a State whose territory was traversed by an important tributary of a main river which was used to a great extent for navigation.

22. He agreed that the Commission should consider first the categories of uses of international watercourses, then the specialized problems involved and thereafter the relationship between those two matters. He also agreed that, since there was no general law on the subject and since all rivers and river systems had their own special characteristics, the States using a given river system should be free to regulate that system in the manner they deemed appropriate, but within the framework of basic general rules. The Commission's task was to formulate those rules. In doing so, it should draw upon the wealth of literature and information available, so as to determine which rules were general and therefore fundamental in character and which were in the nature of particular regulations and might be covered by user agreements. Some user agreements included a clause providing that the agreement did not affect the obligations and rights of the parties under international law. In such cases it was difficult to distinguish fundamental from particular law, but it should nevertheless be possible to do so if reference were made to the terms of the agreements themselves and to the work of other bodies involved in the matter. The Commission would have to consider the relationship between fundamental rules and user agreements.

23. He endorsed the views expressed in paragraph 55 of the Special Rapporteur's report on the definition of the term "international watercourse", and agreed that the Commission should deal with that later. Since the main issues would probably be tributaries and groundwater, the Special Rapporteur might wish to draft further articles catering for those two matters, and also an optional clause of the kind referred to in his opening statement (1554th meeting, para. 11). That should

provide an effective solution to the problem represented by the difference of views on the question of definition.

24. Turning to the existing draft articles (A/CN.4/320, para. 2), he said that articles 1, 2 and 3 were generally acceptable. In connexion with draft article 2, would a third country that used a river solely for transport be regarded as a user State? That question would lose much of its significance if the draft articles were confined to non-navigational uses, but there were other matters to be considered, such as that of a power plant in a third country that used the water of an international watercourse to which it did not contribute and which it did not otherwise use directly.

25. He suggested that the Commission should revert to draft article 4 when it had completed its consideration of the substantive issues which the article involved.

26. Draft articles 5, 6 and 7 were crucial, in that they established the nexus between fundamental rules and user agreements. Assuming that an international watercourse was used by four States, A, B, C and D, and that State A alone was a party to the articles, States B, C and D would have the option, under article 5, of becoming parties to a user agreement in regard to that watercourse. If they did so, paragraph 1 of article 6 would apply, in other words, the user agreement would have to be in conformity with the fundamental rules. Moreover, under paragraph 2 of article 6, any matters not regulated by the user agreement would be subject to the fundamental rules residually. Yet article 7 would bring the articles into force for a given international watercourse only if two States were parties to them. On what basis, therefore, could the articles be imposed on States B, C and D in a situation in which only one of the partners concerned, namely, State A, was a party to the articles?

27. Of course, if the articles embodied customary rules of international law, they would apply to States B, C and D, regardless whether they were parties to the articles. But that was quite different from the Special Rapporteur's novel proposition of saying that, if States B, C and D decided to enter into a user agreement, it must be in accordance with the fundamental rules even if those States were not parties to the articles. That would be of no practical value and would also be an entirely false basis for linking fundamental and particular law. If the purpose of a user agreement was to give autonomy to the parties, so that they could take account of the special characteristics of their international watercourse by treating it as they deemed appropriate, fundamental law should not be imposed on them unless they were parties to that law. Nor could the problem be resolved by replacing the words "one or more user States" in draft article 5 by "two or more user States", since the legal problem remained, namely, how to impose an obligation on States adjoining an international watercourse to abide by fundamental rules that they had not accepted. The short answer was through the device of consent, since such States had the option of becoming parties to the

articles; but that was a matter of persuasion, which was not the same as a legal requirement.

28. The Special Rapporteur had explained at the 1554th meeting why he had drawn a distinction in draft article 7 between the general and particular entry into force of the draft articles and why, in that connexion, the Convention relating to the development of hydraulic power affecting more than one State,⁹ had been ineffective. In his view, the Convention could have been effective in practice only if it had truly embodied customary law, and that would apply to the rules to be drafted by the Commission as well. In that connexion, he fully endorsed the statement in paragraph 109 of the report to the effect that, to the extent that the draft articles codified customary international law, they formulated law binding on all States, whether or not parties to the articles. For the time being, therefore, the Commission should perhaps concentrate on the quality of the fundamental rules it was seeking to develop. His own experience was that the regulation of a particular international watercourse had always been settled under general international law. In any case, it was unnecessary to make the entry into force of the rules conditional on ratification or accession by merely two States. The only precedent he could find for that was in article 20 of the 1965 Convention on Transit Trade of Land-locked States,¹⁰ but in that case the provisions on entry into force were of general and not particular application.

29. In the light of those considerations, he suggested that the Commission should revert to draft articles 5, 6 and 7 after it had dealt with the substantive issues involved.

30. Draft articles 8, 9 and 10 concerned important questions of co-operation and economic development. Paragraph 1 of article 9 imposed an obligation on contracting States to make data available to co-operating States and other contracting States. In his view it would be better for any such obligation to be regulated by a user agreement, in line with general practice, rather than under fundamental rules. The examples cited in paragraph 129 of the Special Rapporteur's report supported that view. Moreover, paragraph 1 of article 9, by referring to paragraph 2 of article 8, turned an indication of what was desirable into a binding obligation. He none the less agreed with the broad principles underlying the provisions on collection and exchange of data, although they might perhaps be expanded and inserted later in the draft articles.

31. In conclusion, he urged the Commission to concentrate on the substantive law of non-navigational uses of international watercourses before entering into the question of the nexus between fundamental law and user agreements.

32. Sir Francis VALLAT said it was his impression that members of the General Assembly probably had more real interest in the topic under consideration than in any other with which the Commission was

currently concerned. It would therefore be most regrettable if the Commission failed to report on the topic positively. He suggested that the debate on the item should not yet be closed and that the Commission should set itself a minimum target for the current session, which in his view should be the adoption of an article on the scope of the draft articles. In addition, since the technical information furnished by the Special Rapporteur showed clearly that the contribution of water, within the meaning of draft article 2, was indivisible from that of the use of water, he believed the Commission would agree that the concept of contribution could be written into the concept of use of water, as put forward in draft article 1, so as to form the basis of a key article for consideration by the General Assembly at its next session.

33. In his view, draft article 3, which provided that the articles could be supplemented by user agreements, must be examined in conjunction with draft articles 4 to 7, since they all involved the same relationship problem. He agreed that those articles, and the question of the definition of an international watercourse, should be considered later. The case for establishing some kind of relationship between the articles and user agreements had been adequately made out by the Special Rapporteur, although how the relationship was to be expressed and exactly what it should be was difficult to foresee. The Commission would have to give further consideration to the substance of the draft articles before it could reach any conclusion on that point. It was clear, however, from the wealth of information available on existing agreements, that it was essential to draft the articles in such a way that those agreements would be given adequate scope. In general, therefore, he could agree with the concept of a framework agreement. That aspect of the matter should be pinpointed in the Commission's report.

34. In considering the question as a whole, the Commission should concentrate on the use of the water of international watercourses rather than on international watercourses in the abstract sense. Also, in its report, it should ask the Special Rapporteur to examine more closely the various uses of water, to recommend to the Commission in 1980 the order in which the different aspects of the topic might be considered, and possibly to propose some further draft articles. He was grateful to the Special Rapporteur for having already submitted a series of draft articles. It was important that the Commission should not be asked to decide on isolated articles and that they should be able to see the articles in perspective. He hoped the Special Rapporteur would be able to broaden that perspective in time for the Commission's next session.

35. Mr. TABIBI endorsed the views expressed by Sir Francis Vallat on how the Commission should proceed. He suggested that the Commission's timetable might be adjusted to allow members more time for consideration of the item.

The meeting rose at 1.10 p.m.

⁹ See A/CN.4/320, para. 86.

¹⁰ United Nations, *Treaty Series*, vol. 597, p. 3.

1556th MEETING

Wednesday, 20 June 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/320 and Corr.1)

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Sir Francis VALLAT said that as members of the Commission sat not as representatives of Governments but as individual experts on international law, they might sometimes be in a better position than representatives to assess the equities of a situation. Accordingly, while recognizing that the United Kingdom's direct interest in the item under consideration was marginal, he thought it was only right, in view of the importance of the subject for international relations, for every member to contribute his views. He also thought it essential for lawyers to have a general understanding of the technical considerations involved, and was therefore grateful to the Special Rapporteur for the outline of those considerations included in his report.

2. That outline was only a beginning, however, and seeking further information he had turned to the report of the Secretary-General on legal problems relating to the utilization and use of international rivers.¹ Although that document was a valuable source of material, it did not provide any substantial technical information, being almost exclusively devoted to treaties and studies by non-governmental organizations such as the International Law Association. In the circumstances, it would be useful if the Commission could be provided, as its work progressed, with one or more selected bibliographies on water, related to the particular topics under consideration. The Secretariat and the Special Rapporteur might perhaps bear that in mind. He was thinking not of an exhaustive bibliography but of some guide that would enable members to have ready access to sources of technical information, and thus to inform themselves on the matters with which they were dealing. The kind of document that could provide members with useful background information was the publication *Unitar News*, volume IX (1977) of which dealt with over-all water problems.

That issue also contained a map of the various river basins throughout the world, of which members should have some knowledge.

3. He agreed that in the future course of its work the Commission should concentrate on the various uses of water. He would be inclined to include pollution under that heading, although strictly speaking it was an abuse rather than a use of water. As far as the choice of topics was concerned, he would certainly agree that irrigation should be included among the uses of water to be considered by the Commission. He referred members to paragraph 1 of the Secretary-General's supplementary report on legal problems relating to the non-navigational uses of international watercourses,² which outlined the proposal made on that subject by the representative of Bolivia in the Sixth Committee at the fourteenth session of the General Assembly. That proposal provided some ideas on the initial approach that might be adopted, and he saw nothing to contradict it.

4. The articles on data exchange and collection were a necessary part of the draft, but it was clear from the statements made by Mr. Jagota and Mr. Tabibi (1555th meeting) that they would require more detailed examination.

5. Lastly, as there had been no appreciable decrease in the volume of water for 3 billion years, he would suggest that in dealing with the subject the Commission think in terms not of the volume but of the distribution and quality of water.

6. Mr. QUENTIN-BAXTER said there could be no question about the General Assembly's keen and continuing interest in the progress of the Commission's work on the law of the non-navigational uses of international watercourses, and the Commission, as a body of lawyers, was not indifferent to the political considerations involved. Indeed, it was its constant practice to take account of the major policy interests of the international community and of the reasons motivating those interests. In dealing with a subject such as succession in respect of treaties, the Commission had had no difficulty in basing its draft on the concept of decolonization and on the "clean-slate" principle, while seeking to strengthen the bonds of continuity in other directions. In the present case, however, it was faced not with broad divisions of interest that followed regional patterns, but with divisions of interest between neighbours.

7. It had been said that the positions taken in that regard in earlier times had been little more than a rationalization of national self-interest. Were that now to be said of the Commission, it would gravely reduce the respect in which the Commission was held. The difficulty could not be overcome merely by saying that the Commission should include members from a few lower and upper riparian States as well as from States with mixed interests. The problems were too local and

¹ Yearbook... 1974, vol. II (Part Two), p. 33, document A/5409.

² Ibid., p. 270, document A/CN.4/274.

too acute for that kind of reassurance to give much comfort to a State that had major interests in the matter, yet no national serving on the Commission. It was therefore important for the Commission to be constantly aware of the need for an objectivity akin to that displayed by the members of an international tribunal hearing a contentious case. Only then would world opinion be satisfied that a small body of experts serving in their individual capacities could make a significant contribution to the study of the subject. He for one had no doubt that they could do so.

8. He agreed that the Commission's target at its current session should be the adoption of draft article 1 (A/CN.4/320, para. 2), and he believed that common ground for it could be discerned. He was broadly in favour of the proposals made in regard to that article, but recognized that there was room for a separate debate at a later stage on its concepts and wording. He also agreed on the need to consider use in all its facets, bearing in mind that there would never be circumstances in which use and contribution could be wholly separated. Moreover, the number of uses could not readily be limited. Most cities that were not seaports were sited on a river, often for economic, commercial or agricultural reasons, but almost as often for purposes of recreation or to enhance the environment.

9. Referring to the relationship between the draft articles and general international law, he said that the judgements of the International Court of Justice in the *North Sea Continental Shelf* cases³ had emphasized the difference between delimitation and apportionment. The Court had held that anything not outside the national jurisdiction belonged to the State with which it had the closest natural connexion. There was no question of awarding anything to anybody; it was simply a matter of determining to whom something belonged. The Court had held that there was no single solution, no rule that obviously had to be applied to the exclusion of all others, and that there was still need for negotiation and accommodation between adjacent States.

10. There was a certain subtlety in that notion, although it was common to the judicial process everywhere. When construing a contract or a will, courts were not giving to one party and taking away from another, they were ascertaining to whom something belonged. Delimiting an underwater boundary could be a complicated matter, but it was comparatively simple if regard were had to the factors that might have to be taken into account when dealing with the draft articles. The principle was the same. In that connexion, he referred members to paragraph 80 of the Special Rapporteur's report, which stated:

A principle that injury to others be avoided in using one's own requires tests to determine what is one's own, what constitutes injury and where the dividing line between a permissible measure of injury and an impermissible measure of injury lies.

The criterion of injury might well be the hardest to establish, but it was that concept, determined after all conflicting considerations had been weighed, that would introduce in the draft the concept of delimitation, of determining what belonged to whom and what was the limit of the particular national interest. Those principles should perhaps be considered in relation to the doctrines governing the present study.

11. It had rightly been said that the abandonment by the United States of America of the Harmon doctrine might not have been unrelated to a new perception of national interest. The law between States as developed by the Commission was of course always based on perception of national interest, but it imported a greater degree of enlightenment and performed the normal legal function of allowing to others what one claimed for oneself. The principle of national sovereignty over natural resources could perhaps be regarded as the modern equivalent of the Harmon doctrine; but that principle, so dear to the hearts of all United Nations Members, flourished within a world organization that emphasized interdependence, a certain concern for other people's interests as well as for one's own, and a duty to the world community, which was the price to be paid for the benefits derived from national sovereignty over natural resources.

12. Again, some encouragement could be drawn from the principles laid down in the *North Sea Continental Shelf* cases, one of which was that equality was to be reckoned within the same plane.⁴ Thus it was clearly not the purpose of the draft articles to iron out the natural inequalities in resources between States, or to tone down the central importance of the principle of national sovereignty over natural resources. But it was equally clear, both under the old law and under the new, particularly in regard to uses of water, that there had always been perceptions of a duty owed to neighbours regarding the way in which the natural resources of a sovereign territory were used. It was unthinkable that a nation that lived on the banks of a river should lose that river entirely as a result of the application of modern technology in the interests of a higher riparian State. It was equally unthinkable that a lower riparian State should refuse to receive a natural flow of water by erecting a dam for the benefit of its own hydro-electric resources, thereby causing that water to flood valuable land in a neighbouring State. In that area more than any other the basic duties could be seen.

13. He agreed entirely that there was a continuing need for user agreements between adjacent States or States with a community of interests in a particular source of water, and that reliance on a general principle was not enough. The general rules the Commission would formulate in regard to user agreements were far more than residual rules, however, since they arose out of the bedrock of customary law, having been recognized ever since States started to regulate the joint use of their resources, and having been rein-

³ *I.C.J. Reports* 1969, p. 3.

⁴ *Ibid.*, p. 50.

forced countless times by United Nations doctrines. It was on that basis that the Commission would be able to reassure those government representatives who might wonder if it was bargaining with their natural resources.

14. Mr. USHAKOV said that, since the physical and legal situation of international watercourses was extremely varied, the Commission must draw up very general rules that could be applied to any conceivable situation. Those rules must be legal, not technical. The rules proposed in draft articles 8, 9 and 10, however, were more technical than legal, and the provisions of article 8 were not sufficiently general to be applicable to all situations.

15. In his view, it was not necessary to collect and exchange technical data on every international watercourse. Such activities were justified only with respect to international watercourses that were exploited. Furthermore, the data mentioned in article 8 were not relevant to all regions of the world. For example, data on water evaporation would concern mainly tropical countries, whereas countries like the Soviet Union would be more interested in information relating to the ice that covered certain rivers in winter. Since the technical data concerning international watercourses varied from one geographical region to another, it would be impossible to enumerate all the data necessary for the study of those watercourses. Hence it would be preferable not to specify the data in the draft, and to replace articles 8, 9 and 10 by a more general article providing that the States concerned should co-operate in studying the situation with respect to certain international watercourses and in exchanging data.

16. The draft articles before the Commission had been drawn up as though they formed part of a draft convention, but he thought that approach was contrary to the Commission's mandate and practice. The Commission was not required to prepare draft conventions, but only draft articles, and it was for the General Assembly alone to decide how those articles should be used when completed. It was therefore impossible to know in advance whether a set of draft articles would become a multilateral convention.

17. Draft article 2 was based on the concept of the "international drainage basin". It should be noted that, according to the definition of that term given by the International Law Association at its Helsinki Conference in 1966, which the Special Rapporteur had included in his report (A/CN.4/320, para. 34), a national watercourse that flowed through the territory of a single State could become an international watercourse if it was fed by underground water originating in the territory of another State.

18. In draft article 1, the concept of use could include or exclude that of consumption. It might be preferable to adopt the latter alternative. The definition of the scope of the draft articles given in paragraph 1 of the article did not correspond to the title of the subject. In his view, there was a difference between the "law of the uses" and the "uses" of water-

courses. He also wondered why the term "non-navigational" had been omitted from the article. Did that mean that navigation was included in the scope of the draft articles, or that it was implicitly excluded by the title of the subject? He believed that it would be better to reproduce the title of the subject and to say, in article 1, paragraph 1: "The present articles apply to the law of the non-navigational uses of international watercourses ...".

19. With regard to paragraph 2 of the article, he pointed out that the great majority of international watercourses were not navigable and that it was mainly to such watercourses that the articles were intended to apply, since the major international rivers were already covered by agreements concluded between the riparian States. He had already proposed making a distinction between international rivers, which were navigable watercourses and could be used by all States, and multinational rivers, which were not navigable watercourses and which were used only by the riparian States.

20. Mr. VEROSTA thought some difficulties might have arisen because of a lack of awareness of the existing rights and duties of States under the general rules of international customary law. During the discussion, reference had been made to the national character of rivers, but in his view the sovereignty of a State over the mass of water flowing through its territory was matched by certain duties. Mr. Quentin-Baxter had said it was unthinkable that one State should dam the waters of a river on its territory before the river reached a lower riparian State, or that a lower riparian State should force water back on to the territory of an upper riparian State. With the advances in technology, however, those were now very real possibilities. In such an event, a rule of customary law would come into play: on the one hand, the upper riparian State would have the duty to allow an appropriate volume of water to flow down and out of its territory and, on the other, the lower riparian State would have the right to expect that the water would flow into its territory at seasonal intervals. The same could be said to apply to lakes on which a number of States bordered, such as lakes Léman and Constance.

21. Modern technology also played a significant part in the use of water as a major tourist attraction. The Horseshoe waterfall at Niagara, for example, had been largely constructed by engineers.

22. Mr. NJENGA said he was grateful for the scientific and technical information in the introductory part of the Special Rapporteur's comprehensive report, which was extremely instructive. It was to be hoped that the capacity of water for self-purification, referred to in paragraphs 22 and 23 of the report, would not lead to complacency about the task of preventing pollution, for it should be remembered that a very high proportion of the peoples in developing countries, particularly in Africa, drew their water directly from rivers. Mankind must obviously take account of the ability of water to cleanse itself, but must also ensure that

toxic substances were not discharged into watercourses.

23. He wondered whether the Commission's decision to defer consideration of the definition of an international watercourse⁵ had in fact been wise, since it would be difficult to establish rules without an appropriate definition of what was involved. For example, it was quite conceivable that Governments would accept rules relating to international watercourses defined as successive or contiguous rivers, but would be completely opposed to the same rules if they were applied in the wider context of international drainage basins. For the moment, he had not come to any firm conclusions regarding the best approach. The Special Rapporteur appeared to be in favour of the concept of an international drainage basin. In any event, since there seemed to be some difference of opinion among members, and since the very content of the rules would depend upon the way in which an international watercourse was defined, it was essential for the Commission to consider that matter at the earliest opportunity.

24. Another problem was whether, in view of the diversity of the uses and characteristics of rivers, and even of drainage basins, it would be possible or useful to formulate general rules applicable in all cases. On that point, he agreed with Brierly's view, cited by the Special Rapporteur in paragraph 65 of his report, that rivers could not be subjected to legal regulation by rules applying generally to all rivers, since the political factors that had to be taken into account differed, as did the uses to which rivers might be put. General rules might prove to be so general that they would be of little value for codifying the law, and it was questionable whether the Commission would be able to elaborate a comprehensive code that would be broadly acceptable to States. Clearly, a further exchange of views was required to determine whether it was really necessary to draw up a general code for international watercourses. By and large, the absence of general principles applicable to all international watercourses had not created major obstacles to negotiations between States aimed at co-operation in the utilization of international watercourses.

25. Water was the most important of all natural resources, for all life depended on it. Few States, if any, would agree that they should not be allowed to make the fullest possible use of water within their national boundaries. Of course, he did not in any way endorse the Harmon doctrine, but full and responsible use by a State of an international watercourse was not necessarily inconsistent with protection of the interests of lower riparian States. Hence the emphasis should be placed on co-operation between States in the use of watercourses rather than on limitation of the rights of States to use them. He did not see how any State, if it was not damaging the interests of other States, could be prevented from making the widest possible use of its water resources. It would be dangerous to place too

much reliance on the Helsinki Rules,⁶ which did not take account of a State's permanent sovereignty over its resources.

26. Many of the draft articles raised serious problems if the Commission was not yet agreed on its basic approach. Some of them were not clearly drafted: in article 2, for example, it was difficult to determine whether the two elements of the phrase "contributes to and makes use of" were separate or cumulative. Because of its climatic conditions, Egypt, for example, did not contribute to the waters of the Nile, but it none the less made use of those waters.

27. Lastly, some of the articles might impose a burden that States would regard as unreasonable. The categorical terms of article 8 placed an obligation on contracting States to collect a considerable amount of data, which would constitute an onerous responsibility for them, particularly if the Commission later decided to adopt the concept of the international drainage basin. The article should therefore be couched in terms of co-operation between States rather than of an obligation to other States, which would be more in keeping with article 3 of the Charter of Economic Rights and Duties of States⁷ and recommendation 51 of the United Nations Conference on the Human Environment.⁸

28. Mr. REUTER said he would confine himself to pointing out that the subject under study entailed limitations both on the territorial sovereignty of States and on the ancients' concept of rivers, which had been regarded as divinities. The Commission must therefore find the golden mean between absolute respect for the principle of territorial sovereignty and prohibition of the use of, or construction of works on, international watercourses. Perhaps it should be guided by the position taken by ECE with regard to hydroelectric works, namely, that priority should be given to the concept of usefulness to man within the national context, as though the river concerned were not international. The judgements of the supreme courts of the United States of America and Switzerland might show the way in that matter.

29. As to the method of work, he thought the extreme complexity of the subject would make it difficult to see the way clear from the outset. Initially, the approach should be very broad; it could always be restricted later.

30. It was both helpful and incautious to submit draft articles at that stage of the work. Without such articles, the Commission could not make progress, but they were bound to give rise to criticism. There was no reason to suppose that the Special Rapporteur saw the articles as necessarily forming part of a convention. The Commission's work might culminate in a

⁵ See *Yearbook...* 1976, vol. II (Part Two), p. 162, document A/31/10, para. 164.

⁶ See A/CN.4/320, para. 34.

⁷ General Assembly resolution 328 (XXIX).

⁸ See 1554th meeting, foot-note 25.

declaration or a model agreement; in any event, the Commission had always considered the preparation of draft articles to be a useful method.

31. Mr. SCHWEBEL (Special Rapporteur) said there was little time left to sum up the Commission's discussion, but he would try to draw some conclusions from it and answer some of the questions raised.

32. With a few notable exceptions, there appeared to be broad support among members for the basic approach adopted in the report and in the draft articles. The scope of the subject, as defined in article 1, appeared in the main to be acceptable. In effect, that article deferred the question of the definition of an international watercourse, but again there was general, if not unanimous, support for the idea of postponing that contentious question. At the same time, it was recognized by some members that the problem would have to be tackled at some stage. The Commission was markedly more sympathetic than it had been in 1976 to the adoption of the concept of the international drainage basin for defining an international watercourse, but at least three members had been opposed to that approach. A possible way to overcome the difficulty would be to include in the draft articles an optional clause that would enable States to specify that, as far as they were concerned, the articles applied to successive or contiguous rivers, to river basins or to international drainage basins.

33. Most members had expressed support for the preparation of articles structured to form a framework convention that would set out general principles of the law of the non-navigational uses of international watercourses binding the parties thereto, and that would be coupled with user or system agreements that would enable the States of a particular watercourse to establish detailed arrangements and obligations governing the uses of the watercourse in question.

34. The Commission had also questioned the nexus between general principles and the projected user agreements. While some members were ready to accept the approach adopted in articles 3 to 7, others doubted whether it was practicable. The nexus should be carefully reconsidered. Mr. Ushakov had not discussed the deficiencies of the nexus but had simply said that, as articles 3 to 7 were cast in treaty form, they should be set aside, because the Commission could not at present assume that the draft would eventually constitute the text of a convention. For the time being, however, the best method would be to draft the articles in the form of a convention, on the understanding that the Commission could decide at any time on the form in which it would submit the articles to the General Assembly. Member States were of course entitled to deal with the Commission's drafts as they saw fit.

35. Reconsideration of what had been termed the nexus problem was not regarded as a matter of first priority. The Commission thought it preferable that he should indicate particular uses of watercourses and the order in which they were to be discussed; he would

then prepare reports and draft articles setting out the principles of law that applied or should apply to such uses, and would direct attention to the complementary role of user or system agreements. Once the articles had been drafted, it would be possible to judge whether the principles formulated in them were mainly a codification or essentially a progressive development of international law; the articles themselves would establish the link between those principles and user agreements.

36. In addition, support had been expressed for the idea that the draft articles should take full account of the physical properties of water and that the necessary scientific and technical advice should be obtained. That support was somewhat general, however, and its implications were not clear.

37. The members of the Commission, with two or three notable exceptions, had considered that the articles should deal with the problem of data collection and exchange and the costs thereof. There appeared to be willingness to formulate binding obligations in that regard, although some members had indicated in strong terms their belief that only recommendatory guidelines should be proposed. Mr. Ushakov had pointed out that certain watercourses were not exploited and that it would consequently be otiose to place a responsibility on States to engage in the collection of data for all watercourses. That point could perhaps be met by a provision to the effect that States should fulfil their obligation or comply with the guidelines, as appropriate, only in respect of international watercourses that were exploited. At the same time, even minor watercourses tended to be exploited in some measure.

38. Perhaps the most important conclusion to be drawn from the discussion was that nearly every member of the Commission who had spoken had regarded the topic as ripe for codification and progressive development. Only two members had expressed doubt.

39. Mr. Riphagen (1554th meeting) and Mr. Verosta had remarked on the need to clarify the relationship between the articles and customary international law. Most members also appeared to support the view that, under customary international law, States were not entirely free to treat international watercourses as they pleased.

40. It had been observed that the articles would presumably not govern existing user agreements, and the question arose whether they could be presumed to govern future user agreements. If a State not party to the articles concluded a user agreement with a State party to the articles, it would, by the terms of the user agreement, accept article 6 of the draft. There would be no question of imposing the articles on a user State, since that State would express its consent by adhering to a user agreement that specified that the parties thereto agreed that the articles applied to the user agreement in a residual manner, except where the agreement varied the terms of the articles. In his opinion, that was wholly consistent with the underlying

principles of the Vienna Convention.⁹ Mr. Jagota (1555th meeting) did not believe that, in the light of such a requirement, a user State not party to the articles would conclude a user agreement and accept the provisions of article 6. Obviously, the matter called for further reflection. The report made the reasonable assumption that there might be situations in which a State not willing to accept all the provisions of the articles would in fact agree to a user agreement that incorporated the provisions of the articles exclusively in a residual manner, and at the same time permitted the parties to vary those provisions to suit their needs.

41. As to the extent to which the articles should deal with the navigational uses of international watercourses, he believed that those uses could not be excluded entirely, because of their impact on non-navigational uses.

42. A number of questions had been raised about the definition of a user State contained in article 2. For example, did the definition include States that only used, but did not contribute to, the watercourse? And in view of the facts of the hydrologic cycle, which States could be regarded as contributing to a watercourse? Plainly, further reflection would be required before those questions could be answered.

43. With regard to some of the questions put by Mr. Tabibi (*ibid.*), it was his impression that the General Assembly had not consciously decided to confine the topic to watercourses, any more than it had decided to adopt the concept of the drainage basin. He thought the Helsinki Rules reflected the most considered statement on the matter by the International Law Association. The articles would deal with land only in so far as it was necessary for them to deal with the uses and abuses of water. Moreover, it was not proposed that neighbouring riparian States should consult on all their economic planning, but simply that they should collect and exchange minimal data on shared watercourses.

44. As to the question how detailed and technical the articles were to be, in his capacity as Special Rapporteur he had been thinking in terms of articles that would go beyond the general principles of the Helsinki Rules. His view, as illustrated by articles 8, 9 and 10, was that the Commission could consider in detail certain uses of international watercourses, endeavouring to establish a core of obligations that States parties to the articles would undertake, and to suggest further matters that States parties to user agreements might wish to take into account. Such an approach might not prove feasible, but it would be extremely helpful to know whether the Commission wished to proceed further in that direction. Obviously, it would be much easier to prepare a draft on the lines of the Helsinki Rules than a draft that took account of highly technical matters and sought to formulate rules on them.

45. With regard to Mr. Njenga's comments, it was obvious that the exercise of permanent sovereignty over natural resources, like the exercise of sovereignty in general, was subject to international law. States did not enjoy complete discretion to deal with shared watercourses as they pleased. As Mr. Reuter had pointed out, if the Commission did not agree on that point it would be futile to prepare draft articles on the topic.

46. Lastly, Mr. Quentin-Baxter had observed that the problem was not an ideological one; it was a problem involving the interests of States that shared international watercourses. That was a cause for optimism, since it meant that, unlike some other issues, the subject under study was not encumbered by factors that made it extremely difficult for States to reach agreement.

The meeting rose at 1 p.m.

1557th MEETING

Thursday, 21 June 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

ARTICLE 48 (Error)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 48 (A/CN.4/319), which read:

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

⁹ See 1554th meeting, foot-note 23.

* Resumed from the 1553rd meeting.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

2. Mr. REUTER (Special Rapporteur) said that article 48 was the first of five articles on invalidity of consent. Both the Commission and the United Nations Conference on the Law of Treaties had paid very special attention to the preparation of the corresponding articles of the Vienna Convention,¹ which had been adopted by a comfortable majority. As those articles of the Vienna Convention concerned the consensual element of every treaty, he had thought that they could be transposed, with greater or lesser drafting changes, to the draft in preparation.

3. In article 48, he had proposed only minor drafting changes. It should be noted that article 48 of the Vienna Convention was based on generally accepted international jurisprudence that had found expression, in particular, in the 1962 judgement of the International Court of Justice in the *Case concerning the Temple of Preah Vihear*.²

4. Mr. USHAKOV deemed the article under consideration acceptable, although it might have been drafted in such a way as to contrast treaties concluded between States and international organizations with treaties concluded between two or more international organizations. Moreover, paragraph 2 raised two questions that should be answered in the commentary. First, how could an international organization contribute by its conduct to an error? Could it contribute to the error if none of its organs had taken a position? Secondly, how could an organization have been put on notice of a possible error if the error had not been brought to the attention of the competent organ?

5. Mr. REUTER (Special Rapporteur) understood Mr. Ushakov to be of the opinion that it would not be possible, in practice, to determine the conduct of an international organization in the same way as that of a State. Furthermore, assessment of the circumstances in which the organization should be put on notice of an error and determination of the organ to be put on notice in a specific case would not take place in the same way as for a State. Mr. Ushakov was thinking mainly of the case in which final power to commit an organization was held by a non-permanent organ; accordingly, he wished it to be explained in the commentary that the conduct of an organization could not be determined in the same way as that of a State and, with reference to the last phrase of paragraph 2 of article 48, that the principles laid down for international organizations could not be as general as those for States and that regard must necessarily be had to the internal structure of the organization.

6. It seemed obvious that in article 48 of the Vienna Convention, and even more so in articles 49 and 50,

the question of the validity of consent overlapped that of responsibility. The fact of contributing to an error by its conduct implied at least negligence or imprudence on the part of an international organization. But in preparing the draft articles on State responsibility the Commission had always left aside the question of the responsibility of international organizations. In short, it might be advisable to deal with the problem in the commentary to the article under consideration by pointing out that, to assess the conduct of an international organization, the peculiarities of its internal structure must be taken into account.

7. Sir Francis VALLAT said that the difference between States and international organizations was obviously relevant to the terms of many of the draft articles. In the case of article 48, paragraph 2, however, the Commission was faced not with the problem of the difference between States and international organizations but with the question of evidence, in other words, how to establish that the conduct of the international organization had contributed to the error.

8. Questions of that kind were often encountered in the task of codifying the law. In the past, the Commission had frequently laid down general rules in the knowledge that some of them might prove difficult to apply because of a variety of circumstances. For example, how could one establish the object and purpose of a treaty? There was in fact no general answer, since that problem had to be resolved in the context of each case considered. The Commission had recognized, beyond dispute, that an international organization could in principle have the status and the capacity necessary to conclude international treaties; the organization was therefore capable of the conduct required for that purpose. Hence the circumstances of a particular case could be examined to determine whether or not the conduct attributable to the organization had contributed to the error. In view of the diversity of international organizations and of the ways in which they operated, the difficulties of such an examination might be considerable, but that did not alter the principle underlying article 48. The best course would be to deal with the matter in the commentary and leave the text of the article unchanged.

9. The CHAIRMAN suggested that the Commission should decide to refer draft article 48 to the Drafting Committee for consideration in the light of the discussion.

*It was so decided.*³

ARTICLE 49 (Fraud)

10. The CHAIRMAN invited the Special Rapporteur to introduce draft article 49 (A/CN.4/319), which read:

Article 49. Fraud

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating international organization, the State or the

¹ See 1546th meeting, foot-note 1.

² *I.C.J. Reports 1962*, p. 6.

³ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

international organization may invoke the fraud as invalidating its consent to be bound by the treaty.

11. Mr. REUTER (Special Rapporteur) pointed out that the corresponding article of the Vienna Convention had not raised any difficulties at the United Nations Conference on the Law of Treaties, and that the article under consideration differed from it only by minor drafting changes.

12. Mr. USHAKOV said he could not accept article 49 as drafted. He was uncertain what constituted fraudulent conduct by an international organization. In the case of a State the situation was clear: the conduct of a representative of a State provided with full powers to conclude a definitive treaty must be recognized as the conduct of that State. If he engaged in fraudulent conduct he placed the State under an obligation, even if he was acting *ultra vires*. For the conduct of an international organization to be fraudulent, on the other hand, the competent organ of that organization must have authorized fraudulent conduct by its representative empowered to participate in the negotiations. Such a case was obviously very difficult to imagine. If the General Assembly of the United Nations authorized a person to represent the Organization in negotiations and that person engaged in fraudulent conduct, the Organization would probably not incur responsibility.

13. In conclusion, draft article 49 should cover fraudulent conduct only in the case of a State, not in that of an international organization.

14. Sir Francis VALLAT said that Mr. Ushakov's comments brought to mind the time in the nineteenth century when States had been gradually developing a national law of corporations. English law had seriously questioned whether a corporation, which did not have the soul of a human being, could really be guilty of a criminal offence or of fraudulent conduct. Fortunately, the law had developed realistically and had recognized that a corporation could be so guilty. Once it was accepted that a corporate body, whether national or international, had legal personality, it had also to be recognized that it was capable of engaging in various kinds of illegal conduct.

15. In modern internal and international law, many international organizations were acknowledged to have corporate capacity and the view that an international organization had objective legal personality had been upheld by the International Court of Justice on a number of occasions. If the Commission sought to deal exhaustively with the elements that might vitiate consent or bring about the invalidity of a treaty, it must consider the possibility of an international organization being responsible for fraud. Admittedly, the concept of fraud in international law was extremely elusive. He could not recall any international case in which a State had been held guilty of fraud. However, the absence of cases of that kind did not constitute grounds for precluding the principle. The article clearly raised a problem, but it was a problem that should be dealt with in the commentary rather than in the article itself.

16. Mr. REUTER (Special Rapporteur) agreed that there were not many examples of fraud committed by States. During the Commission's consideration of the text that was subsequently to become article 49 of the Vienna Convention, reference had been made to a treaty concluded in former times between a colonial Power and a free African State, in the text of which, drafted in two languages, there had been a deliberate contradiction.⁴ There were also the Munich agreements, signed by France, which the representatives of Free France in London had subsequently hastened to declare void. Nevertheless, after the Second World War, it had been necessary to justify their invalidity legally. France had maintained that, as a result of the Nürnberg trials, it had been established that at the time of the Munich agreements the Germans had already decided to invade Czechoslovakia. There had thus been fraud, since the Germans had led the French authorities to believe that, to preserve peace, one of France's allies must be partially sacrificed.

17. With regard to international organizations, the case could be posited of the head office of an international bank that had already concluded loan agreements with several developing countries deciding to give a representative of the bank very wide powers to negotiate a new loan with one of those countries, while at the same time secretly deciding to enforce a guarantee given by that country in respect of a prior commitment it was unable to meet. Subsequently, the State in question might very well assert that the bank had committed a fraud, because it would never have accepted the new agreement had it known the bank's intentions. Having found that developing countries feared not only the great Powers but also certain international organizations with large financial means, he did not think such cases should be excluded. When the text that was to become article 50 of the Vienna Convention (Corruption of a representative of a State) had been considered by the Commission,⁵ half the members, unlike himself, had taken the view that that case ought not to be covered either.

18. What seemed to worry Mr. Ushakov most was that a fraud might be committed not by the organ that had the power of decision but by a representative acting *ultra vires*, in which case the conduct of a person who did not have the "capacity" to engage in fraudulent acts could not be imputed to the organization. That point of view seemed to confirm the fact that draft articles 48, 49 and 50 pertained both to the law of treaties and to the law of responsibility. Personally, he would be inclined to admit that an international organization, like a State, could be bound by an act of one of its agents acting *ultra vires*. Not to accept that principle might have troublesome consequences. If, paraphrasing the English maxim that "the king can

⁴ See *Yearbook...* 1963, vol. I, pp. 27 *et seq.*, 678th and 679th meetings.

⁵ See *Yearbook...* 1966, vol. I (Part Two), pp. 140-148, 862nd meeting, paras. 81 *et seq.* and 863rd meeting, and pp. 156 and 157, 865th meeting, paras. 1-27.

do no wrong", it was affirmed that an international organization could do no wrong, that would be transposing for the benefit of international organizations, which ultimately were creations of States, a principle that had not been deemed applicable even to States. In his opinion, if the agent of an international organization acted *ultra vires*, the organization would have to assume partial responsibility, even if such responsibility were assessed in accordance with norms different from those applied to States. The question of the responsibility of international organizations should not, of course, be dealt with in draft article 49, and it was not even certain that the Commission would eventually consider it, but it should perhaps be mentioned in the commentary to the article. The Commission could also develop the question in the commentary to article 73, dealing with the reservations that would be necessitated by certain circumstances, such as the generation of international responsibility.

19. Mr. SCHWEBEL fully agreed with the Special Rapporteur's analysis. As to the question of the responsibility of international organizations under international law, it might be remembered that, on rare occasions, members of United Nations peace-keeping forces had acted *ultra vires* and that the United Nations had accepted responsibility for their acts. That had happened in the Congo, when a number of claims had been paid by the Secretary-General with monies appropriated by the General Assembly for that purpose. Again, the examples cited during the discussion on the capacity of agents of international organizations to enter into international agreements binding on those organizations⁶ were relevant to draft article 49. It was easy to imagine cases in which, although the supreme organ of the international organization concerned had not been a party to the act, fraudulent conduct could none the less be imputed to the international organization on the standard principles of responsibility and on the principle of *respondeat superior*.

20. Mr. VEROSTA, referring to the Rapporteur's comments, pointed out that, during the drafting of article 50 of the Vienna Convention, not only had the existence of corruption been denied by some members of the Commission and certain delegations to the Conference on the Law of Treaties, but it had also been maintained that in any case corruption was already covered by the provisions of article 49, on fraud. If cases of corruption were included among cases of fraud, the latter would not be so rare and could be attributed to international organizations as well as to States. What was more, both the representative and the competent organ of an international organization could engage in fraudulent conduct and be guilty of corrupting the representative of a State. Provision must therefore be made in draft articles 49 and 50 for cases of fraud and corruption by an international organization.

21. Mr. USHAKOV considered draft article 49 acceptable as far as fraudulent conduct by the competent

organ of the organization was concerned. In any case, that provision did not raise any question of responsibility. As provided in the draft articles on State responsibility, the two constituting elements of an internationally wrongful act were conduct attributable to a State and breach of an international obligation of that State.⁷ In the case of article 49, only the conduct of the international organization was at issue. Hence the question of the fraudulent conduct of the organization did not arise in the context of responsibility, but in that of invalidation of consent. It had to be ascertained whether the conduct of the representative of an organization could be attributed to the organization when he had acted *ultra vires*. In the case of States, that question was dealt with in article 10 of the draft articles on State responsibility⁸ and it had already raised quite a number of difficulties. Was the Commission now prepared to affirm that the fraudulent conduct of any person whatever who represented an international organization was the conduct of that organization, even if he had acted *ultra vires*?

22. Mr. REUTER (Special Rapporteur) understood Mr. Ushakov's view to be that articles 48 to 50 should not be adapted to international organizations as though article 46⁹ did not exist. What Mr. Ushakov feared was that the representative of an international organization, who must be given specific authority and was generally not entitled to bind the organization by his signature alone, might commit fraudulent acts that would be attributable to the organization independently of article 46—a provision under which such acts might not be attributed to the organization. If that was Mr. Ushakov's position, he saw no objection to stating in the commentary that articles 48 to 50 should be understood as being without prejudice to cases in which a person negotiating a treaty with an international organization, acting in accordance with normal practice and in good faith, found that the representative of that organization was not acting in accordance with the relevant rules of the organization. Mr. Ushakov seemed to think that the differences that existed between States and international organizations were not reflected in articles 48 to 50. He would not be opposed to an article on fraud, and in particular fraud by an international organization, provided that such fraud was first and foremost the act of the organ empowered to conclude treaties. If the author of the fraud was not the organ entitled to conclude treaties, some reference should at least be made in the commentary to the restrictions imposed by article 46 in cases of action *ultra vires*.

23. Sir Francis VALLAT said that one point of principle had to be borne in mind: the mere fact that an act was wrongful did not necessarily make it *ultra vires* with respect to the international organization. It would be most unfortunate if the commentary were so

⁶ See 1553rd meeting, paras. 13 *et seq.*

⁷ See *Yearbook... 1978*, vol. II (Part Two), p. 78, document A/33/10, chap. III, sect. B, 1, article 3.

⁸ *Ibid.*

⁹ See 1550th meeting, para. 22.

phrased as to suggest that, because an act was wrongful, it automatically became *ultra vires*—a view that should be firmly rejected by the Commission. If the board of an international finance organization had certain powers to make loans and to enter into agreements with States for that purpose, it was not inconceivable that, acting within those powers, it might still commit a fraudulent act.

24. There had been a famous case in the United Kingdom involving the London General Omnibus Company, at a time when omnibuses had been horse-drawn vehicles. An accident had occurred because the horses had bolted. The court had drawn a distinction between cases in which a driver drove badly—for example, by making excessive use of the whip—on his proper route, and cases in which a driver did not take the proper route and, as the saying was in English law, went “on an expedition of his own”. In the latter instance, the company would not, *prima facie*, be responsible for acts committed by the driver.

25. That example was perhaps somewhat elementary, but it illustrated the kind of distinction that could be drawn with regard to international organizations. Where an official representing an international organization committed a fraudulent act in the course of his duties, the organization had no right to allege that the act was *ultra vires*. On the other hand, if the official went “on an expedition of his own”, an act committed by him might well be *ultra vires*. The Commission should note in the commentary that there might be few instances in which an international organization could commit a fraudulent act within the exercise of its competence, but it should none the less allow for such a possibility.

26. The CHAIRMAN suggested that the Commission should decide to refer draft article 49 to the Drafting Committee for consideration in the light of the discussion.

*It was so decided.*¹⁰

ARTICLE 50 (Corruption of a representative of a State or of an international organization)

27. The CHAIRMAN invited the Special Rapporteur to introduce draft article 50 (A/CN.4/319), which read:

Article 50. Corruption of a representative of a State or of an international organization

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

28. Mr. REUTER (Special Rapporteur) said that draft article 50 raised the question whether corruption could

be the act of an international organization. Although cases of corruption by States were relatively numerous, there were few judicial decisions on the subject, and none on corruption by international organizations. Under a fairly broad definition of corruption, it was easy to imagine cases involving States, but which could also involve organizations. For instance, in negotiations on the withdrawal of reservations to a treaty, money might not necessarily be offered, but a promise might be given to nominate someone for a post or to support his election.

29. In considering article 50, the Commission would probably come up against an objection raised by Mr. Ushakov in regard to article 47 (1553rd meeting). When drafting articles 7 *et seq.*,¹¹ the Commission had had to resolve a terminological problem. The expressions “full powers”, “ratification” and “expression of consent” had been replaced, for international organizations, by the expressions “powers”, “formal confirmation” and “communication of consent”. To take those differences into account, he had had the choice of dividing article 50 of the Vienna Convention into two parts, which would have made the text of the article under consideration clumsy, or of resorting to subtlety of drafting, which he had preferred. That was why he had opted for the formula “if the expression by a State or an international organization of consent” rather than for the formula “if the expression of a State’s or international organization’s consent”.

30. Mr. USHAKOV pointed out that in article 50 the word “representative” meant a person empowered to bind a State or an international organization by a treaty, but he did not think the Commission had envisaged that possibility in regard to international organizations. Article 7, paragraph 4, in fact provided for the case in which “a person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty”. Thus whereas the representative of a State could “express” the consent of the State to be bound by a treaty, the representative of an international organization could only “communicate” the consent of the organization. In using the term “communicate” instead of the term “express” with reference to international organizations, the Commission had wished, as stated in paragraph (11) of its commentary to article 7, to make it clear that

the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization and that the action of its representative should be to transmit that consent; he should not, at least in the present draft article, be empowered to determine by himself the organization’s consent to be bound by a treaty.¹²

31. The distinction made between States and international organizations in regard to the expression of con-

¹⁰ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

¹¹ See 1546th meeting, foot-note 4.

¹² *Yearbook*... 1975, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B, 2, article 7, para. (11) of the commentary.

sent to be bound by a treaty was explained by logic and practice. A State could authorize a person in advance to conclude a treaty on its behalf without knowing the exact content of the treaty, because the representative of a State could keep in constant contact with the State to inform it of the progress of the negotiations and receive its instructions. In the case of an international organization, on the other hand, an organ that did not meet on a permanent basis, such as the Security Council or the General Assembly of the United Nations, could not authorize a person to conclude a treaty of which it did not yet know the content, because it was for that organ alone to decide whether the organization should be bound by the treaty. If the Secretary-General of the United Nations could sign a treaty on behalf of the Organization, it was not in his personal capacity but in his capacity as an organ of the United Nations. That was why article 7 did not provide that a person could be authorized to bind an international organization definitively. The same problem was also raised in article 47 and article 51.

32. Article 50 raised another problem that had also arisen in connexion with article 49: how could an international organization proceed to corrupt the representative of a State or of another international organization?

33. Mr. TABIBI supported draft article 50 and would recommend that it be referred to the Drafting Committee. He regarded the whole of section 2, on invalidity of treaties, as particularly important in view of the need to protect both States and international organizations against vitiation of consent. The growing involvement of organizations in the treaty-making process meant increasing opportunities for corruption.

34. Mr. SCHWEBEL said Mr. Ushakov's remarks prompted the thought that computers did not express the consent of an international organization to be bound by a treaty; even if they did, they would presumably be programmed by human agency. A person acted on behalf of an international organization to express consent or to communicate it; a person could also act on behalf of an organ and, in the case of the Secretary-General of the United Nations, the person and the organ were in a sense one and the same.

35. He appreciated the point behind the theory developed by Mr. Ushakov, but considered that it had a fatal flaw in that it did not square with the facts. By way of illustration, he referred the Commission to the exchange of letters constituting an agreement between the United Nations and the Government of Cyprus concerning the status of the United Nations Peace-Keeping Force in Cyprus.¹³ Members would note that at no point in the two letters exchanged between the Secretary-General and the Minister for Foreign Affairs of Cyprus had any reference been made to ratification

by the Security Council or the General Assembly. As far as he could see, the agreement had been regarded at the time, and was most probably still regarded, as one entered into by the Secretary-General and binding on the United Nations and the Government of Cyprus.

36. Mr. REUTER (Special Rapporteur) noted that Mr. Ushakov had raised two different questions: that of corruption by an international organization and that of corruption of the representative of an international organization. With regard to the first question, Mr. Ushakov had put forward the same considerations as for the preceding article; with regard to the second, he had invoked considerations both of vocabulary and of substance.

37. With regard to vocabulary, he thought that the term "communicate", provisionally adopted—rightly or wrongly—in article 7 in regard to the consent of international organizations, should not again be called in question. If it were, it would be necessary to abandon the relatively simple formula he had proposed for draft article 50 and adopt more complicated wording that dissociated the expression of consent, for States, from the communication of consent, for international organizations.

38. With regard to the substance of the question, he did not agree with Mr. Ushakov. The passage of the Commission's commentary to article 7 cited by Mr. Ushakov contained a very important restriction, expressed in the phrase "at least in the present draft article". The Commission had considered that under general international law there were certain persons—heads of State, heads of government and ministers for foreign affairs—who, by virtue of their functions, and without having to produce full powers, could express the consent of a State to be bound by a treaty. But since for the time being there was no general practice of international organizations, the Commission had not thought it possible, in the case of such organizations, to set out a general rule giving equivalent authority to persons.

39. Nevertheless, although there was no general practice common to international organizations, each organization had its own practice. Thus while an international organization could not authorize a representative to bind it by a treaty by virtue of general practice, it could do so by virtue of its own practice, and it was on that point that he disagreed with Mr. Ushakov. Certain international organizations sometimes, in fact, gave a representative powers that went beyond merely automatic transmission of consent.

40. He believed that the practice of each international organization should be respected and that international organizations should not be prevented from developing as they saw fit by the adoption of rules that were too inflexible. From the drafting point of view, he thought it would be wiser to separate the expression of consent by a State from the communication of consent by an international organization by indicating, in the commentary, how the word "com-

¹³ United Nations, *Juridical Yearbook*, 1964 (United Nations publication, Sales No. 66.V.4), pp. 40–50.

municate" had been interpreted by certain members of the Commission.

41. Mr. USHAKOV believed that to say that a person could be authorized by an international organization to bind it by a treaty would be contrary to the practice of international organizations and their constituent instruments, since it would permit persons to replace the competent organs of organizations and possibly to act against the will of those organs.

42. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 50 to the Drafting Committee.

*It was so decided.*¹⁴

The meeting rose at 1 p.m.

¹⁴ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1558th MEETING

Friday, 22 June 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 51 (Coercion of a representative of a State or of an international organization)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 51 (A/CN.4/319), which read:

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

2. Mr. REUTER (Special Rapporteur) said that article 51 called for the same comments as article 50. It followed from the discussion on the latter text (1557th meeting) that article 51 should also be divided into two paragraphs, one dealing with States and the other with international organizations.

3. Mr. USHAKOV considered that article 51 raised the same problem as article 50. He therefore proposed that it be referred to the Drafting Committee.

4. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 51 to the Drafting Committee.

*It was so decided.*¹

ARTICLE 52 (Coercion of a State or of an international organization by the threat or use of force)

5. The CHAIRMAN invited the Special Rapporteur to introduce draft article 52 (A/CN.4/319), which read:

Article 52. Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

6. Mr. REUTER (Special Rapporteur) said that, apart from its title, draft article 52 reproduced without change the corresponding text of the Vienna Convention.²

7. Mr. USHAKOV wondered what was meant by "the threat or use of force" in the case of a treaty between two or more international organizations. He also wondered what was meant by the word "threat": was it the armed threat contemplated in the Vienna Convention, or any kind of political, diplomatic or economic pressure? In any case, he did not see how reference could be made to one international organization coercing another by the threat or use of force.

8. He therefore proposed that draft article 52 be divided into two paragraphs, one dealing with treaties between States and international organizations and the other with treaties between two or more international organizations.

9. Sir Francis VALLAT shared Mr. Ushakov's misgivings in so far as the United Nations Charter had in fact been drafted to govern relations between States, not relations between international organizations, and was worded accordingly. On the other hand, if regard were had to the principles of international law rather than of the Charter as such, there would seem to be a very real need for a provision on the lines of draft article 52, to cover the possibility of an international organization using force contrary to those principles.

¹ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

² See 1546th meeting, foot-note 1.

For example, supposing that an organization were established by six States for their collective self-defence, the question might arise whether the use of force by that organization was a genuine exercise of the right of self-defence in accordance with the principles of the Charter, or whether it constituted an attack on the territorial integrity and political independence of another State. Such an attack was a possibility, both in law and in fact, although it was obviously to be hoped that it would never happen, and could lead to the imposition of a treaty on the State attacked. There would surely be a lacuna in the draft articles if provision were not made for that kind of situation, and he, for one, would not be prepared to assert in those circumstances, on the basis of the limitation of the Charter to Member States, that such action was not contrary to the principles of international law embodied in the Charter and that the treaty in question should therefore not be regarded as void.

10. His reasoning on article 52, as on all the draft articles, was that it should be worded to meet contingencies, so that it would apply where it properly fell to be applied. That, again, was a problem which he thought should be exposed in the commentary.

11. Although an armed conflict between two organizations was perhaps a somewhat far-fetched idea, it was still a possibility that it would be unwise to exclude. A conflict between States could take place, for instance, under the guise of a conflict between two international organizations.

12. Mr. SCHWEBEL associated himself with Sir Francis Vallat's remarks.

13. Article 53 of the United Nations Charter provided for the use of force through regional arrangements or agencies, and it was of course to be hoped that such force would be applied only in accordance with the terms of the Charter, but he wondered whether modern history in fact gave grounds for confidence in that regard. There had been cases of military and other alliances using force against a State or proclaiming the intention of doing so under circumstances which, to put it charitably, were highly dubious and had raised serious questions of violation of the Charter and of international law. He did not think that the possibility of a State or group of States using force against an international organization could be excluded. An international organization might well be subjected to the threat or even the use of force by a powerful State. He was not thinking in that context of organizations such as UNESCO or ILO, but of the many other organizations that existed, such as customs unions and associations of a small number of States having a co-operative economic character. There could also be cases of two international organizations using force against each other. Again, he was thinking not of organizations such as UNESCO and ILO, but of, say, regional organizations set up for defence purposes. One man's view of what was defensive might be another man's view of what was offensive. That did not mean that it was not possible to make an objective judgement, but judgements often differed and any

such difference might well be expressed through an organization as well as through a State. In principle, therefore, he could see no grounds for objecting to the inclusion of an article on the lines proposed.

14. Mr. RIPHAGEN said that, as he read article 52, it was not restricted to the use of force by one of the parties to a treaty, since the use of force by a third party could also invalidate the treaty. Moreover, it did not presuppose the use of force by an international organization, although that was possible too. He therefore considered that article 52 was necessary and should be retained in the form proposed.

15. Mr. PINTO agreed on the need to retain draft article 52, but would like to know whether the Special Rapporteur intended to amplify the commentary by specifying that the article covered the use not only of armed force but also of other types of force. That question was bound to arise at any diplomatic conference at which the draft articles were considered.

16. Mr. NJENGA said he could accept draft article 52 in so far as an international organization might use force to procure the conclusion of a treaty, although that possibility was somewhat remote. However, he did not see what was to be gained by including the phrase "embodied in the Charter of the United Nations". In his view it was misleading, since, in effect, it referred to Article 2, paragraph 4, of the Charter, which opened with the words "all Members shall refrain..." and thus clearly had nothing to do with international organizations. He therefore considered that the reference to the Charter should be deleted. It would then be possible to take account not only of military force but also of other kinds of force—the point made by Mr. Pinto—and of current developments, as reflected 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,³ and of any results achieved by the Special Committee on enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. In other words, he believed that the article would be unduly limited by the reference to the Charter, and for no good reason.

17. Mr. SCHWEBEL said he would be most interested to hear the Special Rapporteur's views on the important point raised by Mr. Njenga. His own immediate reaction was that there would be merit in retaining the reference to the Charter since it was a standard reference, whose core was readily recognized as lying in Article 2, paragraph 4. Mr. Njenga had observed that the opening words of that paragraph were "All Members shall refrain...". He would respond by pointing out, first, that, as shown in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the United Nations had deliberately interpreted that provision as applying not only to all Members but to all States,

³ General Assembly resolution 2625 (XXV), annex.

and, secondly, that Article 2 of the Charter provided that: "The Organization and its Members... shall act in accordance with the following principles". If those principles were binding on the United Nations *qua* organization, why should they not also be binding on other international organizations?

18. A further point was that, even if—despite the terms of the opening phrase of Article 2 of the Charter—the obligations were regarded as binding only on States and not on international organizations, the sole concern of the Commission in that context was with organizations of States, in other words, with intergovernmental organizations. If States, in their individual capacity, undertook what was obviously a *jus cogens* obligation, they must also be bound thereby in their collective capacity, when they acted through the medium of an international organization.

19. Mr. FRANCIS said that he also agreed on the need for article 52, because the possibility of the threat or use of force against or by an international organization was not so very remote. For example, an organization that had sent peace-keeping forces into a territory might make use of their presence to secure the host country's signature to a treaty. Conversely, it was not inconceivable that the chief executive of a United Nations regional office might be compelled by the threat of an intemperate head of State—say, to occupy the regional headquarters building—to take certain action in regard to the negotiation of a treaty.

20. Whether or not the reference to the Charter should be retained in the draft article would depend on the answer to Mr. Pinto's question. During the debates in the Sixth Committee of the General Assembly on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, as well as on the Definition of Aggression, the smaller States had argued that the concept of force should include not only armed force but also other kinds of force, although there had been a body of opinion that favoured the traditional meaning. Consequently, if it was the Special Rapporteur's intention to broaden the concept of force in draft article 52, it would make for greater flexibility to omit the phrase "embodied in the Charter of the United Nations".

21. Sir Francis VALLAT said that the term "force" had been the subject of close scrutiny at the United Nations Conference on the Law of Treaties, which had adopted a resolution concerning measures that could be described as falling short of armed force.⁴ He regarded it as axiomatic that the wording of draft article 52 would be interpreted in essentially the same way as the selfsame wording contained in article 52 of the Vienna Convention, which had been considered in detail and at great length before being adopted by the

Conference. The Commission's present task was to adapt the terms of the Conference on the Law of Treaties to meet the needs of international organizations, and it seemed unnecessary to alter the terms of article 52 of the Vienna Convention simply because the draft article covered not only States but also international organizations.

22. In discussing the threat or use of force, it was natural to take account of the first part of Article 2, paragraph 4, of the Charter, which referred to the threat or use of force "against the territorial integrity or political independence of any State", but it was equally natural to overlook the latter part of the paragraph, which required that States should refrain from the threat or use of force "in any other manner inconsistent with the purposes of the United Nations". The legal implications of the whole of that paragraph would be covered if the draft article followed the wording of the Vienna Convention. He was well aware that the interpretation of Article 2, paragraph 4, of the Charter was open to discussion, but the many purposes of the United Nations were enumerated in Article 1 of the Charter, so that the scope of Article 2, paragraph 4, was not as restricted as the discussion appeared to indicate. The reference to the principles of international law embodied in the Charter showed the intention to use a sufficiently broad form of words that was hallowed by usage and for which there was a precedent in article 52 of the Vienna Convention. Hence it would be wise not to tamper with that wording.

23. Mr. FRANCIS said his concern was simply to determine whether the traditional interpretation of the concept of force had changed since the discussions at the United Nations Conference on the Law of Treaties, in other words, during the elaboration of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States or during the deliberations of the Special Committee on the Question of Defining Aggression. He pointed out that in 1977, during the Sixth Committee's consideration of the item concerning the conclusion of a world treaty on the non-use of force in international relations, the view had been expressed that force should be regarded as something more than armed force alone.⁵

24. Mr. PINTO said that the object of his earlier question had been to ascertain whether the Special Rapporteur intended to indicate in his commentary that the interpretation of the phrase "principles of international law embodied in the Charter of the United Nations" had evolved or whether, since the draft articles simply adapted the terms of the Vienna Convention to international organizations, there was no need for further elaboration of the concept of force to meet some of the preoccupations that would undoubtedly be expressed at any diplomatic conference convened to consider the draft articles.

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. 285, document A/CONF.39/26, annex.

⁵ See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 220.

25. Ten years had passed since the Conference on the Law of Treaties, and in his opinion it could not be affirmed that the concept of force had remained unchanged. Presumably Mr. Njenga considered the phrase "principles of international law embodied in the Charter of the United Nations" to be inadequate not because the Charter did not relate to interational organizations, but rather because it failed to take full account of all the possibilities for the use of force by international organizations that had now emerged. If the commentary did not include any explanations concerning draft article 52, it might give the impression that the Commission had been unaware of the developments that had taken place.

26. Mr. RIPHAGEN said that, having been present at the Conference on the Law of Treaties and taken part in the discussions on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, he was in favour of retaining the wording of draft article 52 as it stood. At the Conference, the stability of treaties had been a prime consideration for many States. The Commission should not act hastily and approve an article that would have the effect of invalidating a treaty; it should be remembered that the use of force included the legitimate use of force by States—for instance, in self-defence or on the orders of the Security Council. The legitimate use of force might lead to the conclusion of a peace treaty, and it was very easy to imagine circumstances in which an international organization, such as the United Nations, would be a party to a peace treaty. The States represented at the Conference on the Law of Treaties had been well aware that it was not possible to declare all peace treaties invalid. Moreover, as was apparent from its title, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operating among States in accordance with the Charter of the United Nations in fact elaborated on the principles of the Charter. Consequently draft article 52 should also be interpreted in the light of that Declaration.

27. For those reasons, he thought the wording proposed was perfectly satisfactory and he wished to reiterate that, to his mind, the article was not confined to the use of force by a party to a treaty; it also covered the use of force by a third State or by an international organization or on the orders of an international organization.

28. Mr. USHAKOV considered that for treaties between States and international organizations the rule of the Vienna Convention should be retained as it stood. Article 3 of the Vienna Convention specified that the fact that the Convention did not apply "to international agreements concluded between States and other subjects of international law or between such other subjects of international law... shall not affect... the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties". The Vienna Convention was thus applicable to relations between States, even under agreements to which international organizations

were parties. Consequently, if a State used threats or force against another State or an international organization to procure the conclusion of a treaty between States and international organizations, the Vienna Convention applied.

29. Nevertheless, the text of the Convention could not be retained for treaties concluded between international organizations only. It was not possible in that case to refer to the principles of the United Nations Charter, since States and international organizations that were not members of the United Nations were not bound by the Charter.

30. He believed, therefore, that the rule of the Vienna Convention should be retained for treaties between States and international organizations and that a separate rule should be drafted for treaties between two or more international organizations. In his view, it would be impossible to draft a single rule for both kinds of treaty, since such a rule would not apply to international organizations other than the United Nations. Thus it would not be a general rule applicable to all situations.

31. With regard to the use of armed force, the question arose whether, in the example given by Sir Francis Vallat, the use of armed force between two international defence organizations would be directed against one of those organizations *per se* or against its member States. In the former case, would the armed force be directed against the headquarters of the organization, its organs, its secretariat or its executive director?

32. In the case of simple economic or financial pressure, could an international monetary fund, for example, refuse to grant a loan to a State because the conclusion of the loan agreement had been procured by some kind of pressure? He thought the Commission should elucidate all those points in the commentary.

33. Sir Francis VALLAT said that Mr. Riphagen's pertinent comment regarding the use of force on the orders of the Security Council brought to mind the provisions of Chapter VIII of the Charter, concerning regional arrangements, which were relevant to the discussion. Article 53 of the Charter contemplated quite clearly not only the use of armed force, but also the illegal use of force by regional agencies. The Article provided that "the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority", but that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council"; it then proceeded to specify an exception, namely, "measures against any enemy State". Thus the Charter established very definite principles of law with respect to regional agencies, which must, in the nature of things, be regarded as international organizations.

34. Mr. REUTER (Special Rapporteur) said that the Commission should not take a position on the nature of force, but confine itself to recalling, in its commentary, what had been said on the subject at the

Conference on the Law of Treaties. It should also ask the Secretariat to extract from United Nations records the statements made on that subject in the General Assembly.

35. He pointed out that the Conference on the Law of Treaties could have referred, in article 52 of the Vienna Convention, only to the Charter of the United Nations. The reason why it had referred to the principles of international law embodied in the Charter was that it had intended the article to apply also to treaties concluded prior to the Charter. For it had considered that, during the period immediately preceding the adoption of the Charter, States had concluded a number of treaties that should be regarded as void. The commission had been asked how long those principles had been in existence, since if they had always existed most territorial treaties could be challenged, which would endanger the international territorial order. The Commission had said that it was not qualified to answer that question, but that the principles had certainly been in force in or about 1928, when the League of Nations had adopted its main instruments.

36. In connexion with the definition of aggression, the General Assembly had already raised the question whether an international organization could resort to the unlawful use of armed force. Article 1 of the Definition of Aggression⁶ specified that the term "State" "includes the concept of a 'group of States' where appropriate". In his view, what was at issue was not so much whether a distinction ought to be made between treaties concluded between States and international organizations and treaties concluded between international organizations only, as whether an international organization could use force unlawfully.

37. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 52 to the Drafting Committee.

*It was so decided.*⁷

The meeting rose at 1 p.m.

⁶ General Assembly resolution 3314 (XXIX), annex.

⁷ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1559th MEETING

Monday, 25 June 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Welcome to Mr. Barboza

1. The CHAIRMAN congratulated Mr. Barboza on his election and welcomed him to the Commission.
2. Mr. BARBOZA thanked the Commission for the welcome extended to him and for the honour of being elected to its membership—an honour that entailed an obligation to contribute to the best of his ability towards maintaining the Commission's traditionally high standards of work.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR (*concluded*)

ARTICLE 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))

3. The CHAIRMAN invited the Special Rapporteur to introduce draft article 53 (A/CN.4/319), which read:

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

4. Mr. REUTER (Special Rapporteur) pointed out that draft article 53 was identical with the corresponding article of the Vienna Convention,¹ which stipulated that States could not derogate from peremptory norms of general international law. As international organizations were established by treaties concluded by States, it was unthinkable that they should be exempted from compliance with those norms. It was therefore appropriate to include in the draft an article equivalent to article 53 of the Vienna Convention.

5. It was open to question whether the phrase "the international community of States" was altogether appropriate in the article under consideration and whether the words "and international organizations" should not be added. In his opinion, the addition of those words would only cause difficulties. The international community of States was a unitary notion, which did not call for any mention of international organizations.

6. Mr. TSURUOKA approved of the draft article under consideration.

¹ See 1546th meeting, foot-note I.

7. Mr. USHAKOV was not sure whether peremptory norms of general international law, which were undoubtedly binding on States, were also binding on international organizations. That question could be dealt with in the commentary.

8. Mr. FRANCIS said he could accept article 53 in the form proposed by the Special Rapporteur. He believed, however, that it would be preferable to delete the words “of States” from the phrase “international community of States as a whole”, since the article imposed obligations not only on States but also on international organizations as subjects of international law.

9. Mr. DÍAZ GONZÁLEZ said that the discussions at the United Nations Conference on the Law of Treaties had clearly shown the need and the justification for the text of article 53 of the Vienna Convention. There was certainly no reason why international organizations should be exempted from the application and observance of rules of *jus cogens*. He therefore fully endorsed the terms of the draft article and the Special Rapporteur’s view that “the international community of States as a whole” should be regarded as a unitary concept.

10. Sir Francis VALLAT said that draft article 53 was extremely important and that its terms must apply not only to States but also to international organizations. Like Mr. Francis, however, he had some hesitation about including the words “of States”.

11. Article 53 of the Vienna Convention had been studied with exceptional thoroughness and the phrase “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole” had been adopted only after long discussion. The Conference had taken the view that, since it was not possible to seek the acceptance and recognition of each and every State in the world, it was essential that a peremptory norm of general international law should have been accepted by the international community as a whole. The reasoning behind that approach had been that peremptory norms were of an exceptional character in the context of traditional international law and should not be accepted lightly. The same reasoning applied in the case of international organizations, and he would have been inclined to press that point of view were it not for the fact that article 2, paragraph 1 (i),² defined an international organization as an intergovernmental organization, in other words, an inter-State organization. Consequently acceptance and recognition by the international community of States of the fact that a norm was peremptory in character indirectly signified the same acceptance and recognition on the part of international organizations.

12. On the other hand, deletion of the words “of States” would give rise to a number of difficulties, since the article would then depart from the correspon-

ding text of the Vienna Convention, and would have the effect of placing States and international organizations on the same footing as members of the international community. It was one thing to say that international organizations had international legal personality and the capacity to include treaties, but quite another to place international organizations in the same position as States in regard to peremptory norms of general international law. Despite some hesitation, therefore, he was inclined to favour the text submitted by the Special Rapporteur.

13. Mr. REUTER (Special Rapporteur) pointed out that, if the Commission decided in favour of the phrase “the international community as a whole”, it would have to justify the deletion of the words “of States”. However, such deletion could assume a doctrinal significance that might not be accepted by all Governments. There were of course several categories of subjects of international law, as was shown by the advisory opinion of the International Court of Justice in the case concerning *Reparation for injuries suffered in the service of the United Nations*,³ but it was a fact that there were original members of the international community—States—and derivative members. States could create legal entities—international organizations—which formed part of the international community and through which they could act. If the Commission affirmed that international organizations could establish precedents binding States, it would be entering the sphere of international custom, which would certainly cause a stir. Some might claim that individuals were also subjects of the international community as a whole. To avoid alarming Governments without cause, it would probably be preferable to retain the wording of the article as it stood.

14. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 53 to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties) and

ARTICLE 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)

15. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 54 and 57 (A/CN.4/319) together, as they were very similar. The articles read:

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

³ *I.C.J. Reports 1949*, p. 174.

⁴ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

² *Ibid.*, foot-note 4.

(b) at any time by consent of all the parties after consultation with the States or international organizations which have only the status of contracting States or contracting international organizations.

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the States or international organizations which have only the status of contracting States or contracting international organizations.

16. Mr. REUTER (Special Rapporteur) pointed out that a distinction had been made in the Vienna Convention between "contracting States" and "parties". Before the entry into force of a multilateral treaty, States normally began by individually expressing their consent to be bound by the treaty. They thus acquired the status of contracting States. When the conditions for entry into force of the treaty had been met, the contracting States acquired the status of parties. Sometimes, however, a contracting State might not become a party at that time because, when expressing its consent to be bound by the treaty, it had made the effective origination of its obligations under the treaty conditional on the completion of certain formalities. That would be the case if a State wished first to bring its internal law into line with the treaty in question. The somewhat surprising wording of subparagraph (b) of articles 54 and 57 of the Vienna Convention was explained by the desire to cover that case.

17. Draft articles 54 and 57 had been modelled on the corresponding articles of the Vienna Convention, since an international organization could find itself in the same situation as a State which, at the time of expressing its consent to be bound by a treaty, postponed the entry into force of the treaty for itself pending completion of certain procedures. An international organization might, for example, wish to go back on one of its decisions before a certain treaty entered into force for it.

18. In conclusion, he explained that the reason why he had refrained, in the two articles under consideration, from distinguishing between treaties concluded between States and international organizations and treaties concluded between international organizations was that, as the Commission had already had occasion to point out, the expression "States or international organizations" did not necessarily imply the presence of States and was therefore applicable to both categories of treaty.

19. Sir Francis VALLAT observed that the word "only", which did not appear in the corresponding articles of the Vienna Convention, had been inserted in subparagraph (b) of draft articles 54 and 57; the Drafting Committee would doubtless wish to consider that point.

20. Mr. FRANCIS, referring to subparagraph (b), said that the equivalent provisions of the Vienna Conven-

tion were intended to apply to all States that had not completed certain procedures, whereas the terms of draft articles 54 and 57 would apply both to States and to international organizations. He wondered whether, in the phrase "after consultation with the States or international organizations", the word "or" should not be replaced by the word "and", for it was possible to take the present wording as meaning either States or international organizations.

21. Mr. REUTER (Special Rapporteur) pointed out that, if the word "or" were replaced by the word "and", a distinction would have to be made between the two broad categories of treaties in subparagraph (b) of each of the two articles, and the latter part of that provision would have to be drafted on the following lines: "after consultation, as the case may be, with the international organizations which have only the status of contracting international organizations, or with the States and international organizations which have only the status of contracting States or contracting international organizations". If the Commission could accept the sense he intended to give to the word "or", it would not have to make that distinction and the text would be rather less cumbersome.

22. Mr. USHAKOV observed that a "State party" was still a "contracting State" and that the formula "after consultation with the other contracting States" had been rightly used in the Vienna Convention. In the draft articles under consideration, the following formula could be used: "after consultation with the other contracting international organizations or with the other contracting States and the other contracting international organizations, as the case may be".

23. Mr. TSURUOKA said that the articles under consideration raised only questions of drafting, and suggested that they be referred to the Drafting Committee.

24. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft articles 54 and 57 to the Drafting Committee.

*It was so decided.*⁵

ARTICLE 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

25. The CHAIRMAN invited the Special Rapporteur to introduce draft article 55 (A/CN.4/319), which read:

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

26. Mr. REUTER (Special Rapporteur) said that draft article 55 was identical with the corresponding article

⁵ For consideration of the texts proposed by the Drafting Committee, see 1576th meeting.

of the Vienna Convention. He emphasized that the words "by reason only" were intended to show that other reasons could result in the termination of a multilateral treaty when a party withdrew from it, although that was rare in the case of general multilateral treaties. On the other hand, restricted multilateral treaties might lose their object and purpose if a single one of the parties withdrew. When preparing the draft articles on reservations, the Commission had already considered the case where several States and an international organization concluded a treaty for the purpose of providing technical assistance to a State through the organization. As the organization would assume functions essential to the application of the treaty, the treaty would terminate if the organization ceased to be a party to it. Although such cases did not seem to have arisen yet, they must be taken into account, and the article under consideration was justified.

27. Mr. USHAKOV pointed out that a treaty concluded between States and international organizations could contain a provision making its entry into force conditional on ratification by a minimum number of States and a minimum number of organizations. That case was not covered by the wording of the article under consideration.

28. Mr. REUTER (Special Rapporteur) admitted that that possibility, although somewhat theoretical, could be mentioned in the commentary to article 55 or taken into consideration in the text of the article. In the latter case, the text would have to be followed by a phrase on the following lines: "whether this number is expressed in relation to the total number of parties or is fixed in consideration of their nature".

29. Sir Francis VALLAT said that draft article 55 was rather unusual, since in modern conventions it was usually the number of instruments of ratification or acceptance deposited, not the number of parties, that was the key factor in bringing the convention into force. That was particularly true of multilateral treaties drafted under United Nations auspices. The depositing of an instrument of ratification was not necessarily the same thing as becoming a party to the treaty, however, since there might be some delay in becoming a party. Certain maritime conventions, for instance, provided for an interval of perhaps 12 months between the date of ratification and the date of entry into force, to allow States time to make the necessary legislative arrangements. In such cases, the final provisions determined whether entry into force was to depend on the number of instruments of ratification deposited or on the number of parties.

30. As he saw it, it was not a question of synchronizing modern treaty practice with the draft article, since the Commission was bound to use the test of parties. One of the advantages of using the term "parties" was that, under the definitions that had been provisionally adopted, it would cover both States and international organizations. Theoretically, however, the possibilities of variation were quite considerable. On the one hand, a treaty might be open to States and

international organizations without distinction, in which case the number of instruments of ratification or acceptance would be the decisive factor in bringing the treaty into force. On the other hand, there certainly had been and would be cases in which the very existence of a multilateral treaty depended on an international organization becoming a party. It seemed to him that the draft articles would have no relevance in such cases, because the treaty would come into force only when the international organization concerned and, in addition, a certain number of States, had become parties or deposited their instruments. In other words, something other than the question of number was involved. As long as it was merely a question of number, however, it did not matter whether the party happened to be an international organization or a State.

31. Logically, therefore, rather than seek to redraft the article, which would only add to the complications, it would be better to bring out those points in the commentary, stressing in particular that the draft article dealt only with the mere fact that the number of parties fell below that necessary for the entry into force of a multilateral treaty.

32. Mr. REUTER (Special Rapporteur) noted that the comments of the members of the Commission concerned mainly the commentary to draft article 55, which ought to bring out the usefulness of the provision.

33. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 55 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)

34. The CHAIRMAN invited the Special Rapporteur to introduce draft article 56 (A/CN.319), which read:

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than 12 months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

35. Mr. REUTER (Special Rapporteur) pointed out that the United Nations Conference on the Law of Treaties had had to decide whether a treaty that con-

⁶ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

tained no provision regarding its termination and did not provide for denunciation or withdrawal could be subject to denunciation or withdrawal. It had been possible to regard treaties as eternal, in accordance with the principle *pacta sunt servanda*, or, on the contrary, to consider that each party could withdraw when it wished, which would have deprived treaties of all meaning. Subject to the reservation of a fundamental change of circumstances, the Conference had taken an intermediate position: in principle, such treaties could not be subject to denunciation or withdrawal unless it was established that the parties had intended to admit the possibility of denunciation or withdrawal, or unless a right of denunciation or withdrawal might be implied from the nature of the treaty. The second condition had given rise to much controversy at the Conference.

36. Because of that second condition, he had hesitated a long time before proposing an article 56 that was identical with the corresponding article of the Vienna Convention. It was indeed open to question whether there existed any treaties concluded between States and international organizations whose nature might imply a right of denunciation or withdrawal. Personally, he believed that headquarters agreements, for example, might be of such a nature. Every international organization had the right to choose its headquarters as provided in its constituent instrument, and it could not be supposed that the competent organs of an organization intended to renounce that right when concluding a headquarters agreement. Conversely, was it conceivable that a headquarters agreement could give a State acting as host to an organization the right to keep that organization's headquarters in its territory? From the legal point of view, it could be accepted that it was in the nature of a headquarters agreement to be subject to denunciation by the organization concerned. It was indeed difficult to admit that an organization could lose its right to choose its own headquarters. In none of the headquarters agreements he had examined had he found either a duration clause or a denunciation clause. In short, the compromise solution embodied in article 56 of the Vienna Convention also seemed valid in the context of the draft articles.

37. Mr. USHAKOV, referring to paragraph 1(a), pointed out that, in the case of a treaty between international organizations, the denunciation or withdrawal mentioned in that provision would be the act of any international organization party to the treaty. In the case of a treaty between States and international organizations, on the other hand, the denunciation or withdrawal might be made only by an international organization or only by a State. The point would have to be clarified, if not in the text of the article then at least in the commentary.

38. Mr. REUTER (Special Rapporteur) illustrated that point by an example. Supposing six States and an international organization concluded a technical assistance treaty which the international organization was responsible for implementing. In that case, the right to denounce the treaty or withdraw from it was conferred on the international organization, but not on the States

parties. In the opposite case, it would be the States, but not the international organization, that could denounce the treaty or withdraw from it. That question could certainly be considered by the Drafting Committee or dealt with in the commentary.

39. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 56 to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)

40. The CHAIRMAN invited the Special Rapporteur to introduce draft article 58 (A/CN.4/319), which read:

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

41. Mr. REUTER (Special Rapporteur) said that, as indicated in the commentary, draft article 58 was identical with the corresponding article of the Vienna Convention. He pointed out that articles 41 and 58 of the Vienna Convention were perfectly parallel. The provisions concerning agreements *inter se* to suspend the operation of a multilateral treaty were exactly the same as the provisions concerning agreements *inter se* to modify a multilateral treaty. There was the same correspondence between draft article 58 and draft article 41, which the Commission had examined at its thirtieth session⁸ and for which the Drafting Committee had just adopted variant II. That variant followed the text of the Vienna Convention, whereas variant I departed from it by providing for three categories of multilateral treaties. In his view, the choice made by the Drafting Committee in deciding to follow the text of the Vienna Convention for article 41 predetermined the wording of draft article 58. He therefore suggested that that draft article 58 be referred to the Drafting Committee.

⁷ *Idem.*

⁸ See *Yearbook...* 1978, vol. I, p. 185, 1508th meeting, para. 28.

42. Mr. USHAKOV said that draft article 58 raised the same problem as article 58 of the Vienna Convention: the title referred to "suspension of the operation of a multilateral treaty", which seemed to indicate that the whole treaty could be suspended, whereas paragraphs 1 and 2 dealt only with suspension of the operation of certain provisions of the treaty, which implied that the treaty subsisted. Apart from that inconsistency, however, draft article 58 was acceptable and could be referred to the Drafting Committee.

43. Mr. REUTER (Special Rapporteur) thought Mr. Ushakov was right and that the title of article 58 of the Vienna Convention should have read: "Suspension of the operation of provisions of a multilateral treaty by agreement between certain of the parties only". For his part, he had not wished to depart from the text of the Convention.

44. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 58 to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

45. The CHAIRMAN invited the Special Rapporteur to introduce draft article 59 (A/CN.4/319), which read:

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

46. Mr. REUTER (Special Rapporteur) pointed out that draft article 59, which was identical with the corresponding article of the Vienna Convention, dealt with the intention of the parties and therefore concerned the purely consensual aspects of international agreements.

47. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 59 to the Drafting Committee.

*It was so decided.*¹⁰

⁹ For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

¹⁰ *Idem*.

ARTICLE 60 (Termination or suspension of the operation of a treaty as a consequence of its breach)

48. The CHAIRMAN invited the Special Rapporteur to introduce draft article 60 (A/CN.4/319), which read:

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

- (i) in the relations between themselves and the defaulting State or international organization; or
- (ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

49. Mr. REUTER (Special Rapporteur) said that draft article 60 followed the corresponding article of the Vienna Convention with a few minor drafting changes. It was a very important article which, although not purporting to deal with the problem of responsibility, considered the consequences that a breach of a bilateral or a multilateral treaty might have on relations between the parties.

50. Mr. USHAKOV thought it might be better to deal separately with treaties between States and international organizations and treaties between international organizations only. However, he left it to the Drafting Committee to decide that point.

51. Sir Francis VALLAT saw no need to distinguish in the draft article between the different categories of treaties, since the question of the consequences of a breach of a treaty by a State or an international organization did not really depend on the nature of an international organization. That being so, there was no

need to recast the article, although some minor drafting points might require attention.

52. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 60 to the Drafting Committee.

*It was so decided.*¹¹

The meeting rose at 5.30 p.m.

¹¹ *Idem.*

1560th MEETING

Tuesday, 26 June 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of matters other than treaties (A/CN.4/322 and Corr.1 and Add.1 and 2)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE A (Transfer of State archives)

1. The CHAIRMAN invited the Special Rapporteur to introduce his eleventh report on succession of States in respect of matters other than treaties (A/CN.4/322 and Corr.1 and Add.1 and 2), and in particular draft article A (*ibid.*, para. 89), which read:

Article A. Transfer of State archives

1. Except as otherwise agreed or decided, and subject to the provisions of paragraph 3 below, State archives of whatever nature that relate exclusively or principally to the territory to which the succession of States relates, or that belong to that territory, shall pass to the successor State.

2. The successor State will permit any appropriate reproduction of the State archives that pass to it, for the purposes of the predecessor State or of any interested third State.

3. Except as otherwise agreed or decided, the predecessor State will keep the originals of the State archives referred to in paragraph 1 above, if they are archives of sovereignty, subject to the proviso that it will authorize any appropriate reproduction thereof for the purposes of the successor State.

2. Mr. BEDJAOU (Special Rapporteur) drew attention to the fact that, by its resolution 33/139, adopted at its thirty-third session, the General Assembly had requested the Commission to complete, at its thirty-first session, the first reading of the draft articles on succession of States in respect of State property and State debts. At the Commission's previous session, some members had also expressed the hope that the draft articles would be supplemented by provisions on succession to State archives. By submitting, in his eleventh report, six draft articles on succession to State archives, he had endeavoured to comply with those two requests. Since the problem of succession to State archives was a complex and difficult one, he believed that the Commission should help States to avoid disputes concerning archives by proposing rules on the subject. He had also seen in that problem an opportunity of enriching the draft articles. Lastly, if the draft articles were to be submitted to a diplomatic conference, he believed it would be better for the conference to have too much material before it rather than too little.

3. The adoption of provisions on succession to State archives was further justified on four grounds related to the specific character of State archives and to the special problems they raised in the case of a succession of States. First, although they were movable property of the type whose transfer had already been considered by the Commission, State archives had the particular characteristic of being property that could be reproduced, which facilitated their transfer by making it possible to satisfy both the predecessor State and the successor State. Secondly, State archives constituted a common heritage. It was therefore necessary, while respecting the integrity of a collection of archives, to recognize the rights of all States that shared in that heritage. Thirdly, while it was possible to conceive of a successor State existing in the absence of certain movable or immovable property—for example, a navy—without prejudice to its viability, it was not possible to conceive of a State without archives. Fourthly, archives could be the documentary evidence of movable or immovable property transferred to the successor State or retained by the predecessor State.

4. The question of State archives had given rise to extensive discussion, of which he had endeavoured to give some account in his eleventh report. Although international organizations had never concerned themselves with the fate of other movable property in the event of a succession of States, they had endeavoured to alert States to the problem of archives; that was true not only of UNESCO but also of the United Nations and other international organizations such as OAU, or the conferences of the non-aligned countries. It would therefore be regrettable if the Commission did not adopt provisions on such an important question.

5. To facilitate the Commission's task and enable it to complete its first reading of the draft articles on State property and State debts at the current session, as the General Assembly had requested, he proposed that, while the Commission was examining the six

draft articles on State archives, the Drafting Committee should review the 25 draft articles previously adopted.¹ Those 25 draft articles presented no major difficulties and the few problems outstanding could be resolved by the Drafting Committee. As to the provisions on the peaceful settlement of disputes, which were to be added to the draft articles, he proposed that the Commission should follow the Vienna Convention on Succession of States in respect of Treaties.²

6. His eleventh report was divided into two chapters, one dealing with State archives in modern international relations and in succession of States and the other with provisions peculiar to each type of succession of States in respect of State archives.

7. In chapter I, he had discussed the problem of State archives in modern international relations, starting with the definition of archives affected by succession of States. He had not considered it necessary to devote an article to that definition, but had analysed the content of the concept of archives and sought to define that concept in the light of State practice regarding succession of States.

8. From the answers of 33 States to the questionnaire drawn up by the round table conference on archives, it could be inferred that "archives" were generally taken to mean "the documentary material amassed by institutions or by natural or legal persons in the course of their activities, and deliberately preserved".³ State archives could therefore be defined as the documentary material amassed by State institutions in the course of their activities and deliberately preserved by them.

9. In his previous reports, he had drawn a distinction between administrative archives, which served administrative purposes, and historical archives, which were used for research. But that distinction was not absolute; first, because historical archives were often no more than old administrative archives, and secondly, because administrations sometimes consulted historical archives in their day to day business and, conversely, research workers made greater use of current administrative archives when access to them was permitted by the State.

10. In any case, it was not easy to define archives, because there was no absolute distinction between the categories of archival, library and museum items. Writing was not a decisive criterion, because archives were not necessarily written documents; they could include, for example, numismatic collections, iconographic documents, photographs, sound records and cinematographic films. Archival items could be found in libraries or museums and, conversely, library or

museum items could be found in archives. National archives could also include objects seized by the police and exhibits relating to criminal proceedings, as well as models, drawings, prototypes, scale models and samples.

11. State practice, of which there was a great abundance, showed that the expression "State archives" was generally understood in the broadest sense to cover "State documents of every kind". In the event of a succession of States, it was the internal law in force in the predecessor State at the time of succession that indicated what was meant by State archives, and the successor State was bound by that definition. The expression "State documents of every kind" showed that archives of every kind belonging to the predecessor State might be included. It thus referred to ownership. It also referred to the type of archives, whether diplomatic, political, administrative, military, civil or ecclesiastical, historical or geographical, legislative, judicial, financial, fiscal or cadastral; to the character of the archives, whether secret or accessible to the public; and to the nature of the items, whether hand-written or printed, drawings, photographs or films, paper or parchment, originals or copies. The detailed list set out in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, concluded pursuant to the Treaty of Peace of 10 February 1947,⁴ clearly showed the diversity of documents covered by the expression "State archives".

12. Archives played a very important role in the modern world. According to a group of experts convened by UNESCO in March 1976, they were "an essential part of the heritage of any national community" because "not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights".⁵ Moreover, the scientific and technological revolution and the advances in data processing had changed the factors of the problem of State archives in State succession. The difficulties that had formerly arisen between States through the indivisibility of archives could now be overcome in part thanks to modern means of reproduction. Nevertheless, a reproduction, however faithful, was not the same as the original document. The reproduction of documents was only a means of facilitating the transfer of archives between the predecessor State and the successor State, and should not obscure the fact that the successor State had the right to ownership of the archives.

13. In a world in which information had become one of the keys to power, the possession of archives and their exploitation was of capital importance, but that importance also derived from the fact that archives were an essential part of the cultural heritage of any national community. That explained the interest of

¹ For the text of all the draft articles adopted so far by the Commission, see *Yearbook... 1978*, vol. II (Part Two), pp. 111 *et seq.*, document A/33/10, chap. IV, sect. B, 1.

² For the text of the Convention, see *Official Records of the United Nations Conference on Succession of States in respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31.

³ See A/CN.4/322 and Corr.1 and Add.1 and 2, para. 8.

⁴ *Ibid.*, para. 23.

⁵ *Ibid.*, para. 25.

UNESCO in the problem and the measures it was taking for the restitution of archives, not only as such, but also in the context of the reconstitution and protection of national cultural heritages. Peoples liberated from colonialism were now claiming the right to their cultural heritage in the framework of a new international cultural order; they were seeking a lost collective "cultural memory" and their cultural identity, which constituted the very basis of their national identity. Thus the Fourth Conference of Heads of State or Government of the Non-aligned Countries, held at Algiers in September 1973, had adopted a declaration on the preservation and development of national cultures in which it had emphasized "the need to reassert indigenous cultural identity and eliminate the harmful consequences of the colonial era, and call for the preservation of their national culture and traditions".⁶ Similarly, in its resolution 31/40, of 30 November 1976, the General Assembly had declared its conviction "that the protection by all means of national culture and heritage is an integral part of the process of preservation and future development of cultural values", and had affirmed "that the restitution to a country of its... manuscripts, documents and any other cultural or artistic treasures constitutes a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values".

14. Thus the object of the new international cultural order was that each people should have a right to its cultural heritage, and in particular to its archives. At the present time, however, all or nearly all the sources of African, Asian and Latin American history were under European control, in so far as they were preserved in European archives.

15. State practice regarding archives in cases of succession of States showed that almost all succession agreements concluded between European countries from 1600 to the present day contained provisions on the transfer of archives, whereas agreements on State succession concluded under decolonization arrangements practically never contained such provisions. Similarly, while the removal of archives had occurred at all times and places, such archives had nearly always been restored to their owners in the end, except in cases of decolonization. State practice also showed that administrative archives, which were the most necessary for the conduct of the routine business of the State, had nearly always been left to the successor State. Historical archives, on the other hand, had given rise to many more difficulties than administrative archives; their transfer had tended to depend on circumstances, and it was not always possible to discover what principles had determined their transfer to the successor State or, conversely, their retention by the predecessor State.

16. He believed that there were several reasons for the absence of clauses concerning archives in most of

the State succession agreements concluded in cases of decolonization. First of all, decolonization had not been complete at the outset, and the problem of archives had arisen only later. Moreover, the newly independent States had immediately been faced with urgent economic problems which had prevented them from realizing the importance of the problem of archives. Their lack of interest in the problem was also explained by the underdevelopment they had inherited from colonialism. Finally, the power relationship that had existed between the former administering Powers and the newly independent States had enabled those Powers to settle the problem of archives to their own advantage.

17. In view of the complexity of the problem, he thought the Commission should confine itself to establishing a general legal framework, leaving it to the States concerned to work out flexible arrangements in each particular case. The Commission should take account of the new demands of States regarding their right to archives and to their cultural heritage. It should also promote cultural exchanges between States, to enable research workers from every State to have access to the historical archives of other States, since archives relating to the history of a State were nearly always dispersed among several countries. It should thus make all countries aware of their interdependence in regard to historical archives, so that they might learn to be capable, in the words of UNESCO, of "managing mankind's knowledge"⁷ together.

18. He believed that the problems relating to disputes over archives should be demystified. If legitimate, a transfer of archives should not be regarded as a depletion of the national heritage, since co-operation between the predecessor State and the successor State could facilitate the transfer. Irregular additions to archives should be avoided. It was also necessary to refrain from delaying tactics, which merely prolonged disputes. Finally, the possibilities of reproduction on microfilm must not obscure the right of ownership of original documents.

19. The principle of the transfer from the predecessor State to the successor State was even more important for archives than for other State property, since archives were property pertaining to the sovereignty and the very existence of the State. That being so, documents that gave rise to disputes over archives must be regarded as being of interest to both the predecessor State and the successor State. All negotiations should be based on recognition of that mutual interest and be conducted in good faith by the two States with a view to a satisfactory settlement. Such a settlement might result from the application of several principles.

20. The principle of territorial origin applied in the case of removal of archives from the territory to which the succession of States related. That principle concerned archives originating in the territory, the concept

⁶ *Ibid.*, para. 55.

⁷ *Ibid.*, para. 67.

of origin implying the concept of ownership of the archives. The principle of territorial origin, which had initially been applied to administrative archives, had also been applied to historical and cultural archives. However, it was not an absolutely reliable criterion, for it sometimes happened that archives originating in the territory to which the succession related, and organically linked with that territory, were not transferable, so that the principle could not be applied.

21. The principle of functional pertinence made it possible to transfer archives that had not originated in the territory, but that related to it. There were several ways of moderating the effects of the application of that principle. First, microfilming could be used. Secondly, the principle of respect for the integrity of collections of archives could be taken into consideration, according to which it was necessary to respect the indivisible whole constituted by the central archives of the predecessor State concerning the territory to which the succession of States related. Thirdly, account could be taken of the concept of common heritage, according to which the archives could be of interest to both the predecessor State and the territory to which the succession related. That concept, which had emerged in UNESCO, could provide a solution in so far as States were prepared to resort to it in good faith and refraining from any improper appropriations.

22. The principle of the territoriality of archives implied the devolution of a territory's documents in such a way as to establish its rights, enable it to meet its obligations, preserve administrative continuity and protect the interests of the local population, in other words, to contribute to the viability of the territory.

23. Two subsidiary principles must also be mentioned: the right to a substitute copy and the right to reparation by delivery of documents of equivalent importance. The first often provided an acceptable solution, but must not obscure the legitimate right of ownership by one of the States concerned of the original archives. The second applied to situations in which, for various reasons such as respect for the integrity of archival collections, it was difficult to transfer collections or documents because of their great cultural or historical value. In such cases, the States concerned could agree to replace them by documents of equivalent importance, thereby making it possible to satisfy the twofold requirement of historical value and administrative value.

24. His proposed draft article A was a general provision on the transfer of archives to the successor State, and was applicable to all types of State succession. It could be placed in section I (General provisions) of part I (Succession to State property), and would thus precede the provisions peculiar to each type of succession of States regarding State archives. Draft article A was based on article 9, which laid down the general principle of the passing of State property situated in the territory to which the succession of States related. However, since archives were frequently removed by the predecessor State just before the date of State succession, it was necessary to supplement article 9 by

providing also for the passing of archives situated outside that territory. On the other hand, whereas all State property covered by article 9 was susceptible of assignment to the successor State, the same was not true of archives, which might be of concern to both the predecessor State and the successor State. Archives, however, had the special characteristic of being reproducible, and their duplication made it possible to satisfy both the predecessor State and the successor State.

25. Paragraph 1 of the draft article stated the principle of the primacy of agreement between the parties, which were free to agree to any arrangement whatsoever. The principle of the transfer of archives, in accordance with article 9, was then laid down for "State archives of whatever nature that relate exclusively or principally to the territory to which the succession of States relates".

26. Under the terms of paragraph 2, when archives were transferred in accordance with paragraph 1, the predecessor State was entitled to obtain the reproduction of the archives it surrendered. He considered that that faculty should be granted even to any interested third State; for it was possible that some of the inhabitants of the territory to which the succession of States related might leave that territory and settle in the territory of the predecessor State or in that of a third State. In the latter case, the third State might need certain administrative archives, and it should be able to obtain them for the administration of that part of its population.

27. Lastly, paragraph 3 moderated the provisions of paragraph 1. In the case of archives of sovereignty, it would seem difficult for the predecessor State to surrender the originals. The successor State should then be given the right to obtain reproductions. After a certain time, some archives remaining in the predecessor State would in any case become accessible to the public under the law of that State. Hence there was no reason to deprive the successor State of copies of those archives.

28. The CHAIRMAN thanked the Special Rapporteur and congratulated him on his eleventh report on succession of States in respect of matters other than treaties.

29. As the Special Rapporteur had pointed out, the General Assembly, in its resolution 33/139, had recommended that the Commission should continue its work on succession of States in respect of matters other than treaties at its current session, with a view to completing the first reading of the draft articles on succession of States in respect of State property and State debts.

30. After a procedural discussion in which Mr. USHAKOV, Sir Francis VALLAT, Mr. REUTER, Mr. FRANCIS and Mr. QUENTIN-BAXTER took part, the CHAIRMAN noted that it seemed to be the general wish of the members of the Commission that the Drafting Committee should shortly begin to review the first 25 articles of the draft, and that, in principle,

the Commission should devote the next three weeks to consideration of the six draft articles on succession to State archives submitted by the Special Rapporteur.

The meeting rose at 1.5 p.m.

1561st MEETING

Wednesday, 27 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Corr.1 and Add.1 and 2)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (*continued*)

ARTICLE A (Transfer of State archives)¹ (*continued*)

1. Mr. RIPHAGEN said it was clear from the Special Rapporteur's report that State archives could not be treated in quite the same way as other State property. In principle, the importance of such archives lay in the information they contained. That information could be taken from the archives by means of various copying processes, whereas the originals themselves constituted cultural property. The subject had three aspects: first, the functional aspect, namely, the information contained in the archives; secondly, the physical and territorial aspect of the originals as objects; thirdly, what might be termed the "personal" aspect, which was the fact that some archives contained information of a privileged nature and could therefore be regarded as "archives of sovereignty". The general problem in all types of succession of States was to determine the importance of the connecting links between the archives and the predecessor State or the successor State. From that point of view, it was doubtful whether types of succession such as separation, uniting or dissolution of States, which might in any case overlap, really called for different treatment. The importance of

the various connecting links could of course prove different in different types of succession, particularly in a case of decolonization, in which a new State was formed. It might be useful to formulate a special article for that case. But with regard to the other types of State succession, he was inclined to think that a general rule would suffice, although it could be argued that some simplification of the connecting links was possible.

2. The wording of draft article A reflected the three aspects he had mentioned, but it was questionable whether the situations covered in articles B and E (A/CN.4/322 and Corr.1 and Add.1 and 2, paras. 140 and 204), namely, transfer of a part of the territory of one State to another State and separation of part or parts of the territory of a State, were really so different that separate articles were needed. Again, in the case of article D (*ibid.*, para. 189), which dealt with the uniting of States, it seemed self-evident that the archives could pass only to the new State.

3. Mr. REUTER thought the most tragic aspect of colonial domination was probably the injury inflicted on the soul of the colonized nations. As the Special Rapporteur had indicated, that situation should be remedied, although the Commission could not do much merely at the level of State archives. The problem was indeed beyond the scope of the Commission's work.

4. In his opinion, the draft articles on succession to State archives raised six questions. First, should State archives be defined in the draft? Although the Special Rapporteur had not proposed a definition, he did not seem to be opposed to one. It might therefore be asked whether such a definition should be provided by internal law, in the case in point the internal law of the predecessor State, or by international law, which meant the draft articles in preparation. In that connexion, reference should be made to the articles already adopted. The definition of State property in article 5² referred to the internal law of the predecessor State. It therefore seemed that any definition of State archives that departed from that general definition would have to be duly justified.

5. If the Commission did not define State archives, article 5 would apply, and the internal law of the predecessor State would determine the content of the concept of State archives in each case. That would not be a bad solution, since most countries, particularly the former colonial Powers, had laws on State archives. But as the concept of archives was extremely broad, covering not only State papers but also libraries or numismatic collections, the definitions under internal law might be very varied.

6. To ensure some degree of uniformity, therefore, it might perhaps be advisable for the Commission to specify that the internal law in question was that dealing generally with some particular subject, whether the

¹ For text, see 1560th meeting, para. 1.

² See 1560th meeting, foot-note 1.

term used in the internal law was “archives” or any other. Generally speaking, internal law provided that all papers and documents registered as such formed part of the State archives, and that entailed decisions on classification. Such decisions could even affect sets of private papers; for instance, account books and journals had been classified in France as State archives because they were documents of great value for the history of the nation. On the other hand, internal law sometimes treated as State archives all documents that had a material bearing on affairs of State or that emanated from State officials, even if they had not been classified as State archives. Thus, although the private correspondence of a head of State did not form part of the State papers, a letter in that correspondence containing some reference to State affairs became a State paper. Supposing, for example, that Emir Abdel-Kader had written a private letter containing considerations on the Algerian State before its colonization: under French internal law, that letter would have been part of the State papers of France, and decolonization would not have changed the rule. Under the international law embodied in the draft, however, the letter would pass to Algeria.

7. Such considerations of protection might relate to objects other than State papers. If the internal law of the predecessor State provided that certain cultural and historical objects of a colony were inalienable, that property ought to remain inalienable after decolonization. Thus the Commission should not deviate, in the case of archives, from the definition of State property given in article 5, but should specify the objects it wished to include in the concept of State archives.

8. Secondly, was it really necessary to draft articles relating specifically to State archives? In the absence of such articles, State archives would come within the scope of the draft because they were State property. That point called in question articles 5 and 9, and article 13, paragraph 3. According to the general rule stated in article 9, State property situated, on the date of the succession of States, in the territory to which the succession of States related, passed to the successor State. The Special Rapporteur did not seem quite sure that all State archives situated in the territory of the successor State passed to that State. He had proposed an exception for “archives of sovereignty”. In the case of administrative State papers concerning, for instance, the organization of military units of the colonial Power, the newly independent State might be expected to surrender them without difficulty, but was it really obliged to return them because they were papers of sovereignty? The Special Rapporteur had answered that question in the affirmative, arguing that certain movable property situated in the territory of the predecessor State should pass to the successor State, a rule that ran counter to an *a contrario* interpretation of the general principle stated in article 9.

9. In that connexion, he pointed out that the rule proposed by the Special Rapporteur in draft article A was valid for all cases, whereas the rule requiring the transfer of movable property situated in the territory of

the predecessor State was valid only in the case, dealt with in article 13, of newly independent States. He shared Mr. Riphagen’s concern on that point.

10. Thirdly, it would be necessary to settle separately two groups of preliminary questions relating, respectively, to the transfer of State archives and to the status of State archives of common interest, whether transferred or not.

11. Fourthly, what was the nature of the rules on the transfer of State archives? It would of course be desirable for such rules to be precise and clear, and to apply automatically. If the Commission laid down transfer rules that were not clear, their application would give rise to many difficulties. The Commission might also consider that certain cases were straightforward, whereas in others contradictory principles had to be taken into consideration. For cases of that kind, without going as far as to lay down rules, the Commission could indicate principles, such as the principle of negotiation in good faith in compliance with certain subsidiary principles. If the Commission proclaimed the obligation to negotiate, it would also have to state the principles of negotiation.

12. Fifthly, in which cases was the passing of archives automatic? He could identify three. First, a simple case, but one that was not expressly covered by draft article A: that in which archives were situated in the territory of the successor State and subject to the exception proposed by the Special Rapporteur for papers of sovereignty. Secondly, in regard to newly independent States, there was the case of papers predating colonization that could be regarded as State papers. That case showed the need for an international definition of State papers, for it was to be feared that a simple reference to the law of certain human societies predating colonization, which had possessed State papers, would not suffice to protect those papers adequately. Lastly, there was the case of State papers situated in the territory of the successor State before the succession of States, but transferred during the period described as suspect by the Special Rapporteur.

13. In his report and in draft article A, the Special Rapporteur had found it possible to apply other criteria, such as that of territorial connexion. That criterion would be acceptable only if it were clearly defined. As to the criterion of functional connexion, he thought it was covered in paragraph 1 of the draft article by the words “that relate exclusively or principally to the territory”. That criterion seemed too general, even if it was moderated by the concept itself rather vague, of “papers of sovereignty”. It would be dangerous to give that concept too broad a meaning and make it include, for example, judicial archives.

14. Sixthly, with regard to the status of documents of common interest, he was not in favour of retaining the words “or of any interested third State”, which the Special Rapporteur had placed in square brackets in paragraph 2 of the draft article. Archives of that kind should be placed at the disposal of third States, or of the public, only with the consent of the two States

concerned. That was why the documents in an arbitration were not State papers, even if they were classified as such, and the States concerned had a genuine right to them. In regard to consideration of the needs of other States, he was thus less generous than the Special Rapporteur.

15. Mr. USHAKOV doubted whether State archives could be treated as State property. A distinction should be made between corporeal property, whose value could be expressed in money, and incorporeal property which, strictly speaking, had no material value and of which archives formed a part. Hence it was difficult to accept that the concept of State property, as defined in article 5, included archives.

16. With regard to the definition of the term "archives", he noted that the Special Rapporteur had retained only one of the three elements of the definition given by archivists, namely, "the documentary material amassed by institutions or natural or legal persons in the course of their activities, and deliberately preserved" (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 8). Later in his report, the Special Rapporteur had even included in the concept of State archives documentary material not amassed by State institutions, since he had extended it to cover engravings, drawings and coin collections. But a coin collection, for example, could have been formed by private persons before belonging to the State. It should therefore be made clear what was meant by "documentary material amassed by State institutions in the course of their activities and deliberately preserved by them" (*ibid.*).

17. In the Soviet Union, State archives could be defined by the fact that they belonged directly to the State or were under its control. Private collections of objects that might not be sold abroad were placed under State control. If a private person had letters of Pushkin in his possession, they belonged to him, but they constituted State archives because they were placed under State control. Similarly, local archives were State archives in the sense that they were controlled by the State, but from the point of view of ownership they were the archives of the local authorities. The collections of manuscripts preserved in the museums of the Soviet Union belonged not to the State but to the museums, which, under State control, could decide for example to hold exhibitions.

18. Thus all archives in the Soviet Union, whether administrative, political, diplomatic, economic, technical, literary or artistic, were State archives in the broad sense, because they were either the property of the Soviet State or under its control. The criterion of control made it difficult to determine whether archives belonged to a territory to which a succession of States related.

19. It was just as difficult to determine whether archives related "exclusively or principally" to a territory. For example, it might be considered that archives concerning the history of Moscow related exclusively to Moscow. But it might also be held that they related to the Soviet Union as a whole, in so far as Moscow

was the capital of the Soviet Union. Similarly, it could be considered that archives situated in Armenia related principally to that territory. But it could also be argued that, since Armenia had become part of the Russian Empire 150 years ago, those archives concerned the whole of the Soviet Union, for they contained documents relating to the history of Russia as a whole. Soviet internal law provided no means of resolving that problem.

20. The problem would be easier to resolve in the case of administrative and technical archives, because the same criterion could be applied for the passing of those archives as for the passing of moveable property by stipulating that the archives must be connected with the activity of the predecessor State in respect of the territory to which the succession of States related. It was obvious that technical archives relating to the construction of a bridge were connected with the State's activity in respect of the territory in which the bridge had been built, and therefore passed to that territory. But the internal law of countries made no distinction between administrative or technical archives and other archives, for it regarded State archives as indivisible.

21. Lastly, he thought that article A was not really necessary and raised more problems than it resolved. He believed that it was unnecessary to state a general rule and that it would be enough, as in the case of State debts, to lay down particular rules for each type of succession of States. It was only after such particular rules had been drafted that it might be possible to deduce a general rule.

22. He also pointed out that the criterion of "sovereignty", applied in draft article A, paragraph 3, did not appear in the following draft articles.

23. Mr. PINTO fully agreed with the Special Rapporteur that archives had a character of their own that warranted separate treatment, and that they not only represented the cultural heritage of a State but could also constitute a national asset of considerable value. He likewise endorsed the general principles adopted by the Special Rapporteur regarding the passing of State property preserved in archives, which would provide the Commission with an excellent starting point for its study.

24. At the same time, he saw certain difficulties, the first of which related to the definition of archives. Despite the wealth of material in the report, which emphasized not only the documentary but also the cultural and historical significance of archives, he considered that the definition should be confined to documentary material, and it was his impression from section A of chapter I of the report, that the Special Rapporteur also favoured that restrictive definition. If the Commission agreed to deal specifically with archives in the form of documents, it might wish to consider whether further articles should be drafted to cover cultural and historical material.

25. It would also be necessary to determine what constituted a document. He agreed, of course, that for

the purposes of State archives documents should be understood to include films. However, documents were records not only on paper but also on wax, stone, ivory or other materials, and the latter records should also be treated as documents for the purposes of State archives. In Sri Lanka, for example, such documents had been in existence for 25 centuries; not only were they of historical and archaeological importance, but they were sometimes also of considerable administrative importance, even in modern times. For example, the rules governing operations in the market place in certain areas were recorded in that way. In determining what constituted a document, the Commission should perhaps also consider a rather objective definition referring to the manner in which a record was conveyed to the mind, for instance by sight or by hearing.

26. Another important point concerned the ownership of archives, in other words, which archives were State archives. He noted that, under article 5 of the draft, such ownership would be determined in accordance with the law of the predecessor State. He presumed that that meant the law at the time of the succession, for if the predecessor State continued to exist in one form or another it should not be able to declare that the archives belonged to the predecessor State after succession had taken place.

27. He noted further that draft article A made no reference to the location of archives at the time of the succession of States. He presumed, from paragraphs 84 and 85 of the report, that the Special Rapporteur's intention had thus been to broaden the sphere of application of the article, and hence the rule on the passing of State archives to the successor State, wherever they might be situated at the time of the succession. He fully agreed with that approach, but wondered why it had not also been adopted for State property in general, in article 9 of the draft.

28. The case of newly independent States raised two particular points. First, although the draft dealt with direct succession from the metropolitan State to the newly independent State, there had been cases in which property had passed first from one metropolitan Power to another, and thereafter to a newly independent State, the archives being redistributed at each stage of that process. For instance his own country, Sri Lanka, had been colonized by the Portuguese in the early sixteenth century and subsequently by the Dutch and the British. When the British had finally handed over their records to the newly independent State, those records had been no more than fragmentary administrative archives covering four centuries. Although some of the records, particularly those of especial cultural or material value, had been returned, others had not. It would therefore be useful to provide for some means of recovering records in cases where one or more intermediate successions had taken place. Although in the case of Sri Lanka, for example, the records dated back to the sixteenth and seventeenth centuries, they were nonetheless of considerable significance, particularly in regard to territorial claims.

29. Secondly, it could also happen that the metropolitan Power had constituted archives common to several territories which it administered. In such cases, the records had often not been properly distributed among the countries concerned, and a few directives might be useful. For instance, the provisions of paragraph 2 (b) of draft article F (Dissolution of a State) (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 206) might also be applied to newly independent States when there was more than one successor State.

30. He agreed with the Special Rapporteur that the successor State should be deemed to have an absolute right to the archives to which it was entitled, for to qualify that right might result in records being withheld on unjustifiable grounds. He would like to know, however, whether the Special Rapporteur had not also been thinking in terms of a duty—a trust, as it were—of the successor State to preserve the archives, not merely as part of the national cultural heritage but also as part of the heritage of mankind as a whole.

31. Draft article A, like several of the articles already adopted, was a residual provision subject to the will and agreement of the parties, as was shown by the words "except as otherwise agreed or decided". Possibly the Drafting Committee might wish to consider whether a single article might not suffice for that purpose.

32. In paragraph 1 of the draft article, the phrase "belong to that territory" seemed to him rather too concise, since other rules drafted by the Special Rapporteur would apply in determining the connexion between the archives and the territory. The expression "archives of sovereignty", in paragraph 3, also seemed too concise to convey the exact meaning intended.

33. The cost of reproduction provided for in paragraphs 2 and 3 should be equitably apportioned and, as in other articles, it was necessary to indicate who should bear the cost. In the case provided for in paragraph 3, the successor State should not have to bear the cost, which could be considerable. Lastly, the Commission should consider whether the expression "appropriate reproduction", in paragraph 3, referred to photographs only or also covered other modes of reproduction.

34. Mr. DÍAZ GONZÁLEZ observed that, in the case of decolonized nations, the Special Rapporteur had approached the question of archives as being the "lost collective memory" which those nations were entitled to recover. However, a distinction should perhaps be made between newly independent States and States such as those of Latin America, which had achieved independence in the nineteenth century. In the case of States that were already old, it would be wrong to maintain that the archives situated in the former metropolitan Power should be transferred to them. It could not be asserted that the enormous volume of material on Latin America now housed in Seville by Spain, as the former administering Power, belonged to any particular State, for it was the com-

mon heritage of the Spanish people of Europe and the Spanish people of Latin America.

35. Moreover, it should not be forgotten that, when the Spanish had first arrived in what was now Latin America, there had been no archives in the sense now attributed to that term, although cultural property had existed, for instance in the form of monuments. When Spain had recognized the new Spanish-speaking States of Latin America *de jure*, the archives had been reconstituted in the territory of the metropolitan Power. Only the archives of Cuba and Puerto Rico had been transferred, and they had passed to the new metropolitan Power, the United States of America.

36. The Special Rapporteur had rightly made reference in his report to the cultural property removed from the newly independent States of Latin America. It was well known that there were few, if any, Latin American *objets d'art* in Spain. Indeed, even an object of symbolic value such as the golden Inca mask was now in Austria, not Spain. All such cultural property had been removed after independence by other States or by archeological societies that had undertaken excavations in Latin America. A typical case was the Machupicchu site in Peru; almost everything excavated at that site was now on view in the museums of other countries. Excavations in the territories of the Toltecs and Aztecs, also after independence, had likewise yielded treasures that had been taken abroad. There had been no treasure to find in Venezuela, since the nomadic tribes that had lived there had left behind neither archives nor monuments, but a collection of gold objects found in Colombia had recently been on display in Europe, and there were more Ecuadorian *objets d'art* in the United States of America than in Ecuador itself. In none of those cases could it be asserted that the predecessor State was under an obligation to return cultural property, because it had not been removed by the administering Power.

37. In those circumstances, could such property be treated as archives that should pass to the successor State by succession? For his part, he was not clear about the distinction between artistic and cultural property, on the one hand, and archives on the other, which together formed the historical heritage of a State. That heritage was to some extent protected by the various conventions adopted under the auspices of UNESCO, in particular by the Paris Convention of 14 November 1970.³ Account should perhaps be taken of existing international jurisprudence in so far as it related to the protection of the cultural and artistic heritage, which should however be differentiated from archives. A consideration of that general point might assist the Commission in its task.

38. With regard to paragraph 1 of draft article A, the idea of belonging to the territory should not be stressed. It was not so much a question of State

archives that belonged to the territory as of those relating to or concerning the territory. For example, written documents might exist that belonged to the territory but did not concern it. Certain documents of great importance concerning Latin American countries were not even in Spain; they were in the Netherlands, the United Kingdom or the United States of America.

39. The Special Rapporteur had drawn an interesting distinction between the actual transfer of documents to the State concerned, on the one hand, and the communication of such documents, on the other. Actual transfer was impossible where the material concerned was the joint property or common heritage of several States; in such cases, however, there was the possibility of reproduction by modern techniques. Obviously, a copy did not have the same value as the original, but if a State did not have the original it could always obtain accurate information on a given historical event, or scientific and cultural data of interest to it, from microfilms or photocopies. France, the Netherlands and the United Kingdom, for example, held certain archives that related not only to the policies pursued on their behalf by their agents in the territories of Latin America but also to their general policy in the context of the balance of power in Europe. It would be impossible for those States to surrender the documents in question, which did not concern Latin America only, but they could supply photocopies or microfilms. In that connexion, he pointed out that Venezuela had recently sent a mission to Europe, as a result of which photocopies would have been made, by the end of 1979, of nearly all the documents on Latin America now to be found in Europe, except in the Soviet Union.

40. Lastly, he stressed the need to examine the draft articles on succession to State archives with the utmost care, in view of the importance of the subject, and to distinguish clearly between that subject and a number of similar matters dealt with in other conventions.

The meeting rose at 1 p.m.

1562nd MEETING

Thursday, 28 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

³ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, p. 231).

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Corr.1 and Add.1 and 2)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (*continued*)

ARTICLE A (Transfer of State archives)¹ (*continued*)

1. Sir Francis VALLAT said that the Commission had been wise to decide that special treatment was required for the question of State archives, which was undoubtedly difficult and technical. He wondered, however, whether the Commission should not follow the example of UNESCO and seek expert advice, particularly in regard to the return of documentary and other material, so as to ensure that it arrived at sound and satisfactory conclusions. He was in no way belittling the Special Rapporteur's excellent work, but he knew from experience how many technical problems were involved.

2. The Commission would not find it easy to form clear legal views on the subject, and it was necessary to proceed with some caution. The Special Rapporteur had referred to a series of principles, including the principle of territoriality, which were really more in the nature of ideas or concepts. If the Commission was to consider principles in a legal context, then those principles would have to be not only identified but also clarified and defined, particularly in an area in which they overlapped and even tended to conflict. Where any set of papers was concerned there would inevitably be a conflict of interests, which would not necessarily be confined to the predecessor and successor States.

3. In his view, two related principles were of particular importance: the principle of the place of accumulation and the principle of the unity of archival collections. Archives, in the sense in which the Commission used the term, were collected by government offices, which were normally located in the capital city of the State concerned or the place where government business was carried on, and were gradually built up until they formed a rich and varied collection of documentary material. There could be no archives unless documents were collected at a given point or points, which meant that they had a natural attachment to their place of accumulation. Allied to that principle, but of greater importance, was the principle that a collection built up as a natural unit within the government service should remain a natural unit.

4. In that connexion, he had been impressed by the remarks of Mr. Díaz González (1561st meeting), whose problems in obtaining documents from various sources he appreciated only too well. If he had understood aright, Mr. Díaz González was not suggesting that the

archives of other States should be broken down and handed over to Venezuela simply because that country had a primary interest in the content of some of the documents and, indeed, a primary interest also from the point of view of territorial sovereignty. The kind of problem with which the government of Venezuela was faced should be resolved not by the passing or transfer of part of the government archives of certain other countries, but by access to those archives. The unity of the accumulated archives should be preserved in the interests of the world as a whole, and that was one of the cardinal principles to be reflected in any modern codification of the subject.

5. The need to delimit the subject-matter with which the Commission was concerned had been generally recognized. He thought it was necessary to distinguish between government records and other objects of intrinsic value, such as works of art. In particular cases, that distinction was of course very difficult to draw, but it was not one that could be avoided in principle. He therefore agreed that the Commission should think in terms of a definition based on the concept of records of a documentary character, so that it would be the nature, as a record, of the particular paper or instrument concerned, and also its nature as part of a collection, that would give it the character of an archive. It seemed to him that on that basis archives were properly to be distinguished from, say, paintings and valuable coins. The problem of the removal of treasure from certain countries undoubtedly called for a solution, but it had its own special aspects and should be kept distinct from the question of archives. Of course, he was not excluding the possibility of archives being recorded on some material other than paper or parchment.

6. Another point on which the Commission should be clear was the legal nature of the subject. He had detected a slight tendency to treat succession of States as though it were an aspect of the return or restitution of archives, whereas, in his view, a clear distinction should be made between those two matters. He had no hesitation in agreeing that, where records had been removed from a territory that had become a separate State to the territory of another State, they should, in principle, be restored; but that was not really a problem of succession of States.

7. Another distinction that should be made was between the transfer of an item and what in English law was known as the "passing of property" in the item. Draft article A had been formulated in terms of the passing of property, but when the archives in question were located in the territory of the predecessor State, the time would inevitably come when they would have to be physically transported to the successor State. That involved innumerable practical problems, which was why he considered it essential to make such a distinction. At the same time, he would have thought that any such transfer was contrary to the basic principle of the unity of State archives. That, in turn, pointed to the need to go somewhat beyond the strict confines of the topic—since it might be unrealistic to isolate the abstract question of the pass-

¹ For text, see 1560th meeting, para. 1.

ing of title—and to draft certain other provisions. For example, the Special Rapporteur had contemplated the possibility of providing for the reproduction of State archives, and some such provision might indeed be necessary in the general interest. A copy, of course, particularly on microfilm, was certainly no substitute for the original, but it was better than nothing.

8. On a broader plane, it was necessary to bear in mind that interest in State archives was not confined to the successor and predecessor States, since archives were in a sense the heritage of all mankind. For any set of State archives, there might be some 40 or 50 States with a direct interest, either legal or cultural.

9. Lastly, there were a number of practical problems concerning archives to be considered, which related to preservation, protection against destruction, access and national security.

10. Mr. TSURUOKA drew the Commission's attention to two cases of succession of States in respect of archives concerning Japan, which had been the successor State in one case and the predecessor State in the other.

11. The first case, in which Japan had been the successor State, concerned the restoration to Japan, in 1953, of the Amami Islands, part of the Ryukyu Islands, which had been placed under United States administration after the Second World War under the terms of the Peace Treaty with Japan. The 1953 Agreement between the United States of America and Japan concerning the Amami Islands² provided, in article III, paragraph 4, that the property of the government of the Ryukyu Islands, including papers, archives and evidentiary materials, situated in the Amami Islands on 25 December 1953, would be transferred to the Government of Japan on that date and without compensation.

12. The second case, in which Japan had been the predecessor State, concerned the peace treaty concluded in 1965 between Japan and the Republic of Korea,³ and did not relate directly to archives. Indeed, that treaty, which had been concluded to settle the basic relations between the two countries, did not mention the transfer of archives, although such a transfer had in fact taken place. But in addition to that basic treaty, Japan and the Republic of Korea had in the same year concluded an Agreement on art objects and cultural co-operation,⁴ article II of which provided that the Government of Japan would restore to the Government of the Republic of Korea, by a procedure to be agreed upon between the two Governments, and within six months of the entry into force of the Agreement, the works of art listed in the annex.

13. As in those two cases, succession to archives was generally settled by agreement between the two States

concerned, without its being necessary to refer to special rules of international law concerning the transfer of archives. If it was nevertheless necessary to draw up rules on succession of States in respect of archives, what was most important was to specify clearly which archives were to be transferred in the event of a succession of States.

14. A distinction had first to be made between archives belonging to the State and those belonging to private persons. It was also necessary to distinguish between State archives proper and historical or cultural State archives. That distinction was based on a criterion of time: most States published their archives after 20 or 30 years, and State archives thus became historical State archives, as they were now of only historical value and were accessible to everyone. In his opinion, the draft articles should cover only State archives proper, in other words those that had not yet been published. Lastly, State archives must be distinguished from works of arts. Draft article 1⁵ stated:

The present articles apply to the effects of succession of States in respect of matters other than treaties.

It was therefore necessary to circumscribe the subject-matter by limiting it to the direct effects of succession of States. The example of Japan and the Republic of Korea showed that, without being regulated by a treaty on State succession, works of art and historical documents could be the subject of artistic and cultural collaboration between the two countries concerned. The Japanese Government had even promised to encourage Japanese owners of works of art of Korean origin to restore them to the Republic of Korea.

15. He thought, therefore, that State archives proper should be distinguished from other documents and works of art and that the Commission should concern itself only with State archives. It should also be observed that draft article A stated only a residuary rule, leaving essentials to be freely settled by agreement between the parties. That rule should merely establish, in an equitable manner, the necessary minimum conditions for satisfying the legitimate interests of the predecessor State and the successor State.

16. Mr. NJENGA said that the Special Rapporteur's eleventh report provided an interesting insight into a problem that the newly independent States had begun to perceive but had not yet really formulated. The Commission had been wise in its decision to treat archives separately from other movable property, and its work on the progressive development of international law in that area would be particularly valuable, given the situation of newly independent countries in regard to archives. In many of those countries, particularly those whose accession to independence had been preceded by armed conflict, documents had been removed or destroyed, or had simply disappeared. He was referring not only to recent documents but also to documents dating back several centuries, which were of considerable importance for a country's history.

² United Nations, *Treaty Series*, vol. 222, p. 193.

³ Treaty on basic relations between Japan and the Republic of Korea (*ibid.*, vol. 583, p. 33).

⁴ *Ibid.*, vol. 584, p. 49.

⁵ See 1560th meeting, foot-note 1.

History was a part of the national heritage and an essential element in self-knowledge, and he therefore considered that, in affording newly independent States an opportunity of obtaining at least copies of some of those documents, the draft articles were taking a step in the right direction, which should be encouraged.

17. He agreed that the question of the definition of archives was not particularly important at that stage and that the Commission could perhaps revert to it later. At the same time, he believed that if the definition were limited to documentary material alone, the draft articles would lose much of their force. As was clear from the Special Rapporteur's report (A/CN.4/322 and Corr.1 and Add.1 and 2, paras. 8–19), archives could include many other objects, and he agreed with Mr. Pinto (1561st meeting) that documents reproduced on substances other than paper should not be excluded. Indeed, one of the means by which the history of a country could be traced was by deciphering inscriptions on wood and stone. In his country, Kenya, all such inscriptions were now treated as archives, and one private collection, which included stamps and old books dating back to the period before the British administration, had been considered of such national importance that the premises in which it was housed, together with the contents, were to be declared a national museum. Consequently, it was important not to cast the definition of "archives" in such narrow terms that materials of that kind would be excluded.

18. The draft rightly emphasized the need for agreement between the predecessor and successor States, which would serve the interests of equity and obviate the likelihood of dissension. However, clear-cut rules were also needed to regulate the many cases in which there was no agreement and to oblige the predecessor State to return archives, both documentary and historical, to the successor State or, as the case might be, to leave such documents in the successor State. The Special Rapporteur had given a number of reasons why newly independent States had not been in a position to insist on such agreements (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 63), but there was an additional reason, namely, that in many cases those States did not even know what archives had been removed.

19. He had some doubts about the exception made in draft article A for archives of sovereignty, since some of those archives might be of only relative importance to the predecessor State, but of vital importance to the successor State. If it were decided to retain that exception, he would suggest—and there was some basis in practice for his suggestion—that it be understood not to apply to documents and records pertaining to boundaries. Countries that did not know on what basis the boundaries they had inherited had been drawn—and that applied to most African countries—would then be in a position to defend their legal position regarding those boundaries.

20. He did not think there was any need to seek the advice of experts, as Sir Francis Vallat had suggested, since the Special Rapporteur had gone into the subject

in great detail in his report, and UNESCO's long experience also indicated that the material available was adequate to enable the Commission to deal with the subject. Moreover, the provision in the draft concerning reproduction of documentary archives would ensure an equitable arrangement that was fair to both sides. Admittedly, a copy was not the same as an original, but there might be cases in which a country would have to be content with a copy: for instance, where it would be inequitable for the successor State to deprive the predecessor State of certain documents.

21. He did not share the Special Rapporteur's doubts about the position of interested third States. Provided that they were prepared to bear the cost of reproduction, and that provision to that effect were inserted in the draft, third States should be entitled to secure copies of administrative archives.

22. Mr. EVENSEN said that the Commission would be deceiving itself if it failed to recognize that the subject under consideration had strong political overtones. In the circumstances, its main task was to engage not in codification but in the progressive development of international law pertaining to succession to State archives, and to formulate articles that would have some chance of survival when they came to be examined in the political climate of the General Assembly. He fully agreed with the legal principles reflected in the proposals under consideration and wished to congratulate the Special Rapporteur on the great wisdom and moderation he had displayed in drafting proposals that constituted progressive development of the law.

23. On the other hand, he could not agree with Sir Francis Vallat's view that the Commission did not have the necessary expertise to accomplish the task before it. The Special Rapporteur's report in fact contained sufficient factual and legal information to enable the Commission to move ahead. Sir Francis Vallat had also mentioned two fundamental principles relating to State archives, namely, unity of archives and integrity of their place of accumulation. With regard to the first of those principles, the originals could be returned to what might be termed the "rightful owners", but the unity of archives could still be maintained thanks to the efficacy of modern reproduction processes. It was also important to bear in mind that the unity of accumulated archives must to some extent depend upon the manner in which they had been accumulated—an essential consideration underlying the Special Rapporteur's report. Again, there were a number of principles of a legal, social and moral character that could be invoked in opposition to the principle of integrity of the place of accumulation of archives, and he thought that they too should form a cornerstone of the present draft.

24. The very substantial State practice referred to by the Special Rapporteur showed that succession to State archives was an essential element of the different types of State succession. Hence the formulation of a set of relevant principles was not only useful but also

necessary; in addition, the Commission was politically expected to engage in such a task. One of the basic principles should be that of fair and reasonable restitution of archives. In that connexion, he drew attention to the appeal made by the Director-General of UNESCO that governments should conclude bilateral or multilateral agreements concerning the restitution of archives—an appeal in which he had stated that the vicissitudes of history had robbed many peoples of a priceless portion of their inheritance, in which their enduring identity found its embodiment (*ibid.*, para. 45).

25. Mr. QUENTIN-BAXTER thought it surprising that, just as the Special Rapporteur was close to completing the immense task of preparing a draft on State succession in respect of matters other than treaties, he should have submitted a final report that opened up entirely new vistas. The fact that, amid all his other official burdens, he had been able to prepare such an excellent report on highly important issues was little short of miraculous.

26. It was difficult to relate the magnitude of the topic under discussion to the over-all structure of the draft articles. In the context in which it had been previously considered, the definition of State property in article 5 was admirably suited to the purposes of the Commission, which was not concerned with property owned by private persons or by any public institution other than the State. Regardless of what might happen in a case of State concession, internal law, until it was changed, was the guide for establishing the legal entity in which rights or obligations were vested. It was only when the State itself, under its internal law, was deemed to own the property in question that internal law failed to provide a means of settling a case of succession of States. International law must then assist internal law in determining who the new owner was to be. As Mr. Díaz González had observed (1561st meeting), the question whether documents or artefacts that were vital to a new State happened to be the property of the predecessor State at the moment of succession was quite an arbitrary factor. The Commission's concern was with the intrinsic importance of the relevant material to the successor State. In its texts on the topic of State succession, the Commission had dealt solely with a particular moment in time. It had not dealt with matters arising before or after the succession of States, which came under the broader topic of State responsibility. However, the important considerations advanced by the Special Rapporteur were in no sense confined to that one point in time, namely, the moment at which the succession occurred: the prime consideration was the connexion between a State and all the documents and other material that helped to determine the nature, title, history and feeling of identity of the State.

27. It should be remembered that the meaning of the term "State property", as employed in part I of the draft, depended on the meaning attached to it in internal law, which in any event decided what constituted property. For example, in the case of copyright, the very existence of such a property right or interest

depended in any given instance on the internal law of the State. In regard to State archives, however, the Commission's primary concern was not whether the predecessor State considered them as constituting property in any ordinary sense of the term. Of course, an item that was a work of art would have commercial value, but even in the more mundane case of State papers, countries were concerned with something that was of great importance to them. As Mr. Reuter (*ibid.*) had noted, it was a question of their soul. In that perspective, it had already been noted that States did, in varying degrees, interfere with property rights. For instance, private owners of items that were intrinsically important to their country were sometimes subject to rules which prevented them from altering the items in question or selling them on the world market. However, the point to be borne in mind was that, although many countries were acutely conscious of the need to preserve their cultural and artistic heritage, they tended to deal with such matters within the framework of respect for existing property rights and simply imposed certain restrictions on ownership. Consequently, it was reasonable to believe that they would wish to apply the same principles in dealing with items of great significance to other countries.

28. Clearly, the topic was of such magnitude that it went beyond the rather narrow scope of the particular moment of succession and of a transaction that involved only the predecessor and successor States and the question as to what the predecessor State regarded as property. He therefore had great difficulty in fitting the subject of succession to State archives into part I of the draft as it had evolved so far, and considered that the proposed articles on that subject should not be regarded as a modification of that part of the draft.

29. The subject was important enough to warrant mention in the draft articles, but it could not be treated adequately in terms of the definition of State property contained in article 5. Obviously, in a case of State succession, the successor State should, as far as possible, receive the material that confirmed its title to sovereignty over particular areas of land. Modern reproduction processes provided the answer to many problems, and, although the integrity of the place of accumulation of State archives must necessarily be an important factor, it was equally desirable that, wherever possible, a complete collection of the documents intimately associated with a country's very being should be available to scholars and researchers in the country itself, which should not be compelled to go on bended knee to seek assistance from other countries where the documents were preserved.

30. The draft articles should certainly refer to the matter of succession to State archives, but it would be unfortunate if it were suggested that the much wider subject of the restitution of objects of cultural and other importance to States could be dealt with adequately within the confines of the topic of State succession in respect of matters other than treaties. It would be even more unfortunate if the Commission's coverage of the question were artificially reduced by dealing with the matter in terms of the definition of

State property in article 5, which had been worked out for an entirely different purpose.

31. Mr. BEDJAOUÏ (Special Rapporteur) noted that the debate had gone far beyond the limits of draft article A to cover all the draft articles concerning State archives, and even articles 1 to 25, which had already been adopted. To answer the questions raised during the debate he would sometimes have to replace article A in the general framework of the articles concerning State archives, and replace the latter in the context of the draft as a whole.

32. In giving his eleventh report an especially wide scope and trying, at the cost of considerable effort, to study the subject in all its aspects, he had been actuated by a sense of duty. Accordingly, he would find it very regrettable if the Commission did not succeed in adopting at least some of the articles on archives at its current session. He would emphasize, in addition, that those articles would make it possible to give the draft topical interest and that the Commission ought not to lose that opportunity. The Commission had been dealing with the subject of succession of States since 1963, but so far its work had resulted only in the adoption of the Convention on Succession of States in respect of Treaties. It was important that the draft articles on succession of States in respect of matters other than treaties should be prepared as soon as possible. A few provisions of that draft—those relating to the nearly completed process of decolonization—would appear outdated, and it was precisely the presence in the draft of provisions concerning archives, which would probably continue to raise difficulties in cases of State succession, that would make the draft an instrument of some value to the international community. He had by no means been convinced by the members of the Commission who had expressed doubts about the advisability of including articles on State archives in the draft; like Mr. Evensen, he thought, on the contrary, that it would be a mistake not to take account of the very pronounced political trend in favour of studying the problems raised by archives in cases of State succession. In addition, as Mr. Njenga and Mr. Evensen had observed, in drafting provisions on that subject the Commission could engage not only in codification but also in progressive development of international law.

33. It was no doubt the difficulties of the subject that had caused Sir Francis Vallat to have some doubts and to suggest recourse to experts. Without claiming to be a complete expert in the matter, he wished to point out that his report was the result of the 17 years he had devoted, in the service of his country, to settling the problem of archives with the former colonial Power. As a UNESCO expert, he had also studied the question of archives with other experts, who had referred to his work on the subject. Since his third report on succession of States in respect of matters other than treaties, which he had submitted in 1970, he had referred to the problem of archives. If the Commission thought it necessary to call in experts, he would agree, but he did not see what form that collaboration could take. He suggested that the Commission should rather

adopt a solution half way between that of simply disregarding the problem of archives, which was of such vital importance for some countries, and that of studying the problem exhaustively in the same perspective as his own. The Commission could confine itself to drafting two or three articles in the most flexible terms possible. As some members had pointed out, the difficulties of the subject were not, after all, insurmountable.

34. Referring to the two agreements mentioned by Mr. Tsuruoka, he observed that the latter seemed to have perceived a succession of States where there had been none in the case of the first treaty, and not to have realized that there had been a succession of States in the case of the second. The agreement of 24 December 1953 between Japan and the United States of America, to which he had already referred in his previous reports, had been concluded in the context of military occupation following the Second World War. The United States could not be considered to have succeeded Japan in a part of Japanese territory occupied by United States troops. With regard to the agreement concluded between the Republic of Korea and Japan concerning works of art, articles 1 to 25 of the draft would be applicable. Works of art, apart from their cultural and historical nature, were in fact movable property that was part of the inheritance and were consequently governed by the relevant provisions of those articles. However, those articles became inadequate when State archives had to be considered as movable property, which of course they were, but neglecting their market value to emphasize their informational, documentary, cultural and historical value. It was because those aspects of State archives could not be disregarded that the draft should be supplemented by special provisions on archives.

35. Mr. Tsuruoka had rightly stressed the importance of the agreement of the parties and had pointed out that the draft would not be of any real use to the international community except in so far as it was largely based on the principle of equity. It was also necessary to emphasize the distinction between restitution of archives and works of art, and international co-operation in cultural matters. States could co-operate in making archives or works of art known while in no way prejudicing the rights of ownership in such movable property. If the rules on State succession gave a right of ownership to the predecessor State or the successor State, those rules must be applied, but they did not prevent collaboration between the States concerned. As examples of such co-operation between a former administering Power and a former colony, he mentioned the case of the Netherlands and Indonesia, as well as that of Belgium and Zaïre.

36. While recognizing the importance of the problem of archives, Mr. Njenga had thought that the Special Rapporteur had perhaps treated the predecessor State too favourably by allowing it to retain the originals of its archives of sovereignty. However, draft article A applied to all types of State succession, and it would have been difficult to lay down any other rule. In practice, archives of succession were located at the

time of succession in the capital of the metropolitan country, either because they had always been preserved there or because the authorities of that country had moved them there shortly before the succession. In any case, they were located far from the successor State and it would be difficult to transfer them to it. That was why he had proposed that the successor State be given a right of access to those archives and an opportunity to obtain copies. In the event of the transfer of a part of the territory of a State, it was obvious that the archives of sovereignty would not be in that part of the territory, which was often quite small, but in the capital of the predecessor State. Hence it would not be reasonable to require that archives of that kind, which constituted a collection that should not be split up, should be handed over to the successor State in their original form. In cases of decolonization, archives of sovereignty were generally not located in the colony but had been removed by the administering Power, and it would be difficult to secure their return to the successor States; that State should be satisfied to have access to them. Practice showed that even States created by the dissolution of a State accepted that the State among them in whose territory the capital of the predecessor State was situated should retain the archives of sovereignty in their entirety, each successor State having access to them and being entitled to reproduce them or to obtain other political archives in compensation. In draft article A he had therefore attempted to find a compromise solution that would satisfy the requirements of each type of succession.

The meeting rose at 1.5 p.m.

1563rd MEETING

Friday, 29 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Tribute to the memory of Mr. Constantin Th. Eustathiades, former member of the Commission

1. The CHAIRMAN announced the death of Mr. Constantin Th. Eustathiades, who had been a member of the Commission from 1967 to 1971, and who had distinguished himself not only in the Commission but also in the Sixth Committee of the General Assembly, on which he had represented Greece for many years.

Mr. Eustathiades had also contributed to the development of modern international law by his scholarly works. A telegram of condolences would be sent to Mr. Eustathiades' family on behalf of the Commission.

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

Succession of States in respect of matters other than treaties (continued) (A/CN.4/322 and Corr.1 and Add.1 and 2)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

ARTICLE A (Transfer of State archives)¹ (concluded)

2. Mr. BEDJAOUI (Special Rapporteur) said it was gratifying that Sir Francis Vallat (1562nd meeting) had drawn attention to the need to take account of two principles: the place of accumulation of archives, which was generally the capital of the predecessor State, and the unity of archival collections. Archives thus accumulated, which were usually archives of sovereignty, constituted a collection that should not be affected by a succession of States. It was out of respect for those principles that he had proposed that, for certain types of succession, archives deemed essential to the successor State should simply be reproduced. In that connexion, it should be noted that not only the dismantling of such a collection but also any improper additions made to it by the predecessor State were harmful. During the "suspect" period, the predecessor State should therefore refrain from swelling its archival collection improperly and, if necessary, return any additions improperly made.

3. Sir Francis Vallat had also pointed out that the physical transfer of archives was not always an easy matter. For his own part, he had never recommended the transfer of all archives, but simply of those that the predecessor State had improperly added to its collection. It was obvious that archives formed part of the heritage of mankind and that their importance to the international community outweighed the respective interests of the predecessor and successor States. Every country possessed archives on other countries and could assist anyone in writing world history. As Sir Francis Vallat had also remarked, it was important to preserve archives and to prevent their destruction. Finally, with regard to State security, Sir Francis had reiterated the concern he himself had expressed, namely, that a State, for reasons of national security, might be unable to transfer archives, either the originals or copies.

¹ For text, see 1560th meeting, para. 1.

4. With regard to the UNESCO experts who had for many years been studying problems relating to archives (basing their work, *inter alia*, on his earlier reports), it should be emphasized that they were expecting the Commission to give them guidance by elaborating general but clear legal principles.

5. All members who had spoken on draft article A had referred to various articles that had already been adopted, more particularly articles 5, 9 and 13.² Some had called for the deletion of article 9, which set forth the general principle of the passing of State property, while others had wondered whether article 5, which contained the definition of State property, was applicable to archives. Article 9 was currently before the Drafting Committee, and he stressed that the articles relating to archives, or at least the parts that the Commission would preserve, were intended to add a little colour to the draft. The definition contained in article 5, which the Commission had had great difficulty in drafting, in fact encompassed archives, since it dealt with property, rights and interests. Archives were unquestionably movable property belonging to the State. Over and above their value as a heritage, they represented incorporeal property, which was covered by the terms "rights" and "interests". In addition, in its commentaries to articles 1 to 25, the Commission had more than once referred to archives, considering them to be property within the definition given in article 5. By devoting draft article 11 to the passing of debts owed to the State, the Commission had gone so far as to consider the incorporeal property represented by such debts as falling within the definition of State property. That definition covered both property that had a market value, such as a collection of jewels, and property which, like archives, also had an intellectual, cultural or historical value.

6. Some members had drawn a distinction between works of art and archives, as private property. However, it had not been his intention to deal with archives solely as elements of the cultural heritage of nations, but simply to indicate the context in which archives should be considered, since they represented something both less and more than a cultural heritage. They formed part of the cultural heritage only if they had an historical or a cultural value; they went beyond the framework of that heritage in so far as there were administrative archives that were used in administering the population of the territory to which the succession related. For that reason, it was essential to consider all aspects of the question of archives, since archives constituted movable property of vital importance to a nation. He did not intend to revert to the relationship between archives and works of art, since the latter, as State property, were governed by draft articles 1 to 25.

7. Several members had raised the question of private archives. In his view, such archives concerned the Commission only indirectly. It was sometimes difficult

to determine the relationship between private archives and State papers. As Mr. Ushakov (1561st meeting) had pointed out, private papers or those of certain public institutions could be likened to State papers by reason of the control the State exercised over them. Mr. Reuter (*ibid.*) had even referred to purely private papers, namely, family records which, with the passage of time, had become papers of historical importance to the French State, and which the latter was at pains to prevent from being lost. Letters by sovereigns, even if they did not contain thoughts on public matters, were of historical importance and, as such, were generally protected by internal law. Only by reference to the internal law of the predecessor State was it possible to establish whether such letters constituted private property, possibly placed under the control of the State, or whether they had become State property. As for any letters by Emir Abdel-Kader that might have referred to political matters, they clearly belonged to the addressee; if they had been addressed to the French Government, they were the property of the French Government. It should be noted in that connexion that the French Government had been willing to open its archival collections to the Algerian Government to enable it to make reproductions of any archives that might be of interest to it.

8. In short, reference to the internal law of the predecessor State seemed inevitable, and the definition contained in article 5 should therefore prove satisfactory. If that was not the view of the Commission, a specific definition of archives would have to be given. But even then, reference would have to be made to internal law, so that, contrary to what Mr. Reuter thought, the definition formulated by the Commission would not be an international legal definition.

9. Many members of the Commission had referred to old or recent cases of decolonization that had presented problems concerning archives. Mr. Reuter had emphasized the possible injury to a nation's soul. If it was true, as an African statesman had said, that Africa had a memory but was without malice, then to deprive African countries of their archives was to deprive them of their memory. Moreover, colonization was not a phenomenon peculiar to the nineteenth and twentieth centuries; mankind must accept it as a fact of history. Mr. Díaz González (*ibid.*) had vigorously defended the presence of Latin American archives in Seville, which showed that time, in the end, was the great healer. In that connexion, however, he wished for his own part to make it clear that he had never intended to reopen a dispute among the Latin American heirs about the common heritage in Seville. On the contrary, it was his view that historical archives formed part of the common heritage of mankind. It followed from all those considerations that it was essential to draft provisions on succession to State archives, particularly for cases of decolonization.

10. Three trends had emerged in the course of the debate. Some members, like Mr. Ushakov (*ibid.*), had taken the view that it was not possible, for the time being, to draft a general article such as article A; they

² See 1560th meeting, foot-note 1.

would prefer to approach the question of archives from the particular standpoint of each type of succession. In Mr. Reuter's opinion (*ibid.*), only one or two general articles should be drafted to cover the two aspects of the question, namely, transfer of archives and treatment of archives of common interest. That approach would emphasize two points with which he had dealt himself: restitution and co-operation. Lastly, Mr. Riphagen (*ibid.*) had advocated a general article like article A, and a single specific article dealing with the case of decolonization, which raised problems for whose solution the international community required guidelines. Personally, he would have preferred the Commission to decide in favour of a general article and five specific articles; however, given the lack of time, he was prepared to endorse the approach suggested by Mr. Riphagen. The Commission would then be in a position to submit a complete set of draft articles to the General Assembly, at its thirty-fourth session. Moreover, as Mr. Riphagen had pointed out, the cases covered by articles B and E were perhaps not so very different. If the Commission adopted that course, it could refer draft article A to the Drafting Committee and would then have only draft article C to consider.

11. Article A should incorporate certain elements. First, it should be specified that States had an obligation to negotiate in good faith to reach a satisfactory outcome, an obligation that had already been emphasized by the Commission in other contexts. The accent should then be placed on agreement by the parties, which was essential if such a complex problem as that of archives was to be resolved. The principle of the passing of archives could be enunciated for the cases in which it unquestionably applied—for instance, when archives, and particularly administrative archives, were already in the territory to which the succession of States related. If such archives had been removed, they could be claimed for the purpose of ensuring the viability of the territory. The same was true of State papers dating from before the time at which the predecessor State had begun to exercise its sovereignty over the territory in question. In that connexion, Mr. Pinto (*ibid.*) and Mr. Njenga (1562nd meeting) had referred to the case where several successions of States had occurred before decolonization. As for archives that had been removed during the “suspect” period, they were dealt with in draft article A by the words “that relate exclusively or principally to the territory”, a formula that corresponded to the concept of property connected with the activity of the predecessor State in regard to the territory and that was embodied in the articles on State property.

12. A provision on papers of common interest should also be included, not in order to establish a guardianship of State papers but to specify to what extent, having due regard for the indivisibility of archival collections, reproduction of originals in the archives should be envisaged. In proposing that interested third States should have a right of access to State archives, he had been thinking of administrative rather than political archives. He had in mind the case where a

part of the population of a territory to which the succession of States related were to leave and to settle in a third State. To administer those new inhabitants, the third State might need to have access to the administrative archives concerning them. In the purely political sphere, a third State might also wish to have access to certain archives. For instance, two former colonies anxious to settle a frontier problem peacefully had addressed a joint request for access to certain archives to the French Government, which had agreed to the request. In a particularly serious dispute, however, a State so approached might well be less amenable.

13. Mr. TSURUOKA wished to dispel the misunderstandings that seemed to have arisen in connexion with his statement at the previous meeting. During the period preceding the conclusion, in 1953, of an agreement between the United States of America and Japan, the international status of the Amami Islands had been governed by article 3 of the Treaty of Peace with Japan.³ Under the terms of that provision, the United States had had the right to exercise over that territory and its inhabitants all powers of administration, legislation and jurisdiction. In accordance with article 1 of the 1953 agreement, the United States had relinquished in favour of Japan all rights and interests under article 3 of the Treaty of Peace, Japan thus assuming full responsibility and authority for the exercise of powers of administration, legislation and jurisdiction over the territory and inhabitants of the Amami Islands. It was on the basis of those provisions that he had taken the view that the case was one of succession of States, in keeping with the definition of the expression “succession of States” contained in article 3(a) of the draft. Before the 1953 agreement, the competent United States authorities had for instance issued passports to the inhabitants of the Amami Islands, or ensured the international protection of such inhabitants as fished on the high seas, and had thus assumed responsibility for the international relations of the territory. That responsibility had reverted to Japan under the 1953 agreement. It had therefore been appropriate to speak of a succession of States. Moreover, article 6 of the Treaty of Peace had contained a provision on the occupation, to the effect that all occupation forces of the Allied Powers should be withdrawn from Japan as soon as possible after the entry into force of the Treaty, with a reservation concerning the stationing or retention of foreign armed forces in Japanese territory under agreements concluded between one or more of the Allied Powers and Japan. The stationing of United States forces after the entry into force of the Treaty of Peace had taken place under a security agreement concluded between the United States and Japan had therefore not constituted military occupation.

14. He had referred to the cultural co-operation agreement concluded between the Republic of Korea

³ United Nations, *Treaty Series*, vol. 136, p. 45.

and Japan simply to demonstrate that, when a succession of States occurred, the States concerned could settle their disputes concerning works of art and other objects of historical or cultural value not by a treaty coming within the context of the succession of States but by a treaty on cultural co-operation.

15. Mr. USHAKOV considered that archives were documents that could not be regarded as State property. Neither an individual's birth certificate nor even the text of a treaty concluded between two States was State property. In his eleventh report, in connexion with the definition of archives, the Special Rapporteur referred to an agreement concluded on 23 December 1950 between Italy and Yugoslavia in which, for example, "documents concerning certain categories of property" were regarded as archives (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 23). It was therefore clear that documents constituting archives could not be included in the general concept of State property. In principle, archives consisted of documents that were not, strictly speaking, property. It followed that they did not come under the definition in article 5. Furthermore, at the beginning of the section of his report concerning the definition of archives, the Special Rapporteur had stated that, for the purposes of the draft articles, he had decided to limit the content of the concept of archives to "the documentary material constituted by State institutions in the course of their activities and deliberately preserved by them" (*ibid.*, para. 8). The difference between property and documentary material could hardly be more marked.

16. Consequently he was of the opinion that the part of the draft articles dealing with State property did not cover archives considered as documents. A separate part of the draft should be set aside for succession to State archives. Like part I of the draft, concerning succession to State property, the new part could contain a section 1 entitled "General provisions", and the articles making up the section could be modelled on articles 4 *et seq.* of the draft.

17. In addition, the Commission could draft general articles concerning State archives along the following lines:

"The predecessor and successor States should co-operate by permitting and encouraging both mutual access to their State archives and appropriate reproduction thereof, duly certified where necessary, for the legitimate needs of the administration or the exercise of the power of jurisdiction and other legitimate interests of the said States."

and

"The predecessor and successor States, in fulfilling their obligations concerning the passing of State archives under the articles of this part, shall as far as possible take into consideration the need to preserve the integrity of archives and other requirements arising from the specific nature of archives."

18. Mr. BEDJAOUÏ (Special Rapporteur) considered that State archives were not merely documents, as Mr.

Ushakov had stated, but also State property, since they belonged to the State. State archives were not solely of documentary value. They could have a cultural value and also a market value, as in the case of the parchments returned by Denmark to Iceland, whose value had been estimated at 600 million Swiss francs. They might also serve to establish ownership of certain property. Again, they might have administrative or evidentiary functions.

19. In the case of archives, he did not think it necessary that a series of general provisions should be adopted, as in the case of State property. The Commission should trust the Drafting Committee and refer draft articles A and C to it. Later on, it might be possible to add a definition and some specific articles; for the moment, however, it would be wiser to deal only with articles A and C.

20. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article A to the Drafting Committee.

*It was so decided.*⁴

ARTICLE C (Newly independent States)

21. The CHAIRMAN invited the Special Rapporteur to introduce draft article C (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 181), which read:

Article C. Newly independent States

1. Where the successor State is a newly independent State:

(a) archives of all kinds which belonged to the territory prior to its dependence and which became the archives of the administering State, and

(b) administrative and technical archives connected with the activity of the predecessor State in regard to the territory to which the State succession relates,

shall pass to the successor State.

2. The successor State shall undertake, for the purposes of the predecessor State, and at the latter's request and expense, any necessary reproduction of the archives that pass to it.

3. Succession to archives other than those referred to in paragraph 1 and concerning the territory to which the State succession relates shall be determined by agreement between the predecessor State and the successor State in such a manner that each of the two States benefits liberally and equitably from such archives.

4. Where a newly independent State is formed from two or more dependent territories, the passing of the archives of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3 above.

5. Where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the archives of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3 above.

6. Agreements concluded between the predecessor State and the successor State in regard to archives shall not infringe the right of every people to information about its history and cultural heritage.

⁴ For consideration of the text proposed by the Drafting Committee, see 1570th meeting, paras. 3-14 and 36-40.

22. Mr. BEDJAOUI (Special Rapporteur) said that draft article C envisaged the case where a newly independent State appeared on the international scene as a result of decolonization. In that case, the problem of succession to archives was particularly acute.

23. Mr. Díaz González (1561st meeting) had pointed out that, when the countries of Latin America had acceded to independence, Spain had not left them any archives and they had had to reconstitute their own collections. Now, however, a new phenomenon had occurred, namely, the stand taken by newly independent countries, which were claiming the right to their archives. UNESCO's work in that area showed that the problem of archives had to be settled on the basis of three major principles: the right to development, the right to information and the right to national and cultural identity. The problem of succession to State archives fell within the context of that threefold right.

24. In his opinion, the successor State should obtain not only the administrative archives needed for the administration of its territory but also the historical and cultural archives that related exclusively to its territory. It was necessary to enunciate as equitable a rule as possible, a rule which, while respecting the legitimate needs of the newly independent countries, opened the way to co-operation between those countries and the former administering Powers. At the same time, a newly independent State should be enabled to recover its national heritage and the former colonial Power should be enabled to ease the moral and material difficulties that might have accompanied its withdrawal from the territory.

25. There were four categories of archives: political archives of the colonial period, precolonial archives, archives established outside the territory to which the succession of States related, and administrative archives.

26. Some had taken the view that political archives of the colonial period should not pass to the newly independent State, since they were connected with the *imperium* and *dominium* of the administering Power. In that connexion, he had referred in his report to the proceedings of the sixth international round-table conference on archives, from which it was apparent that the conference had taken the view that "sovereignty collections... concerning essentially the relations between the metropolitan country and its representatives in the territory... fall within the jurisdiction of the metropolitan country, whose history they directly concern".⁵ Personally, he considered that view exaggerated, in that the exception made to the principle of transfer for archives connected with *imperium*, which was at issue, related less to the principle of ownership than to considerations of expediency and policy. Admittedly, it was important to prevent the publication of archives that might jeopardize good relations

between the predecessor State and the successor State, but it was also necessary to preserve the viability of the newly independent State. After all, certain political archives of the colonial period, such as those relating to the demarcation of frontiers or the conclusion of a treaty applying to the territory, were also of interest to the newly independent State—sometimes even of prime importance in cases of conflict or dispute with a third State. Consequently, if the newly independent State could not reasonably require the immediate and complete restitution of archives connected with the *imperium* and *dominium* of the former colonial Power, it should at least have access to those archives and obtain copies of them—and in any case at least by virtue of the same right as any private individual, since such archives were opened to the public after a certain period of time. Indeed, if the archives in question were connected with the history of the colonial Power, they were obviously even more closely connected with the history of the territory that had become independent.

27. That point of view was confirmed by State practice, for example by the agreement on cultural co-operation concluded in 1976 between the Netherlands and Indonesia,⁶ and by the positive attitude taken by France, which had planned to deliver to Algeria the originals, microfilms or photocopies, depending on the nature of the document, of historical archives connected with the colonization of Algeria, on the grounds that such a procedure was entirely in keeping with the current practice of co-operation among historians.

28. That approach was also encouraged by doctrine. In his report, he had quoted Charles Rousseau, who had said, in connexion with the colonial archives concerning Cambodia, that "the logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863-1953)".⁷ He had also mentioned the recommendation of the symposium on African archives and history held at Dakar in 1965, that "wherever transfers have infringed the principles of the territoriality of archives and the indivisibility of collections, the situation will be remedied by restitution or by other appropriate measures".⁸

29. Consequently, political archives of the colonial period could not be wholly excluded from succession of States, and a newly independent State should be given an opportunity to obtain the originals or copies of the documents that concerned it—for example documents pertaining to the demarcation of its frontiers or the application to its territory of treaties concluded on its behalf by the Administering Power. The hesitation of newly independent States in notifying their succession to certain treaties was sometimes due to their uncertainty about the earlier application of

⁶ *Ibid.*, para. 157.

⁷ *Ibid.*, para. 159.

⁸ *Ibid.*, para. 160.

⁵ See A/CN.4/322 and Corr.1 and Add.1 and 2, para. 149.

those treaties to their territory or about the actual content of those instruments, of which they had found no trace in the archives left in the territory by the colonial Power.

30. Precolonial historical archives and cultural archives proper to the territory should unquestionably revert in their entirety to the newly independent State, for here it was a question not of property belonging to the predecessor State but of property proper to the territory. That principle should be firmly and immediately applied and should not admit of any exception. It was confirmed by doctrine—more particularly by the proceedings of the sixth international round-table conference on archives, which had expressed the opinion that “the metropolitan country should return to States that achieve independence ... the archives which antedate the colonial régime”, for those archives “are without question the property of the territory”.⁹ It was also confirmed by State practice: for example by the 1947 Treaty of Peace between Italy and Ethiopia, by the 1950 Franco-Vietnamese agreement on archives and by the partial settlement of the Franco-Algerian dispute concerning precolonial historical archives.¹⁰

31. He pointed out that article 13, paragraph 1, which the Commission had already adopted, provided that, when the successor State was a newly independent State,

If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

That principle was valid in the case of precolonial historical archives, which were State property.

32. With regard to archives established outside the newly independent territory but relating to that territory, he had found no examples of that type of succession apart from the case of the India Office library, which had not been settled.¹¹

33. As for administrative archives, they should undeniably revert to the newly independent State, since they were indispensable for the administration of its territory. Thus the sixth international round-table conference on archives had stated that the former administering Powers had “the duty to hand over all documents which facilitate the continuity of the administrative work and the preservation of the interests of the local populations”.¹² The General Assembly had confirmed the same principle in the case of the decolonization of Libya (resolution 388 (V), of 15 December 1950) and in the case of Eritrea (resolution 530 (VI), of 29 January 1952). The problem of the administrative archives concerning Algeria had also been resolved in conformity with that principle.

34. In conclusion, he considered that the problem of archives was vital for newly independent States and should not be settled on the basis of the location of the archives, in other words, by assigning the archives to the State that held them at the time of the succession of States, for that would encourage the removal of archives on the eve of the territory's independence. The problem should be settled by direct agreement between the two States concerned, on the basis of the need for co-operation between the predecessor State and the successor State, which should together seek solutions satisfactory to each. One solution was to enable each State to obtain reproductions of any archives of which it had not received the originals.

35. The archives proper to the territory to which the succession of States related should necessarily revert, in their entirety and in their original form, to the newly independent State, in conformity with the two-fold principle of “origin” and “connexion” applied by archival scholarship. “Archives proper to the territory to which the succession of States related” were to be understood as meaning, first, pre-colonial historical archives and, secondly, archives of a purely administrative or technical nature that had been kept in the territory until its independence and that were often termed “local” archives.

36. Political archives of the colonial period, or “archives of sovereignty”, should be opened to the successor State in the same way as they were opened to the public by the predecessor State.

37. Lastly, it was essential to take account of the concerns of the newly independent States without losing sight of the interests or fears of the former administering Powers.

The meeting rose at 1 p.m.

1564th MEETING

Monday, 2 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Corr.1 and Add.1 and 2, A/CN.4/L.298)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur (*continued*)

⁹ *Ibid.*, para. 165.

¹⁰ *Ibid.*, paras. 166–168.

¹¹ *Ibid.*, para. 173.

¹² *Ibid.*, para. 174.

ARTICLE C (Newly independent States)¹ (*continued*)

1. Mr. BARBOZA was prepared to agree, for the time being, that only draft articles A and C should be submitted to the General Assembly. In his view, draft article A (1560th meeting, para. 1) did not adequately cover some of the situations provided for in draft articles B, E and F (A/CN.4/322 and Corr.1 and Add.1 and 2, paras. 140, 204 and 206). For example, paragraph 2(a)(ii) of draft article B provided that State archives concerning exclusively or principally the territory to which the succession of States related would pass to the successor State "if they were constituted in the said territory". The intention seemed to be to make an exception to the general rule laid down in draft article A, namely, that such archives would pass to the successor State in any event. That exception was not immediately apparent, however, and the Commission might wish to provide for it elsewhere in the draft. He was in favour of deleting draft article B, which would make draft article 14² superfluous. The latter article was itself unnecessary, and the fact that it had been placed in square brackets showed that it was controversial. Draft articles E and F raised a number of questions which it was needless to enumerate, but which served to reinforce his view that the General Assembly's examination of those articles at that stage might not be favourable.

2. He had no basic objection to draft article C, which applied accepted principles in regard to succession to State property in general and State archives in particular. He noted, however, that whereas paragraph 1(a) referred in general terms to "archives of all kinds" that had belonged to the territory prior to its dependence, paragraph 1(b) spoke of "administrative and technical archives" connected with the activity of the predecessor State. He wondered what was the reason for that distinction.

3. Paragraphs 2 and 3 of draft article C reflected the concepts of co-operation and common heritage. He found the idea of a common heritage particularly interesting in so far as its application in that and other areas of international law would make it possible to define all its legal consequences. Mr. Reuter had referred to the hypothetical case of a colonial Power that had kept among its archives documents relating to the frontiers of some of its former colonies. That case could be seen as one of the application of the concept of common heritage, imposing a special obligation on the former administering Power to act with caution in the matter of such documents.

4. Paragraphs 4 and 5 provided for the application of, and were therefore the logical sequel to, paragraphs 1, 2 and 3 of the draft article, while paragraph 6 embodied an essential principle applying to agreements concluded between the predecessor and successor States in respect of archives.

5. Lastly, in regard to draft article A, he believed that a short list of items designed to circumscribe the con-

cept of archives would serve the purposes of the draft better than a definition. He noted that draft article 5 (State property), which was the counterpart of draft article A, did not define State property, but provided that such property would be determined by reference to internal law. Article 5, however, referred not only to property but also to rights and interests, so that any object of financial, cultural, intellectual or historical value owned by the predecessor State, and situated in the territory to which the succession related, would be transferred to the successor State. In effect, therefore, State property was defined by reference to international rather than internal order. In his view, it was even more important to adopt such a reference in the case of archives; hence some such wording as "archives, records and other documents" should be used to circumscribe the concept of archives and at the same time to ensure that no relevant materials were excluded from the scope of the draft.

6. Mr. USHAKOV said that the principle of article C was acceptable, but that the text raised some drafting problems.

7. He wondered, first, why the Special Rapporteur had omitted the word "State" before the word "archives" in paragraph 1(a). Was it in order to extend the rule of passage to archives other than State archives, or because it was implicitly understood that the reference was to State archives? He thought it should be made clear that State archives were at issue, because there were also other categories of archives. He also wondered why, again in paragraph 1(a), the Special Rapporteur had not reproduced the formula used in article 13, paragraph 1, concerning movable and immovable property, since he regarded State archives as State property. For to speak of State archives meant that the archives had belonged to an independent State that had existed in the territory before it became dependent. It would therefore be better to reproduce the text of article 13, paragraph 1, and speak of "State archives of all kinds having belonged to an independent State which existed in the territory before the territory became dependent". Obviously, a problem might arise if the territory of the former independent State had been divided between several colonial Powers. That problem need not be resolved in the text of the article, but should perhaps be mentioned in the commentary.

8. With regard to the administrative and technical archives referred to in paragraph 1(b), it should perhaps be made clear that not only central but also local archives were involved. He wondered whether the formula "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates", used in article 13, paragraph 3(a), in regard to movable State property, should not be reproduced in the case of State archives.

9. As to paragraph 2 of the draft article he was not sure whether the obligation to "undertake, for the purposes of the predecessor State, and at the latter's request and expense, any necessary reproduction of the archives that pass to it", could be imposed on the

¹ For text, see 1563rd meeting, para. 21.

² See 1560th meeting, foot-note 1.

successor State. He also wondered whether that obligation would be imposed on the successor State on the date of the succession of States or later. Although the problem of State property was settled on the date of the succession of States, the problem of archives might not arise until after that date, because it was often much later that the predecessor or successor State found it necessary to refer to archives in order to find the documents needed for the management of its affairs. However, after the date of the succession of States, the successor State had sovereign power over the archives that had passed to it, and was therefore free to deny the predecessor State access to them. He therefore believed that it would be better to say, in a more flexible article in the general part of the draft, that the successor and predecessor States must co-operate by granting each other access to their archives.

10. In paragraph 3, he thought it should be specified that the succession referred to was "to the State archives of the predecessor State". In his opinion, the formula "concerning the territory to which the State succession relates" was not clear and might cause difficulties if the agreement between the predecessor State and the successor State was challenged. In that case would it be sufficient to be able to invoke "the right of every people to information about its history and cultural heritage", in accordance with the reservation in paragraph 6? That point should be clarified in the commentary.

11. Mr. NJENGA said it would be regrettable, and entirely unacceptable to him, if the terms of paragraph 1 of draft article C were to be understood in the restricted sense of article 13, namely, as archives that had "belonged to an independent State which existed in the territory before the territory became dependent", for that would necessarily restrict their application to documents kept by the Government. However, there were innumerable documents, collected by individuals—by missionaries for example—for their own use, that did not form part of government archives but that were vital to the history, culture and even the administrative structure of independent States. As the Special Rapporteur had pointed out in his report (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 180 (a)), those States started life at a disadvantage. Moreover, they often had no idea what belonged to them. If the Commission were to start quibbling about words, the draft article would become meaningless. He therefore had no hesitation in opting for a broader application of the draft article calculated to facilitate the widest possible access to archives. That approach was supported by the conclusions of the seventeenth international round-table conference on archives, referred to in the Special rapporteur's report (*ibid.*, para. 179).

12. Archives should be viewed as a whole, particularly since in the colonial situation the dividing line between those that had and those that had not belonged to the State was a very fine one, and since any attempt by the Commission to draw it would do little service to the basic aim of the recovery and integrity of the archives of newly independent States. That dis-

inction would mean, to cite but one example, that there would be no obligation to return the fine collection of manuscripts on Hinduism housed at the India Office library in London, to which the Special Rapporteur had referred (*ibid.*, para. 173). It would be better to err on the side of generosity towards the newly independent States rather than adopt an unduly legalistic approach, whereby succession to archives could be denied on the basis of a narrow classification. It would also be better to explain fully in the commentary what was meant by the phrase "archives of all kinds which belonged to the territory prior to its dependence", rather than restrict the terms of paragraph 1 (a) and then explain the reasons why.

13. Mr. Ushakov had suggested that, instead of a rule requiring the predecessor State to reproduce archives, a general article on co-operation should be included in the draft. His own view was that a clear rule was needed, since co-operation agreements were conspicuous by their absence. The Special Rapporteur had been unable to quote one instance, from territories formerly administered by the British, of an agreement for the return of archives. It was therefore essential to start on the firm basis of an obligation, which could be followed by co-operation agreements. That was what the Special Rapporteur had done, in a fair and balanced draft, and he would suggest that, rather than disturb that balance, Mr. Ushakov's point should be dealt with in the commentary.

14. He endorsed the important principle embodied in paragraph 6, which would ensure that agreements on archives concluded between the predecessor and successor States would serve to promote rather than restrict the dissemination of information on a people's history and cultural heritage.

15. Lastly, he would recommend that draft article C be referred to the Drafting Committee at once; he was opposed to any change in substance, since in his view that would undermine the draft as a whole.

16. Mr. FRANCIS considered draft article C as possibly the most important of all the articles on succession to State archives.

17. He agreed entirely with Mr. Njenga that the first limb of paragraph 1 (a) should be construed in broad terms, given the special historical and cultural background of newly independent States. In Jamaica, for instance, there was a group of people known as the Maroons, who had never been conquered by the British. Retaining the traditions they had brought with them from Africa, they had remained a self-contained unit to the present day. His understanding was that, under the terms of paragraph 1 (a), the documents of the Maroons, although not State-owned, would be regarded as State archives, since they would be considered as part of the heritage and history of Jamaica.

18. Bearing in mind the terms of paragraph 6 of draft article C, he would be inclined to rest the rationale for paragraph 1 (a) on a fundamental right of a people to information and to a national point of reference. He agreed with the spirit of the provision in that—to

borrow a concept of English law—certain rights “ran with the land”, which meant that those rights necessarily depended on the fate of the territory. Moreover, paragraph 1 (a) embodied a sound proposition from the standpoint of administrative convenience and functional utility alike. It was almost certainly true to say that research students from most newly independent States still could not complete a project on the governmental process prior to dependence without consulting the archives of the former administering Power, for instance those at the Records Office in London. All those considerations provided ample justification for the rule.

19. Paragraph 2, which provided for the reproduction of archives, was particularly important, since it was worded in mandatory terms and would therefore facilitate the passing of archives: a predecessor State would know that, after a document had passed, it could still obtain copies, and so would be less likely to remove documents.

20. Lastly, it had been suggested that it might be preferable to replace paragraphs 2 and 3 by a general provision on co-operation. He believed that both paragraphs should be retained as they stood.

21. Mr. DÍAZ GONZÁLEZ fully endorsed the wording of draft article C and shared Mr. Njenga's view that its scope should not be restricted. The only drafting change that might be made would be to replace the word “shall” by the word “may” in paragraph 2, for the simple reason that the reproduction of archives required an agreement between the predecessor and successor States.

22. No one could deny the principle underlying paragraph 1 (a), whereby archives of all kinds that had belonged to the territory prior to its dependence passed to that territory, in other words, to the rightful owner. Similarly, it was obvious that the country with the major interest in the administrative and technical archives referred to in paragraph 1 (b) was the successor State. Paragraph 6 summed up the idea underlying the whole article because, in removing a territory's archives, the colonial Power was appropriating that territory's cultural memory. It was the inalienable right of all peoples to preserve that memory, and the successor State itself could not renounce that right under an agreement with the predecessor State since that right, as indicated in paragraph 6, belonged not to the State but to the people.

23. Draft article C afforded an opportunity of submitting something viable and practical to the General Assembly, and the Commission must avail itself of that opportunity.

24. Sir Francis VALLAT drew attention to the fact that six draft articles had been submitted to the Commission and that, while some members had contended that the general terms of article A would suffice, others had favoured the retention only of articles B, C, D, E and F. However, the combination of article A and those other articles was somewhat odd, to say the least. The relationship between the general principles

enunciated in article A and the specific principles set out in the remaining articles for the different types of State succession would have to be established with considerable care if a viable set of articles were to be prepared on the topic of archives. However, articles B, D, E and F had now been set aside, which would leave only a partial picture of the subject, and was a most unsatisfactory approach. Article C could of course be referred to the Drafting Committee for further examination, but, in the absence of a thorough exchange of views in the Commission, the Drafting Committee would face an extremely difficult task.

25. He had the deepest sympathy for the sentiment expressed in paragraph 1 (a), as documents relating to a territory prior to its dependence ought, in principle, to be returned to that territory; but he seriously doubted whether the matter was strictly one of State succession at all. If it was, then the article was rightly confined to specifying that the documents passed to the successor State. Nevertheless, such a provision did not resolve the problem that arose, since it was to be inferred that, at the time of the succession, the documents were outside the newly independent State. In that case, the documents had to be identified and separated from existing archives, and arrangements made for their transfer. Again, a single document removed from a territory by the former administering Power might relate not to one newly independent State, but to a number of such States. Yet another problem was that a document might well have been sent to the metropolitan State and integrated in other archives. Rather than return the document, it would be much more satisfactory to supply the newly independent State with copies of the whole series of documents in the appropriate section of the archives, no matter where or when they had originated. Plainly, the subject gave rise to a number of practical problems that did not follow from the mere fact of succession, in other words, from the replacement of one State by another in responsibility for foreign relations.

26. In paragraph 1 (a), dealing with archives that were in the possession of the former administering State, it was essential to clarify the meaning of the expression “archives of all kinds”. It was clear from the report that scholars attached different meanings to the term “archives”. Moreover, it would be difficult to speak of “State archives”, because it was questionable whether all the territories concerned could have been regarded as independent States, in the modern sense, during the period prior to dependence. In the fifteenth and sixteenth centuries the concept of the modern monolithic State had been virtually unknown; there had been a large number of small units, each headed by a prince or a duke, for example, which could not be regarded as independent States in the modern sense of the term. He therefore agreed with Mr. Njenga and Mr. Francis that it would be inappropriate to restrict the article by referring to State archives only.

27. Paragraph 1 (b) presented much more difficulty. It was presumably intended to relate to administrative and technical archives accumulated in the territory

before the date on which the succession of States occurred. However, if it related to administrative and technical archives accumulated in the administering State, he could not support it. In the case of the United Kingdom, for example, it had been the normal practice during the period of colonial administration to accumulate archives both in the territory under administration and in London. What might be termed "colonial correspondence" had been treated in very much the same way as diplomatic correspondence. Broadly speaking, the archives left in the territory on its accession to independence were thus a faithful reflection of the archives accumulated in the administering State. Naturally, there might be instances in which certain deficiencies in local archives could be made good by securing copies of archives constituted in the former administering State. However, if the suggestion in paragraph 1 (b) was that technical and administrative archives accumulated in the administering State were to be transferred to all territories that had become independent, it was quite unrealistic and wholly unacceptable; he could not believe that such a proposition could form the foundation of codification or of progressive development of the law. Consequently he assumed that paragraph 1 (b) did not mean that the archives of the former administering State could be decimated or dissolved, so to speak.

28. On a minor drafting point, he thought it might be preferable to replace the words "succession to archives", in paragraph 3, by the words "the passing of archives"; since succession formed the subject-matter of the whole draft, it was not possible to speak of succession to archives.

29. Lastly, he fully agreed with the principle stated in paragraph 6 of the article.

30. Mr. TSURUOKA submitted the text of three draft articles (A/CN.4/L.298), the first two of which corresponding to article A and the third to article C:

Article X. State archives of an administrative nature

"For the purposes of the articles in the present part, 'State archives of an administrative nature' means documentary material in all forms, constituted and owned by a State, which relates to the actual legislative, administrative or judicial activities of that State."

Article Y. Passing of State archives of an administrative nature

"1. All matters relating to State archives of an administrative nature of the predecessor State shall be settled by agreement between the predecessor and successor States.

"2. In the absence of agreement,

"(a) State archives of an administrative nature which, at the date of the succession of States, are

situated in the territory to which the succession of States relates, shall pass to the successor State;

"(b) the predecessor State will authorize, upon request by the successor State, the appropriate reproduction of State archives of an administrative nature which are necessary for the administration of the territory to which the succession of State relates and which are situated in the territory of the predecessor State, except where such reproduction is deemed incompatible with the national security of the predecessor State."

Article Z. Newly independent States

"When the successor State is a newly independent State,

"(a) the passing of documentary material other than State archives of an administrative nature having historical or cultural value shall be settled in conformity with the relevant provisions of the present articles concerning the passing of State property;

"(b) the agreement referred to in paragraph 1 of article Y shall be negotiated in good faith and in accordance with the principle of equity and shall duly take into account the requirements and concerns of the successor State in respect of the administration of its territory."

31. Those texts were governed by the principle set out in draft article C, paragraph 3, namely, the primacy of any agreement concluded between the predecessor and successor States under which each would benefit liberally and equitably from the archives. That principle must, indeed, be the basis for article C as a whole, even more than for article A. The rules laid down in article C must therefore be of a residual nature, primacy being accorded to the respective interests of the predecessor and successor States.

32. Mr. QUENTIN-BAXTER noted that the draft as a whole employed a system of categorization by type of State succession, which had been applied to State property and State debts and was now being applied to State archives. If the Commission could resolve the very difficult and elusive problems inherent in the present topic, little time would be lost by using the same categorization. Moreover, something would be gained if the draft eventually submitted to the General Assembly were to be comprehensive, rather than appearing arbitrarily selective. Nevertheless, if a selective approach was to be adopted, he fully agreed that special attention should be paid to newly independent States.

33. Draft article C provided a comparatively narrow, conservative and reasonable coverage of the question and could not be regarded as wide-ranging or ambitious. The scope of the article was defined in paragraphs 1 and 6. In paragraph 1, the dominant provision was that in subparagraph (b), in which the Special Rapporteur had rightly chosen to use very much the

same wording as had been adopted for succession to State property, namely, "archives connected with the activity of the predecessor State in regard to the territory". That phrase, which had been fully discussed in the commentaries to the articles in part I of the draft, served to indicate that the test in regard to all kinds of movable property was not the place where such property was situated on the date of the succession of States. Account was taken of the fact that movable property was sometimes more closely associated with the predecessor State or with the successor State, even if it was situated in the other State. Administrative and technical archives could include a vast range of documents, such as correspondence relating to policy in regard to the former colony, civil registers, records of court decisions in criminal and civil matters, and there was no doubt in anyone's mind that such documents belonged to the successor State. It was only in cases of multiple succession that certain problems of distribution might arise. However, the Commission was not concerned with establishing any system of apportionment; it was dealing not with the value of property, but with the value of complete records.

34. The principle enunciated in paragraph 1(a), although very limited in scope, was entirely correct. Archival documents belonging to a territory prior to its dependence should be returned to that territory, even in cases of multiple succession. Certain islands in the Pacific, for instance, had fallen successively under the control of a number of metropolitan Powers.

35. Paragraph 6 stated the broad and uncontested principle that it was the right of peoples to obtain information on their historical and cultural heritage. However, although it was expressed as an overriding principle and one that limited freedom of contract between independent States, that principle was specifically related to access to information and not to possession of property.

36. He had no objection to any of those principles and considered that the Commission would have little difficulty if, in the case of administrative and technical archives, which covered most of the field, it preserved the form of language used in part I of the draft, which had once again been employed by the Special Rapporteur. Nevertheless, he wondered whether there might not be scope for saying, in carefully phrased terms, that in a case of State succession it was always the duty of the predecessor State to provide the successor State with the best evidence available on matters relating to the very identity of the successor State—for example, documents pertaining to boundaries. It would be justifiable for the Commission to endeavour to cover that aspect of the topic, without in any way moving into a matter that came under an entirely different rubric, namely, restitution of property which, for various reasons, had acquired value as works of art. As to the cost of reproducing archives, it did not matter where the incidence of such minor cost factors lay, provided that it lay equitably on the States concerned. The most important thing to stress was that it was the duty of the predecessor State to do everything

in its power to place the successor State in a position of "good title".

37. Mr. REUTER observed that the question of State archives was not only complicated in itself, but also raised serious technical problems for the Commission. The Commission was preparing to deal with that question at three levels: in general provisions relating to State property; in an article on the general régime of State archives, and in an article concerning newly independent States. He wondered whether all the rules applicable to newly independent States were set out in the article under consideration, or whether they were additional to those laid down in the general article on the régime of archives which, in turn, were additional to the rules relating to State property. Personally, he would have preferred the Commission to prepare those articles in reverse order, beginning with the rules applicable to newly independent States.

38. The régime applicable to newly independent States, as it appeared from draft article C and the commentary thereto, seemed less favourable to those States than the régime embodied in draft article A, as explained in the commentary to that article. Whereas "in principle, State archives of whatever kind pass to the successor State", as the Special Rapporteur had indicated with reference to draft article A (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 90(b)), only "archives of all kinds which belonged to the territory prior to its dependence and which became the archives of the administering State" passed to the successor State under article C paragraph 1(a).

39. As several members of the Commission had already pointed out, the concept of "archives of all kinds" required clarification. Was that concept to cover documents that formed part of the cultural heritage, to which reference was made in paragraph 6 of the article? It could be laid down as a principle that archives of all kinds situated in the territory of the successor State automatically belonged to that State. He did not consider it necessary to lay down such a principle; the successor State, as the sovereign State in its own territory, would not fail to enact a law providing that all papers situated in its territory and relating to its cultural heritage were State property. The real problem, as Sir Francis Vallat had emphasized, was posed by archives of all kinds that were not in the territory of the successor State and had never been State archives of the predecessor State. That was the problem that several members of the Commission had in mind. To resolve it, the obligation would have to be imposed on all States parties to the future convention to enact legislation permitting any State to take possession, where necessary, of archives that were in private hands, in order to restore them to the successor State. Having regard to that solution, the wording of paragraph 1(a) of the article was too cautious.

The meeting rose at 6.5 p.m.

1565th MEETING

Tuesday, 3 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Succession of States in matters other than treaties (*continued*) (A/CN.4/322 and Corr.1 and Add.1 and 2, A/CN.4/L.298)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur (*concluded*)

ARTICLE C (Newly independent States)¹ (*concluded*)

1. Mr. REUTER drew a distinction between registered archives, which had the status of archives, and potential archives, namely, documents for which the State had not assumed administrative responsibility but which were likely to become archives. Mr. Ushakov (1564th meeting) had maintained that the archives of all kinds referred to in paragraph 1(a) of draft article C were registered archives. The Special Rapporteur's intention had indeed been to limit that provision to registered archives of all kinds that had become archives of the predecessor State. Personally he was not opposed to that provision, but thought it would oblige the Commission to define the concept of archives. He thought it preferable that, instead of defining that concept, the Commission should enumerate in paragraph 1(a) the State papers considered to be archives of the predecessor State. However, some members of the Commission took the view that the provision should have a broader scope and cover documents of all kinds that had not become archives of the administering State. As drafted, paragraph 1(a) did not apply to documents, wherever they might be, that were potential archives, and the successor State was thus definitively deprived of them.

2. To satisfy the members of the Commission who were concerned about that point, it would be necessary to draft a provision supplementing paragraph 1(a), under which the predecessor State, or better still all States parties to the future convention, would accord archives of the successor State situated in their territory the protection provided for by their laws to their own archives. Reverting to the example of the letters written by Emir Abdel-Kader, he explained that, if those letters were offered for sale in Paris, the French

Government would have to intervene and seize them on behalf of the successor State. The scope of such a provision would obviously depend on the definition given to archives. That definition could either be restricted to old papers relating to the public affairs of the successor State, or extend to cultural archives. The latter alternative seemed consistent with the spirit of paragraph 6 of the article under consideration.

3. As he had pointed out at the previous meeting, it was important to determine whether the provisions of the articles relating to State property were to be combined with those of article A (1560th meeting, para. 1) and article C, in which case the general rules on the transfer of State archives could be invoked in favour of newly independent States, since those rules were themselves governed by the rules relating to State property. While there was no doubt about the intentions of the Special Rapporteur on that point, the same could not be said of the wording of articles A and C. Clearly, the régime applicable to newly independent States should be more generous to the successor State than the general régime for the transfer of State archives. Paragraph 1 of article C provided for the passing of three categories of archives: archives that had previously belonged to the territory, administrative archives and technical archives. The rest were covered by paragraph 3. That provision did not expressly provide that other archives passed to the successor State, but simply that succession to such archives was to be determined by agreement between the predecessor State and the successor State in such a manner that each of the two States benefited liberally and equitably from such archives. Must it be inferred from that provision that, to benefit in such a manner from those archives, the predecessor and successor States must conclude an agreement governing the passing of the archives, or must the agreement prescribe a special régime for archives that did not pass to the successor State? The situation would be simple if paragraph 3 related to the régime for archives of common interest, but the expression "succession to archives" assumed a transfer. If paragraph 3 really related to the passing of archives by agreement, it should be drafted in more precise terms; in particular, the reference to equity could be accompanied by an enumeration of principles of equity.

4. It thus appeared that, in regard to rules on transfer, article A was more generous than article C. According to article A, paragraph 1, "State archives of whatever nature that relate exclusively or principally to the territory to which the succession of the States relates, or that belong to that territory, shall pass to the successor State", with the exception of archives of sovereignty, which constituted a fourth category of archives. But archives relating exclusively or principally to a territory did not necessarily fall within one of the three categories of archives passing to the successor State under article C. Given the lack of symmetry between articles A and C, it might also be asked whether there were archives of sovereignty that passed to the successor State under article C. According to article C, paragraph 3, their passing was subject to the

¹ For text, see 1563rd meeting, para. 21.

conclusion of an agreement, and the need for an agreement implied that the passing was not automatic. It followed that article C was no more generous than article A, and that was most unsatisfactory.

5. As Sir Francis Vallat (1564th meeting) had rightly pointed out, paragraph 4 of article C dealt with the case of a newly independent State formed from two or more dependent territories, but ignored the case of a dependent territory from which several States emerged. The latter case should be dealt with in an additional paragraph.

6. As to the right of every people to information about its history and cultural heritage, referred to in paragraph 6, although he could not but support the provision, he had some doubts about its effect. He wondered whether the paragraph, which provided that agreements concluded between the predecessor and successor States in regard to archives must not infringe that right, stated a genuine legal rule. If it was a firm legal rule, it was a rule of *jus cogens*, so that agreements concluded in violation of the right in question would be void. Before endorsing such a bold step, he would like to be sure that it was intended by the Special Rapporteur. Personally, he would prefer the right of every people to information about its history and cultural heritage to be mentioned in paragraph 3, rather than in paragraph 6. As he had already pointed out, paragraph 3 should specify the principles governing the conclusion of the agreements referred to, and it would seem logical to state that those agreements must take the broadest possible account of that right of every people.

7. In all the articles relating to State archives, the Special Rapporteur made a distinction between the passing of certain archives to the successor State and the régime governing archives that did not pass to the successor State but that were of interest to that State, as well as to the predecessor State. In his opinion, it would have been better to group together all the rules concerning that régime in a single provision. Slight differences could indeed be noted between article A, paragraph 2, and article C, paragraph 2. According to the former, "the successor State will permit any appropriate reproduction of the State archives that pass to it", whereas, according to the latter, "the successor State shall undertake, for the purposes of the predecessor State... any necessary reproduction of the archives that pass to it". It might perhaps be preferable to combine those provisions in a single text setting out the general régime for archives of common interest, which would appear in article A.

8. Turning from the Special Rapporteur's approach to explain his own point of view, which he was quite prepared to abandon, he said that it would have been much simpler to begin by distinguishing between archives according to their location. Just as a mollusc naturally formed its shell in the place where it was situated, so an administration normally produced its archives in the place where it conducted its activities. Even the archives of a colonial administration, as long as it behaved normally, were accumulated in their

natural place, either as local or as central archives. It was only when archives had been arbitrarily moved that they had to be returned. It might be considered, for example, that certificates of births, marriages and deaths would remain in the same place as the persons they concerned. But to what extent was it possible to select, from central archives, those that concerned exclusively or principally the territory to which a succession of States related? To obviate the difficulties of application to which the rules in article A would inevitably give rise, it would be preferable to amplify the régime applicable to archives of common interest. How would it be possible, for example, to distinguish, among the central archives of Germany accumulated in Berlin, between those relating to the German Democratic Republic and those relating to the Federal Republic of Germany? To study the history of many countries, it was necessary to refer to other countries. For example, to learn the history of the Grand Duchy of Luxembourg from 1815 to 1890, it was necessary to consult the archives at The Hague and in Paris, as well as the German archives. Since the German occupation during the Second World War, parts of the archives of many European countries were to be found in German archives. To avoid giving newly independent States the impression that what they wanted was being denied them, he would willingly abandon his point of view, although he hoped that the Commission would draft more vigorous articles.

9. Mr. USHAKOV, reverting to his statement at the previous meeting, pointed out that paragraph 1 (a) of article C did not relate to archives of all kinds, whatever they might be, but to archives that had belonged to the territory prior to its dependence. If the territory was a unitary State, those archives were State archives, but if it was a part of a larger territory, they might perhaps be the archives of a local State. Perhaps the Special Rapporteur intended to refer simply to archives of all kinds located in the territory, a concept that would cover all archives, even those in private hands.

10. Mr. THIAM thought that the distinction made by the Special Rapporteur between archives that had belonged to a territory prior to its dependence, administrative archives, technical archives and archives of sovereignty, was of some theoretical and perhaps even practical value, if not taken to extremes. It seemed obvious that archives in the first category belonged to the successor State in the same way as administrative and technical archives, which were needed to ensure the continuity of administrative action. In regard to archives of sovereignty, the Special Rapporteur was proposing that the opposite principle should be laid down. It was sometimes difficult, however, to distinguish a purely administrative act from an act of sovereignty. Under colonial régimes where there had been some degree of internal autonomy, the metropolitan State had normally reserved to itself the spheres of justice, defence and diplomacy. Could it thus be concluded that all the documents of the predecessor State deposited in archives were documents of sovereignty and that those archives themselves were archives of

sovereignty? The Special Rapporteur considered it normal not to ask the predecessor State to reveal documents of sovereignty concerning certain aspects of the policy followed in dependent territories. But it was not so much a question of sovereignty as of discretion. It could not, after all, be maintained that an act of sovereignty such as the unilateral delimitation by the predecessor State of a colonial territory was of no concern to the successor State. As to archives relating to the administration of justice, although they pertained to sovereignty, they were of interest to the successor State because they concerned its inhabitants. The same applied to diplomacy and defence, so that it seemed exaggerated to affirm that archives of sovereignty did not pass to the successor State. The principle of the passing of State archives to the successor State should therefore be broadened.

11. Mr. FRANCIS said the discussion had clearly shown that article C formed the core of the provisions on succession to State archives. The provisions of paragraph 6 of that article might well be combined with those of paragraph 3, as Mr. Reuter had pointed out. In any event, the Drafting Committee should take account of the view that the agreements referred to in paragraph 3—a paragraph of vital importance—should always be governed by the fundamental principle stated in paragraph 6, namely, that every people had the right to information about its history and cultural heritage. In accordance with that principle, newly independent States had the right to succeed to archives.

12. In commenting on the terms of paragraph 1 (a) at the previous meeting, he had referred to the Maroons of Jamaica. A more appropriate example might be that of the Arawak Indians, the indigenous population that had died out after the English conquest of Jamaica in 1655. If archival items belonging to the Arawaks, either as a group or as individuals, had come into the possession of the administering State, whether by seizure, purchase or mere discovery, such items clearly fell within the terms of paragraph 1 (a), because they had belonged to the territory in question prior to its dependence, and they should therefore pass to the successor State.

13. Mr. PINTO said he hoped it would be possible to draft provisions that would ensure the return of archives where a newly independent State had been successively under the administration of several metropolitan Powers before finally gaining independence.

14. With regard to the suggestion that paragraph 4 of article C should be matched by an additional paragraph dealing with instances in which State succession had led to the emergence of several independent States from what had formerly been a single colonial territory, he recalled his suggestion (1561st meeting) for the inclusion in article C of a paragraph similar to paragraph 2 (b) of article F (A/CN.4/322 and Corr.1 and Add.1 and 2, para. 206).

15. Mr. BEDJAOUÏ (Special Rapporteur) noted that some members of the Commission thought that the rule stating the principle of the transfer of State

archives was too cautious; personally, he would be glad if the Drafting Committee went further.

16. He also noted that some members were concerned about the future of the draft articles on succession to State archives and had expressed various views on the subject, from which three major trends could be discerned. Some, like Mr. Ushakov, were in favour of drafting only articles relating to each of the different types of State succession, without stating general rules whose application could not be controlled. Others, like Mr. Tsuruoka, would prefer, on the contrary, very general and flexible articles. Between those two extreme positions, some members, like Sir Francis Vallat, Mr. Barbosa, Mr. Riphagen and Mr. Reuter, had taken an intermediate position. Mr. Reuter, for example, had envisaged two régimes; one for the transfer of State archives, the other for the exploitation of the common heritage constituted by archives relating to a history in which the predecessor and successor States had been intimately associated.

17. However, all members of the Commission agreed that it was necessary to adopt a number of provisions on succession of States in respect of State archives if the draft articles were to be of practical value at the present time. For his part, he thought that the future of the draft articles on State archives, other than draft articles A and C, would depend on the progress of the Drafting Committee's work on articles 1 to 25, which had already been adopted by the Commission.² The Commission had not yet stated the principle of the general passing of State property. In that regard, the draft articles represented a regression in terms of jurisprudence and doctrine, which provided for the general passing of State property in all types of State succession. Thus article 9 referred only to "State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates", thereby excluding archives that had been removed from the territory on the eve of its independence. Some members of the Commission also thought that the definition of State property given in article 5, to which the Commission might have referred in connexion with archives, was inadequate and could not be applied to State archives. The Drafting Committee should therefore revise the definition of State property so that it could also apply to archives, and should broaden the general principle of the passing of State property set out in article 9.

18. Referring to Mr. Thiam's argument that the distinction he had made between, on the one hand, administrative and technical archives and, on the other hand, political and colonial archives (termed "archives of sovereignty"), was too theoretical, he appreciated that it was sometimes difficult in practice to distinguish between administrative archives and archives of sovereignty because the two categories of archives were closely interconnected. He nevertheless considered the distinction useful where a territory had

² See 1560th meeting, foot-note 1.

accessed to independence under difficult conditions, since it could enable the former colonial Power to satisfy the legitimate claims of the newly independent State while ensuring the maintenance of good relations between the two States. After all, it would be unrealistic to ask the former administering Power to surrender to the newly independent State military or diplomatic archives concerning the colonial war that had led to the territory's independence, since their publication might jeopardize future relations between the two States. Moreover, if the passing of all archives were laid down as a general principle, without distinguishing between administrative archives and archives of sovereignty, Senegal, for example, would have to return some of the archives it held to other countries, such as the Ivory Coast, Guinea and Benin, because the French administration had assembled all its archives of sovereignty concerning French West Africa in Dakar.

19. With regard to the problem of the location of archives, Mr. Reuter had distinguished between archives situated in the territory at the time of the succession of States (generally administrative archives abandoned on the spot by the administering Power) and archives that had been removed by the administering Power on the eve of the territory's independence and that should be restored to the newly independent State, and had proposed a common régime for archives of sovereignty that were located in the metropolitan country and that were of interest to both the former administering Power and the newly independent State.

20. For his own part, he believed that the position was more complex and that there was another possible solution for colonial political archives. Such archives generally existed in duplicate since, when writing to his Government, an official of the colonial Power had nearly always kept a copy of his letter, which was preserved in the archives of the territory. Those were the copies that the colonial Power had often removed at the time of the territory's accession to independence, and that should be restored to the newly independent State. The metropolitan country would suffer no loss, since it would keep the originals.

21. In the case of colonial political archives that existed only in the capital of the metropolitan country, and of which the territory did not possess copies (for example, a treaty concluded between two colonial Powers concerning the frontiers of their respective colonies), it was impossible to require the outright transfer of the archives to the newly independent State, since the originals were also of interest to the predecessor State. However, the newly independent State should receive copies of those archives.

22. On paragraph 1 (a) of article C, there were three main trends of opinion among members of the Commission.

23. Mr. Ushakov (1564th and 1565th meetings) had said he was prepared to go as far as possible and to consider the complete restitution of archives of all kinds prior to colonization. Nevertheless, he had

pointed out that the logical structure of the draft imposed certain limits, because once reference was made to archives "having belonged to an independent State which existed in the territory before the territory became dependent"—the formula used in article 13, paragraph 1, the archives in question were State archives, not simply any archives.

24. Conversely, Mr. Njenga (1564th meeting) and Mr. Francis (1564th and 1565th meetings) had argued that to limit the archives covered by paragraph 1 (a) to State archives would be to reduce the practical effect of a provision which, in their opinion, should cover all archives prior to colonization, such archives constituting an important cultural and historical heritage for the newly independent State.

25. Mr. Quentin-Baxter (1564th meeting) had taken the view that, no matter what interpretation were placed on the word "archives", the practical effect of paragraph 1 (a) would be very limited, since the archives that were most important for the newly independent State were not those antedating colonization but those constituted during the colonial period.

26. For his own part, he had deliberately refrained from referring to "State" archives in paragraph 1 (a), because he had considered that if the provision covered only State archives its scope would be very limited. It was possible to speak of State archives in that context on only two conditions: there must have been a State in the territory prior to colonization, and the archives belonging to that State must have become the property of the colonial Power. That would exclude cases in which there had not been a State in the territory prior to colonization. It would also exclude archives which, before the colonial period, had belonged to private persons, whether individuals or tribes. A serious problem would thus arise for most newly independent States. In the case of Niger, for example, it could be maintained that there had been no State before colonization, although the empire that had existed in the territory before the arrival of the French had left priceless archives. Similarly, it had been claimed that western Sahara had been a *terra nullius*, although its cultural wealth was unquestionable. Thus if article C, paragraph 1 (a), were restricted to State archives, its scope would be considerably limited.

27. It was obvious, however, that the predecessor State could give only what belonged to it: hence it could not be obliged to hand over to the successor State archives belonging to private collectors. It would therefore be possible to speak, in paragraph 1 (a), of archives that had been in the territory prior to colonization and that had become State archives under the administration of the colonial Power. The problem of the existence of a State prior to colonization would no longer arise: it would suffice that, at the time of decolonization, the archives had belonged to the administering Power as State archives, even if they had belonged to private persons before colonization.

28. The rule stated in paragraph 1 (a) would thus apply to archives that had belonged to private collectors prior to colonization, for example to religious mis-

sions, like the archives of the Institut des Belles-Lettres arabes (IBLA), in Tunis, or to private enterprises, such as the library of the India Office, which had been constituted by the British East India Company, or like the archives assembled by the British South Africa Chartered Company, which had worked copper mines in the territory of what was now Zambia. As those companies had been charter companies, on which the British Government had conferred certain governmental powers, it was clearly open to question whether the archives they had collected belonged to them as private institutions or as agents of the administering Power. The case of the parchments relating the history of the kingdoms of Norway, assembled by a private collector and restored by Denmark to Iceland following a series of decisions taken by the High Court of Justice of Denmark,³ also came within the context of decolonization and was accordingly relevant to the situation covered by article C, paragraph 1 (a).

29. The rule he had proposed in that paragraph came midway between what some feared and others desired. It did not, unfortunately, allow the successor State, as Mr. Francis and Mr. Njenga wished, to obtain all archives, public or private, that had existed in the territory prior to the colonial period. Personally, he hoped that the Drafting Committee would go further.

30. With regard to paragraph 1 (b), he pointed out that the expression "administrative and technical archives" referred to all archives connected with the administrative management of the territory. Mr. Ushakov (1564th and 1565th meetings) had emphasized that they were mainly local archives, whereas Sir Francis Vallat (1564th meeting) had asked whether they might not be central archives, for example administrative and technical archives concerning the capital of a newly independent State, but held in London. He wished to dispel Sir Francis Vallat's fears by assuring him that it was not a question of despoiling the former metropolitan Power of its archives, but of encouraging the predecessor and successor States to co-operate, because in most cases there were copies of administrative and technical archives and it was those copies that the newly independent State should obtain.

31. In regard to paragraph 2, he noted that Mr. Ushakov wished to relieve the newly independent State of the obligation to undertake, "for the purposes of the predecessor State, and at the latter's request and expense, any necessary reproduction of the archives that pass to it", arguing that the sovereignty of the newly independent State over its archives must be respected. That argument, however, assumed that the problem of the transfer of archives had already been settled. It was precisely to facilitate such transfer, however, that he had sought, by giving the predecessor State an assurance that it would be able to obtain reproductions of the archives, to encourage that State to hand over to the successor State archives relating to the latter's territory. Personally, like Mr. Francis and Mr. Njenga, he would prefer to achieve that result by

means of a more flexible rule which, instead of imposing a unilateral obligation on the successor State, would provide for collaboration between the successor and predecessor States.

32. Paragraph 3 dealt with colonial political archives, or "archives of sovereignty", which were related to the *imperium* or *dominium* of the colonial Power. In that paragraph he had proposed as flexible a provision as possible, calculated to induce the predecessor State to open those archives as widely as possible to the successor State. Such archives constituted a common heritage, for they related to the history of the former colonial Power as well as to that of the newly independent State, for which they were vitally important. Mr. Quentin-Baxter (1564th meeting) had said, in that connexion, that the predecessor State had a duty to furnish the successor State with any available evidence on questions relating to the frontiers of the newly independent State and its political identity.

33. In paragraph 4, he had merely reproduced the provision contained in article 13, paragraph 4, which dealt with the case of a newly independent State formed from two or more dependent territories. He was also prepared to consider the case in which a dependent territory split up to form several independent States.

34. Several members of the Commission had considered paragraph 6 fundamental. Thus Mr. Díaz González (*ibid.*) had said that it summed up the whole philosophy of the draft articles, while Mr. Quentin-Baxter had considered that it organized access to information, but did not settle the problem of ownership. The idea of heritage, however, embraced the idea of ownership. Thus paragraph 6 referred not only to the right to information but also to the right of ownership. It would facilitate management of the common heritage, because it could be interpreted as safeguarding both the archival heritage of the newly independent State and that of the predecessor State. The rule laid down in that paragraph was based on the rule in article 13, paragraph 6, which the Commission had considered a rule of *jus cogens*. That rule should facilitate succession to the colonial archives covered by paragraph 3 of article C.

35. Mr. Reuter had said that article A was much more generous than article C and that there was some inconsistency between the provisions of those two articles. However, if paragraphs 1 and 3 of article A were considered together, it was apparent that the idea contained in those paragraphs was exactly the same as that contained in article C. The word "benefits", in article C, paragraph 3, was ambiguous, as the reference might be to the actual transfer of colonial political archives to the successor State or merely to the successor State's access to those archives, which would remain the property of the predecessor State. Sir Francis Vallat (*ibid.*) had observed, in that connexion, that the term "succession" suggested rather the transfer of archives. It would therefore probably be better to say that "the problem of succession to archives... shall be determined by agreement between the predecessor

³ See A/CN.4/322 and Corr.1 and 2, paras. 192 and 193.

State and the successor State". He had not wished to decide the question, for he had judged that the two parties were free to resolve as they wished the problem of succession to archives covered by paragraph 3 of article C.

36. He thought Mr. Reuter's proposal (see para. 2 above) for a general rule that would go further than article C by imposing on the predecessor State, and indeed on all States, the obligation to grant all archives of the successor State that might be in their territories the protection provided by their internal laws to their own archives, an excellent solution, similar to the one advocated by UNESCO and by a number of international conferences, such as the seventeenth international round-table conference on archives, held at Cagliari in October 1977. However, the problem had not yet been settled, and only a few attempts had been made in that direction through bilateral agreements. He would be very pleased if the Drafting Committee helped States to take a step forward by going beyond what he had himself proposed in draft article C.

37. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article C and Mr. Tsuruoka's proposal (A/CN.4/L.298) to the Drafting Committee.

*It was so decided.*⁴

The meeting rose at 12.50 p.m.

⁴ For consideration of the text proposed by the Drafting Committee, see 1570th meeting, paras. 3-8, 15-35, and 36-40.

1566th MEETING

Friday, 6 July 1979, at 10.30 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Dadzie, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Co-operation with other bodies [Item 13 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Herrarte González, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. HERRARTE GONZÁLEZ (Observer for the Inter-American Juridical Committee) said that the

Committee attached utmost importance to its co-operation with the International Law Commission, because of the significance for the progressive development of international law of the topics considered by the Commission and the scholarship each of its members brought to the study of those topics. He had closely followed the discussion on succession of States in respect of matters other than treaties and had noted that the subject had been analysed in all its aspects. It was that method of work that had enabled the Commission to achieve constructive results.

3. The question of succession to State archives was of particular interest because, as a UNESCO group of experts had rightly pointed out, archives were an essential part of the heritage of any national community.¹ At the Commission's previous session, the Special Rapporteur had cited a number of very interesting examples of historical archives. In that connexion, he would like to mention the "Archivo de Indias", preserved in Spain since the time of America's colonization. That archival collection had proved extremely valuable for research on the history of the Spanish-American countries and, in particular, for settling questions concerning boundaries. His country, Guatemala, held the "Archivo de Centroamérica", so called because, during the colonial era, central America had formed a single administrative unit, the Capitanía General de Guatemala, which after independence had become a political entity called the United Provinces of Central America. Those archives contained an original edition of the first history of America, written by Bernal Díaz del Castillo and entitled "True history of the conquest of New Spain". They also included the original of the Popol-Vuh, the holy book of the Quiché Maya, written in Latin characters by a Quiché Indian, which had been translated into all languages and was of capital importance for a knowledge of pre-colonial America. Other documents, such as the famous Maya codes, were preserved in international museums.

4. Referring briefly to the work of the Inter-American Juridical Committee, he said that the Second Inter-American Specialized Conference on Private International Law, held at Montevideo in April and May 1979, had approved eight multilateral conventions drafted by the Committee on the following subjects: conflicts of laws concerning cheques; conflicts of laws concerning commercial companies; extraterritorial validity of foreign judgements and arbitral awards; execution of preventive measures; proof of information of foreign law; domicile of natural persons in private international law; and letters rogatory. Those eight conventions, which were designed to facilitate relations between the countries of the American community, would supplement the Convention on Private International Law known as the "Bustamante Code".

¹ See A/CN.4/322 and Corr.1 and Add.1 and 2, para. 25.

5. As every year, the members of the Committee would take an active part in the course on international law to be given in Rio de Janeiro in July and August under the Committee's auspices, to which eminent lawyers were invited. Mr. Barboza, a member of the Commission, had been invited that year.

6. The Committee was to hold its next session in July and August 1979. The main items on its agenda were: torture as an international crime (on which subject a draft convention was to be prepared in collaboration with the Inter-American Commission on Human Rights); transnational corporations and a code of conduct; revision of the inter-American conventions on industrial property; legal aspects of co-operation in transfer of technology; the principle of self-determination and its sphere of application; measures to promote the accession of non-autonomous territories to independence within the American system; jurisdictional immunity of States; and settlement of disputes relating to the law of the sea.

7. The CHAIRMAN thanked Mr. Herrarte González, Vice-Chairman of the Inter-American Juridical Committee, for his account of the Committee's work. He emphasized that co-operation between the Commission and regional bodies should be maintained and further strengthened. It was particularly important that the views of regional bodies should lead to concrete achievements, so that the Commission could take them into account in the codification and progressive development of international law, which it was pursuing at a universal level.

8. The Inter-American Juridical Committee was the first intergovernmental regional body responsible for codifying international law with which the Commission had established co-operative relations, in accordance with article 26, paragraph 4, of its statute. The Committee's achievements and the range and diversity of the subjects on its agenda showed the importance attached by OAS to the codification and progressive development of international law and to the work of its principal legal organ. Latin American lawyers had always been in the front rank of those who strove for the progress of international law in the service of peace and the promotion of friendly relations between States and peoples based on respect for the principle of sovereignty, as evidenced by their contribution to the development of the principle of non-intervention, the law of the sea and the right of asylum. The Commission was itself indebted to them on several counts. For example, it was on the basis of a draft submitted to the General Assembly by the delegation of Panama that the Commission had prepared, in 1949, a draft declaration on the rights and duties of States. And it was the system of reservations originating in Latin America that had prevailed in the Commission during the preparation of the draft articles on the law of treaties which had formed the basis of the Vienna Convention on the Law of Treaties.

9. He hoped that the Inter-American Juridical Committee would continue its work with the same success as in the past, in the interests of Latin America and of the rest of the world.

10. Mr. FRANCIS said that the work of the Inter-American Juridical Committee, like that of the other regional juridical committees, was an essential tributary to the mainstream of the codification process in which the Commission was engaged. The Committee was also a source of that process, as was clear from Mr. Herrarte González's account of its contribution to both public and private international law.

11. As one who came from the Caribbean region, he wished to convey to the members of the Committee his personal regards and his best wishes for the success of its 1979 session. He trusted that co-operation between the Committee and the International Law Commission would continue to flourish.

The meeting rose at 11.20 a.m.

1567th MEETING

Tuesday, 10 July 1979, at 10.40 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Valat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318 and Add.1-3, A/CN.4/L.297)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 28, 29 AND 30

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 28, 29 and 30 adopted by the Drafting Committee (A/CN.4/L.297), which read:

Article 28. Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

* Resumed from the 1545th meeting.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility of the State which has committed the internationally wrongful act, under the other articles of the present draft.

Article 29. Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in its consideration of articles 28 to 30 and of the title of chapter V, the Drafting Committee had been privileged to have the active participation of Mr. Ago, and had taken account of the Commission's discussion of the topic and of the formal proposals contained in documents A/CN.4/L.289/Rev.1 and A/CN.4/L.290-295. The Committee had also had before it written proposals and suggestions by some of its members and had kept in mind the need to maintain consistency of terminology throughout the draft.

3. Article 28 had been the subject of a formal reservation in the Drafting Committee. The word "indirect" had been deleted from the title proposed by Mr. Ago (A/CN.4/318 and Add.1-3, para. 47), in order to take account of the Commission's views. Whereas the original text of the article had been divided into two paragraphs, the text adopted by the Drafting Committee contained three paragraphs. Paragraph 1, which concerned the "stable relationship" aspect of the rule, corresponded to paragraph 1 of the original article, but a number of drafting changes had been introduced to make the rule clearer. First of all, the negative formulation of the original text, which had placed the emphasis on the absence of international responsibility of the State committing the wrongful act, had been changed to a positive formulation stressing the international responsibility of the State exercising the power of direction or control over the State that committed the act. Thus the last part of the original paragraph, which had read "does not entail the international responsibility of the State committing the wrongful act but entails the indirect international responsibility of the State which is in a position to give directions or

exercise control", had been amended to read "entails the international responsibility of that other State", a formulation expressing the same idea in a more succinct manner. In addition, the expression "in law or in fact" had been deleted, and the words "the power of" had been inserted before the words "direction or control", it being understood that, for the purpose of invoking responsibility under article 28, paragraph 1, it was not necessary to establish that that power had in fact been exercised to secure the commission of the internationally wrongful act. The words "not in possession of complete freedom of decision, being" had been deleted, as unnecessary.

4. Paragraph 2 of article 28, which concerned the "coercion" aspect of the rule, corresponded to paragraph 2 of the original text, although some drafting changes had been made for the sake of greater precision and clarity. The new text included a change similar to the one made in paragraph 1, the negative formulation "does not entail the international responsibility of the State which acted under coercion but entails the indirect international responsibility of the State which exerted it" having been replaced by the positive wording "entails the international responsibility of that other State". Again, as in the case of paragraph 1, the reference to "indirect" responsibility had been omitted. Moreover, the words "under coercion" had been replaced by the words "as the result of coercion", to stress the direct causal connexion between coercion and the commission of the internationally wrongful act. The expression "to that end" had been amended to read "to secure the commission of that act", to emphasize the purpose of the coercion.

5. Paragraph 3 of article 28 had been inserted in order to separate the question of the possible responsibility of the State committing the wrongful act from that of the responsibility of the State which exercised the power of direction or control, or which had coerced the State committing the act. Paragraph 3 thus made it clear that the rules in paragraphs 1 and 2 did not necessarily exclude any responsibility that the State committing the wrongful act might incur under other articles of the draft. It also left open the possibility that the State committing the act might incur joint and several responsibility with the dominant State.

6. Article 29 was entitled "Consent". The words "of the injured State", used in the original title (A/CN.4/318 and Add.1-3, para. 77), had been deleted as not being entirely accurate or necessary. The article was set out in two paragraphs, which corresponded to the two sentences of the single paragraph of the original text. In paragraph 1, taking due account of the Commission's discussion, the Drafting Committee had inserted the word "validly", to qualify the consent given by a State. That word had been included in some of the formal proposals submitted to the Commission, notably in documents A/CN.4/L.291, L.292 and L.293, and it was to be understood in relation to international law. To circumscribe the application of the rule more clearly, the word "specified" had also been inserted to qualify the word "act", an idea that

had been reflected in document A/CN.4/L.293. For the same reason, the phrase “to the extent that the act remains within the limits of that consent” had been added at the end of the paragraph. In addition, as in the proposal contained in document A/CN.4/L.292, the words “in relation to that State” had been inserted after the words “precludes the wrongfulness of the act”, to emphasize that the rule was without prejudice to the possible wrongfulness of the act in relations with third States. Lastly, for the sake of *elegantia juris*, the phrase “with what the first State would have the right, pursuant to an international obligation, to require of the second State” had been replaced by the more succinct phrase “with an obligation of the latter State towards the former State”. The words “in question”, appearing at the end of the first sentence of the original text, had been deleted as unnecessary.

7. Paragraph 2 of article 29 corresponded to the second sentence of the original text and concerned the inapplicability of paragraph 1 when the obligation was one of *jus cogens*. The word “rule” had been replaced by the word “norm”, which was the term used in the Vienna Convention on the Law of Treaties.¹ In view of the new structure of the article, the initial words of the second sentence of the original text (“Such an effect shall not, however, ensue”) had been amended to read “paragraph 1 does not apply”. The word “concerned” had been deleted as superfluous. Paragraph 2 also included a definition of a peremptory norm, namely, that given in article 53 of the Vienna Convention, and specified, following the example of that Convention, that the reference was to “the present draft articles”, more particularly because article 18, paragraph 2, of the draft already included a reference to a “peremptory norm”.²

8. In article 30, the reference to a “sanction”, appearing in the original text (A/CN.4/318 and Add.1–3, para. 99), had been deleted, in view of the divergence of opinion in the Commission as to the precise meaning of that term in the context of chapter V of the draft and, in particular, to make it clear that the rule was not limited to sanctions that were mandatory under the Charter of the United Nations. The word “countermeasures”, employed in both the title and the text of article 30, thus extended to other legitimate measures (such as the application of the *exceptio non adimpleti contractus* under article 60 of the Vienna Convention) which, in the context of multilateral or bilateral relations, might in a broad sense amount to a sanction under general international law. In the text of the article, the phrase “was committed as the legitimate application of a sanction” had been replaced by the words “constitutes a measure legitimate under international law”. The replacement of the words “was committed as” by the word “constitutes” was intended to prevent any attempt at a subjective inference in the application of the rule. In addition,

the expression “under international law”, which qualified the word “legitimate”, had been inserted for further precision in regard to the term “measure”. For the wrongfulness of an act in regard to another State to be precluded, that act must constitute a measure legitimate under international law against that other State. Further, the word “international”, used at the beginning of the original text to qualify “wrongfulness”, had been deleted to ensure consistency with other provisions of the draft. For similar reasons, and to make the text more precise, the words “of a State” had been inserted to qualify the word “act” at the beginning of the paragraph. Finally, much as in the case of article 29, the somewhat cumbersome phrase “with what would otherwise be required of a State by virtue of an international obligation towards another State” had been replaced by the phrase “with an obligation of that State towards another State”.

9. The CHAIRMAN invited the members of the Commission to consider, one by one, the articles proposed by the Drafting Committee.

ARTICLE 28³ (Responsibility of a State for an internationally wrongful act of another State)⁴

10. Mr. USHAKOV said that the Drafting Committee had not adopted article 28 unanimously and that he himself was opposed to it. He therefore wished to state his position to the Commission again.

11. Paragraph 1 of the article referred to an internationally wrongful act committed by a State. That an act was an act of the State and that it was an internationally wrongful act could be established on the basis of the articles in chapters I to III of the draft. A certain conduct must be attributable to a State and that conduct must constitute a breach of an international obligation of that State. Such an act then entailed the international responsibility of the State in question. But contrary to those general principles, paragraph 1 of article 28 asserted that the internationally wrongful act of one State could entail the international responsibility of another State. Admittedly, as the Chairman of the Drafting Committee had pointed out, the international responsibility of the State that had committed the act could also be entailed, but the fact remained that the State that had not committed the wrongful act was held responsible in the first instance, which was both inexplicable and unacceptable. It was contrary to the articles already adopted to lay down the principle that the responsibility of one State could be entailed by the wrongful act of another State.

12. According to paragraph 2 of article 28, an internationally wrongful act of a State entailed the international responsibility of the State which had coerced it.

¹ See 1533rd meeting, foot-note 2.

² See 1532nd meeting, foot-note 2.

³ For consideration of the text initially submitted by Mr. Ago, see 1532nd to 1537th meetings, paras. 1–24.

⁴ For text, see para. 1 above.

In his view, a State that applied coercion was responsible for the coercion, but not for the wrongful act committed by the coerced State. According to the text of the proposed provision, however, if an act of aggression was committed by one State under the coercion of another, it was the international responsibility of that other State that was entailed, so that the coercion absolved from all responsibility the State that was subjected to it and that had committed the internationally wrongful act. Moreover, paragraph 2 of article 28 covered any coercion, however slight it might be and however serious its consequences, applied by one State in regard to another to secure the commission of an internationally wrongful act. As the provision stood, therefore, it would be necessary to establish the *animus* of the State applying the coercion to determine whether or not it had intended to secure the commission of the act in question. But to adopt that course was unthinkable.

13. Reverting to paragraph 1, he observed that the expression "power of direction or control" was very vague and could not be clarified by any commentary. A State that was entirely subject to the power of direction of another State did not itself commit an internationally wrongful act. Since it was no longer a sovereign State, it was not in a position to commit such an act. It was the State to whose power of direction it was subject that committed the internationally wrongful act, and it was the international responsibility of that State that was entailed. In the wrongful legal situations to which article 28 might be applied, the State subjected to the power of direction of another State could not commit an internationally wrongful act, since it was not able to act itself. To admit that it could do so would be contrary to the preceding articles of the draft.

14. The wording of paragraph 3 of article 28 gave the impression that a State could commit an internationally wrongful act "under the other articles of the present draft".

15. Mr. REUTER found draft article 28 acceptable, but doubted whether the expression "pouvoir de direction ou de contrôle" was correctly rendered in English. In French, there was a slight difference in meaning between "pouvoir de direction" and "pouvoir de contrôle", the former implying a greater ascendancy than the latter. A State exercising "pouvoir de direction" over another State almost substituted itself for that State. The expression "pouvoir de contrôle" had a much more restricted meaning, which did not seem to be true of the English expression "power of control".

16. In accepting draft article 28, he was well aware that the problems referred to in paragraph 3 of that article were duly reserved and would have to be considered later. Those problems arose from the fact that several States could participate in the same international offence in different capacities, for example, as accomplices or co-authors. Unlike Mr. Ushakov, he believed that article 28 was necessary, because his conception of sovereignty was less exclusive.

17. Mr. DIÁZ GONZÁLEZ, referring to paragraph 2 of article 28, said that an internationally wrongful act could of course be committed as a result of coercion, but that coercion need not necessarily have been used to secure the commission of the act. Hence it would be much more logical to replace the words "to secure" ("para provocar" in the Spanish version) by the words "to induce" ("para inducir")—a broader formulation that more accurately reflected what the provisions of paragraph 2 sought to establish. In other respects the article raised no difficulties.

18. Mr. TSURUOKA understood the concern expressed by Mr. Díaz González, but thought the meaning of the verb "provoquer" was consistent with the spirit of paragraph 2. No coercion was so strong that it left no freedom of action at all to the State subjected to it.

19. Subject to closer concordance between the words "provoquer" and "to secure", he was willing to accept the article.

20. Sir Francis VALLAT said that paragraphs 1 and 2 of article 28 embodied two essential principles of international law and, in general, reflected the views of the Commission. The difficulty was to give expression to those principles, particularly as they related to the possible responsibility of the State that had committed the act, as opposed to the responsibility of the State that had not committed the act.

21. The relationship between paragraphs 1 and 2, on the one hand, and paragraph 3, on the other, caused him considerable misgivings. Paragraph 3 referred to "the other articles of the present draft", and under those articles the State to which the act was attributable was the responsible State. The provision therefore seemed to reflect the idea of dual responsibility: that of the State which committed the act and that of the State which exercised the power of direction or exerted coercion. That, however, was not his understanding of the general sense of the Commission, for while the Commission had accepted that the act brought about by the dominant State would normally be regarded as the act of that State, a number of speakers had recognized that, in some circumstances, the subordinate State could not escape responsibility altogether by invoking the responsibility of the dominant State. For example, if, under a treaty provision, the dominant State had power of control over the armed forces of the subordinate State, and if the subordinate State used its armed forces, that case would fall *prima facie* within the terms of paragraph 1. But what would be the effect of paragraph 1 read in conjunction with paragraph 3 if, in those circumstances, the subordinate State used its armed forces, possibly in disregard of the wishes of the dominant State, in a way that was internationally wrongful? To put the problem in a slightly different way, if the subordinate State committed an act of aggression under the direction or control of the dominant State, was the subordinate State to be free of all responsibility? For his part, he could not subscribe to any such proposition. He considered that there was a certain relationship between paragraphs 1

and 2, on the one hand, and paragraph 3, on the other, which was not brought out by the draft. Perhaps, however, that would be corrected by subsequent provisions.

22. With regard to the expression “subject to the power of direction or control”, in paragraph 1, he understood broadly what was intended, but thought it was for scholars of French rather than of English to say whether it was an exact reflection of the French text. He very much doubted, however, whether the word “direction” added anything to the word “control” in that context, since a power of control necessarily implied a power of direction. He also wondered whether the words “subject to the power” reflected the notion originally conveyed by the expression “in law or in fact”, as had been intended by the Drafting Committee. If a State became “subject to the power” by the *de facto* exercise of force, then that case fell more properly within the terms of paragraph 2 than of paragraph 1; and if it was a question of a legal right, which would normally be established by agreement, paragraph 1 seemed to go too far. Again, he would have difficulty in accepting the proposition that if a State, which was legally subject to some measure of control by virtue of a treaty, chose to ignore that treaty obligation and to act independently, it was relieved of responsibility for its act. The Commission should not be seen to provide such a cloak for wrongdoing.

23. Lastly, to avoid ambiguity, the phrase “under the other articles of the present draft”, which appeared at the end of paragraph 3, should be placed after the words “international responsibility”.

24. As it would be difficult to improve on the draft at that stage, the points he had raised could perhaps be reflected in the commentary and in the report.

25. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, as he had mentioned in his introductory remarks, article 28 had been the subject of a formal reservation in the Drafting Committee. That reservation reflected the point raised by Mr. Ushakov.

26. The expression “power of direction or control”, in paragraph 1 of the English text, had been considered at some length by the Drafting Committee, which had concluded that it was the correct rendering of the French expression “pouvoir de direction ou de contrôle”. Mr. Díaz González had suggested, if he had understood aright, that the word “secure” (“provocar”), in paragraph 2, should be replaced by the word “induce” (“inducir”). There again, the wording had been agreed by the Drafting Committee only after full discussion.

27. The expression “under the other articles of the present draft” had been included in paragraph 3 because it had been thought advisable to embody a general reference at that point, although the Committee had been well aware that a problem remained. That problem could perhaps be resolved either in the context of part II of the draft, which would deal with

the consequences of an internationally wrongful act, or in some subsequent article on *force majeure*.

28. Mr. AGO observed that there was a fundamental difference of opinion between Mr. Ushakov and the other members of the Commission regarding the situation of a State under military occupation. According to Mr. Ushakov, the occupied State lost its character as a sovereign State, so that any act committed by its organs must be attributed to the occupying State. According to the other members of the Commission, on the contrary, the sovereignty of the occupied State normally remained unchanged, so that an act committed by the organs of the occupied State remained attributable to that State; on the other hand, an act entailed the responsibility of the occupying State if it had been committed under the direction of that State or in a sphere of activity controlled by that State. That was the difference of opinion that was at the root of the problem raised by Mr. Ushakov. In fact, the two positions were not as divergent as they appeared, since in the most important cases they both led to the conclusion that the occupying State must be considered responsible.

29. With regard to the question put by Sir Francis Vallat concerning the relationship between paragraphs 1 and 2 and paragraph 3 of article 28, he pointed out that the responsibility of the dominant State, which was the subject of paragraphs 1 and 2, was a “necessary” responsibility, whereas the responsibility of the subordinate State, which was the subject of paragraph 3, was only a “possible” responsibility. Paragraph 3 did not mean that if there was responsibility of the dominant State there was necessarily also responsibility of the subordinate State. The question of the responsibility of the subordinate State must be settled in each specific case in accordance with the circumstances.

30. As to the terms “direction” and “control”, used in paragraph 1, “direction” was more active than “control” and was imposed in advance, whereas control was exercised after the event. Personally, he was willing to delete the words “the power of”, as proposed by Sir Francis Vallat. He thought that the problem raised by Mr. Díaz González concerning the use of the word “provocar” was merely a matter of translation.

31. In conclusion, he thought it would be useful to place the words “under the other articles of the present draft”, in paragraph 3, after the words “international responsibility”, as Sir Francis Vallat had proposed. It should be emphasized in the commentary that the international responsibility of the State that had committed the internationally wrongful act was a possible, not a necessary, responsibility, and that the problem raised by such responsibility could be resolved only in each specific case.

32. Mr. VEROSTA supported the proposal made by Sir Francis Vallat and endorsed by Mr. Ago concerning the position of the words “under the other articles of the present draft”, in paragraph 3. He proposed that

in paragraph 2 the verb "provoquer" should be replaced by a verb corresponding more closely to the verb "secure" in the English text.

33. Mr. REUTER said that he too had doubts about the use of the verb "provoquer", which had a criminal connotation in French, but he did not really see what other verb could be used to replace it. He would have preferred paragraphs 1 and 2 to speak of *an* international responsibility. However, he understood that Sir Francis Vallat wished to place the accent on substitution of responsibility, by stressing that the responsibility of the State committing the offence was only subsidiary.

34. Sir Francis VALLAT did not think the difficulty could be overcome, as far as the English text was concerned, simply by substituting the indefinite article for the definite article before "international responsibility", although some such phrase as "without prejudice to any international responsibility" could perhaps be introduced to suggest the idea of possibility. His main point had been that the question should be dealt with in the commentary, since it would be better not to change the draft at that stage.

35. Mr. USHAKOV emphasized that, in his opinion, the State referred to in article 28 as committing the internationally wrongful act was neither completely sovereign nor completely under military occupation. He knew that in Nazi-occupied States, during the Second World War, there had been collaborationist national organs which had been responsible for the crimes they committed; but that, in his opinion, was another type of responsibility, because the States in question had been completely occupied by the Nazis, and consequently had not been free.

36. Mr. RIPHAGEN (Chairman of the Drafting Committee) explained that the Drafting Committee had decided, after long deliberation, to add the words "power of" in paragraph 1, in order to distinguish the situation dealt with in that paragraph from the situation dealt with in paragraph 2. Paragraph 1 concerned the "stable relation" aspect of the rule, and the power did not actually have to be exercised for the purposes of the internationally wrongful act.

37. Sir Francis VALLAT suggested that the point would be met if Mr. Riphagen's remarks as Chairman of the Drafting Committee were reflected in the report.

38. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to replace the text of paragraph 3 of draft article 28, as proposed by the Drafting Committee, by the following text:

"Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act."

It was so decided.

39. The CHAIRMAN said that if there were no objections he would take it that the Commission

decided to approve the text, as amended, of draft article 28 proposed by the Drafting Committee.

It was so decided.

ARTICLE 29⁵ (Consent)⁶

40. Mr. REUTER proposed that the title should be made more precise by adding the word "prior" before the word "consent". He wondered whether the consent referred to in article 29 was a conventional act or a unilateral act. In the former case the tautological character of article 29 would be accentuated, since it would be tantamount to saying that there was no violation of an international obligation if there was no longer any obligation.

41. Mr. AGO considered that the consent referred to in article 29 always constituted, in the final analysis, participation in a voluntary agreement between two States. But the article was not as tautological as it appeared, because the obligation at issue remained; it was rendered inoperative only in a particular case.

42. Mr. USHAKOV observed that Mr. Reuter's question no longer arose since the Drafting Committee had added the word "specified" before the word "act" in paragraph 1. Consent did not remove the obligation as such, but suspended its application in regard to a specified act.

43. Sir Francis VALLAT was a little doubtful about amending the title of the article to read "prior consent". In practice, what was often involved was not a single act but a continuing course of conduct, so that in a sense it was not a question of prior consent but of simultaneous consent. Moreover, the Commission should follow the normal practice of not using language in the title that did not appear in the body of the article.

44. Although he also had certain doubts about the words "specified" and "remains", he thought it would be inadvisable to reopen those questions, and that the draft should be accepted.

45. Mr. FRANCIS considered that the consent of a State whose territory was affected by an act must be given before that act was committed. Since that was made clear in Mr. Ago's report, he would not press for any change in the title of the article. Perhaps it would satisfy Sir Francis Vallat if his point were also reflected in the commentary.

46. Mr. USHAKOV shared Sir Francis Vallat's doubts as to the need to add the adjective "prior" to the word "consent" in the title. An act could comprise several constituent acts.

47. Mr. AGO thought, on reflection, that the title of article 29 was sufficiently clear and did not necessarily require amendment. He pointed out that in French the

⁵ For consideration of the text initially submitted by Mr. Ago, see 1537th meeting, paras. 25 *et seq.*, 1538th, 1540th, 1542nd and 1543rd meetings, and 1544th meeting, paras. 5-7.

⁶ For text, see para. 1 above.

word “fait” could mean an action or an omission, a “simple” act or a “continuous”, “composite” or “complex” act, and that in English the word “act” had always been used in the draft as the equivalent of the word “fait” in French. On the other hand, the word “specified”, in the English text of paragraph 1, might be taken to imply that the act referred to was a single act. He wondered whether it would not be better to replace it by the word “given”.

48. Mr. NJENGA said that, since the article referred to a specified act subject to consent, it was only rational for the consent to precede the act. He would have difficulty in accepting the notion of simultaneous or subsequent consent—which was not what the Commission had in mind. However, he was prepared to agree that the title should be left unchanged on the understanding that it referred to prior consent.

49. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted the text of article 29 proposed by the Drafting Committee, as well as the title of chapter V: “Circumstances precluding wrongfulness”.

It was so decided.

ARTICLE 30⁷ (Countermeasures in respect of an internationally wrongful act)⁸

50. Mr. USHAKOV said that the article was very clear and could be adopted by the Commission without difficulty.

51. Mr. REUTER welcomed the fact that the Drafting Committee had introduced the word “countermeasures” in the title.

52. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted the text of article 30 proposed by the Drafting Committee.

It was so decided.

The meeting rose at 12.30 p.m.

⁷ For the text initially submitted by Mr. Ago, see 1544th meeting, paras. 8 *et seq.*, and 1545th meeting, paras. 3 *et seq.*

⁸ For text, see para. 1 above.

1568th MEETING

Friday, 13 July 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/322 and Corr.1 and Add.1 and 2, A/CN.4/L.299/Rev.1)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 1–23

1. The CHAIRMAN invited the Chairman of the Drafting Committee to present the results of the Committee's work on the first 25 articles of the draft,¹ which the Commission had provisionally adopted at its twenty-fifth session and from its twenty-seventh to thirtieth sessions, and which it had referred to the Drafting Committee at the current session (1560th meeting, para. 30) for review as a whole on completion of the first reading.

2. The results of the Drafting Committee's work were presented in document A/CN.4/L.299/Rev.1, which contained the titles of part I, of part II and sections 1 and 2 thereof, of part III and sections 1 and 2 thereof, and the titles and texts of articles 1 to 23.

3. The texts proposed by the Drafting Committee read:

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2 [3].² Use of terms

1. For the purposes of the present articles:

(a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;

(b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;

(c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;

(d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) “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;

(f) “third State” means any State other than the predecessor State or the successor State.

* Resumed from the 1565th meeting.

¹ See 1560th meeting, foot-note 1.

² The number in square brackets refers to the number of the corresponding article in the original draft (for reference, see 1560th meeting, foot-note 1).

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.

Article 3[2]. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

PART II

STATE PROPERTY

SECTION 1 GENERAL PROVISIONS

Article 4. Scope of the articles in the present part

The articles in the present part apply to the effects of a succession of States in respect of State property.

Article 5. State property

For the purposes of the articles in the present part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 6. Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present part.

Article 7. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

Article 8. Passing of State property without compensation

Subject to the provisions of the articles in the present part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

Articles 9[X]. Absence of effect of a succession of States on third party State property

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

SECTION 2 PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Articles 10[12]. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in

the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Article 11[13]. Newly independent State

1. When the successor State is a newly independent State:

(a) movable property, having belonged to the territory to which the succession of States relates and become State property of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State other than the property mentioned in subparagraphs (a) and (b), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(d) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 12[14]. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

Article 13[15]. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 14[16]. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

PART III

STATE DEBTS

SECTION I. GENERAL PROVISIONS

Article 15[17]. Scope of the articles in the present part

The articles in the present part apply to the effects of a succession of States in respect of State debts.

Article 16[18]. State debt

For the purposes of the articles in the present part, "State debt", means:

(a) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(b) any other financial obligation chargeable to a State.

Article 17[19]. Obligations of the successor State in respect of State debts passing to it

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present part.

Article 18[20]. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State or an international organization asserting a claim unless:

(a) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present part; or

(b) the agreement has been accepted by that third State or international organization.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Article 19[21]. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

Article 20[22]. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of the newly independent State.

Article 21[23]. Uniting of States

1. When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Article 22[24]. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

Article 23[25]. Dissolution of a State

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

4. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in reviewing the 25 articles provisionally adopted by the Commission, the Drafting Committee had addressed itself in particular to those articles or parts of articles on which the Commission had not yet taken a position, and which had been left in square brackets. The Committee had also tried to ensure conformity of the draft articles with those of the 1978 Vienna Convention on Succession of States

in respect of Treaties.³ Finally, it had kept in mind that the draft was still at the first reading stage and that certain points of substance or drafting could better be settled at the second reading, in the light of the comments of Governments.

5. With regard to the general structure of the draft, to ensure concordance with the 1978 Vienna Convention and with the Vienna Convention on the Law of Treaties,⁴ the Drafting Committee had decided to subdivide the draft not into two but into three parts, entitled respectively "Introduction", "State property" and "State debts", and to reverse the order of articles 2 and 3 of the original text so that the article on "Use of terms" immediately followed article 1 (Scope of the present articles).

6. Having reviewed the 25 articles drafted at successive sessions of the Commission, the Drafting Committee had come to the conclusion that article 9 of the original draft, entitled "General principle of the passing of State property", had become unnecessary and might even give rise to serious problems of interpretation, since in the new part II the passing of State property, both movable and immovable, was dealt with in detail for each type of succession of States. The article had therefore been deleted, as had article 11, which had been placed in square brackets in view of the reservations expressed and which had provided essentially that debts owed to the predecessor State were an exception to the physical situation rule set out in article 9. In the absence of articles 9 and 11, the provisions of the draft concerning the passing of movable property would apply to the passing of debt claims. The remaining 23 articles had been renumbered accordingly.

7. With regard to the draft articles proposed by the Drafting Committee, he pointed out that the text of article 1 of the original draft and the title of the draft itself had been retained without change. The Committee had however been aware that, in view of the Commission's decision to restrict the contents of the draft to the effects of succession of States in respect of State property, State debts and State archives, the title of the draft and the text of article 1 no longer accurately reflected the real scope of the draft articles. If the Commission decided to restrict the draft to the three aforementioned matters, the title of the draft and the text of article 1 could be recast without great difficulty. Various forms of words had been proposed in the Drafting Committee, such as "succession of States in respect of State property, State debts and State archives". However, the Committee had not wished to prejudge the Commission's decision, which

would be taken in the light of its own views on the future programme of work and the comments of Governments on the subject.

8. In article 2 [formerly article 3], the order of subparagraphs (e) and (f) had been reversed, in conformity with the corresponding article of the 1978 Vienna Convention, and a new paragraph 2 had been added, which was identical to that in the corresponding articles of the Vienna Convention on the Law of Treaties and the 1978 Vienna Convention.

9. In article 3 [formerly article 2] and articles 4 and 5, minor drafting changes had been made to bring the English and Spanish texts into conformity with the corresponding articles of the 1978 Vienna Convention.

10. In article 6, for the sake of consistency throughout the draft, the words "the present articles" had been replaced by the words "the articles in the present part".

11. Article 7 was unchanged.

12. Article 8 had been redrafted to bring out more clearly the rule it laid down. The phrase "subject to the provisions of the articles in the present part" had been adopted to replace the words "in accordance with the provisions of the present articles", and had been placed at the beginning of the article. It was followed by the words "unless otherwise agreed or decided" which, in the original draft, had appeared at the end of the article. In addition, the words "without prejudice to the rights of third parties" had been deleted as being superfluous; that point was covered by article 9 [formerly article X].

13. The Drafting Committee had considered that article 9 [X] should be retained in its original place in the draft because of its general nature and in view of the deletion of the former articles 9 and 11. The words "predecessor State", which had appeared in square brackets in the original draft, had been retained to avoid any ambiguity in regard to the interpretation or application of the rule. The words "of the successor State" immediately following, and in consequence the words in square brackets at the end of article X, had been deleted.

14. Article 10 [formerly article 12] remained unchanged.

15. Article 11 [formerly article 13] had been redrafted to improve its presentation. The new article consisted of four paragraphs instead of six, the introductory clause being numbered paragraph 1, to conform to treaty practice. Former paragraphs 1, 2 and 3 (a) and (b), which had been renumbered paragraph 1, subparagraphs (a), (b), (c) and (d), had been rearranged to separate the provisions relating to movable property (new subparagraphs (a), (b) and (c) of paragraph 1) from the provision relating to immovable property (new subparagraph (d) of paragraph 1). It had also been decided that there was no need to refer to immovable property in new subparagraph (a) of paragraph 1 (formerly paragraph 1), since the passing of such property

³ See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31. The Convention is hereinafter referred to as the "1978 Vienna Convention".

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. 287.

was covered by subparagraph (d) of paragraph 1 (formerly paragraph 2). In the same subparagraph (a) of paragraph 1, the phrase “an independent State which existed in the territory before the territory became dependent” had been replaced by the words “the territory to which the succession of States relates”, so as to give the rule its proper scope and avoid the difficulties created by the reference to an independent State existing prior to dependence; and the words “administering State” had been replaced by the words “predecessor State”, in conformity with the terminology adopted throughout the draft. Lastly, in the new paragraph 4, the words “the foregoing paragraphs” had been replaced by the words “paragraphs 1 to 3”, in accordance with the usage followed in the 1978 Vienna Convention. Similar changes had been made elsewhere in the draft.

16. The Drafting Committee had seen no compelling reason to retain the square brackets enclosing article 12 [formerly article 14], and had aligned the text with that of the new article 21, which was the corresponding provision in part III of the draft. In paragraph 1, the words “subject to paragraph 2” had been deleted in order to strengthen the rule laid down, but the phrase “without prejudice to the provision of paragraph 1” had been added at the beginning of paragraph 2. Some minor drafting changes had also been made to bring the text of article 12 into line with the 1978 Vienna Convention.

17. Some minor changes had been made in article 13 [formerly article 15] and in article 14 [formerly article 16], as well as at other points in the draft, again to bring the text into conformity with that of the 1978 Vienna Convention.

18. Articles 15 to 23 formed part III of the draft, relating to State debts. The Drafting Committee had endeavoured to ensure its consistency with the structure and drafting of part II, on State property.

19. Article 15 [formerly article 17] was unchanged.

20. With regard to article 16 [formerly article 18], he reminded members that in the original text the word “international”, preceding the words “financial obligation”, had been placed in square brackets to indicate that opinions in the Commission had differed regarding the scope of the article in regard to creditors. In an endeavour to narrow the gap, the Drafting Committee had decided to delete the word “international” and divide the single paragraph of the original provision into two subparagraphs: subparagraph (a), which was aimed at covering the situations referred to by the word “international” by the reproduction, with the necessary drafting changes, of the relevant passage from the Commission’s commentary to article 18 of the original draft; and subparagraph (b), which reproduced, with some drafting changes and the omission of the word “international”, the rule laid down in the original text. The words “at the date of the succession of States” had been deleted, as they had been considered unnecessary in an article whose purpose was to define the term “State debt”. On the inclusion of

subparagraph (b), however, the Drafting Committee had not been unanimous.

21. Article 17 [formerly article 19] remained unchanged.

22. With a view to resolving the differences of opinion in the Commission regarding the last part of paragraph 2 of article 18 [formerly article 20], the Drafting Committee had deleted the words “or against a third State which represents a creditor”, appearing in square brackets in the original draft, and had replaced the words “a creditor third State or international organization” by the words “a third State or an international organization asserting a claim”, the latter wording being intended to cover representation or diplomatic protection. The order of subparagraphs (a) and (b) of paragraph 2 had been reversed to make it clear that, if the agreement was to be invoked, its consequences must be in accordance with the other applicable rules in part III. Similarly, for the sake of greater precision, the words “concerning the passing of the State debts of the predecessor State” had been replaced by the words “concerning the respective part or parts of the State debts of the predecessor State that pass”.

23. Articles 19 to 23 [formerly articles 21 to 25] had been retained without change, except for a few minor drafting amendments to ensure consistency. In particular, the introductory phrase of article 20 [formerly article 22], which had not been numbered in the original draft, had been embodied in the text of paragraph 1.

24. The CHAIRMAN suggested that the articles proposed by the Drafting Committee should be considered successively, beginning with article 2, since article 1 should be considered last.

PART I (Introduction)

The title of part I was adopted.

ARTICLE 2 (Use of terms)⁵

Article 2 was adopted.

ARTICLE 3 (Cases of succession of States covered by the present articles)⁶

Article 3 was adopted.

PART II (State property)

The title of part II was adopted.

SECTION 1 (General provisions)

The title of section 1 was adopted.

ARTICLE 4 (Scope of the articles in the present part)⁷

Article 4 was adopted.

ARTICLE 5 (State property)⁸

⁵ For text, see para. 3 above.

⁶ *Idem.*

⁷ *Idem.*

⁸ *Idem.*

25. Mr. VEROSTA observed that during the discussions in the Commission and in the Drafting Committee he had drawn attention to the fact that "State property" was defined in article 5 as "property, rights and interests", whereas articles 10 and 11 made a distinction between movable and immovable property. He also drew the Commission's attention to the problem of the relationship between State archives and State property.

26. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 5 proposed by the Drafting Committee.

It was so decided.

ARTICLE 6 (Rights of the successor State to State property passing to it)⁹

Article 6 was adopted.

ARTICLE 7 (Date of the passing of State property)¹⁰

27. Mr. BARBOZA proposed that in the Spanish version the word "paso" should be replaced by the word "traspaso", which was used in the title of article 10.

28. Mr. VALENCIA-OSPINA (Secretary of the Drafting Committee) said that two different concepts were involved, which called for two different translations into Spanish. The word "traspaso", in the title of article 10, was the translation of the English word "transfer", whereas the word "paso", in article 7, was the translation of the word "passing".

29. Mr. DÍAZ GONZÁLEZ fully agreed with Mr. Barboza. The words "traspaso" and "paso" were not at all the same; whereas the former indeed meant "transfer", the latter implied physical motion of some kind.

30. Mr. USHAKOV observed that, if the word "paso" were replaced by the word "traspaso" in the Spanish version of the draft articles, it would be necessary to amend the Spanish text of all the commentaries approved by the Commission in its previous reports.

31. Mr. REUTER also had doubts about the exact meaning of the word "passage" in the French text. In his opinion, "passage" would take place almost automatically, whereas "transfert" implied a decision.

32. Mr. VALENCIA-OSPINA (Secretary of the Drafting Committee) said that the Spanish version of the draft could be reviewed at the second reading. The point raised could then be considered in the context of the draft as a whole and in the light of the comments submitted by Governments.

33. Mr. BARBOZA pointed out that the same difficulty arose in the case of State archives. He would therefore reserve the right to revert to the matter later.

34. Sir Francis VALLAT said there was indeed a difference between "passing" and "transfer". "Passing" took effect by the operation of law, whereas

"transfer" might involve the intervention of the predecessor State. It was important for the structure of the draft to maintain that distinction, in English at least.

35. The CHAIRMAN proposed that if there were no further comments the Commission should adopt article 7 proposed by the Drafting Committee.

It was so decided.

ARTICLE 8 (Passing of State property without compensation)¹¹

36. Sir Francis VALLAT said that unfortunately article 8, as proposed by the Drafting Committee, significantly omitted the phrase "without prejudice to the rights of third parties". The remarks made by the Chairman of the Drafting Committee on that point should be reflected in the commentary, since the problem was further complicated by the terms of article 9, which spoke of property "owned by a third State". The purpose of that phrase had been to preserve the rights of third parties, such as those that were mortgagees or had some lien on property, but were not owners of the property. Consequently the terms of article 9 tended to imply that article 8 in its present form would prejudice the rights of third parties. It was very important that the commentary should make it clear that, when State property passed to the successor State, it passed without prejudice to the rights of third parties in that property.

37. Mr. USHAKOV said he had suggested that the Drafting Committee should introduce in article 9 the reservation concerning the rights of third parties that had been deleted from article 8, for he believed that, although the problem of the property of third parties did not arise in article 8, it might, on the other hand, arise in connexion with article 9. But the other members of the Drafting Committee had considered it self-evident that the property of third parties was not affected by a succession of States.

38. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that article 8 dealt with the passing of State property without compensation. The phrase "without prejudice to the rights of third parties" had been deleted simply to emphasize the principle underlying the article, namely, that the passing of State property did not give rise to the payment of compensation by the successor State to the predecessor State. The problem to which Sir Francis Vallat had referred could be dealt with in article 9, but the Drafting Committee had taken the view that article 9, formerly article X, required only minor drafting changes.

39. Mr. NJENGA said that he would have no objection to including in the commentary the remarks made by the Chairman of the Drafting Committee. However, the commentary should not imply that property passing to the successor State could be encumbered by the rights of third parties; that would run counter to the terms, for example, of article 11, paragraph 1 (d).

⁹ *Idem.*

¹⁰ *Idem.*

¹¹ *Idem.*

40. Sir Francis VALLAT said that article 8, which specified that State property passed without compensation, in fact implied the extinction of the rights of third parties. In his view, it was a general principle of law that one State could pass to another only what it actually had. Its property interest was its title to the property, subject to the rights of third parties. He could not accept Mr. Njenga's view that, on the passing of State property, the rights of third parties were automatically extinguished. The problem would have to be discussed in the commentary to article 8 or article 9 if those articles were to command general acceptance.

41. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 8 proposed by the Drafting Committee.

It was so decided.

ARTICLE 9 (Absence of effect of a succession of States on third party State property)¹²

Article 9 was adopted.

SECTION 2 (Provisions relating to each type of succession of States)

The title of section 2 was adopted.

ARTICLE 10 (Transfer of part of the territory of a State)¹³

Article 10 was adopted.

ARTICLE 11 (Newly independent State)¹⁴

42. Sir Francis VALLAT said that he experienced difficulties not with the underlying principles of article 11, but with the way in which those principles were reflected in the terms of the article itself. If a literal interpretation were to be placed on paragraph 1, the provision went much too far and became virtually unworkable. For example, it was questionable whether the words "having belonged to the territory", in paragraph 1 (a), could be properly defined, and they were open to such a broad interpretation that they could even include any property that had its origin in the territory concerned. The implication of such an interpretation was that paragraph 1 (a) would cover movable property originating in the territory that had changed hands in the ordinary course of trade and had come, however indirectly, into the possession of the predecessor State. For instance, it could cover a gift from the Queen of Tonga to the Queen of the United Kingdom of Great Britain and Northern Ireland, a gift that could, in a sense, be regarded as State property. That was surely not the intention behind the paragraph, which presumably reflected the idea that in some instances the predecessor State had removed property in a manner that could be regarded as morally improper. The principle underlying that idea was of course entirely acceptable, but it was too much to say that anything that had originated in the territory and, by whatever means, had become the property of the pred-

ecessor State, should pass automatically to the successor State. He was compelled to express his reservations on that point and would like to have them recorded in the Commission's report in the usual way.

43. Again, he was concerned about the practical implications of the phrase "connected with the activity of the predecessor State", in paragraph 1 (b). While he fully agreed with the principle involved, he thought that that principle should be more clearly expressed. The paragraph could mean, for instance, that the desk at which the Minister for Foreign Affairs had written letters concerning matters pertaining to a dependent territory should automatically pass to the successor State, for that desk had certainly been connected with the activity of the predecessor State in respect of the territory to which the succession of States related.

44. Lastly, paragraph 1 (c) more clearly reflected the intentions of the Commission, but its practical application would undoubtedly raise the extremely difficult problems of how to assess the proportion of the contribution made by the dependent territory and what factors were to be taken into account in that assessment.

45. Mr. NJENGA considered the formulation of article 11 entirely satisfactory and did not share any of the doubts expressed by Sir Francis Vallat. The article dealt with a situation involving two very unequal States: the predecessor State and a newly independent State. Unfortunately, at the time of succession, newly independent States had often suffered from bad faith on the part of the predecessor State, which had frequently plundered the property of the territory during the colonial period. Hence if paragraph 1 erred in any way, it was only right that it should err on the side of protection of the interests of newly independent States, so that they would be in a position to acquire property that rightfully belonged to them but that they had been unable to protect during the period of dependence. He too would like to have his view included in the records of the Commission.

46. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 11 proposed by the Drafting Committee.

Article 11 was adopted.

ARTICLE 12 (Uniting of States),

ARTICLE 13 (Separation of part or parts of the territory of a State), and

ARTICLE 14 (Dissolution of a State)¹⁵

Articles 12, 13 and 14 were adopted.

PART III (State debts)

SECTION 1 (General provisions)

The title of part III and that of section 1 were adopted.

ARTICLE 15 (Scope of the articles in the present part)¹⁶

Article 15 was adopted.

¹² *Idem.*

¹³ *Idem.*

¹⁴ *Idem.*

¹⁵ *Idem.*

¹⁶ *Idem.*

ARTICLE 16 (State debt)¹⁷

47. Mr. QUENTIN-BAXTER said that the problems inherent in the definition of State debt contained in article 16 were so far-reaching and confusing that, unless they were resolved satisfactorily, they might well prejudice the fate of the entire set of draft articles.

48. Unlike the articles on State property, the articles on State debts had not been examined at great length, as they had been considered and adopted at only two sessions, the twenty-ninth and the thirtieth, at which time the work on the articles in question had proved rather easier because the categorization of State property had been established at an earlier session. However, the wider problem of the triangular relationship between a predecessor State, a successor State and a creditor, whether or not that creditor was a State, had proved extremely difficult to deal with. Part III of the draft, concerning State debts, indeed provided much more assurance for creditors, since it emphasized the idea of the continuity of rights and obligations. Article 18, in particular, despite the problems associated with it, offered creditors a good prospect of receiving fair treatment—a better prospect than they might be said to have under anything as vague as existing general law.

49. In retrospect, however, it was apparent that the Commission's discussion of the topic at its twenty-ninth session had been dominated more by the question of the creditor State than by that of the respective rights and obligations of the predecessor or successor States. That shift in emphasis was reflected in the terms of article 16, in the same way as it had been reflected in the word "[international]" contained in article 18 in its earlier form. If it was the intention to codify the rights of creditors on the occasion of a succession of States, it would be a reasonable policy choice to confine the article to the interests of creditor States by retaining subparagraph (a) and deleting subparagraph (b).

50. However, the Commission was not dealing with the codification of the rights of creditor States but with a matter that was essentially parallel to that of succession to State property. At the same time, it was obvious that the definition of State debt, unlike that of State property, was not tied to the internal law of the predecessor State or, for that matter, to any other system of law. Of course, it was questionable whether a parallel definition would in fact be entirely satisfactory and whether a reference could be made solely to the internal law of the predecessor State. At no stage in its discussion of the articles on State debt had the Commission satisfactorily examined that fundamental question. He was none the less convinced that the definition should refer to one or more systems of law, whether internal law or even international law, although in the latter case it was difficult to think of debts as being raised to the international level and

existing outside some kind of system of internal law; they would then fall under the law of treaties, and an entirely different régime would apply.

51. Admittedly, the definition in its present form reflected perfectly legitimate and important concerns. For example, the Commission had been justifiably concerned that State debt might be defined so broadly as to impose unreasonable obligations on States, especially newly independent States. Fortunately, the provisions of article 20 met that concern, provided article 20 proved acceptable to the international community. Nevertheless, the definition in article 16 could be regarded as violating the rights of a successor State with respect to matters that fell within its domestic jurisdiction, such as relations between the State and its own nationals.

52. Despite those considerations, the basic rule undoubtedly was that, when a succession of States occurred, the internal law remained the same until the successor State changed it. No provision of the draft could affect the right of the successor State to change the internal law. Recognition of that fact meant that there would be little ground for concern if the Commission attempted to relate a State debt to all debts owed by a State. On the other hand, if article 16 were presented to the General Assembly as a straightforward matter of a policy choice, the Commission would be giving bad technical advice. For example, if an airline company of a predecessor State had acquired aircraft to be paid for over a certain period of time, was it conceivable that the draft articles should provide for the passing of the property, but not for the passing of the debt associated with the property? Was it even possible that a successor State, studying the draft articles in their final form, might find that the question whether it had an international obligation depended entirely on whether the creditor happened to be another sovereign State or an international organization? The Commission must recognize that it was dealing not with the interests of creditor States but with the status of debts owed by States faced with a situation of State succession. If the question could be pinpointed properly in legal doctrine, it would be possible to produce solutions that would allay every legitimate fear. For the time being, it should be noted that, if the definition appeared to offer Governments a policy choice, that was indeed a very misleading representation of the real situation.

Co-operation with other bodies (continued) *

[Item 13 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

53. The CHAIRMAN invited Mr. Nemoto, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

¹⁷ *Idem.*

* Resumed from 1566th meeting.

54. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee firmly intended to further the close relations between the Committee and the Commission, which had common objectives. The Committee, which provided the Asian-African region with a unique forum in the sphere of international law and now had a membership of 38 Governments, had engaged in activities in five different branches of law, apart from its examination of the work of the Commission on such topics as succession of States in respect of matters other than treaties, State responsibility and the most-favoured-nation clause.

55. In recent years, the Committee had placed great emphasis on a study of the law of the sea, with a view to assisting member Governments in preparing their positions on that matter. More than 40 countries had participated at a meeting of high-level experts convened in New Delhi in the summer of 1978, and the meeting had been described by the President of the Third United Nations Conference on the Law of the Sea as having made a positive contribution.

56. The Committee had had the pleasure of welcoming Mr. Tabibi as observer for the Commission at the Committee's twentieth session, held in Seoul in February 1979. At that session, the Committee had decided that it could assist member Governments by preparing model legislation for the economic zone, so as to achieve some degree of uniformity of approach, and model clauses for joint ventures in optimum exploitation of fishery resources in that zone.

57. The Standing Sub-Committee had been working for several years on standard contracts for transactions in various goods. It had already completed model f.o.b. and f.a.s. contracts for agricultural produce and minerals, and a model c.i.f. contract for durable consumer goods and light machinery.

58. Two regional centres for commercial arbitration had been established, one in Kuala Lumpur and one in Cairo. They would eventually operate as institutions arranging arbitration for the settlement of disputes arising out of international commercial transactions, including investments; they would provide facilities for *ad hoc* arbitrations and arbitration proceedings held under the auspices of other recognized institutions; and they would render assistance in the enforcement of awards. In addition, they would help to develop national arbitration institutions and promote co-operation among such institutions in the region. The secretariat of the Committee had requested Governments in Asia and Africa and other regions to recommend noted jurists who could serve as arbitrators; a list of an international panel of arbitrators would soon be made available to interested parties. In February 1979, an agreement had been concluded between the Centre in Kuala Lumpur and the IBRD International Centre for Settlement of Investment Disputes on co-operation in the settlement of disputes arising out of foreign investment and in other activities relating to international trade. A similar agreement was expected to be concluded shortly with the Centre in Cairo.

59. In December 1978, a meeting of an expert group on environmental questions had been convened in New Delhi and had been attended by delegations from 24 Governments as well as observers from the International Law Commission and UNEP. It had been decided to give urgent attention to the common problems of human settlements, land use, mountain ecology, industrialization and marine pollution.

60. In the matter of regional economic co-operation, it had been agreed at the twentieth session that the Committee could contribute greatly to industrial development and co-operation between nations by preparing model clauses for joint ventures that would facilitate and accelerate the harnessing of the resources of the region. In the future the Committee would also attempt to formulate schemes and legal arrangements for regional and subregional economic co-operation.

61. Lastly, the Secretary-General of the Committee had attended the fifth session of UNCTAD, in Manila, to emphasize the importance of practical approaches to the question of the new international economic order.

62. The support and co-operation of the Commission was indispensable to the Committee in playing a constructive role in Asia and Africa, and in accordance with its tradition the Committee would certainly invite an observer from the Commission to attend its next session.

63. The CHAIRMAN, speaking on behalf of the Commission, congratulated the Observer on his outstanding statement and pointed out how useful it was for the Commission to keep in touch with the activities of regional organizations which, like the Asian-African Legal Consultative Committee, were working on the codification and development of international law. Year after year, the Committee had been reviewing the juridical problems studied by the Commission and endeavouring to find solutions to them.

64. With regard to the other subjects considered by the Committee, he welcomed the opening of the two regional centres for commercial arbitration in Kuala Lumpur and Cairo, as well as their collaboration with the World Bank through the International Centre for Settlement of Investment Disputes. Importance should also be attached to the positive results achieved by the meeting of an expert group on environmental questions held in New Delhi.

65. He expressed the hope that co-operation between the Committee and the Commission would increase still further in the years to come.

66. Mr. QUENTIN-BAXTER said that he had been privileged to act as observer for the Commission at the meeting of the expert group on environmental questions convened in New Delhi. He had been most grateful for the hospitality shown him by the secretariat of the Committee and had left New Delhi with a deeper appreciation of the great importance to the Commission, in all its endeavours, of the active support of regional bodies.

67. Mr. TABIBI said that he had had the honour of representing the Commission at the Committee's twentieth session, in Seoul. He had been greatly impressed by the work of the Committee and the organization of its secretariat. In his opinion, one of the principal reasons for the success of the Commission was the co-operation extended to it by such valuable regional bodies. Indeed, the rules of the Asian-African Legal Consultative Committee provided that the Committee should discuss items on the Commission's agenda. The Committee had succeeded in establishing two important centres for commercial arbitration that would be of great assistance to the countries in the region, and its study of the topic of the law of the sea would make a great contribution to the negotiations at the forthcoming resumed session of the Third United Nations Conference on the Law of the Sea.

68. He was most grateful for the extremely warm welcome given him by the secretariat of the Committee and for the generous hospitality of the Government of the Republic of Korea.

The meeting rose at 1 p.m.

1569th MEETING

Monday, 16 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)**

ARTICLE 31 (*Force majeure*) and

ARTICLE 32 (Fortuitous event)

1. The CHAIRMAN invited Mr. Ago to present section 4 (*Force majeure* and fortuitous event) of chapter V (Circumstances precluding wrongfulness)

of his eighth report on State responsibility and, in particular, articles 31 and 32 (A/CN.4/318 and Add.1-4, para. 153), which read:

Article 31. Force majeure

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise.

2. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is likewise precluded if the author of the conduct attributable to the State has no other means of saving himself, or those accompanying him, from a situation of distress, and in so far as the conduct in question does not place others in a situation of comparable or greater peril.

3. The preceding paragraphs shall not apply if the impossibility of complying with the obligation, or the situation of distress, are due to the State to which the conduct not in conformity with the obligation is attributable.

Article 32. Fortuitous event

The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if, owing to a supervening external and unforeseeable factor, it is impossible for the author of the conduct attributable to the State to realize that its conduct is not in conformity with the international obligation.

2. Mr. AGO said that *force majeure* and fortuitous event were circumstances frequently invoked as precluding the wrongfulness of an act of a State. However, the expressions "*force majeure*" and "fortuitous event" were not always used in the same sense by writers, and still less by Governments, judges and arbitrators. Sometimes, for example, the expression "state of emergency" ("état de nécessité") was used as a synonym for "*force majeure*". It should be made clear that neither of those concepts was used in its "natural" meaning; it was only by a convention that they were used to designate certain situations and to distinguish them from others. It was important, therefore, to define them at the outset, so as to avoid any misunderstanding.

3. In the first place, *force majeure* and fortuitous event differed from the other circumstances precluding wrongfulness dealt with in article 29 (Consent)¹ and article 30 (Countermeasures in respect of an internationally wrongful act).² In the case of *force majeure* or fortuitous event, the previous conduct of the State subjected to an act not in conformity with an international obligation was not at issue, as it was in the cases dealt with in articles 29 and 30: the State had neither given its consent to the commission of the act nor previously engaged in conduct that constituted an international offence.

4. The distinction between *force majeure* and state of emergency was less easy to draw, but practice and

* Resumed from the 1567th meeting.

** Resumed from the 1545th meeting.

¹ See 1567th meeting, para. 1.

² *Idem*.

doctrine showed that those concepts, although similar, presented marked differences. Both, it was true, were characterized by the irrelevance of the prior conduct of the State against which the act to be justified had been committed. It was equally true that in both cases there was a factor that caused the State to act—in *spite of itself*, as it were—in a manner not in conformity with what was required of it by an international obligation. However, closer examination of those concepts showed that the reference was rather to a state of emergency when the State adduced, as a justification of its acts not in conformity with an international obligation, the alleged necessity of saving the very existence of the State from a grave and imminent danger, a danger which, of course, did not emanate from that State and could not be avoided by any other means. Sometimes the objective invoked was not that of saving the very existence of the State but that of safeguarding some of its vital interests: for instance, ensuring the survival of part of its population overtaken by a natural disaster by requisitioning foreign means of transport or supply, or preventing the State's bankruptcy by deferring payment of a State debt. The concept of a state of emergency in any case comprised two elements: first, the impossibility of otherwise protecting the State or its vital interests from a grave and imminent danger and, secondly, the undeniably intentional nature of the conduct not in conformity with an international obligation engaged in for that purpose.

5. *Force majeure*, on the other hand, was generally invoked to justify *unintentional* conduct. An external factor that made it *materially impossible* for the State to act otherwise than it did was then adduced. That was the case, for example, when an aircraft was obliged, by reason of a storm or of damage, to violate the air space of another State, deliberately but involuntarily. Similarly, property that a State was required to hand over to another State might be destroyed by uncontrollable natural causes, or by causes resulting from human action beyond State control, so that the State was prevented from discharging its obligation.

6. Among cases of impossibility of acting in conformity with an international obligation, cases of "absolute" impossibility could be distinguished from cases of "relative" impossibility. There were cases where it was beyond all doubt "materially" impossible for a State to act in conformity with its obligation. The impossibility might, however, be less definite. For instance, a ship might violate the maritime space of a State not because it was really materially impossible to avoid such violation but in the knowledge that, if it acted in conformity with its international obligation, it would run the risk of sinking. In such a situation, however, where the material impossibility was only relative, the person acting for the State could not be considered to enjoy real freedom of choice, one of the alternatives before him being one that he could not reasonably be required to choose. Consequently, such cases were assimilated to cases of absolute material impossibility. It was necessary to emphasize that such cases must be distinguished from cases of "state of emergency". When there was a state of emergency,

conduct not in conformity with what was required by an international obligation was adopted in order to protect the State, or a fundamental interest of the State, from danger. On the other hand, when there was *force majeure* due to the relative impossibility of acting in conformity with an international obligation, the grave and imminent danger determining the action was a personal danger to the organs of the State or to the individuals under its responsibility.

7. In accordance with the dominant opinion, he had limited the concept of *force majeure* to cases in which the organ that took action was placed in a situation of absolute and material impossibility of acting otherwise, and to cases in which it could not act otherwise without incurring very grave danger to its own existence or to persons placed under its responsibility.

8. Although related to the concept of *force majeure*, the concept of fortuitous event, according to prevailing opinion, differed therefrom in an important respect. In both cases an external factor intervened, but whereas in cases of *force majeure* the State organ was aware that it was acting in a manner not in conformity with an international obligation, in cases of fortuitous event it was not so aware. Examples of the first case would be situations where the pilot of an aircraft caught in a storm was impelled by irresistible air currents into the air space of another State, despite his efforts to avoid it (absolute impossibility), or where the same pilot decided, rather than court death, to penetrate the foreign air space (relative impossibility). Examples of the second case would be situations where the pilot of an aircraft whose flight instruments had ceased functioning, and which was caught in a fog, unwittingly entered air space in which he was not authorized to fly, or where a frontier patrol, in similar circumstances, unwittingly found itself in foreign territory. *Force majeure* affected the will of the organ that acted, fortuitous event the awareness of that organ.

9. Leaving the area of semantics, he turned to a legal analysis of the concepts of *force majeure* and fortuitous event, beginning with *force majeure*. In the case of absolute impossibility of acting otherwise, the external factor that intervened could be a natural event or a human action. For example, a State that had undertaken to hand over certain property to another State might be unable to fulfil its obligation either because the property had been destroyed by a cataclysm or because it was situated in territory which, at a given point, had ceased to be under its sovereignty or control. The impossibility of acting in conformity with a certain international obligation could be permanent or temporary; in the latter case, the act regarded as internationally lawful obviously became wrongful once the temporary situation ended.

10. Although the preparatory work for the Conference for the Codification of International Law (The Hague, 1930) had not expressly dealt with *force majeure* or fortuitous event, interesting information on those two cases was to be found in the answers given by certain Governments to the question of State responsibility for acts of the executive. The Swiss Gov-

ernment, for instance, had made two reservations on State responsibility for acts of the executive; the case of fortuitous event and the case of *force majeure*.³ It should be noted that the Conference had been especially concerned with State responsibility for injury caused to the person or property of foreigners, and had consequently been concerned in particular with failure to fulfil obligations of prevention. That was why it had frequently been asserted that a State must be held responsible for conduct consisting in failure to exercise prevention, unless reasons of *force majeure* had made it absolutely impossible for the State to take the necessary measures of prevention.

11. As early as 1966, the Commission had regarded *force majeure*, in the sense of real impossibility of fulfilling an obligation, as a circumstance precluding State responsibility. In its commentary to article 58 of the draft articles on the law of treaties, it had emphasized that the disappearance or destruction of an object indispensable for the execution of a treaty could be invoked as a ground for terminating the treaty, or suspending its operation, if they rendered its execution permanently or temporarily impossible.⁴

12. As practical examples of absolute impossibility of acting in conformity with an international obligation, he referred first to the case, mentioned in his report, of the dispute between the United States of America and Yugoslavia following overflights of Yugoslavia by United States aircraft.⁵ From an exchange of correspondence between the two States it had appeared that cases of material impossibility of fulfilling an international obligation would be regarded as a circumstance precluding wrongfulness. Article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone affirmed the right of innocent passage of ships of all States through the territorial sea of a foreign State, but specified that such passage included stopping and anchoring only in so far as they were incidental to ordinary navigation or were rendered necessary by *force majeure* or by distress.⁶ "*Force majeure*" must be taken to mean absolute material impossibility, "distress", relative impossibility. Article 18, paragraph 2, of the Informal Composite Negotiating Text/Revision 1, drawn up in April 1979 for the eighth session of the Third United Nations Conference on the Law of the Sea, contained a similar provision, in which the expression "*relâche forcée*" had been replaced by "*force majeure*".⁷

13. In addition to obligations to abstain, absolute impossibility of fulfilling an international obligation could relate to obligations to act, to engage in certain positive conduct. For instance, under the Treaty of Versailles, Germany had undertaken to deliver a certain quantity of coal annually to France. In 1920,

however, the quantity of coal supplied by Germany had been much less than that provided for. Germany had claimed that domestic needs had made it materially impossible for it to meet its obligation. France had denied the existence of absolute impossibility in that particular case, while recognizing implicitly that in the case of absolute impossibility the conduct not in conformity with the international obligation in question would not have been wrongful, because there would have been *force majeure*.⁸ In the case of the dispute between Greece and Bulgaria, to which he had referred in his report,⁹ the existence of *force majeure* had eventually been recognized.

14. The role of *force majeure* as a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation had also been taken into consideration in regard to failure to pay a public debt. In his report, he had mentioned three cases brought before the Permanent Court of International Justice: that of the *Serbian loans*, that of the *Brazilian loans* and that of the *Société commerciale de Belgique*.¹⁰ In none of those cases had the parties questioned the principle that a real situation of *force majeure*, or at least the absolute impossibility of fulfilling an international obligation, constituted a circumstance precluding the wrongfulness of failure to fulfil the obligation.

15. *Force majeure* as a circumstance precluding wrongfulness had also been invoked in regard to a special category of obligations to act, termed obligations of prevention. In that connexion he referred members of the Commission to the comments he had made in his report on the *Corfu Channel* case and the *Prats* case.¹¹

16. Generally speaking, writers were unanimous in recognizing that the wrongfulness of a State's conduct was precluded if it had been absolutely and materially impossible for the State to act differently in a particular case in which its conduct had not been in conformity with an international obligation incumbent upon it.

17. As to codification drafts, mention should be made of the draft prepared for the Commission by García Amador and the draft prepared by Graefrath and Steiniger. According to a provision of the former draft,

An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.¹²

The latter draft provided that the obligation to indemnify did not apply in cases of *force majeure* or a state of emergency.¹³

³ See A/CN.4/318 and Add.1-4, para. 108.

⁴ *Ibid.*, para. 109.

⁵ *Ibid.*, para. 112.

⁶ *Ibid.*, para. 113.

⁷ *Ibid.*

⁸ *Ibid.*, para. 114.

⁹ *Ibid.*, para. 115.

¹⁰ *Ibid.*, paras. 117-120.

¹¹ *Ibid.*, paras. 121 and 122.

¹² *Ibid.*, para. 124.

¹³ *Ibid.*

18. It should be made clear that the situation of absolute impossibility of performing a certain international obligation must exist at the precise moment when the State adopted conduct not in conformity with that obligation. Just as the obligation must exist at the moment when the violation occurred, so the circumstance precluding wrongfulness of the conduct must exist at that moment. That condition was of particular importance in the case of a non-instantaneous act. When conduct was continuous, *force majeure* precluded the wrongfulness of that conduct as long as *force majeure* subsisted, but the conduct became wrongful as soon as *force majeure* ceased.

19. The situation of relative impossibility was sometimes called “distress”; it implied, as he had indicated, serious peril to the very life of the organ that was required to ensure fulfilment of an international obligation of its State. The incidents between Yugoslavia and the United States of America in 1946, which were recounted in paragraph 130 of his report, provided an illustration of a case of relative impossibility. The two Governments had considered that violations of air boundaries were justified when they were absolutely necessary or when their purpose was *to save the aircraft and its occupants*. The same principles had been affirmed in cases of violation of a sea boundary, as was shown by the dispute between the Government of the United Kingdom and the Government of Iceland, described in paragraph 131 of his report. Moreover, article 18, paragraph 2, of the aforementioned negotiating text on the law of the sea¹⁴ provided, in regard to innocent passage, that ships might stop “for the purpose of rendering assistance to persons, ships or aircraft in danger or distress”. In that provision, as in the Convention on the Territorial Sea and the Contiguous Zone, or in the international conventions for the prevention of pollution of the sea, distress was regarded as a circumstance precluding wrongfulness of conduct contrary to an international obligation.

20. It must also be stressed that the wrongfulness of an act or omission not in conformity with an international obligation could be precluded only if there was a certain value relationship between the interest protected by that act or omission and the interest which the obligation was intended to protect. It was not possible to justify conduct which, to save the life of one person or of a small group of persons, endangered the existence of a much greater number of human beings. That would be the case if a military aircraft carrying explosives took the risk of causing a disaster by making an emergency landing.

21. To sum up on the subject of fortuitous event, he said that the concept covered a situation in which, as a result of external and unforeseen factors, it was impossible for the State organ to realize that its conduct was not in conformity with what was required of it by an international obligation incumbent upon the State. He

had given several examples of fortuitous events in his report.¹⁵

22. Draft article 31, relating to *force majeure*, was divided into three paragraphs. The first concerned absolute and material impossibility of acting in conformity with an international obligation; the second dealt with relative impossibility and emphasized the need for some proportion between the danger to which the person engaging in the conduct was subjected and the danger he caused; the third reserved the case in which the impossibility of complying with the obligation, or the situation of distress, were due to the State to which the conduct not in conformity with the obligation was attributable. Draft article 32, relating to fortuitous event, consisted of a single paragraph.

23. The CHAIRMAN congratulated Mr. Ago on his detailed and well documented presentation of the new articles he proposed.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/322 and Corr.1 and Add.1 and 2, A/CN.4/L.299/Rev.1)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 1–23 (*continued*)

ARTICLE 16 (State debt)¹⁶ (*concluded*)

24. Mr. NJENGA said that article 16, except for subparagraph (b), was an improvement on the version that had been referred to the Drafting Committee, since subparagraph (a) was confined to international financial obligations. On the other hand, the terms of subparagraph (b), which spoke of “any other financial obligation chargeable to a State”, made it difficult to understand the scope of the article as a whole. For example, the salaries paid by a State to its civil servants constituted a financial obligation chargeable to the State. He did not wish to assert that financial obligations towards nationals or foreigners should not be met by the successor State, but he very much doubted whether a text codifying international law should include a provision so broad as to cover financial obligations of a domestic character, which were governed by other rules of law. The inclusion of subparagraph (b) would produce the same effect as the deletion of the word “international”, which had been included in square brackets in the former article 18. Some clarification was required in regard to subparagraph (b), and if the explanations proved satisfactory they should be included in the commentary.

25. Mr. USHAKOV said that in principle State debts comprised not only a State’s financial obligations

¹⁴ *Ibid.*, para. 113.

¹⁵ *Ibid.*, paras. 138–149.

¹⁶ For text, see 1568th meeting, para. 3.

towards other subjects of international law; they also extended to other financial obligations chargeable to a State, such as debts contracted by a State to its own nationals or to foreign natural or legal persons. When a succession of States occurred, the question of such other State debts arose, but it was settled under internal law, not international law, since the rules of international law were applicable only to relations between subjects of international law. Hence the draft articles in preparation applied only to State debts understood as "any financial obligation of a State towards another State, an international organization or any other subject of international law", to the exclusion of other financial obligations chargeable to a State, which came under internal law.

26. A breach of the rules governing the passing of State debts gave rise to international responsibility, but there could be no international responsibility towards persons not subjects of international law. The articles on the passing of State debts must therefore relate solely to the financial obligations of a State towards other subjects of international law.

27. He willingly accepted the general provision in paragraph 1 of article 18 (formerly article 29),¹⁷ which protected the rights of all creditors, but apart from that general provision he saw no need to deal with obligations other than those contracted by the State towards subjects of international law. He was therefore in favour of deleting subparagraph (b) of article 16.

28. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in attempting to answer Mr. Njenga's comments, he might have to speak otherwise than as Chairman of the Drafting Committee.

29. Some members of the Commission considered that there was an obvious link between the passing of State property, as assets of the State, and the passing of State debts, as liabilities of the State. That link was established, for example, in article 19, paragraph 2,¹⁸ which provided that an equitable proportion of the State debt of the predecessor State should pass to the successor State, and in that context referred to "property, rights and interests" which passed to the successor State in relation to that State debt. Article 20, paragraph 1,¹⁹ and article 22, paragraph 1,²⁰ contained similar provisions. Again, except where the predecessor State disappeared, the draft articles provided that the passing of State debts to the successor State was not automatic, but was subject to agreement between the predecessor State and the successor State. Account should also be taken of the fact that the passing of State debts did not and could not affect the régime governing those debts. On the occasion of a succession of States, debts that constituted debts under a system of internal law remained debts under a system of internal law. The draft articles on State debts dealt

with the passing of debts, not with the régime governing such debts; they were not concerned with the highly disputed question whether there were limitations in international law on the treatment by a State of its debts to foreigners.

30. Lastly, article 20, paragraph 2, provided that, in the case of a newly independent State, an agreement with the predecessor State should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of the newly independent State, a provision that was particularly important if the agreement in question covered all State debts.

31. Mr. NJENGA expressed appreciation of the explanation given by the Chairman of the Drafting Committee. Nevertheless, he thought that subparagraph (b) of article 16 might give rise to practical difficulties, since it apparently sought to regulate by means of international law matters that fell under internal law. Perhaps the Drafting Committee might wish at a later stage to consider the possibility of transforming the subparagraph into a saving clause, by stipulating that the provisions of the first part of the article were "without prejudice to any other financial obligation chargeable to a State".

32. The CHAIRMAN proposed that it should be stated in the commentary that subparagraph (b) of draft article 16 had not met with the approval of all the members of the Commission.

It was so decided.

Article 16 was adopted.

ARTICLE 17 (Obligations of the successor State in respect of State debts passing to it)²¹

Article 17 was adopted.

ARTICLE 18 (Effects of the passing of State debts with regard to creditors)²²

33. Mr. TSURUOKA said he was uncertain about the relationship between paragraph 1 and paragraph 2(a), the justification for which he failed to see. In particular, he was not sure what was meant by the words "consequences of that agreement" and "other applicable rules", in paragraph 2(a), which seemed to him extremely ambiguous. He wondered why "consequences" were referred to instead of legal effects. Were they economic, social or political consequences? He also wondered what were the "other applicable rules" mentioned in subparagraph (a). Did they include the rule stated in paragraph 1? If so, and if the consequences of the agreement were not in accordance with the rule stated in paragraph 1 (in other words, if they affected the rights and obligations of creditors), could the agreement be invoked by the predecessor State or by the successor State or States, as the case might be, against a third State or an international organization asserting a claim?

¹⁷ *Idem.*

¹⁸ *Idem.*

¹⁹ *Idem.*

²⁰ *Idem.*

²¹ *Idem.*

²² *Idem.*

34. Sir Francis VALLAT suggested that the words “the succession”, at the beginning of paragraph 1, should be replaced by the words “a succession”, to ensure consistency with articles 9 and 17.

35. With regard to paragraph 2, he shared some of the difficulties mentioned by Mr. Tsuruoka, but thought there was one point that might help to explain the position. Whereas paragraph 1 of the article dealt with a succession of States as such, paragraph 2 dealt with an agreement between the predecessor and successor States. Consequently, as he understood it, paragraph 2(a) referred not to the consequences of a succession of States as such, but to the consequences of the agreement; it therefore followed that the phrase “the other applicable rules of the articles in the present part” did not refer to paragraph 1, but to those provisions in the draft that related to the terms of a relevant agreement. He would like to know whether the Chairman of the Drafting Committee agreed with that view.

36. Mr. USHAKOV agreed that it would be better to use the indefinite article before the words “succession of States” in article 18, paragraph 1, as the phrase “a succession of States” was to be found in articles 11 and 12 of the 1978 Vienna Convention.²³

37. He proposed that the words “with the other applicable rules of the articles”, in paragraph 2(a), should be replaced by the words “with the provisions of the other articles”.

38. Mr. RIPHAGEN (Chairman of the Drafting Committee), referring to the point raised by Mr. Tsuruoka, said his own understanding of paragraph 2 of article 18 was that it dealt not with the position of creditors, which was covered by paragraph 1, but with the possibility of invoking an agreement on the passing of State debts against a third State or an international organization. However, that possibility would arise only if one of the two conditions laid down in subparagraphs (a) and (b) of paragraph 2 was satisfied. In the case of subparagraph (a), the consequences of the agreement had to be tested against the principles set out in the articles that followed article 18, including, for example, the principle of equitable proportion (article 19, paragraph 2, and article 22, paragraph 1), and the principles that the permanent sovereignty of every people over its wealth and natural resources should not be infringed and that the fundamental economic equilibria of the newly independent State should not be endangered (article 20, paragraph 2). In his view, it was to those principles that the phrase “other applicable rules”, in paragraph 2(a), referred.

39. As far as the wording of the article was concerned, he thought Sir Francis Vallat’s proposed amendment to paragraph 1 would be an improvement. He could also accept the amendment to paragraph 2(a) proposed by Mr. Ushakov.

40. Mr. TSURUOKA thanked the Chairman of the Drafting Committee for his explanations. He hoped, however, that the drafting of article 18 would be improved on second reading. His doubts would be partly removed if, in paragraph 2(a), the words “with the other applicable rules” were replaced by the words “with all the applicable rules” or “with all the applicable provisions”.

41. Mr. REUTER said that he had no objection to replacing the definite article by the indefinite article before the words “succession of States” in paragraph 1, but that it would be necessary to revert to the matter when the draft was finally adopted so as to harmonize articles 6, 9 and 17, which sometimes spoke of “the succession of States” and sometimes of “a succession of States”.

42. Mr. USHAKOV observed that the provisions of articles 19, 22 and 23²⁴ were not applicable to the consequences of an agreement between the predecessor State and the successor State on the passing of State debts since, according to those provisions, any agreement was possible. The only provision limiting the scope of the agreement was that contained in article 20, paragraph 1.

43. Mr. VEROSTA failed to see the purpose of the word “other” in article 18, paragraph 2(a).

44. Mr. QUENTIN-BAXTER said that the expression “other applicable rules” referred to rules other than the rule that the predecessor State and the successor State could make such agreements as they saw fit. It was necessary to exclude the latter rule by the use of the word “other” since, if the fact that the successor State and the predecessor State had concluded an agreement satisfied the requirement, there would in effect be no requirement. Possibly, therefore, the provision required further consideration.

45. The CHAIRMAN proposed that it should be stated in the commentary that some members of the Commission had criticized draft article 18.

It was so decided.

Article 18 was adopted.

The meeting rose at 6.5 p.m.

²⁴ For texts, see 1568th meeting, para. 3.

1570th MEETING

Tuesday, 17 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi,

²³ See 1568th meeting, foot-note 3.

Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/322 and Corr.1 and 2, A/CN.4/L.299/Rev.1 and Rev.1/Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (*concluded*)

ARTICLES 1-23 (*concluded*)

SECTION 2 (Provisions relating to each type of succession of States)

The title of section 2 was adopted.

ARTICLE 19 (Transfer of part of the territory of a State)¹

Article 19 was adopted.

ARTICLE 20 (Newly independent State)²

1. Mr. REUTER wished to make a reservation with regard to article 20. His understanding was that the article implied an obligation to conclude an agreement on the basis of the principles embodied therein, but he did not think the article was worded sufficiently clearly to express that idea.

2. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted draft article 20, subject to the reservation entered by Mr. Reuter.

It was so decided.

ARTICLE 21 (Uniting of States),

ARTICLE 22 (Separation of part or parts of the territory of a State), and

ARTICLE 23 (Dissolution of a State)³

Articles 21, 22 and 23 were adopted.

ARTICLES A AND C

3. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles A and C, on State archives, as adopted by the Committee (A/CN.4/L.299/Rev.1/Add.1), which read:

Article A. State archives

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

Article C. Newly independent State

1. When the successor State is a newly independent State:

(a) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the articles in the present Part.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

4. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had been unable to decide whether draft articles A and C should be included in part II of the draft, relating to State property, or whether they should form the subject of a new part IV. It had finally taken the view that the question was one for the Commission itself to decide. It had therefore kept to the arrangement suggested by the Special Rapporteur in his report and had submitted the two draft articles as an addendum (A/CN.4/L.299/Rev.1/Add.1) to the document setting forth articles 1 to 23.

5. Article A defined "State archives" and, like article 5,⁴ which defined "State property", referred to the internal law of the predecessor State. Unlike article 5, however, it contained the words "and had been preserved by it [the predecessor State] as State archives", so as to make it clear that the reference to internal law related only to the belonging of archives and not to their preservation as State archives. The object was to ensure the public documents of recent origin, which under the law of some countries would not be designated as State archives until a certain period had elapsed, should not be excluded from the scope of the draft. The Commission would note that the word "appartenait" had been used in the French version of

¹ For text, see 1568th meeting, para. 3.

² *Idem.*

³ *Idem.*

⁴ *Idem.*

both article 5 and article A, whereas in the English version the words “were owned” had been used in article 5 and the words “belonged to” in article A. That was because the latter term was considered more appropriate for archives. The word “documents” included not only paper but also any other materials, a point that the commentary should reflect.

6. Article C, entitled “Newly independent State”, was modelled on article 11⁵ of the draft, relating to State property, but in essence it retained the provisions of article C as submitted by the Special Rapporteur.⁶ Paragraph 1 (a) set forth the same rule for archives as did paragraph 1 (a) of article 11 for movable property. Paragraph 1 (b) dealt with State archives required for the administration of the territory concerned. The phrase originally proposed by the Special Rapporteur, “administrative and technical archives connected with the activity of the predecessor State in regard to the territory”, had been replaced by the words “which for normal administration of the territory... should be in that territory”, to obviate the need for defining “administrative and technical archives” and to make the text more precise by referring to the criterion of situation in the territory rather than mere connexion with it. Paragraph 2 of the original text had been deleted as relating not to succession of States but to relations of co-operation between the two States after State archives had passed. The new paragraph 2 was a modified version of the original paragraph 3. In addition to making certain changes for the sake of precision, the Committee had added the words “or the appropriate reproduction of”, to encourage the exchange of the reproductions in question where appropriate. Paragraph 3 was new and had been formulated to take account of the newly independent State’s need for evidence from documents relating to its territorial sovereignty or clarifying the meaning of the State archives that had passed to it. Paragraphs 4 and 5 were simplified versions of paragraphs 4 and 5 of the original text and corresponded to paragraphs 2 and 3 of article 11. The changes made in paragraphs 4 and 5, which concerned style alone and not the substance of the provisions, might perhaps be introduced in article 11 as well. Paragraph 6 was a slightly modified version of the original paragraph 6. Apart from making certain purely drafting changes, the Committee had added a reference to the right to development of the peoples of the States concerned, to take account of views expressed in the Commission.

7. Lastly, the Committee had considered the question of the temporal application of the draft articles in the light of article 7 of the 1978 Vienna Convention.⁷ It had decided not to draft an article on that subject and to refer the matter to the Commission.

8. The CHAIRMAN suggested that the Commission should first take a decision on the wording of draft articles A and C as presented by the Drafting Com-

mittee and then on the two general questions raised by the Committee’s Chairman, namely, the placing of the articles on State archives in the draft as a whole and the temporal application of the draft articles.

ARTICLE A⁸ (State archives)⁹

9. Mr. BARBOZA was unable to approve the definition contained in article A, which was tautological and therefore meaningless. Moreover, it made reference to internal law not only to determine which documents belonged to the predecessor State but also for the purpose of the definition itself. A better approach would be first to define archives in the light of their basic component, namely, the documents themselves, and by reference to the concept of a collection made either by the State or by a private individual. Having thus defined State archives, the draft could then specify that they were archives which, under the internal law of the predecessor State, belonged to that State. Such a definition would reflect the views of the Commission more accurately.

10. Mr. REUTER expressed entire agreement with Mr. Barboza.

11. Mr. QUENTIN-BAXTER also endorsed Mr. Barboza’s comments. The discussion in the Drafting Committee had shown how difficult it was to find wording that reflected accurately the intention behind the definition. For example, an expression such as “public records”, in current usage under the system of law of his own country, New Zealand, did not necessarily have any particular meaning for those versed in different systems of law. He therefore thought that the Commission would be greatly assisted by comments on the matter from Governments.

12. Sir Francis VALLAT warmly congratulated the Drafting Committee on its work on the draft articles, but considered that the Commission’s study of the topic of State archives was not sufficiently advanced to enable him to approve unreservedly either of the proposed articles A and C. Although not opposed to those articles, he considered, like Mr. Quentin-Baxter, that it would now be extremely useful for the Commission to have the comments of Governments, not only on the concept or archives itself but also on the question whether archives should be dealt with in a general article alone, or in a general article supplemented by articles dealing with particular cases. He would therefore refrain from detailed comment on the question of State archives at the moment, but would not object to the Commission approving articles A and C at the current session.

13. Mr. USHAKOV considered article A acceptable as a first attempt at defining State archives. He too reserved his position on the article, however, because the part of the draft dealing with State archives was

⁵ *Idem.*

⁶ See 1563rd meeting, para. 21.

⁷ See 1568th meeting, foot-note 3.

⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1560th to 1562nd meetings, and 1563rd meeting, paras. 2–20.

⁹ For text, see para. 3 above.

incomplete and it would be premature to take a final decision on the definition of State archives at the first reading.

14. The CHAIRMAN proposed that the Commission should adopt draft article A and state in its commentary that it would examine the article further in the light of the views expressed by Governments in the General Assembly.

It was so decided.

ARTICLE C¹⁰ (Newly independent State)¹¹

15. Mr. VEROSTA said that the words "or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State", in paragraph 3 of article C, proved that the definition in article A was inadequate, since it was necessary to explain more fully what was meant by State archives. In his opinion, the Special Rapporteur should send a questionnaire to States asking them what they understood by the expression "State archives".

16. Mr. REUTER thought that the word "or", at the beginning of paragraph 2, should be replaced by the word "and", since, in the case of archives of common interest to the predecessor State and the successor State, either State was entitled to call for the reproduction of archives passing to the other. Archives of the predecessor State passing to the newly independent State might therefore have to be reproduced as well if each State were to "benefit as widely and equitably as possible from those parts of the State archives", as provided in paragraph 2.

17. Paragraph 6 did not accurately reflect the intention of the members of the Drafting Committee and the Commission, who had not sought to lay down a rule of *jus cogens*. He thought a positive formulation would be better, with the words "shall respect the right" replacing the words "shall not infringe the right".

18. Mr. BARBOZA said that the expression "title to the territory", in the English version of paragraph 3, had been rendered in Spanish by "el dominio sobre el territorio". The word "dominio", however, generally had internal law connotations, and he knew of no case in which it had been used to refer to territory as understood in international law. It therefore seemed to him that the words "título sobre el territorio" would reflect the English wording better, although he would be prepared to accept any other suitable wording that the Secretariat might suggest.

19. Mr. REUTER said that in French the word "domaine" referred not to the territory of the State but to the régime of State property. Accordingly, in paragraph 3, the Commission had a choice between two solutions: to follow the French terminology and speak of

the "domaine de l'Etat nouvellement indépendant", or to bring the French version into line with the English and use the words "titres territoriaux de l'Etat nouvellement indépendant".

20. Mr. USHAKOV said that the word "or" should be retained at the beginning of paragraph 2, for there would be reproduction of archives only if they failed to pass. Also, the word "appropriate" should apply to both passing and reproduction.

21. With regard to paragraph 3, he suggested that for the time being the Commission should adopt the English version, which was the original, and then bring the French and Spanish versions into line with the English.

22. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that paragraph 3 had been adopted in its English version, and that there was some difficulty in translating terms peculiar to the English system of law into other languages. However, the translation problem could perhaps be resolved by the Secretariat in consultation with the French-speaking and Spanish-speaking members of the Commission.

23. There were two separate limbs to paragraph 3. The first, which related to the possible need of the newly independent State for evidence of its sovereignty over territory, took the form of an obligation of the predecessor State to provide the newly independent State with the best available evidence from documents in the predecessor State's archives. The second concerned the possibility that the part of the archives that passed to the newly independent State made reference to documents that did not pass, and that that part could not be fully understood unless evidence from those documents was made available. In his view, the expression "best available evidence" applied to the first limb of the paragraph but not to the second.

24. With regard to Mr. Reuter's suggestion that in paragraph 2 the word "or" should be replaced by the word "and", he pointed out that the paragraph provided that, leaving aside the cases in which archives passed automatically to the newly independent State in their original form, the States concerned would have a choice between the passing or the appropriate reproduction of archives. In that sense he considered that the paragraph was correctly worded.

25. Mr. QUENTIN-BAXTER felt bound to point out that in the English version—and, he believed, in the French version—the expression "best available evidence" clearly and rightly applied not only to documents bearing on title to the territory or boundaries of the newly independent State but also to documents that clarified the meaning of State archives which had passed to it. For example, if evidence yielded by documents in court proceedings in the successor State was incomplete or misleading, the court would not be satisfied with mere information about the content of other pertinent documents; it would require evidence from those documents, for instance in the form of a certified photostat copy of the original. That was the intention behind the provision.

¹⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1563rd meeting, paras. 21 *et seq.*, and 1564th and 1565th meetings.

¹¹ For text, see para. 3 above.

26. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, whereas title to territory or boundaries might well be the subject of court proceedings, the same could not be said of what was dealt with in the second limb of the paragraph, namely, the need to know the content of documents, as opposed to knowing of their existence, in order to have a clear understanding of the meaning of archives that had passed to the newly independent State. The second limb of the paragraph therefore seemed to apply to something a little wider than mere submission of evidence in court.

27. Mr. USHAKOV proposed the replacement at the end of paragraph 3 of the words "pursuant to other provisions of the articles in the present part" by the words "pursuant to other provisions of the present article", since the provisions of article C would be the only ones to apply to the passing of State archives to a newly independent State.

28. Mr. DÍAZ GONZÁLEZ said that the expression "best available evidence" was rather obscure in the context, at least in the Spanish version. It was not so much a question of proving the existence of a document as of securing the best copy available, for production as evidence. Perhaps the best course would be to ask the Secretariat to align the French and Spanish versions with the English.

29. Mr. RIPHAGEN thought the amendment proposed by Mr. Ushakov would improve the draft.

30. With regard to the comment of Mr. Díaz González, it would be for the court concerned to determine what constituted the best available evidence and whether, for example, it would be satisfied with a certified copy. He agreed that the question of aligning the different versions should be left to the Secretariat.

31. Sir Francis VALLAT suggested that, to dispel any doubts about the intention behind paragraph 3, a colon should be placed after the words "State archives of the predecessor State", and that the remainder of the paragraph should be subdivided into two subparagraphs, (a) and (b). That would reproduce the format of articles 34 and 35 of the 1978 Vienna Convention.

32. Mr. VEROSTA fully supported that suggestion, although the doubts he had expressed in the Drafting Committee regarding the second limb of the paragraph remained.

33. Mr. NJENGA said that the subdivision of paragraph 3, as suggested by Sir Francis Vallat, could give rise to serious problems. He for one could not accept the change if it meant that the second limb of the paragraph did not refer to documents bearing upon title. In the circumstances, it would be better for the paragraph to stand as drafted.

34. Sir Francis VALLAT said that his suggested amendment would have precisely the effect Mr. Njenga wished: in other words, subparagraph (b) would be entirely general in its terms.

35. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to replace the words "pursuant to other provisions of the articles in the present part" by the words "pursuant to other provisions of the present article".

It was so decided.

Article C, as amended, was adapted.

PLACING OF ARTICLES A AND C IN THE DRAFT

36. The CHAIRMAN invited the Commission to settle the question of the position of articles A and C in the draft. By issuing the texts of those articles in an addendum, the Drafting Committee had to some extent indicated the path the Commission might follow. Furthermore, the Commission's discussion of articles A and C had shown that the Commission might take the same course as the Drafting Committee. If it did so, it should make it clear that by adding articles A and C to the draft articles it intended that the question of their ultimate place in the draft should be decided in the light of comments made by Governments after they had studied the draft.

37. Mr. USHAKOV thought that was undoubtedly the best solution: it was too early to decide whether articles A and C should be included in the part of the draft articles dealing with State property or whether they should form the subject of a separate part of the draft. However, articles A and C did not exhaust the question of State archives in the case of succession of States, for consideration would have to be given to the various types of State succession. It was true that the Commission had completed its first reading of articles 1 to 23, but it could not be regarded as having completed its work on the provisions relating to State archives.

38. Sir Francis VALLAT said he could agree to the course suggested by the Chairman provided that the Commission's report indicated the background to articles A and C and included the text of the other articles submitted by the Special Rapporteur in connexion with State archives. It was important that Governments should be able to examine the material that had been placed before the Commission during its consideration of the topic.

39. The CHAIRMAN proposed that the Commission follow Sir Francis Vallat's suggestion, but on the understanding that the other articles submitted by the Special Rapporteur would be reproduced in the report for information only.

40. If there were no objections, he would take it that the Commission decided to adopt that procedure.

It was so decided.

TEMPORAL APPLICATION OF THE DRAFT ARTICLES

41. The CHAIRMAN said that the Drafting Committee had considered the question of the temporal application of the draft articles; it had not deemed it possible to propose a definite text on the subject for the time being, and had suggested that the matter should be dealt with on the basis of article 7 of the 1978 Vienna Convention.

42. Mr. USHAKOV said that he had been responsible for the Drafting Committee's suggestion. The draft in course of preparation contained no provision on temporal application corresponding to article 7 of the 1978 Vienna Convention. Since that article was of fundamental importance, he proposed that the Commission should take it as a basis, but using only paragraph 1. It would thus be clear that, unless otherwise agreed, the draft articles would apply solely to a succession occurring after their entry into force. Article 7 of the 1978 Vienna Convention stemmed from article 28 of the Vienna Convention on the Law of Treaties,¹² which laid down the general principle of the non-retroactivity of treaties. Unless the draft articles contained a provision on temporal application, a number of States might be reluctant to accept them.

43. The CHAIRMAN said that it was his understanding that the Drafting Committee was merely suggesting that the Commission should sooner or later settle the question of temporal application by reference to article 7 of the 1978 Vienna Convention. If that was correct, it would suffice to say in the report that the Commission had examined the question in general terms and that it favoured the course of action recommended by the Drafting Committee. Mr. Ushakov, however, seemed to be saying that the Committee should draft an article corresponding to article 7 of the 1978 Vienna Convention at the current session.

44. Mr. USHAKOV said that it was his understanding that the Drafting Committee was asking the Commission for permission to prepare an article corresponding to that article 7. Merely to mention the question of temporal application of the draft articles in the commentary would mean leaving it unresolved.

45. The CHAIRMAN pointed out that the Committee had raised the question because the Commission had not had time to discuss it. The Commission would have to debate the question of the temporal application of the draft articles before it could give the Drafting Committee instructions on the matter.

46. Mr. REUTER could see no objection to the Commission stating now that it favoured the application of principle of non-retroactivity of treaties to the draft articles in course of preparation, but it should not embark on a technical discussion of the drafting of a provision on that subject at the current session. The members of the Commission should first have studied such additional articles as might be forthcoming on the question of State archives.

47. Sir Francis VALLAT said it was obvious that the Commission would find it virtually impossible, in the little time remaining at the current session, to deal with the question of temporal application, a matter that had to be examined in terms of the substance of the articles concerned. It would not be satisfactory to make use solely of paragraph 1 of article 7 of the 1978 Vienna Convention, nor would it be possible to

include paragraphs 2, 3 and 4 of that article in the draft, since they involved special considerations and political and legal difficulties that had been discussed at great length at the United Nations Conference on Succession of States in Respect of Treaties. Nevertheless, the matter was of such importance that it should figure prominently in the Commission's report, possibly in the form of a subdivision of the introduction to the subject, with an indication that the Commission recognized the need for further consideration of the problem of temporal application of the draft articles and that it would find it most helpful to have the views of Governments in that regard.

48. Mr. USHAKOV said that he would not insist on the preparation by the Drafting Committee of an article on the question of temporal application at the current session, although that seemed to him an easy task, since article 7 of the 1978 Vienna Convention was available as a model. However, such an article would have to be drawn up sooner or later, failing which the draft articles would have a very limited application, since all successions of States occurring before they entered into force and entailing the creation of newly independent States would escape their provisions.

49. The CHAIRMAN said that all the members of the Commission who had spoken about the temporal application of the articles seemed to conclude that the Commission should consider the matter, but that it had insufficient time to do so at the current session.

50. If there were no objections, he would take it that the Commission decided simply to deal with the matter in its report by indicating the views expressed on the subject and by emphasizing the need to include in the draft articles, before their final adoption, an article on the temporal application of the draft.

It was so decided.

TITLE OF THE DRAFT ARTICLES AND ARTICLE 1 (Scope of the present articles)¹³

51. The CHAIRMAN reminded the Commission that the Chairman of the Drafting Committee had explained (1568th meeting, para. 7) why the Committee had not made any changes in the title of the draft or in the text of article 1. The main point was whether the Commission wished to state in the title and in article 1 the matters with which the draft articles dealt.

52. Mr. USHAKOV said he had no very definite view on the subject. Perhaps the Commission should state that article 1 was approved on an entirely provisional basis and that the final wording of the article would depend on the views expressed by Governments and the instructions of the General Assembly.

53. Mr. VEROSTA agreed with Mr. Ushakov. It would be best for the Commission not to alter the wording of article 1 until it knew whether the articles

¹² See 1568th meeting, foot-note 4.

¹³ For text, see 1568th meeting, para. 3.

on State archives would be incorporated in the part of the draft dealing with State property or whether they would form a separate part of the draft.

54. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had not wished to prejudge the Commission's decision on the title of the draft and the text of article 1, a decision that would be taken in the light of the future programme of work. If the topic of succession of States in respect of matters other than treaties were placed on the agenda for the Commission's thirty-second session, the question could be left open. On the other hand, if the Commission took the view that it could not proceed further with the topic and submitted the draft articles to the General Assembly, it would be more realistic for article 1 to stipulate that the draft applied to the effects of succession of States in respect of State property, State debts and State archives.

55. Mr. REUTER did not think the title of the draft or the text of article 1 should be altered. As yet, the Commission did not even know whether the draft articles would result in a convention. If there had to be a drafting change, however, it should be in the French version of the title of the draft, in which the words "dans les matières" should be replaced by the words "dans des matières".

56. Sir Francis VALLAT said that the English version of the title was ambiguous, for it did not indicate whether the subject was treated exhaustively or not. The best course would be to retain the text in its existing form, at least in the English version.

57. Mr. SUCHARITKUL agreed with Sir Francis Vallat. At an earlier session he had pointed out, in connexion with the definition of State debts, that the Commission was dealing solely with financial obligations.¹⁴ Consequently, the Commission had not dealt exhaustively with every kind of State debt, let alone with all the other matters that might be affected by State succession.

58. Mr. RIPHAGEN (Chairman of the Drafting Committee), speaking as a member of the Commission, said that the French version of the title of the draft was not at all ambiguous, whereas the English version was. To introduce that ambiguity in the French version, the Commission should make the change suggested by Mr. Reuter.

59. Mr. BARBOZA said that fortunately the Spanish version was as ambiguous as the English. The French version should therefore be brought into line with the Spanish and English versions.

60. The CHAIRMAN said that the Commission as a whole seemed to agree that, in the French version of the title of the draft articles, the words "dans les matières" should be replaced by the words "dans des matières", and that it should be left to the Drafting Committee to explain the reasons for the change.

The title of the draft articles, as amended in the French version, was adopted.

Article 1 was adopted.

61. The CHAIRMAN proposed that the Commission should decide to submit articles 1 to 23 and articles A and C of the draft articles on succession of States in respect of matters other than treaties to the General Assembly for transmission to Member States for their comments.

It was so decided.

62. Mr. USHAKOV wondered whether the Commission should await the views of Governments on articles A and C before continuing the preparation of provisions on State archives.

63. The CHAIRMAN, supported by Mr. YANKOV, observed that the Commission could not predict the outcome of the matter in the General Assembly. It must await instructions on whether or not to continue the preparation of articles on State archives.

State responsibility (*continued*) **(A/CN.4/318 and Add.1-4)**

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 31 (*Force majeure*) and

ARTICLE 32 (Fortuitous event)¹⁵ (*continued*)

64. Sir Francis VALLAT suggested that the Commission should leave aside the titles of articles 31 and 32 for the time being and consider the principles enunciated in those articles. In that way, it would be possible to devise titles that were more in accord with the content of the articles. In common law systems, for example, the term "*force majeure*" was employed with a somewhat special meaning: it referred to specific events, sometimes called "acts of God", as well as to others such as lightning, thunder, storm, pestilence, earthquake and war, and the point at issue was usually the actual consequences of the *force majeure*. Article 31, however, was concerned with further matters, such as absolute impossibility—although it was questionable whether the word "impossibility" required the qualifying adjective—and cases in which some choice was open to the organ of the State. Article 32 dealt with the situation in which it was impossible for the author of the conduct attributable to the State to realize that its conduct was not in conformity with the international obligation. It might therefore be fruitful for the Commission to concentrate first on the substance of the articles.

65. Mr. AGO said that the Commission should, as always, concentrate its attention on the substance and principles to be defined in the text of the articles, and treat titles as a matter of secondary importance. As Sir

¹⁴ See *Yearbook...* 1977, vol. I, pp. 30 and 31, 1421st meeting, paras. 24-26.

¹⁵ For texts, see 1569th meeting, para. 1.

Francis Vallat had indicated, there were cases in which it was genuinely impossible to perform an international obligation. Although the expression "absolute impossibility" might not appear to be very satisfactory, it demonstrated clearly that there were occasions when it was materially impossible to comply with an international obligation. It was especially to situations of that kind to that the continental law systems applied the term "*force majeure*". Anglo-Saxon lawyers were undoubtedly faced with a difficulty, since they preferred to use the French term "*force majeure*" rather than *vis major*. For them, the concept of *force majeure* evoked primarily "acts of God", which covered only natural events, whereas the concept of *force majeure* also covered situations resulting from human action.

66. In short, Sir Francis Vallat was right to suggest that the Commission should confine its attention to the following three questions. Where it was "materially impossible" to adopt the conduct required by an international obligation, did that preclude the wrongfulness of conduct not in conformity with that obligation? Where a State organ that should have adopted a particular course of conduct failed to do so because it was in distress and could at most choose between the conduct required of it and the conduct it adopted, but where it could not reasonably be expected to have adopted the conduct required of it because that would amount to self-destruction, did that preclude the wrongfulness of the organ's conduct? Where an external and unforeseen event made it impossible for an organ to realize that its conduct was in breach of an international obligation, did that preclude the wrongfulness of the conduct?

67. Referring to his oral presentation of articles 31 and 32 at the previous meeting, he wished to thank the Secretariat for its valuable assistance in providing him with materials on *force majeure* and fortuitous event. The Secretariat study entitled "State responsibility—'*force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine"¹⁶ had not only helped him greatly in preparing his report but would also be appreciated as an authoritative work of great academic value.

The meeting rose at 1 p.m.

¹⁶ Yearbook... 1978, vol. II (Part One), document A/CN.4/315.

1571st MEETING

Wednesday, 18 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi,

Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*)

(A/CN.4/318 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 31 (*Force majeure*) and

ARTICLE 32 (Fortuitous event)¹ (*continued*)

1. Mr. RIPHAGEN said that articles 31 and 32 submitted by Mr. Ago formed an excellent basis for discussion. The Commission could not ignore the special circumstances provided for in those articles if it wished to take account of the concept of justice, which was not only universal and permanent, but also concrete, as indicated by the maxim *jus in causa positum*. Nevertheless, there were inherent difficulties in treating the subject-matter of *force majeure* and fortuitous event within the framework of the draft, which was at a very high level of abstraction, for two reasons: first, because the draft dealt with the legal relationship between States, which were themselves abstractions; secondly, because it dealt with the responsibility of States irrespective of the content of the obligation whose non-performance entailed that responsibility, as could be seen from articles 1 and 16,² and irrespective of the content, forms and degree of responsibility—matters that would be treated later, in part II of the draft.

2. With regard to the first level of abstraction, articles 31 and 32 were concerned with the situation in which the author of the conduct attributable to the State was placed, in other words, the situation of the individual through whom the State was considered to act; account also had to be taken of the situation of the individuals through whom the State suffered, as was shown by the last phrase of article 31, paragraph 2. As to the second level of abstraction, an effort had to be made to resolve the problem without drawing any distinction between the two sides of the legal relationship between States, namely, the content of the obligation of one State and the content of the right of the other. It was in that context that the Commission faced the difficult task of dealing with the impact of the unforeseeable.

3. The problem involved an abstract obligation of one State with a corresponding abstract right of another State, and vice versa—which touched on the content of the so-called primary rule. On the other hand, the Commission also had to deal with responsibility,

¹ For texts, see 1569th meeting, para. 1.

² See 1532nd meeting, foot-note 2.

in other words with the legal consequences of non-performance of the abstract obligation that took the form of rights of the other State—which involved the so-called secondary rules. Both matters formed part and parcel of the legal relationship between the two States.

4. The task facing the Commission was to adapt the abstract obligations and rights of the legal relationship to the special circumstances of what, for the time being, could be called *force majeure* and fortuitous event. It was important to remember, however, that they could be adapted in various ways and not simply in order to preclude the wrongfulness of the act in respect of *all* the legal consequences the act would normally—in other words, in the abstract—entail under the so-called secondary rules. For instance, the obligation and the right might have to be adapted under the primary rule, or again, they might have to be adapted under the secondary rules. The crucial problem was which of the two States involved in the legal relationship, in both its primary and secondary aspects, should bear the risk of the unforeseeable. In addition, it might prove necessary to discuss whether the risk could be divided between the States in question and whether the obligation and the right could be adapted by conversion of the legal relationship as a whole, in other words, by means of a substitute performance of the obligation of one State or a substitute right of the other State.

5. To do justice, consideration must clearly be given to the special circumstances of a concrete case of non-performance of an international obligation, but that could be done in several ways. With regard to adaptation of the obligation, it would be noted that paragraph 103 of Mr. Ago's eighth report (A/CN.4/318 and Add.1-4) spoke of the "unquestionable" case of destruction, through uncontrollable natural causes, of property that a State was required to hand over to another State. But was that always so? Could there be no substitute performance of the obligation? The textbooks often cited the hypothetical case of an obligation under which one State was required to transfer an island to another State, and asserted that the obligation would no longer exist if the island in question disappeared, for example as a result of volcanic eruption. Nevertheless, that part of the continental shelf would remain, and it could well be of value or interest to the State to which the island would have been transferred. As to adaptation of the right, it would be seen that paragraphs 113 and 132 of the same document mentioned *force majeure* and distress in connexion with the right of innocent passage through the territorial sea. In that context, however, *force majeure* and distress did not constitute justification for an otherwise unlawful act; they were simply the necessary elements of the right of innocent passage itself. It was interesting to note that the circumstances of *force majeure* and fortuitous event were not specifically mentioned in article 38 of the Informal Composite Negotiating Text/Revision 1,³ used in the current

negotiations on the law of the sea, in connexion with the right of transit through straits, transit passage being considered to be part of freedom of navigation and overflight, for the purposes of continuous and expeditious transit.

6. An example of the possibility of adapting the legal consequences of non-performance of an obligation was given in paragraph 115 of the report, which cited the case of Bulgarians who had been unable to return to their properties in Greece. Greece had not fulfilled its obligation to permit the Bulgarians to return to their properties, but it had fulfilled a substitute obligation by paying them compensation. Again, paragraph 118 discussed the *Case concerning the payment of various Serbian loans issued in France*, in which the Permanent Court of International Justice had considered that the obligation had not been to repay the loans *in specie*. However, had the Court taken the view that Serbia had an obligation to pay *in specie*, would it then have ruled that, in the circumstances of the case, the obligation had ceased to exist? He could not imagine that any court would arrive at such an unwarranted conclusion. Another case of adaptation of a State's obligation seemed to be contemplated in foot-note 290 of the report, in which it was difficult to distinguish between fortuitous event as a circumstance precluding wrongfulness and determination of "the degree of diligence required", which was a matter of the content of the obligation.

7. The answer to the question which party was to bear the risk lay to some extent in the nature of the breach, particularly when the breach did not entail any material damage, as it might not in a case of violation of a frontier, for example. That general problem was reflected in the train of thought developed in paragraphs 133 to 136 of the report relating to *force majeure*, and in paragraph 145, relating to fortuitous event. With regard to paragraphs 133 to 136, it was at first sight difficult to draw a distinction between non-performance of the obligation not to violate the frontier of another State—a violation that often did not entail any real damage—and non-performance of other obligations involving an interest that was "sacrificed" (paragraph 133).

8. The rule of proportionality between the interest protected by adopting conduct not in conformity with an international obligation and the interest protected by the obligation seemed easy to apply in the case of Breaches that did not result in real damage. Nevertheless, the interest served by the *prima facie* wrongful act was the interest of a person or entity other than that whose interest was injured, which meant that what was at issue was not so much a hierarchy of interests as a hierarchy of norms, namely, the conflict between the right of self-preservation and the duty not to injure others. Again, that conflict could to some extent be resolved by adaptation of the consequences of non-performance of the obligation.

9 Paragraph 145 brought out the same link between the character and content of the obligation and the

³ See A/CN.4/318 and Add.1-4, para. 113.

consequences of the existence of a fortuitous event. In that respect, the distinction made earlier by the Commission between obligations to refrain from certain conduct, obligations to do something and obligations to prevent something from happening, was clearly relevant to the concepts of *force majeure* and fortuitous event. There again, there seemed to be room not only for adaptation of the obligation, but also for adaptation of the consequences of objective non-fulfilment of the obligation, in other words, for substitute performance.

10. The difficulties in applying the two concepts under discussion did not, of course, rule out the possibility of drafting articles on them. The articles proposed by Mr. Ago were extremely useful, as long as they were not regarded as providing a complete answer to the problems involved. Paragraph 1 of article 31 was perfectly clear and logical, and paragraph 3 was its obvious counterpart. The question arose, however, whether the last part of paragraph 2, referring to "a situation of comparable or greater peril", adequately covered the full effect of the rule of proportionality. In regard to article 32, there was some doubt whether a "supervening external and unforeseeable factor" was not in principle something for which the State committing the act had to bear the risk. That State should at least express regret and make good any real damage caused by the act, which meant that an act that was not considered wrongful still had some consequences. If a number of situations were construed as precluding the wrongfulness of a particular act of the State, there might still be room for certain legal consequences of that act. However, the legal consequences of an act that was not wrongful formed a quite separate topic.

11. Mr. TABIBI said that he had been greatly impressed by Mr. Ago's analysis of the concepts of *force majeure* and fortuitous event, which encompassed doctrine, State practice and, more particularly, the views expressed at international conferences held under the auspices of the League of Nations and the United Nations. He could not fail to agree with the conclusion reached in paragraph 125 of the report that, in international law, it was a well-established and unanimously recognized principle that conduct not in conformity with what was required by an obligation did not constitute a wrongful act if it was absolutely impossible for the subject to act otherwise. The terms of article 31, paragraph 1, fully reflected that conclusion. In general, he supported the principles underlying both article 31 and article 32.

12. Nevertheless, there were many pitfalls surrounding the question of fortuitous event, and great care must be taken to draft the articles in such a way as to prevent any abuse and ensure that international obligations were not breached on a variety of pretexts. Good faith should be the point of departure in establishing the intentions of the author when a breach of an obligation was due to a fortuitous event. Again, the burden of proof should not rest on the victim, but on the author of the conduct attributable to the State. The third element that required very careful consideration was proportionality between the act and the obligation.

For example, a State responsible for damage to a highway in a neighbouring State might claim that it was financially unable to repair the damage, yet the damage might be such as to put a stop to free transit along the highway. The terms of paragraphs 2 and 3 of article 31 should be clarified, so as to bring them into line with the purposes of paragraph 1. In article 32, the basic criterion should be a "supervening unforeseeable factor", and the word "external" should be deleted. Lastly, the Drafting Committee might consider the possibility of formulating a single article, containing one section relating to *force majeure* and another relating to fortuitous event.

13. Mr. THIAM did not intend to go into the distinction to be made between *force majeure* and fortuitous event, since the meaning given to those expressions varied according to the system of law considered. It seemed to be generally accepted that *force majeure* and fortuitous event were in principle exonerative of responsibility. Hence it was only possible to inquire from a practical standpoint, in each specific case, whether special circumstances constituted a case of *force majeure* or a fortuitous event.

14. He wondered what value the rules laid down in articles 31 and 32 would have for newly independent States. In his first reports Mr. Ago had raised the question of responsibility in the case of newly independent States, and the Commission had decided to examine that question later, when it took up the grounds for exoneration from responsibility. The question had then arisen whether special provisions should be drafted for newly independent States or whether the elements of a solution could be provided by stating a general rule. He would like Mr. Ago to reply to that question.

15. Mr. USHAKOV recognized that there were circumstances that prevented a State from fulfilling its international obligations and, by their nature, precluded the wrongfulness of an act of the State and consequently its responsibility. But he thought that a very clear distinction should be made between the three types of circumstance that might preclude wrongfulness; those types, in his opinion, were *force majeure*, fortuitous event and "extreme necessity".

16. *Force majeure* and fortuitous event had the same consequences: they made it materially impossible for the State to fulfil its obligation. But they had different causes: *force majeure* (in English, "act of God") was a circumstance brought about by a natural event, independently of the will of man, whereas a fortuitous event was a circumstance produced by human action, individual or collective. Thus a forced landing due to a storm was a case of *force majeure*, since it was brought about by a natural event, whereas a forced landing due to the explosion of a bomb placed on board the aircraft by a terrorist was a fortuitous event, because it was the result of human action.

17. He supported the view expressed by the representative of Haiti at the 1907 International Peace Conference, which had revised the system of arbitration established by the 1899 Convention for the Pacific

Settlement of International Disputes, namely, that the circumstances of *force majeure* could be defined as “facts independent of the will of man”.⁴ However, he did not agree with Mr. Ago’s statement, in paragraph 107 of his report, that *force majeure* was an external factor that “may also be attributable to human action”. In that connexion, he believed that the expression “force majeure” was wrongly used in article 42, paragraph 5, of the Convention on Special Missions,⁵ where it would have been better to speak of “exceptional circumstances”, as in the Russian text. In his view, *force majeure* was always a natural event. Such an event was foreseeable in some cases—for example, in so far as it was possible to foresee a flood or a volcanic eruption—but its consequences were unavoidable.

18. Thus there was *force majeure* when a State could not fulfil its obligations because of a natural event, and there was fortuitous event when a State could not fulfil its obligations because of human action. For example, if a State had undertaken to export the output of a mine to another State and the mine was destroyed by an earthquake, that was a case of *force majeure*. On the other hand, if the mine was occupied by an enemy Power, that would be a fortuitous event. In both cases the result was the same: it was really impossible for the State to fulfil its obligation.

19. What distinguished *force majeure* and fortuitous event from “extreme necessity” was that, in the latter case, it was not materially impossible for the State to fulfil its obligation. It could do so, but such conduct would be so far contrary to its own interests—and even, in some cases, to the interests of the international community as a whole—that it was in a situation in which it found it impossible to meet its obligation. For example, if a State could repay a debt, but by so doing ran the risk of placing itself in a disastrous financial situation that would threaten its very existence, the postponement of payment of its debt could be considered necessary. Similarly, if a State had undertaken, by an agreement, to authorize another State to engage in whaling in its territorial sea, and whales were threatened with extinction as a result of overexploitation, the first State could continue to authorize whaling, but it would find itself under the “extreme necessity” of prohibiting it to protect an endangered species.

20. Consequently, he proposed that draft articles 31 and 32 should be replaced by the following provisions:

“Force majeure

“The wrongfulness of an act of a State not in conformity with its international obligation is precluded if the act is due to *force majeure*.”

⁴ *Ibid.*, para. 116.

⁵ General Assembly resolution 2530 (XXIV), annex.

“Fortuitous event

“The wrongfulness of an act of a State not in conformity with its international obligation is precluded if the act is due to a fortuitous event involving real impossibility for the State to act in conformity with that obligation.”

21. Mr. VEROSTA wished to know, for the future orientation of the Commission’s work, what Mr. Ago proposed with regard to state of emergency, which was to be the subject of article 33.

22. Mr. AGO, replying to Mr. Verosta’s question, stressed the distinction he had made, particularly in paragraph 102 of his report, between *force majeure* and state of emergency. Some of the examples of extreme necessity given by Mr. Ushakov were covered neither by article 31 nor by article 32, but would be covered by the article that was to follow those two provisions and that was to deal with state of emergency. Paragraph 120 of his report describes the case of the *Société commerciale de Belgique*, in which a dispute between Greece and Belgium had been referred to the Permanent Court of International Justice. In arguing that it could not fulfil its international obligation without jeopardizing the normal functioning of its public services, the Greek Government had in fact invoked a state of emergency, in other words, extreme necessity, which constrained it, if not to refuse payment definitively, at least to defer it to avoid State bankruptcy. When there was a state of emergency, it was the very existence of the State or one of its fundamental interests that was normally at stake; however, as Mr. Ushakov had pointed out, it could also be one of the fundamental interests of a number of States or of the international community. Cases of state of emergency relating to a situation of extreme necessity for a State had nothing to do with cases of distress of an agent of the State faced with a choice that was not really a choice at all: a pilot could not be required to commit suicide rather than violate an international obligation.

23. It was a fact that the terminology on the subject was varied. If one expression had been used in a text rather than another, it was merely because it corresponded more closely to the thought of its author, but he wished to point out once again that none of them had an indisputable natural meaning. It would be preferable, in those circumstances, to disregard the expressions provisionally used to designate the real situations dealt with in the articles under consideration, and to concentrate on the drafting of generally acceptable provisions. It was quite possible to maintain, as Mr. Ushakov maintained, that the concept of *force majeure* referred only to natural events, but it would be better, for the time being, not to insist on the use of one expression rather than of another.

24. Mr. VEROSTA said that the Commission would one day have to opt for certain expressions and that it should already give the matter serious consideration. The terminology established by State practice was very varied, but the Commission should be careful not to use expressions that would be unfamiliar to certain States. He himself could not accept the idea of relative

impossibility and would prefer, like Mr. Ushakov, to restrict the concept of *force majeure* to natural events. Furthermore, he thought the Commission could not entirely avoid studying the consequences to which Mr. Riphagen had drawn attention.

25. Mr. REUTER thought that for the time being the Commission should avoid using the expressions "*force majeure*", "fortuitous event" and "state of emergency" in the draft articles, or even in the commentaries, unless they were placed in brackets. The meaning of those expressions varied so widely from country to country that their use by the Commission should be barred, because it would be dangerous. It might perhaps be possible to use, for example, the expression "irresistible coercion".

26. To make progress in its consideration of the articles under study, the Commission should confine itself to the three questions raised at the previous meeting by Mr. Ago (1570th meeting, para. 66). It would reach a deadlock if it took up the questions raised by Mr. Riphagen and tried to determine what became of the international obligation once it was established that the conduct adopted was wrongful. The United Nations conference on the Law of Treaties had been careful not to settle questions of responsibility, which had only been touched on in article 60 of the Vienna Convention.⁶

27. The principles that Mr. Ago had laid down in the articles under consideration were general principles, valid in all cases. To avoid becoming deadlocked on that issue as well, the Commission should not try to determine whether those principles applied to economic relations. The cases cited by Mr. Ago concerning loans were already old, as Mr. Ushakov had pointed out. At the present time, economic questions of that kind were nearly always dealt with in special agreements in which the expression "*force majeure*" was used in a sense quite different from its general meaning. The Commission did not, of course, have to lay down rules for cases covered by agreements, but it could try to show that, in the absence of any agreement, monetary or economic coercion could justify temporary non-fulfilment of an international obligation, or even reduction of a debt. On that issue, there were not only old arbitration cases, but also recent judicial decisions. In its commentary, the Commission could therefore explain that it was laying down general rules and had deliberately refrained from drafting more detailed provisions on particular kinds of obligation.

28. As to the substance, he could give affirmative answers to the three questions raised by Mr. Ago. With regard to article 31, paragraph 1, he was glad that Mr. Ushakov, in his proposal (para. 20 above), had not referred to the author of the conduct attributable to the State. Between paragraph 1 of article 31 on the one hand, and paragraph 2 of the same article and article 32, on the other hand, there were great differ-

ences. As Mr. Ago had pointed out, there could be coercion either of a State or of its agents. It was for that reason that, in the Vienna Convention, two separate articles had been devoted to coercion of a State and coercion of a representative of a State. The case contemplated in article 31, paragraph 2, seemed to relate to natural persons. As he had already observed with regard to another article, the question arose in different terms for States because, in certain circumstances, they must agree to perish. As Mr. Ago wished to deal separately with the problem of necessity for the State and that of necessity for the individual, it might perhaps be advisable to make paragraph 2 of article 31 a separate article. Mr. Ago's idea of the concept of "*cas fortuit*" (fortuitous event) was contrary to French usage and probably not in conformity with a number of systems of law. Moreover, it was open to question whether article 32 was not mainly concerned with natural persons, as appeared from the examples given by Mr. Ago. Could a State be exonerated because it had been impossible for it to realize that its conduct was not in conformity with an international obligation? It might therefore perhaps be better to combine paragraph 2 of article 31 and article 32 in a single provision.

29. In article 31, paragraph 1, Mr. Ago mentioned only the absolute impossibility of acting otherwise. Mr. Ushakov did not wish to go so far. For his own part, he would like to go further and mention the cause. It would not be wise, however, to mention the possible causes in the text of the article itself. In the commentary, the Commission might indicate, first of all, natural causes, such as cataclysms. Would it be appropriate then to mention unknown causes? If a dam built in one State gave way and the waters it retained flowed into the territory of a neighbouring State, the cause of the disaster could be an earthquake, a defect in construction or a defect in construction revealed by the earthquake. Could two concomitant causes be accepted? On whom would the burden of proof rest? In some systems of law, the expression "*cas fortuit*" (fortuitous event) referred precisely to situations brought about by unknown causes. That was why the Commission should not go into the causes in detail, but should perhaps introduce in article 31, paragraph 1, two elements appearing in article 32, namely, the external nature of the determining factor and its unforeseeable character. It could be retorted, of course, that that factor could only be external, since paragraph 3 of article 31 provided that the situation of impossibility or distress must not be due to the State to which the conduct not in conformity with the obligation was attributable. To illustrate the need for the factor to be unforeseeable character. It could be retorted, of course, though international meteorological services had announced a storm and warned airports not to allow any further take-offs, a State authorized an aircraft to take off, but the aircraft had to land shortly afterwards on the territory of another State, causing serious damage. As the factor determining the adoption of conduct not in conformity with the international obligation had been foreseeable, such conduct could not be regarded as lawful.

⁶ See 1533rd meeting, foot-note 2.

30. Sir Francis VALLAT said that, although there was broad agreement on the principles involved, it was the manner in which those principles were to be expressed that gave rise to difficulty.

31. It would be noted from section 4 of chapter V of Mr. Ago's eighth report that there were already cases in which certain elements affected the consequences of the act and the nature of the obligation, as well as cases in which the State was excused, or the wrongfulness of its act precluded, because of the circumstances. In addition, the Secretariat's study on *force majeure* and fortuitous event⁷ had disclosed many more cases that illustrated the marginal character of the topic. In the particular case under consideration, however, the language proposed by Mr. Ago seemed appropriate to the circumstances, since the inclusion of the phrase "an act of the State not in conformity with what is required of it by an international obligation" in reference to each of the three situations covered by articles 31 and 32, meant that, if the obligation was varied so that some other obligation arose, the question should be dealt with elsewhere. He therefore considered that the Commission could safely agree to wording along the lines proposed, provided it was made plain in the commentary that articles 31 and 32 were concerned solely with the assumption that there was an obligation and that the conduct attributable to the State was not in accordance with that obligation and that they were therefore not concerned with the modification of an obligation.

32. With regard to the structure of the draft articles, it seemed to him that the difference between paragraphs 1 and 2 of article 31, on the one hand, and article 32, on the other, did not lie exclusively, or perhaps even mainly, in the nature of the event, since the difference was just as great according to the type of situation contemplated. For example, paragraph 1 of article 31 dealt with what the Vienna Convention termed impossibility of performance, paragraph 2 of article 31 dealt with a situation of distress, and article 32 dealt with the impossibility of recognizing that what had been done was in breach of the obligation. Those three situations, which were all quite different, were as much a part of the essence of the articles as the circumstances that had brought them about. Indeed, his own inclination would be to stress the circumstances that ensued from the situation rather than those that had given rise to it and, to that end, to incorporate the two elements of paragraph 3 of article 31, namely, the impossibility of complying with the obligation and the situation of distress, in paragraphs 1 and 2 of that article respectively.

33. As to the expression "the author of the conduct", in paragraph 1 of article 31, he believed it was the first time it had appeared in the draft, the usual expression being "the conduct of an organ of the State". He doubted whether it was advisable to intro-

duce new terminology at that stage. The main point was not whether it was impossible for the author or the organ of the State to act otherwise, but whether it was impossible for the State itself to do so. In the case of the disappearance of an island, for example, the impossibility of transferring the island applied not merely to the organ of the State, but to the State as such. His concern was that any attempt to distinguish between impossibility for the author of the conduct and impossibility for the State would enable the State to claim that, as its agent had been unable to act otherwise, it was not responsible for the conduct. What mattered in the final analysis was whether or not it was impossible for the State to comply with the obligation; whether or not a particular person was in a position to do so was a secondary factor.

34. He was not proposing a specific amendment, but the essence of what he had in mind would be reflected if the phrase following the words "is precluded", in article 31, paragraph 1, were replaced by the words "if, due to circumstances beyond its control, it was impossible for the State to act in conformity with the obligation".

35. He had omitted any reference to the circumstances giving rise to the impossibility, although in his view the inclusion of such a reference merited the Commission's consideration, because he thought that any discussion of those circumstances would only lead to difficulties. It was clear, however, that the State must exonerate itself by establishing that what had occurred was beyond its control, and the essence of the matter might therefore be said to lie in the question whether or not the State could have avoided the situation.

36. Lastly, he considered that a test of foreseeability would be dangerous, since that quality was purely subjective and depended on the approach of the particular State or organ concerned. Indeed, he doubted whether anything was really unforeseeable, since the most common cases of *force majeure*—earthquake, disappearance of an island through volcanic action, extremes of weather, for example—could be and had been foreseen.

The meeting rose at 1 p.m.

1572nd MEETING

Thursday, 19 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

⁷ See *Yearbook... 1978*, vol. II (Part One), document A/CN.4/315.

State responsibility (*continued*)
(A/CN.4/318 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 31 (*Force majeure*) and

ARTICLE 32 (Fortuitous event)¹ (*continued*)

1. Sir Francis VALLAT said that it might facilitate the Commission's consideration of the questions of *force majeure* and fortuitous event if the three substantive provisions of articles 31 and 32 were treated as separate articles, at any rate for the purposes of initial drafting. That applied in particular to paragraph 2 of article 31, which should incorporate the relevant provision from paragraph 3, since it would be helpful if the Drafting Committee could examine the question of distress in isolation.

2. Inasmuch as distress, as a defence or excuse, was pleaded most frequently in connexion with ships and aircraft, it had a special character, and in a sense the problem could be handled more easily within that specific context. The generalization of the excuse of distress gave rise to difficulties, not the least of which was the meaning of distress itself; what amounted to distress, and to whom and in what circumstances it applied, were questions that called for careful examination. From paragraph 2 of article 31 he assumed it was intended to apply to an individual, as opposed to a corporation or a State. If that assumption was correct, it should be made clear. Also, he wondered what was the precise nature of the distress contemplated in the paragraph. Obviously, if a person was in peril of his life, that was a case of distress. But did a man have to be in peril of his life to be allowed to adopt conduct that would otherwise involve a breach of an obligation by the State under international law? That was a point he had difficulty in deciding. Again, he was not certain that the test of conduct laid down in the same paragraph, namely, conduct that did not "place others in a situation of comparable or greater peril", was the right one. In his view, the doctrine of proportionality should operate to establish a link between the measures of avoidance actually taken and what was necessary, or reasonably necessary, to avoid the peril.

3. A somewhat more important point was that paragraph 2, as drafted, suggested that the choice of means was left entirely to the individual involved in a situation of distress; that seemed to sever the link between the individual, who would normally be the organ of the State, and the State itself. For instance, the pilot of an aircraft in flight might find himself in a situation in which, to save life, he was obliged to cross a border and land in the territory of a foreign country. That situation might have arisen because the airport control tower of the State had failed to provide the pilot with the necessary information or because there had been

negligence in the maintenance of the aircraft. It was his view that in such cases—where what happened was due to some failure on the part of the State—the State should bear the responsibility even though the individual had been in peril and had been obliged to take action to avoid that peril. Paragraph 3 went some way to meeting his point but did not deal with the question as to how the situation had arisen, which called for more positive treatment.

4. In article 32, the stress was likewise placed on the position of the individual, the "author of the conduct", and there again he wondered whether there should not be a more direct link with the State. Also, he had doubts about the shift from the negative formulation of paragraphs 1 and 2 of article 31 to the formulation adopted in article 32, and even greater doubts whether, as a matter of law, the test of what was unforeseeable could be applied. His main difficulty with article 32, however, arose from the words "realize that its conduct is not in conformity with the international obligation"; he would be grateful if they could be explained. A situation might arise where the State had means of knowledge, but not the individual, and he doubted whether the State should be relieved of responsibility in such circumstances. In internal law, for instance, it often happened that a person committed a breach in all innocence, but that did not necessarily relieve him of responsibility.

5. Mr. SUCHARITKUL considered the three general principles set out respectively in paragraphs 1 and 2 of article 31 and in article 32 to be acceptable; he feared, however, that the transposition to international law of expressions peculiar to internal law would inevitably lead to difficulties of understanding and interpretation. Not only were the situations envisaged in the articles in question described by expressions that varied from one country to another, but the same expression was sometimes used in two juridical systems to describe different situations. Moreover, the scope of those expressions could vary in internal law, depending for example on whether they were used in penal or civil matters.

6. The expression "*force majeure*" had often been a source of confusion, whether used in internal law, in international contracts such as contracts for the international sale of goods, or in international conventions. Even where that expression was defined in internal law, it could happen, in view of the rule that the will of the parties to a contract prevailed, that those parties gave it a different meaning. Like Mr. Ago, he believed that the concept of *force majeure* should not be limited to the occurrence of acts of nature but should extend to acts caused by human action. Moreover, the principle stated in article 31, paragraph 1, should be applied not only to conventional and customary obligations but also to obligations that might flow from decisions of the Security Council, from arbitral awards or from judgements of the International Court of Justice. In 1960, in the *Case concerning Right of Passage over Indian Territory*, involving Portugal v. India, the International Court of Justice had ruled that in 1954 Por-

¹ For texts, see 1569th meeting, para. 1.

tugal had had a right of passage to two enclaves.² In the mean time, however, those enclaves had ceased to be under Portuguese sovereignty. The effect of that supervening factor had therefore been to render the performance of India's obligation absolutely impossible materially. Admittedly, in that case, it might be asked whether the situation thus created had not been due to "the State to which the conduct not in conformity with the obligation is attributable", in the terms of article 31, paragraph 3. As to the case of the *Appeal Relating to the Jurisdiction of the ICAO Council*,³ referred to the International Court of Justice shortly before the disappearance of east Pakistan as such, it had involved the overflight of Indian territory by Pakistan civil aircraft. In that case too India's obligation had become void of subject-matter and its performance impossible, but there again it might be asked whether that impossibility had not been attributable to India.

7. With regard to the situation of distress, he was inclined to think, like Sir Francis Vallat, that it concerned individuals rather than States. In Mr. Ago's opinion that situation, which he described as a relative impossibility, was characterized by the choice between the performance of the international obligation and some other conduct that would make it possible to avoid a serious danger.

8. Like Sir Francis Vallat, he doubted whether the idea of an unforeseeable factor constituted a sound criterion. Although many events, such as cyclones, were foreseeable, it was generally impossible to determine in advance the precise moment of their occurrence. Ultimately, in all the cases covered by articles 31 and 32, account had to be taken of a subjective element that found expression in the degree of diligence displayed by the author of the conduct attributable to the State. From that point of view it would be possible to distinguish, as in Roman law, between *culpa lata*, *culpa levis* and *culpa levissima*. A pilot who had to make a forced landing was often at the mercy of natural or mechanical factors that made it very difficult to pilot the aircraft. For that reason, he hoped that the Commission would place the emphasis on some such idea as constraint or "insurmountability" rather than on that of "control".

9. Mr. NJENGA said that the rationale for the rule in article 31 was that an external event over which the State had no control might make it impossible for that State to fulfil its obligation, as a result of which its act could not be wrongful. He was therefore unable to take the view that, for the purposes of the draft articles, the doctrine of *force majeure* should be construed in a restricted sense as applying solely to natural disasters. In that connexion, he noted the statement made in paragraph 107 of Mr. Ago's report (A/CN.4/318 and Add.1-4): "But this external factor may also be attributable to human action, loss of sovereignty or

quite simply loss of control over a portion of State territory, for example." It therefore seemed that Mr. Ago himself had not ruled out the possibility that a cause other than a natural disaster might amount to *force majeure*.

10. He wished to know whether, if wrongfulness were precluded on grounds of *force majeure*, the intention was that compensation for the other equally innocent party was likewise precluded. His concern on that point arose because Mr. Ago, in paragraph 124 of his report, had referred, apparently with approval, to article 10, paragraph 6, of the codification draft of Graefrath and Steiniger, which read: "The obligation to indemnify does not apply in cases of *force majeure* or of a state of emergency." He feared that, if the Commission took that approach, its hands would be tied when it came to deal with responsibility for acts not prohibited under international law. For instance, if an oil tanker travelling from State A to State B collided with another vessel because of dense fog, with the result that oil was discharged on the shores of State C, that in his view would be a clear case of *force majeure*, and he saw no reason why State C should have to suffer the consequences merely because no party was liable in law. It might be that parties engaged in exceptionally hazardous pursuits should be required to insure in advance against the risks involved, and that some mechanism should be set up for dealing with such situations. There was a common law rule (*Rylands v. Fletcher*),⁴ which imposed what amounted to absolute liability for damage resulting from such pursuits.

11. It was also necessary to take account of what might be termed "economic *force majeure*", which had been considered in the *Case concerning the payment of various Serbian loans issued in France* and in the *Case concerning the payment in gold of the Brazilian Federal loans issued in France*, which were referred to in paragraphs 118 and 119 of Mr. Ago's report. The fact that a country had suffered some disaster as a result of which it was completely unable to meet its debts could not, in his view, be excluded as a circumstance of *force majeure*. For instance, the unprecedented rise in the price of petroleum and manufactured goods, combined with the fall in the price of raw materials, had brought many developing countries to the verge of bankruptcy. If that were not *force majeure*, he did not know what was. It was in recognition of that state of affairs that certain creditor countries, including the Netherlands and the Scandinavian countries, had indicated their willingness to write off their loans to developing countries.

12. In conclusion, with regard to the formulation of articles 31 and 32, he suggested that the Drafting Committee should be asked to consider whether the articles could be merged or recast with a view to clarifying their intent and establishing the nexus

² I.C.J. Reports 1960, p. 6.

³ I.C.J. Reports 1972, p. 46.

⁴ United Kingdom, *The Law Reports, English and Irish Appeal Cases before the House of Lords* (London, Council of Law Reporting, 1868), vol. III, p. 330.

between them. He agreed entirely with Mr. Tabibi about the need to narrow their provisions so that the articles could not be used as an excuse to infringe the rights of weaker countries.

13. Mr. YANKOV disagreed with what seemed to be the rejection of the use of the term "*force majeure*". The Commission would be failing in its duty if it decided that it was safer to disregard *force majeure* because the concept had so many different connotations. "*Force majeure*" was a term of art not only in many systems of internal law, where it was left to jurists and the courts to determine the interpretation, but also in international law and even in the terminology of the Commission itself. If some countries did not use the term, the Commission should elucidate it in the commentary. Fortunately, Mr. Ago had fully complied with the request made to him to identify and clarify the factors justifying the non-performance of an international obligation. Article 31 clearly stated the very important element of the impossibility of performing an obligation and also the situation of distress that precluded the international wrongfulness of an act of the State. Article 32 provided for "a supervening external and unforeseeable factor", although it was true that the draft dealt with the responsibility of States and it might therefore be best to avoid referring to "the author of the conduct". The Drafting Committee could doubtless improve the wording of the articles in the light of the suggestions that had been made, but Mr. Ago was to be congratulated on a comprehensive and profound analysis of the subject-matter and of the substance of the articles he had proposed.

14. Mr. USHAKOV stressed the need to consider only those situations that involved the State. In the articles in question, it was absolutely necessary to avoid any reference to State organs, private individuals and other authors of conduct attributable to the State; reference could be made to chapter II of the draft to determine what conduct was attributable to the State.

15. The expression generally used in Russian to translate the expression "*force majeure*"—and which appeared *inter alia* in article 14, paragraph 3, of the 1958 Convention on the Territorial Sea and the Contiguous Zone,⁵—referred to natural occurrences, to the exclusion of human action. That expression could be translated into French by the words "*force insurmontable*" or "*force irrésistible*". It would therefore be best to avoid using the expression "*force majeure*" in the draft. The reason why he favoured two separate articles, dealing respectively with fortuitous events due to human action and with insurmountable events due to natural forces, was because he believed that the State could be held responsible for an event due to human activity, whereas *force majeure* could not be considered as resulting from an activity of the State. Referring to the example given by Mr. Reuter (1571st

meeting), he wondered whether a State that authorized an aircraft to take off from its territory despite pessimistic weather forecasts was really violating an international obligation. In conclusion, he suggested that both acts of nature and acts of man should be taken into consideration in so far as they originated with the State.

16. Mr. QUENTIN-BAXTER said that it was important to resist the lure of discussing the various aspects of the topic that might have some bearing on liability for injurious consequences of acts that were not in themselves unlawful. He realized that it was impossible to deal in articles 31 and 32 with the question of substitute obligations, and he shared the general sentiment that those articles must speak expressly of the State rather than of the author of a particular course of conduct. In emphasizing the latter point, however, it had to be recognized that the perspective of the three main provisions set out in articles 31 and 32 changed somewhat.

17. At the human level, it was easy to take the view that what had been termed "*force majeure*" was the major consideration and that, in the context of article 31, paragraph 2, the impossibility of complying with an obligation was to be judged by a rather different standard when the lives and fate of human beings were at stake. At the level of the State, however, a different relationship could be seen between the three main provisions. Admittedly, the situation of distress provided for in paragraph 2 of that article could not be divorced from its human dimension, yet it was difficult to determine the dividing line between the idea of distress and that of necessity, which the Commission had not yet considered. The release of dam waters that were backing up and flooding towns in a country upstream might lead to loss of life and property in a neighbouring country downstream; such a case would normally be regarded as one of necessity rather than of distress. Nevertheless, the similarity between the two ideas was too great to be ignored or to allow the Commission to make up its mind about the one until it had formed an opinion on the other. If doubts existed about the connexion between that paragraph and the concept of necessity, they must also exist about the connexion between *force majeure* and fortuitous event.

18. In Mr. Ago's view, the distinction between *force majeure* and fortuitous event lay in the fact that there was absolute powerlessness to affect the course of events in the one case and absolute ignorance that the course of events was potentially wrongful in the other. According to Mr. Ushakov, a broad and satisfactory distinction could be made between peril resulting from natural causes and peril resulting from acts of man. However, the affairs of man were so complicated that it would not normally be easy to assign a particular occurrence to one cause or another. For instance, a total crop failure might be due to drought, but it might also be due to the fact that the supply of insecticides had ceased. In article 31, paragraph 1, and article 32, alike, the essence of the matter was powerlessness to change the situation. Article 32 brought into operation

⁵ United Nations, *Treaty Series*, vol. 516, p. 235.

factors similar to those catered for in article 31, paragraph 3. A “supervening external ... factor” presumably meant a factor to which the State in question had not itself contributed, while an “unforeseeable factor” presumably involved considerations of duty of care or reasonableness; he had some difficulties with that, however. Obviously, the terms of article 32 were readily understood in the straightforward case of a pilot who, without any carelessness on his part, was unaware that he had violated foreign airspace. But the draft was concerned with the State and not with the pilot or his crew. What would the situation be if the necessary standard of care had not been met—for example, if the ground staff had fitted the aircraft with a faulty compass?

19. Mr. Sucharitkul had referred to the importance of the time factor. The distinctions that the Commission instinctively sought to draw between the situations covered by article 31, paragraph 1, and article 32, might well relate to the time element. The question whether or not a factor was foreseeable must frequently arise in connexion with *force majeure*, and it was no accident that the literature cited by Mr. Ago assigned a rather shadowy place to the concept of fortuitous event. Article 32 indeed related to an essential aspect of the over-all situation that the Commission was considering, but he was not sure about the dividing line between the two concepts, or whether they could even be separated. Fortunately, the Commission’s brief discussion of the subject had paved the way for an interesting and constructive examination of articles 31 and 32 by the Drafting Committee.

20. Mr. TSURUOKA considered that, in view of the differences of opinion concerning the meaning to be given to such expressions as “*force majeure*”, “fortuitous event”, “necessity” and “distress”, the Commission should formulate the rules applicable to those situations with extreme precision and define very clearly the terminology it used. As the question was one of rules under which an act not in conformity with an international obligation might not be wrongful, and which might consequently give rise to abuse in practice, their scope should be limited as much as possible to ensure the stability of the international legal order.

21. He favoured dividing article 31 into two articles. He would like all the articles concerning *force majeure*, fortuitous event and distress to include a proviso similar to that in article 31, paragraph 3.

22. Mr. VEROSTA said that paragraph 127 of the report referred to a situation which the State could not use to “justify and excuse the conduct”. Care should be taken not to confuse justification and excuse, which were two entirely different concepts. Fortuitous events included cases where wrongfulness disappeared and others where it remained, although with extenuating circumstances.

The meeting rose at 12.30 p.m.

1573rd MEETING

Friday, 20 July 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) (A/CN.4/318 and Add.1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*concluded*)

ARTICLE 31 (*Force majeure*) and

ARTICLE 32 (Fortuitous event)¹ (*concluded*)

1. Mr. AGO, replying to the comments made in the debate, noted first of all the Commission’s general acceptance of the three rules set out in articles 31 and 32. For the moment, therefore, the terminological questions giving rise to disagreement could best be disregarded. He wished to point out, however, contrary to the view expressed by Mr. Sucharitkul at the previous meeting, that it was not really a case of transferring concepts from internal law to international law. The terms he had used to designate the situations dealt with in the articles under consideration had already been used extensively in international law by Governments, writers, arbitrators and judges. The difficulty arose because even in internal law the terminology was uncertain.

2. The Commission should also leave aside the identification of the external factors giving rise to the situations to be taken into consideration and concentrate solely on the situations themselves. It seemed to be generally accepted that three situations, to which the three rules corresponded, must be considered. The first situation was that of material or absolute impossibility. Some members of the Commission were reluctant to use any adjective, because they took the view that, in the cases considered, it was simply a case of impossibility, or not, to perform the international obligation involved. Nevertheless, the expression “absolutely impossible” was used in doctrine, and there were in fact several kinds of impossibility. A person forced to choose between conduct not in conformity with an international obligation of the State on behalf of which he was acting, and conduct in conformity with that obligation but equivalent to suicide, was undoubtedly in a situation of impossibility, even if not of absolute impossibility. It was precisely to that category of situ-

¹ For texts, see 1569th meeting, para. 1.

ation that doctrine applied the expression "relative impossibility". As for material, real or absolute impossibility, the first situation dealt with in the draft articles, it was characterized by the fact that the State or a person acting on the State's behalf could in no way perform a given international obligation and had no choice available to him. In the second situation, that of distress, there was at most a choice between conduct not in conformity with the international obligation and conduct that was theoretically possible but, that could not normally be expected of a human being in the situation in question. A choice therefore existed, but not a free choice. In the third situation, finally, it would be absurd to speak of a choice where, as a result of an unforeseen external factor, the person acting on behalf of the State was placed in a position where it was impossible for him to know that his conduct was not in conformity with an international obligation.

3. Each of the cases envisaged was marked by the intervention of an external and unforeseeable factor. Of course, as several members of the Commission had pointed out, hardly any events were not in some way foreseeable. However, for the purposes of the articles under consideration, what must be established was whether, in the circumstances, the intervention of the deciding factor could have been foreseen as a matter of reasonable diligence. The same factor could intervene in each of the three cases, but its consequences varied according to the case concerned. In the first, it produced a situation of material impossibility of performance; in the second, a virtually inexistent choice; in the third, a situation such that the State's agent was unable to realize that his behaviour was not in conformity with the international obligation. It was at that point that views in the Commission began to diverge. All the members agreed that the external and unforeseeable factor could be due to a natural event or to human action, but they differed on points of terminology. However, whatever expressions and categories they used, they arrived at the same result. Thus Mr. Ushakov (1571st meeting), who distinguished between *force majeure* and fortuitous event according to whether the factor concerned was due to nature or to man, had pointed out that their consequences were nevertheless the same. An aircraft whose wing had been damaged by lightning or by a bomb thrown by a terrorist might in either case be obliged to make a forced landing. As Sir Francis Vallat had pointed out, what counted in every case, in the final analysis, was the material impossibility of performing the international obligation, whether that impossibility was due to an act of nature, an act of the State or the action of individuals. A State that had made a commitment to another State to deliver certain quantities of products from its soil or subsoil might find it impossible to perform its international obligation, for example as a result of drought, an invasion of locusts, a strike or the fact that the territory in which the products were situated had been subjected to foreign invasion.

4. The external factor, which Mr. Reuter (*ibid.*) would like to see defined more precisely, must never-

theless not be due to an intentional act or to the negligence of the State invoking it to justify conduct not in conformity with an international obligation.

5. Several members of the Commission had considered that the articles should refer to the act of the State and not the act of the organ acting on behalf of the State. In his view, that comment hardly applied to the first rule. The words "if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise", in paragraph 1 of article 31, might be replaced by the words "if, when the act is committed, it is materially impossible to act otherwise", yet the difference between obligations to do and obligations not to do must be made clear. For obligations in the first category, it was evident that the articles could refer only to the State. However, in the case of obligations in the second category, for example the obligation not to cross a border, it was not really the State, but the pilot of a particular aircraft or the captain of a particular ship of the State, who found it impossible to act otherwise. However, he would not suggest that the expression "the author of the conduct attributable to the State", proposed in articles 31 and 32, was irreplaceable.

6. Since the Commission approved the first rule, a title should be found for it, and opinions were divided on that point. Mr. Ushakov objected to the term "*force majeure*", while Mr. Yankov and Mr. Verosta (1572nd meeting) were in favour of it. In fact, the term "*force majeure*" was merely the translation of the Latin expression *vis major*, which described a force too great to resist. There appeared to be no reason for that force to be natural and not due to human action. Of course, as pointed out by Mr. Ushakov, in some legal systems the idea of *force majeure* was confined to acts of nature, but the Commission could overcome that difficulty by stating in the article it entitled "*Force majeure*" that it had in mind an external factor, whether natural or human. However, if the Commission rejected that solution he could accept another expression, such as "irresistible force". The expression "irresistible coercion" proposed by Mr. Reuter (1571st meeting) (*ibid.*) should be avoided, since the term "coercion" was used in a different sense in another article of the draft. But such terminological problems were really of only secondary importance, and should be dealt with by the Drafting Committee.

7. If the two rules set out in paragraphs 1 and 2 of article 31 respectively were dealt with in separate articles, the provision in paragraph 3 would obviously have to apply to both, since wrongfulness persisted whenever the State was at the origin of the situation of impossibility. As Mr. Sucharitkul (1572nd meeting) and Mr. Riphagen (1571st meeting) had pointed out, a very important subjective element came into play in all situations covered by article 31.

8. In the wording of the rule relating to a situation of distress, set out in paragraph 2 of article 31, it was impossible not to mention the State agent, since it was not the State itself but its agent that was in such a situation. The fact that a human being was at the

centre of the situation could not be disregarded. It could happen, however, that, faced with the situation of distress of one of its agents, a State would not intervene to extricate him, even though it could do so. In that case, the conduct of the State would be wrongful and article 31, paragraph 3, would apply. That would be the case of a State which, although in a position to save one of its ships in distress on the high seas, failed to intervene.

9. Account should also be taken of the human aspect of the situation referred to in article 31, paragraph 2, to distinguish it from state of emergency. Mr. Ushakov (*ibid.*) had used the expression "extreme necessity" to describe the latter case too, which would be dealt with in article 33. It was for the sake of completeness that the report mentioned cases that in fact did not fall under the concept of *force majeure* or of fortuitous event, but rather under that of state of emergency. In a dispute with Belgium, for instance, Greece had claimed that repayment of its debt would have placed it in a situation of bankruptcy, and that it could not incur such a danger to the State.² Mr. Ushakov had mentioned the case in which a State that had authorized another State, by treaty, to fish a certain species in its territorial waters, found that part of its population was thus in danger of being deprived of an important food resource. Situations to be characterized as "state of emergency" were those that held a grave danger to the existence of the State or to an essential interest of the State. Such situations, however, must be distinguished from those where it was the State organ that was in danger and was obliged to act to escape the distress in which it was placed. As Mr. Riphagen had pointed out, account had to be taken, in that second instance, of the case of a human being acting on behalf of the State, but in terms of a situation in which he was placed *qua* human being.

10. Another question raised with respect to article 31, paragraph 2, was that of the proportionality between the interest of one party that was safeguarded and the interest of another that was sacrificed by the non-observance of the international obligation. As had been indicated, it was possible that no real interest would be sacrificed or, at all events, that no material damage would be caused. On that point Mr. Riphagen had envisaged two cases. In the first, he had considered the example of an island that a State was obliged to cede to another State but that disappeared, whereas of course the sea surrounding it and the continental shelf bordering it remained. It might then be asked what should happen to the sea and the continental shelf. Personally, he was inclined to favour the view that the obligation simply ceased to exist, but that question in fact lay outside the sphere the Commission had been instructed to examine. The second case was one where an act whose wrongfulness was precluded produced injurious consequences for third States. There again the situation was beyond the scope

of the articles under consideration. He was nevertheless prepared to agree that, if the Commission deemed it necessary, there should be a paragraph expressly indicating that, where wrongfulness was precluded, it was without prejudice to other consequences that might for other reasons flow from the act of the State concerned. In addition, it must be borne in mind that the absence of a reasonable proportion between interests safeguarded and interests sacrificed reintroduced the possibility of the wrongfulness of the act.

11. As to the third rule, dealt with in article 32, it was again the situation of the State agent who had committed the act that came into play, because the State as such might even know, for its part, that one of its aircraft had gone beyond the boundaries of its territory, whereas the pilot had not known. It was therefore important to say expressly in the draft article that it was the agent, as a human being, who was in a situation where it was impossible for him to realize that he was acting contrary to an international obligation. As to the title of the article, the expression "fortuitous event" had proved to be a source of difficulty because of the particular meaning given to it in certain juridical systems. The Drafting Committee would have to examine that point.

12. He sympathized with Mr. Reuter's view (1571st meeting) that, generally speaking, it would be preferable not to go into the question whether the general principles stated applied to international economic relations, and hoped that the Commission would avoid any specific reference to economic obligations, even in its commentary, although the International Court of Justice had decided to allow *force majeure* as an exception in such obligations.

13. Some members had pointed out the need to guard against permitting abuses that would be dangerous for weak States. In his opinion, the risk of such abuses seemed unlikely, since the rules prepared by the Commission were aimed precisely at protecting the weakest States. Even in the case envisaged by Mr. Thiam of a newly independent State grappling with an uprising in part of its territory that prevented it from discharging an international obligation relating to that territory, the draft articles would afford sufficient protection, since such a situation would come under the first rule, based on absolute impossibility of performance, and the non-performance would have nothing wrongful about it.

14. Mr. Verosta (1572nd meeting) had indicated that there might be situations in which wrongfulness would not be precluded but in which account should be taken of the circumstances involved as attenuating circumstances in regard to fixing the amount and form of reparation for damage. Such cases would come under part II of the draft, which would have to determine not the existence but the consequences of the internationally wrongful act.

15. Mr. REUTER unreservedly approved Mr. Ago's explanation and agreed with him that the Commission must reason in terms of situations, namely, situations of impossibility. That meant that account would not

² See A/CN.4/318 and Add.1-4, para. 120.

be taken of the cause of the situation, regardless whether it was an act of nature or a human act. In that connexion, Mr. Ago had said that it would be preferable, in describing situations of material impossibility attributable to natural and especially human causes, to avoid the term "coercion", which had been used in other provisions in a specific sense. For his own part, he had taken that remark to refer to article 28,³ and the subject-matter considered by the Commission in fact called to mind the content of that article.

16. In practical terms, it was possible to think of a number of treaty situations in which the treaty as a source of international obligations included many elements of what, between private individuals, would be called a contract. That was particularly the case with treaties between States relating to the delivery of products or equipment. In such a case, the act of a third party might produce some effect. For example, a treaty might provide for the delivery by one State to another of aircraft that the first State was unable to manufacture without having first concluded another agreement with a third State for the supply of necessary equipment. If the third State did not supply the equipment, that would amount to an act by a third State that prevented the performance of the first treaty, and it must be determined whether, as a result, the non-performance by the State that had undertaken to supply the aircraft of its obligation pursuant to the treaty lost its character of wrongfulness. In that connexion, Mr. Ago had mentioned the idea of an act of State, taken from private law, where it described the act of a State that prevented the performance of private contracts. Such a situation could in fact arise in international relations, especially where treaty implementation was prevented by an international decision.

17. The Commission could not avoid studying complex problems of that kind if it decided to approach the matter in terms of causes; like Mr. Ago, he thought it would be best to deal exclusively with situations.

18. Mr. USHAKOV said he had always considered it necessary to make a distinction between natural occurrences, which relieved the State of its responsibility, and acts of human origin, which were a different matter. Moreover, he thought the Commission should rid its commentary of all examples of specific cases that were not clear and indisputable, as great caution was called for.

19. Mr. VEROSTA said he still regretted that articles 31 and 32 were not followed and supplemented by an article 33 defining necessity. It would in fact be desirable to establish a closer link between cases in which the State was in mortal danger and cases of distress on the part of organs of the State, since the author of the conduct attributable to the State was generally an organ of the State.

20. Mr. SUCHARITKUL pointed out that he had mentioned the danger of adopting private law terminology in international law only as a general reminder. In the present case, he was not opposed to the use of the words "*force majeure*", especially after the explanations given by Mr. Ago.

21. Mr. AGO agreed with Mr. Reuter that a number of difficulties could be avoided by not referring to causes. However, the Commission had been asked to draft general rules of international law and it was obvious that, where an international treaty contained a different rule, the latter would apply, since the texts drafted by the Commission had only the value of subsidiary rules.

22. In the specific case described by Mr. Reuter of the impossibility of performing an international sales agreement owing to the act of third State, paragraph 3 of article 31 would become operative, for it might be considered that the State had been careless and negligent by concluding a treaty to supply equipment for whose production it was not dependent on itself alone. In the different case of international sanctions, article 30 (Countermeasures),⁴ could be applied.

23. Like Mr. Ushakov, he thought the Commission should exercise great caution in drafting its commentary.

24. As to the question of distinguishing between state of emergency and situation of distress, raised by Mr. Verosta, he pointed out that state of emergency was quite different from distress, and would be studied subsequently.

25. In conclusion, he shared Mr. Sucharitkul's concern about the need to use clear and precise terminology that left nothing in doubt.

26. The CHAIRMAN proposed that if there were no objections the Commission should refer draft articles 31 and 32 to the Drafting Committee, which would consider them in the light of the discussion and of the proposal submitted by Mr. Ushakov (1571st meeting, para. 20).

*It was so decided.*⁵

The meeting rose at 11.40 a.m.

⁴ *Ibid.*

⁵ For consideration of the texts proposed by the Drafting Committee, see 1579th meeting.

1574th MEETING

Monday, 23 July 1979, at 3.15 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter,

³ 1567th meeting, para. 1.

Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (A/CN.4/323)

[Item 10 of the agenda]

1. The CHAIRMAN invited Mr. Sucharitkul, Special Rapporteur, to introduce his preliminary report on the topic of jurisdictional immunities of States and their property (A/CN.4/323).

2. Mr. SUCHARITKUL (Special Rapporteur) said that, in preparing his report, he had used as a working basis the report of the Working Group on jurisdictional immunities established by the Commission at its thirtieth session,¹ but that at the same time he had endeavoured to take an over-all view of the topic. The purpose of the preliminary report, as explained in the introduction, was to identify the various types of source material with a view to determining the areas of interest and defining the content of the topic. It was hoped thus to ensure systematic treatment of the body of customary and evolutionary rules of international law applicable.

3. He could inform the Commission that eight Governments had now responded to the circular letter sent by the Secretary-General to the Governments of Member States at the Commission's request, inviting them to submit relevant materials on the jurisdictional immunities of States and their property by 30 June 1979. Some of those eight Governments had indicated that there had been no decided cases in their countries, but others had supplied valuable information on their laws and practice.

4. Chapter I of the report, entitled "Historical sketch of international efforts towards codification", referred to the work of the League of Nations, of the Commission itself, and of the regional legal committees. The Asian-African Legal Consultative Committee had discontinued its consideration of "Restrictions on immunity of States in respect of commercial transactions entered into by or on behalf of States and by State trading corporations", but members would note that the European Committee on Legal Co-operation had contributed to the conclusion of the 1972 European Convention on State Immunity, and that the current programme of work of the Inter-American Juridical Committee included an item entitled "Immunity of States from jurisdiction". A number of professional institutions had also been concerned with legal developments in regard to State immunities, including the Institut de droit international, the Inter-

national Law Association, the Harvard Law School (Research in International Law) and the International Bar Association.

5. Chapter II of the report dealt with the sources of international law on State immunities. As he had pointed out in paragraph 22, those sources were unusual in that they were more widely scattered than might have been expected. The different views on that matter expressed in the Sixth Committee of the General Assembly,² pointed to the difficulties that lay ahead and to the need for particularly close examination of national legal systems. However the same difficulties had arisen in connexion with other topics, such as diplomatic and consular relations and immunities.

6. The first source of international law referred to in chapter II of the report was the practice of States, which covered a number of areas, starting with national legislation. Legislative enactments on the judicial system were to be found in the law on the constitution of a State, and in the basic or specific law on the organization of its courts or the establishment of the judicial hierarchy. For example, article 14 of the French Code civil permitted suits against foreigners in French courts, and articles 52 and 54 of the Belgian Code de procédure civile applied the same principles. The report also referred to article 61, entitled "Suits against foreign States: diplomatic immunity", of the Fundamentals of civil procedure of the USSR and the Union Republics. With regard to more recent national legislation, two statutes deserved special mention: the United States Foreign Sovereign Immunities Act of 1976, and the United Kingdom State Immunity Act, 1978.³ There were also a number of statutes in various countries that dealt with certain aspects of State immunity, such as the immunities extended to the premises of a foreign embassy, to the residence of an accredited ambassador, to the premises of a mission accredited to an international organization, to warships and State-owned ships employed in governmental and non-commercial service, to foreign sovereigns, and to the property of a foreign sovereign State.

7. The second area of State practice, and by far the most substantial source of rules of international law on State immunity, was the judicial decisions of municipal courts. Unfortunately, there were no reported cases on State immunity prior to the nineteenth century, and an added difficulty was introduced by the need to appreciate the special characteristics of the procedures of each legal system. On the other hand, there appeared to be a tendency for municipal courts not only to rely on their own precedents but also to refer to the judgements of other courts, so that comparative law techniques had been adopted in a number of fairly recent cases. A case directly in point was the judge-

¹ A/CN.4/L.279/Rev.1 (section III of which was reproduced in *Yearbook... 1978*, vol. II (Part Two), p. 153, document A/33/10, chap. VIII, sect. D, annex).

² See *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 263 and 264.

³ See A/CN.4/323, paras. 25 and 26.

ment of the Supreme Court of Austria in *Dralle v. Republic of Czechoslovakia* (1950), an excerpt from which was cited in his report. United States courts had also referred to foreign judgements, as had the Court of Appeal of the United Kingdom in the *Trendtex* case in 1977.⁴ It would therefore seem advisable to continue to examine the judicial decisions of municipal courts.

8. Governmental practice was the third area of State practice. The executive branch of government could play a decisive part in deciding whether or not a State should claim or waive immunity. It had at least three distinctive roles to play: in the enactment of legislation on State immunities; in giving advice to the judiciary on matters relating to State immunities; and in issuing statements or certificates to its own courts confirming the status of an entity or the existence of statehood, or on any pertinent question of international law or of fact.

9. The second main source of international law on State immunities was international conventions such as Conventions on the Law of the Sea (1958), the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the Convention on Special Missions (1969) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975). Mention must also be made of the regional conventions, in particular the European Convention on State Immunity (1972) and the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (1926).

10. The third source of material was international adjudication, which included both judicial decisions and arbitral awards. There were apparently no reported cases, but that did not mean that the subject was not regulated by international law.

11. The fourth and last source of material was the opinions of writers. Although their opinions differed, there appeared to be an emerging trend in favour of State immunity.

12. Chapter III of the report dealt with the possible content of the law of State immunities. As noted in section A, the main purpose of the preliminary report was simply to define the scope of the study; the structure and order of presentation of the rules of international law in the form of draft articles would be considered at a later stage. There was an apparent dichotomy between States and their property which, although misleading, served to indicate that there were several different phases in the application of the rules, more particularly in regard to immunity from seizure and attachment, and ultimately from execution of judgement.

13. Section B attempted to clarify the meaning of certain key words. While the term "jurisdiction" did

not cause much difficulty, the term "jurisdictional immunities" could have more than one meaning. It did not imply exemption from the application of substantive law, but it might involve immunity not only from the power of adjudication of a court, but also from the powers of arrest and detention, whether of persons or property, in other words, of powers belonging in certain instances to both the judiciary and the executive branch of government. It was not necessary to define the word "State" for all purposes, but the Commission should perhaps consider whether a definition was required, for the purposes of the study, to indicate which entities were covered by the expression. Such a definition was to be found in national laws and also in certain regional conventions. The Commission had already defined "State property" in its earlier work on other matters, particularly in the context of the draft articles on succession of States in respect of matters other than treaties,⁵ and the same or a similar definition could perhaps be used in the present study.

14. With regard to the general rule of State immunity, which was discussed in section C of chapter III, the Working Group had pinpointed the problem by stating that the doctrine of State immunity was the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, those being two aspects of State sovereignty.⁶ In terms of an analysis of legal relations, it could be said that the concept of immunity was the corollary of the non-exercise of a power, but despite the utility of the analytical approach it was important not to lose sight of the historical development of State practice, as outlined in paragraphs 57 and 58 of the report. In determining the elements that constituted the basis of the general rule, a number of factors deserved closer attention, in particular, the existence of a sovereign State with valid territorial jurisdiction over the activities of another sovereign State, or in other words, the exercise of sovereign authority by one State within the territorial jurisdiction of another, and the absence of consent of the foreign sovereign State to the exercise of territorial jurisdiction by the State authorities. Consent was an important element in the doctrine of State immunity, and related to consent were waiver of immunity and other incidental questions. Further questions connected with consent included voluntary submission to the jurisdiction, counterclaim, incidence of costs, and execution.

15. The vital question of possible exceptions to the general rule of State immunity was dealt with in section E. In his view, there were two possible approaches: to define the circumstances in which immunities would be recognized, and to state the general principle of immunity and then provide for exceptions to it. Of those two approaches, he was inclined to favour the latter and would suggest that a tentative list

⁵ See *Yearbook*... 1973, vol. II, p. 205, document A/9010/Rev.1, chap. III, sect. B, article 5.

⁶ See *Yearbook*... 1978, vol. II (Part Two), p. 152, document A/33/10, chap. VIII, sect. D, annex, para. 11.

⁴ *Ibid.*, paras. 29 and 30.

of exceptions could be grouped under the following headings: commercial transactions; contracts of employment; personal injuries and damage to property; ownership, possession and use of property; patents, trademarks and other intellectual properties; fiscal liabilities and customs duties; shareholdings and membership of bodies corporate; ships employed in commercial service; arbitration.

16. The Commission would have to decide at a later stage whether provision for immunity from attachment and execution should be made in the same set of draft articles or whether it should form the subject of another, separate, part of the draft. It would also have to examine a number of other procedural questions, which were referred to in section G of chapter III.

17. Lastly, although the report did not lend itself to any specific conclusions, he believed that it would provide the Commission with a basis for its work, in undertaking which he would suggest that it should be guided by the views of Governments.

18. The CHAIRMAN congratulated the Special Rapporteur on his preliminary report and masterly presentation thereof.

19. Mr. REUTER shared the Special Rapporteur's preference for starting from the principle of State immunity, rather than from the exceptions to that principle. Historically, it was the principle that had been stated first; it was only the economic and technical changes of the modern era that had complicated the subject. The fact remained, however, that the frequency and complexity of exceptions to the application of the principle, due in particular to the trend towards socialization and interventionism, would probably lead the Commission to devote more time to studying the exceptions. Moreover, account must be taken of the fact that States such as the United States of America and the United Kingdom, after long maintaining firm positions on the principles, had relaxed their positions in the matter of legislation.

20. It appeared from a reading of the preliminary report and from the Special Rapporteur's oral presentation that two general approaches were open to the Commission. It could start either from general principles stated in the form of rules or definitions, or from specific cases. Both methods were attractive, but had their dangers. He therefore hoped that the Special Rapporteur would deal at the outset with certain general aspects, while giving examples of specific cases, and that he would simultaneously prepare articles, some relating to general problems and others to specific questions. That would probably complicate his task, but he would thus be able to avoid the extremes of both methods.

21. Only immunity from jurisdiction should be dealt with at first, immunity from execution being left until later. As a result of the great changes in the modern era, immunity from jurisdiction had developed rapidly, which was not true of immunity from execution. It followed that immunity from execution was probably less ripe for codification and that its consideration

would present greater difficulties. The Commission should not decide in advance how it would deal with immunity from execution. Moreover, since immunity from jurisdiction related mainly to questions of procedure, the Commission should begin with those questions, leaving aside, as far as possible, questions of substance and the many difficulties they would surely raise. Consideration of procedural questions might soon yield constructive results that could be given practical expression in draft articles.

22. As to the advisability of making references to internal law in the draft articles, he noted that the Special Rapporteur had drawn attention to the fact that the draft articles on succession of States in respect of matters other than treaties contained a definition of State property that referred to internal law. Although it might be true that in international law many concepts could be defined only by reference to internal law, it was a fact that that method could have disadvantages, as the Commission had found when studying the question of State archives. In his opinion, it would be advisable to go beyond internal law. It would not be sufficient, for example, for the Commission merely to lay down the principle that it was the *lex rei situs* that was applicable to real property. To establish such a rule raised the question of the capacity of a foreign State under internal law; and a State that enjoyed full capacity in international law had no capacity under the internal law of another State. In principle, a State could not purchase real estate abroad, any more than a private person could make a gift to a foreign State.

23. Some questions had been the subject of judicial decisions. For example, what law was applicable in establishing the ownership of movable property? Was it the law applicable to conclusion of the contract or the law applicable to the place where the property was situated? He wondered, too, from what moment a State purchasing aircraft from another State became their owner and, once the aircraft had become its property, from what moment they were military or civil aircraft. What internal law would establish whether they were military or civil aircraft? As the Commission had found when examining the problem of State archives, when it entered the area of internal law it came up against questions of private international law. As far as possible, therefore, it should try to draw up rules of pure public international law, or at least rules under which conflicts of laws could be settled.

24. Mr. RIPHAGEN associated himself with the congratulations expressed to the Special Rapporteur on his report. All who had ever had to deal with the intricate questions of State immunity would appreciate the enormous amount of work that had gone into the document.

25. In general, he agreed with the Special Rapporteur's opinions, especially the statement in paragraph 44 of the report to the effect that the absence of international judicial decisions relating to State immunities did not imply that the matter was not subject to regulation by international law. It was a fact, however, that writers and domestic courts, particularly in the

United States of America, often referred to questions of State immunities as questions of comity—an attitude that was also frequent in regard to questions of conflict of laws or of limits of national jurisdiction.

26. In his view, the differences in practice revealed by such judicial decisions as existed relating to State immunities should be taken less as evidence that there was no universal rule of international law in the matter than as evidence that States enjoyed a measure of “discretion”, in the sense in which that term had been employed by the International Court of Justice in the *Lotus* case.⁷ No doubt the absence of international adjudication could be at least partly explained by the fact that refusal by a national court to recognize the immunity of a foreign State would not of itself result in damage to that State, and by the fact that even the enforcement of judgement in the territory of the State of the court would in practice be of little significance to the State whose immunity had been ignored. At all events, there was a wealth of diplomatic correspondence in which immunity had been claimed and its refusal had been protested on the basis of alleged rules of public international law. Moreover, the subject of State immunities, by its very nature, was one that should be regulated by international law.

27. There was a further aspect of the analogy between situations involving conflicts of laws and those involving State immunities that merited the Commission’s attention, namely, the aspect of legal technique. In both instances, decisions in specific cases were based on the links between the situation giving rise to the claim of immunity and the States or legal systems involved. If, for the sake of argument, it was considered that all the persons representing a foreign State or all that State’s activities or property were exclusively or even predominantly connected with it, absolute immunity would ensue. There was a growing realization, however, that there might be factors connecting a potential subject of immunity with a State or legal system other than the “foreign State”, especially the State of the forum, and that such factors might predominate, with the result that the foreign State would have only limited immunity. Examples of that principle could be found in abundance in national laws and in treaties, including the European Convention on State Immunity.⁸ In that instrument, the existence or non-existence of State immunity was held to be dependent on such questions as whether an obligation under a contract was for discharge in the State of the forum and where the contract had been concluded, the nationality of persons recruited under a litigious contract of employment, and whether the foreign State maintained a representative office or the like in the territory of the other State.

28. There was yet another aspect of the analogy between situations involving conflicts of laws and those involving State immunities that merited atten-

tion. What the Special Rapporteur had said in the first two sentences of paragraph 53 of his report was true in general, but depended, *inter alia*, on the sphere of application of the “territorial laws” in question. Despite the Special Rapporteur’s assertion in the fourth sentence of the same paragraph, he wondered whether such laws would apply in all instances of waiver of immunity. For example, in a case in the Netherlands in which there had been an indisputable implied waiver of immunity through the making of a counter-claim, the highest court in the land had none the less found it necessary to see whether it could test the conduct of the foreign State involved. Such a case clearly came within the ambit of the “act of the State” doctrine, which might conceivably be construed as relating to State immunity, but only at the level of the exercise of *imperium* by the testing of the conduct of foreign States.

29. It should be noted that the question of such testing, or even of its permissibility, could arise before national courts even in cases in which the foreign State was not, in the technical sense, a party to the proceedings. In the Netherlands, for example, an action for tort had been brought against a private shipping company trading in Indonesia. The question had turned on the conduct *jure imperii* of the Indonesian Government, and the court had declared itself incompetent. Similarly, he believed that a United States court that had recently declared itself incompetent to settle a claim between two private litigants concerning the validity of titles conferred by rival Governments had done so not merely because the question at issue had been political, but also because it had not considered itself competent to judge the conduct of foreign States. It would be wise for the Special Rapporteur to avoid including questions of State immunity at such a level in his study, for it was doubtful whether there were any general rules of international law to cover them.

30. While he fully agreed with the Special Rapporteur’s statement in the last sentence of paragraph 53, that sentence seemed to imply that immunity from the jurisdiction of a foreign court would exist as a matter of course if the court assumed jurisdiction in excess of the “ordinary rules of private international law”. The question then naturally arose what those “ordinary rules” were. That was a problem that had given much cause for thought to the drafters of the European Convention on State Immunity, and the answer they had reached was far from simple. Moreover, if it was true that the existence or non-existence of State immunity was based on the existence or non-existence of factors linking the situation giving rise to a claim with the State of the forum, it might be appropriate to look at the factors that linked the claimant with the forum. He could well imagine circumstances in which a defendant State would be unable to claim immunity if a claimant had a real link with the State of the forum, but would be able to do so if he did not. Such cases would in turn raise the issue of “forum shopping”. The Commission could avoid becoming enmeshed in such intricate questions, how-

⁷ P.C.I.J., Series A, No. 10, p. 19.

⁸ Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

ever, if it followed the approach to the topic suggested by the Special Rapporteur.

31. Mr. USHAKOV said he had the impression that the Special Rapporteur proposed to draw up articles dealing with exceptions to the general rule of State immunity rather than with the rule itself. It could not of course be claimed that there were no exceptions to the rule, but it was probably rather early to affirm, as had the Special Rapporteur, that there was no State immunity in certain cases and that the exceptions might take precedence over the rule. Such assertions could not be made unless they were based on customary rules or State practice.

32. With regard to the reference to internal law, he stressed that it could be made only if the rule of internal law referred to did not conflict with a rule of international law.

33. In paragraph 71 of his report, the Special Rapporteur, having stated that a possible exception to the rule of State immunity was the trading activity of a foreign State, said that a question might arise in regard to Government-to-Government transactions. It was strange to consider that such a case might present difficulties, since it was a matter of treaties concluded between States, and such treaties, even if they related to commercial questions, could not be subject to State jurisdiction. Neither the application of internal law nor the question of State immunity was relevant.

34. The Special Rapporteur's terminology was not always very precise, nor was his general conception of the State satisfactory. It was true that in the seventeenth and eighteenth centuries some writers, influenced by theories prevailing in the Middle Ages, had contrasted State *imperium* with State *dominium*. In their view, *imperium* derived from *dominium*, so that the governmental authority exercised by the State over its territory derived from the fact that it was master of that territory. Those outmoded ideas were still upheld by some writers. For his own part, he thought it would be pointless to try to split up the single entity constituted by the State. It was only for the purpose of distributing tasks among State organs, and purely for convenience, that one spoke of legislative, executive and judicial powers, but it could not be said that a State could act as a trader. By definition, everything done by a State was political. To say that the purchase of shoes by a State was commercial in nature, or that other of its activities were cultural, was to resort to a fiction that concealed the essentially political nature of all State activities.

The meeting rose at 6.5 p.m.

1575th MEETING

Tuesday, 24 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter,

Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/323)

[Item 10 of the agenda]

1. Mr. USHAKOV said that, just as the State was an indivisible entity, State property could not be divided into State property in commercial use and other State property. In paragraph 85 of his report (A/CN.4/323), however, the Special Rapporteur referred to "State property in commercial use". Oil, for example, could be used for commercial purposes, but it could also be used for warships. It was not only incorrect but also pointless to state, as the Special Rapporteur stated in paragraph 70 of the report, that "one possible exception to the rule of State immunity is the trading activity of a foreign State", since in the modern world it seemed that States did not engage in foreign trade activities. In the Soviet Union, it was not the State but bodies having the status, as it were, of legal entities in private law, that engaged in foreign trade. Nor could capitalist States themselves engage in commercial activities. The State did not act as a real trader. True, it might sometimes happen, although only very rarely, that the State concluded contracts for the sale of certain products. For example, a private law contract, as opposed to an international agreement, might be concluded between a State and a foreign private bank. In such cases, the State acted as a legal entity under private law and was subject to the applicable law, in accordance with the contract. But there could be no doubt that it enjoyed jurisdictional immunity unless, in concluding the contract, it expressly agreed to submit to a certain internal law.

2. It would be wrong to consider that the topic under consideration comprised only immunity from judicial authority. The immunity of States was indivisible; they were exempt, in principle, from the governmental authority of other States as such, whether that authority was judicial, administrative or of any other kind. That being so, it would be pointless to draft articles relating only to the judicial activities of foreign States. In his view, "jurisdictional immunities" should be taken to mean immunities from State jurisdiction in the broad sense, in other words, from the exercise of governmental authority. That immunity was indivisible, and judicial immunity was only one aspect of it.

3. Mr. VEROSTA wished to place on record the congratulations he had expressed privately to the Special Rapporteur as soon as he had read his report. He agreed with Mr. Reuter (1574th meeting) that, in his approach to the topic, the Special Rapporteur should steer a middle course between general definitions and detailed provisions. Nevertheless, he hoped that the Special Rapporteur would prepare a questionnaire that was as thorough as possible, for it was the replies from

Governments that would show him and the Commission the existing scope for codification and progressive development of the law on jurisdictional immunities of States.

4. He hoped that the Special Rapporteur would try to obtain the questionnaire and the replies from Governments that had been used in preparing the European Convention on State Immunity, for there would be much in those documents that would be of direct relevance to his own work and it would be helpful to avoid repetition. The Special Rapporteur might wish to submit his draft questionnaire to the members of the Working Group for their comments. The questionnaire should include questions concerning procedure and State property, such as the extent to which the ships or aircraft of a commercial enterprise owned by the State were considered to be State property. He hoped that, without going too far into the area of private international law, the Special Rapporteur would be able to propose rules of public international law that would govern matters of private international law. He shared the view that the Commission should not consider the question of execution of judgements at the present stage.

5. Mr. SCHWEBEL associated himself with the congratulations expressed to the Special Rapporteur, whose report gave an admirable outline of the subject and the problems it entailed. He looked forward to a rapid succession of further reports that would probe deeply into the topic.

6. The topic was one in which there was a fascinating interplay between national practice and international reaction. The views of the foreign State whose immunity was at issue had to be weighed against the disposition of the national forum, and there was also the vital factor of executive action and reaction, which was surely classically international. Furthermore, although the bulk of the expressions of opinion on the topic was to be found in national judicial decisions and legislation, it was striking, as the Special Rapporteur had pointed out, how often such expressions had been influenced by international opinion. For example, United States policy on sovereign immunity, as set out in the "Tate letter", to which the Special Rapporteur referred in foot-note 65 of his report, had clearly been heavily influenced by European practice.

7. His personal view was that the essential rationale of the restrictive doctrine of sovereign immunity was very sound and that that doctrine should be followed as closely as would be permitted by the difficulties that would inevitably arise in specific cases. The essence of that doctrine, which was progressive but well established, was that it was neither the object of the transaction nor the person of the actor, but the nature of the transaction, that determined whether jurisdictional immunity should be accorded.

8. Before the adoption of the United States Foreign Sovereign Immunities Act of 1976,¹ the United States

Department of State had employed panels of attorneys to advise on requests for State immunity. He recalled the recommendation of a panel of which he had been a member: the panel had recommended, in the light of a decision by a court in the Federal Republic of Germany to the effect that the building of a foreign embassy was essentially a commercial activity, that immunity should not be granted to the foreign State concerned in a case in which a home-owner claimed that his property had been damaged during the building of an embassy in the United States. That recommendation was of course open to dispute, but he believed that it reflected a trend in United States thinking which had been confirmed in the Act he had mentioned. For example, the United States would view the operation of missile-carrying ships as an activity that was clearly not of a commercial nature, even though commercial activities might be incidental to its performance, and the vessels would therefore be entitled to immunity. On the other hand, activities such as the sale of natural resources, in which the State owning the ships engaged in order to finance their operation, would be viewed as commercial activities, and the State would be considered to be subject to suit in respect of them.

9. In reviewing the issues involved, the Special Rapporteur had noted in his report that the question of jurisdictional immunities raised the question of the limitations on those immunities. While it had been suggested by another speaker that the Commission should place the emphasis in its work on the immunities themselves rather than on the limitations, he believed that the Commission must give thought to both the negative and positive aspects of the question. To do otherwise would be tantamount to studying the privileges and immunities of diplomats without taking the rights of their host countries into account.

10. Judging from the Special Rapporteur's report and the discussion so far, he had every hope that the Commission would be able to contribute materially to the resolution of a question that was of the highest importance to States and was fully ripe for codification and progressive development.

11. Mr. TSURUOKA pointed out that Japan, which was one of the world's most active countries in international trade, clearly favoured absolute immunity in its jurisprudence, but opted for the doctrine of restricted immunity in its practice.

12. The courts had long accepted that the State enjoyed immunity even in matters of trade. On the other hand, several commercial treaties concluded by Japan embodied the principle of restricted immunity. An example was provided by articles 2 to 4 of the annex to the Treaty of Commerce between Japan and the USSR of 6 December 1957,² under which the USSR trade delegation to Japan was an integral part of the USSR Embassy in Japan and acted on behalf of the USSR Government, which assumed responsibility

¹ See A/CN.4/323, para. 26.

² United Nations, *Treaty Series*, vol. 325, p. 35.

for all commercial transactions carried out or guaranteed in the name of the trade delegation. In principle, disputes concerning such transactions came within the jurisdiction of the Japanese courts and were settled in accordance with Japanese law. According to the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan of 2 April 1973,³ the public enterprises of either party, whether wholly owned by the State or under State control, enjoyed no immunity, for themselves or for their property, if they engaged in commercial, industrial or other activities within the territory of the other party.

13. Japanese legal theory also favoured restrictive immunity, as could be seen from the statements made on several occasions by the Japanese delegation to the Asian-African Legal Consultative Committee.

14. Mr. YANKOV congratulated the Special Rapporteur on submitting a report which, by its form and content, constituted a logical and convincing guide to the possible sources of international law on the topic under study and, hence, a promising start to that study. Without wishing to detract in any way from the merits of the Special Rapporteur, who clearly had a deep knowledge of the traditional practice of States with legal and economic systems of the kind prevalent in Western Europe, he thought it expedient to point out that, if the Commission's articles were to gain wide acceptance, attention should also be given to the doctrine and practice of the socialist States and of those developing countries in which the economic structure and the nature of State participation in the national economy had added new elements.

15. In the socialist States, for example, State enterprises engaging in international transactions were themselves liable, within their terms of reference, for their business activities; however, the situation was less clear-cut when the State was viewed, for the purposes of public international law, as an actor in international transactions. Furthermore, it was well known that the socialist doctrine relating to State ownership, especially ownership of commercial vessels, was not generally accepted. That doctrine, however, was one to which the Commission should give attention if it was to produce general rules of law that were as nearly universal in character as possible.

16. He shared the views expressed on the extent to which the study should depart from the realm of public international law to take account of internal law, for he believed that the topic called for a cautious approach. In that respect, he supported the conclusions set out by the Special Rapporteur in the first sentence of paragraph 92 and the first and second sentences of paragraph 92 of his report.

17. Sir Francis VALLAT found the Special Rapporteur's report mature and satisfactory to a very high degree, and his original intention had been to do no more than congratulate the Special Rapporteur and

urge him to continue, subject to the comments of the Commission, to work along the lines set out in chapter V of the document. In view of what had been said by other speakers, however, he thought it necessary to make a number of comments.

18. To his mind, the subject before the Commission was one that had been and still was developing more radically than many other subjects. The concept of the immunity of the State as an entity, which had emerged by almost imperceptible stages from the concept of the immunity of the individual sovereign, was of relatively short standing. The Commission should bear that fact in mind, especially as a new trend had appeared over the past 50 years, moving away from the theory that the State enjoyed absolute immunity in all cases and all circumstances. It could be seen, therefore, that it would be wrong for the Commission to look solely to one period of history to form its conclusions.

19. Furthermore, theories of the State differed: not everyone agreed that the State was indivisible. There were already examples of entities that exercised *de facto* and *de jure* sovereign powers without being States at all, and the world of the future would not consist solely of monolithic sovereign States. If a comparison could be drawn between individuals and States, the former were less readily divisible than the latter, and yet the law was capable of distinguishing between, and treating differently, their official and their private activities. That being so, he did not think it followed from the concept of the indivisible State that it was impossible to distinguish between different kinds of State activity. For example, distinctions between the different kinds of activity of individuals who represented a State had already been made in the Vienna Convention on Diplomatic Relations.⁴ The Commission should therefore avoid being governed by an abstract material approach to the problem.

20. The difficulties of distinguishing *ratione materiae* between commercial activity and activity that genuinely came within the context of the exercise of a State's sovereign powers were illustrated by the uncertainty that had surrounded the status of a United Kingdom fleet auxiliary which had visited New York in 1952 while carrying supplies for Royal Navy vessels. After part of the crew had absconded, the captain had been held liable by a United States court for their presumed illegal entry into the United States, on the grounds that the crew were not Royal Navy personnel and that the vessel's activity was of a commercial nature. The United States Department of State, however, had classified the vessel as an armed warship, and therefore as a vessel entitled to immunity, once it had been found, quite by chance, to have a small gun mounted on its foredeck. It was well known that Sir Hersch Lauterpacht had tried vainly for many years to find a criterion that would permit the making of the kind of dis-

³ *Ibid.*, vol. 206, p. 143.

⁴ *Ibid.*, vol. 500, p. 95.

inction in question, and the continuation of that search would undoubtedly be at the root of the Commission's problems and the most difficult task it would have to undertake.

21. A further difficulty would arise from the fact that the Commission found itself in a sphere of law that involved private international law, private law and public international law. It would naturally have to approach the subject from the viewpoint of public international law, and possibly from that of private international law, and it must therefore perform the difficult task of isolating the concepts of public international law from those of private international law and private law. That would be especially hard, because in practice cases relating to the jurisdictional immunity of States always began from a private claim which in some way involved a foreign sovereign.

22. In paragraphs 61, 63 and 94 of his report, the Special Rapporteur drew attention to the problem of the application of procedures of the courts to foreign States. Personally, he suspected that that was a problem that should be dealt with very generally, perhaps by exclusion rather than by the submission of concrete solutions. Matters to which the Special Rapporteur might wish to give attention in that regard included the problem of implied acceptance of the jurisdiction of a local court (through, for example, a decision to enter an appearance before the court if only to prevent the pronouncement of a judgement *in absentia*) and the question whether a foreign State should be considered subject to local rules concerning security for costs and disclosure of evidence.

23. Those matters might be raised in the Special Rapporteur's questionnaire. With regard to the questionnaire, he joined Mr. Verosta in hoping that it would be so designed as to elicit responses from the greatest possible number of Governments and to produce as much information as was possible at one time.

24. Mr. QUENTIN-BAXTER said that the Commission's attention had inevitably focused on the central problem of a restrictive, or absolute, view of immunity, and members' comments had shown very clearly how difficult it was to draw a dividing line between activities of the State that attracted immunity and those that did not. He had little hope that the Commission, succeeding where Sir Hersch Lauterpacht had failed, would manage to find an objective test which, in all circumstances, would separate questions arising *jure imperii* from those arising *jure gestionis*. That was the area in which the jurisprudence of various national courts had parted company, and the English courts, for example, had even been deterred from making any distinction at all, simply because they could find no rational ground for doing so. It was a case in which common law could be said to offer two traditions, the United States and the United Kingdom having gone their separate ways. He would not pursue the reasons for that state of affairs beyond saying that it was partly due to the balance between executive and judicial responsibility.

25. It was clear that, as indicated in the Special Rapporteur's report, the practice of States should be determined by reference to the activities of the various branches of government—the legislature, the executive and the judiciary. As far as the contribution of the judiciary was concerned, Chief Justice Marshall, in the schooner *Exchange* case,⁵ had provided possibly the best pointer, by making a distinction between cases in which visitors who attracted immunity could be held to have an implied invitation to be present in the jurisdiction, and cases in which they could not; for example, visits of naval ships were so much a matter of course and of international comity that, unless the contrary was made abundantly clear, they would be said to attract immunity, but visits of an army, unless especially invited, would not. That kind of distinction tended to underline the position of the Special Rapporteur as reflected in paragraph 69 of his report, where he had expressed an entirely understandable preference for taking the general rule of sovereign immunity as the starting point, but had recognized that another approach was possible.

26. At an earlier point in his report, the Special Rapporteur had also made the general point that the Commission was as much concerned with determining the limits of the various principles as with stating their substance. Moreover, as indicated in paragraph 56, the Working Group on jurisdictional immunities of States and their property had itself found the doctrine of State immunity to be the result of an interplay of two fundamental principles: the principle of territoriality and the principle of State personality. His own view was that the intricate problems that tended to divide the Commission called for continuing emphasis on that interplay.

27. The Commission was concerned not only with finding exceptions to the rule of State sovereignty, but also with determining the place of that rule in relation to other fundamental principles, such as the sovereignty of States within their respective territories. By proceeding on that basis, the Commission should be able to identify the cases in which immunity was clearly attracted and the cases in which the foreign actor might reasonably be expected to acquaint himself with the rules and doctrine of the forum and to accept those rules if he wished to act within the jurisdiction of that forum. English law had always acknowledged that the doctrine of immunities had its own natural limits. In the *Parlement belge* case,⁶ for example, the concept of immunity had been qualified by that of public use. Admittedly, that qualification had been somewhat ignored in later cases, but the current trend in English law, as in the law of other countries, was for awareness of such limitations to revive.

⁵ The schooner "Exchange" v. McFaddon and others (1812), W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, Banks Law Publishing, 1911), vol. VII, 3rd ed., p. 116.

⁶ The "Parlement belge" (1880), United Kingdom, *The Law Reports, Probate Division* (London, Incorporated Council of Law Reporting for England and Wales, 1880), vol. V, p. 197.

28. Lastly, it would be helpful if the Special Rapporteur, in preparing his first report, could concentrate on a limited range of fundamental issues, while building on the foundation laid down in his preliminary report.

29. Mr. THIAM said that the numerous questions raised by the Special Rapporteur called for very careful consideration.

30. As to whether it would be better to lay down a general principle and then specify exceptions, or to proceed empirically and formulate the rule only in the final analysis, both approaches had their advantages and it was difficult to fix a course *a priori*.

31. With regard to the exceptions mentioned by the Special Rapporteur, it had rightly been pointed out that there was perhaps no criterion common to the various examples given by which to establish the existence of an exception. The problem of immunity from execution was particularly interesting and difficult to resolve, even in internal law, whether the parties involved were long-established States or, *a fortiori*, new States.

32. He had no doubt that, pursuing his work along the lines described, the Special Rapporteur would succeed in proposing satisfactory solutions in the various areas identified in the preliminary report.

33. Mr. CALLE y CALLE noted that the title of the topic under consideration had undergone a series of changes since 1948. The title proposed for the Commission's long-term programme of work had been "Jurisdictional immunities of foreign States and their organs, agencies and property",⁷ which he thought particularly apt, since even if the titular holder of the immunity was the State, it was the organs and agencies of the State that could be called upon to submit to the jurisdiction. In the title the Commission had adopted in 1978,⁸ and which appeared in the agenda, the reference to organs and agencies had been omitted, but he considered that it was none the less implicit in the word "States".

34. The Commission's objective was to draw up a multilateral convention to regulate a matter that was generally recognized as being of everyday importance, in view of the multiplicity of activities in which modern States engaged. In principle, the State and its organs were outside the jurisdiction of the national forum of another State. Immunity, therefore, appeared to be based on a procedural exception or remedy, which was accorded by the State that recognized the existence of immunity and which annulled the jurisdiction of the national court.

35. To determine the scope and content of immunity, and to ensure a degree of uniformity in the rules drafted by the Commission, account should be taken,

in the first place, of the Convention on Private International Law (known as the "Bustamante Code"), since cases might arise, in connexion with the application of private law, in which States, or their organs or agencies, could claim lack of jurisdiction of the local courts on the ground of immunity. Account should likewise be taken of the 1972 European Convention on State Immunity,⁹ which provided for the restrictive approach that was desirable in view of the increasing involvement of States in commercial activities. Another convention that would merit the Commission's consideration was in course of preparation by the Inter-American Juridical Committee.

36. The Commission should also consider the effect of the nationalization by a State of foreign private property situated in its territory, as it related to immunity. There had recently been such a case in Chile, when a foreign mining company had been nationalized.

37. Lastly, he fully agreed on the need for a questionnaire, and thought it would also be useful if the Secretariat could make a compilation of existing legislative material on immunity. The practice of local courts, together with national legislation, would prove valuable in determining the principles and basic rules of immunity.

38. Mr. DÍAZ GONZÁLEZ commended the Special Rapporteur for his excellent report on a complex subject. The information embodied in the report, together with members' comments, should provide the Special Rapporteur with sufficient material to begin his task of codification.

39. He agreed entirely that the study should for the time being be confined to jurisdictional immunity, and that other aspects of the subject should be dealt with later. The Special Rapporteur had pointed out, in paragraph 44 of his report, that there had apparently been no incident or conflict that had compelled States to seek international judicial settlement or an advisory opinion of the International Court of Justice, or to go to arbitration. It was therefore clear that, as far as immunities were concerned, all decided cases, precedent and doctrine were to be found at the national level. At the same time, he agreed that it would be dangerous to refer exclusively to internal law, notwithstanding the fact that disputes had generally been settled by reference to that law or to private international law.

40. What the Commission was endeavouring to do was to codify international law; its main aim, therefore, should be to lay down rules of public international law governing questions of immunity. That, in his view, would provide a sound basis for the Commission's future work.

41. Mr. SUCHARITKUL (Special Rapporteur) said that the comments made by members during the dis-

⁷ See *Yearbook... 1971*, vol. II (Part Two), p. 18, document A/CN.4/245, para. 67.

⁸ See *Yearbook... 1978*, vol. II (Part Two), p. 6, document A/33/10, para. 10.

⁹ See 1574th meeting, foot-note 8.

cussion would do much to assist him in achieving a balanced approach to the topic of jurisdictional immunities of States and their property. He had taken due note that the consensus of opinion in the Commission appeared to be that he should continue along the lines proposed in his report, while concentrating at the outset on general principles.

42. With regard to exceptions to the general rules on State immunity, he reiterated that the purpose of his preliminary report was simply to identify the issues involved and to draw attention to certain exceptions. Those exceptions had in fact been derived from the practice of certain States, although he recognized that they might attract a different response in other parts of the world.

43. The reaction to his proposals regarding source materials had been generally favourable. In particular, he was grateful for having his attention drawn to the question of treaties, which he would certainly examine more closely, as it could provide a pointer for a balanced approach that was acceptable to all States.

44. Allied to the general question of principle was the question of priorities, in regard to which he agreed that it was necessary to concentrate first on immunity from jurisdiction and to leave aside, for the time being, the question of immunity from execution. He had been pleased to hear that Mr. Ushakov agreed that the term "jurisdictional immunities" was not confined to the exercise of judicial power but extended to exemptions from the exercise of other kinds of power, including that of the executive, administration and legislature. That common ground afforded a basis on which the Commission could proceed.

45. With regard to the scope of the subject, and in particular to the relationship between international law and other areas of law, it was clear that source material came in the main from internal law, since the question was essentially one that fell within the jurisdiction of the municipal courts and of the executive branch of the State. Consequently, even private international law operated as a branch of internal law, because what was at issue was a choice of law and of jurisdiction. Mr. Reuter had rightly urged the need for care to be exercised in distinguishing between cases in which there was immunity and cases in which there was no jurisdiction under the applicable rules of private international law.

46. A note of warning had likewise been sounded by certain members, to the effect that the Commission should not delve too deeply into private international law. His point in that connexion had simply been that, with regard to immovable property, and particularly to land, State practice was virtually uniform in applying the law of the State in which the immovable property was situated, since a question of territorial sovereignty was involved. He had taken note of the suggestion that certain procedural questions, such as the incidence of costs, security for costs and service of writs, required examination, and would consider those matters more closely in due course. He agreed that the doctrine of act of State should be eschewed for the

purposes of the study, and also that it was possible for a State to conclude contracts in private law that did not fall within the purview of the law of treaties. However, he had mentioned the latter point merely to indicate that it should be disregarded for the time being.

47. A fundamental concept was the duties and functions of the State, which differed according to the country concerned. The political and economic developments taking place in the world, particularly in developing countries, might well have an impact on the progressive development of law, although precisely what form it would take was not known.

48. Lastly, he agreed that a questionnaire would be useful, and thought the Commission would be assisted in its further work if the Secretariat could make a compilation of existing legislative material on immunity.

49. Sir Francis VALLAT urged that, to spare Governments unnecessary or repetitive work, any questionnaire circulated should be as specific and comprehensive as possible.

The meeting rose at 1 p.m.

1576th MEETING

Wednesday, 25 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organization (*concluded*)* (A/CN.4/312,¹ A/CN.4/319, A/CN.4/L.300)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

ARTICLES 39-60

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report on draft articles 39 to 60 on treaties concluded

* Resumed from the 1559th meeting.

¹ Yearbook... 1978, vol. II (Part One).

between States and international organizations or between two or more international organizations, which had been referred to it for consideration.

2. The text of draft articles 39 to 60 and the titles of parts IV and V, and of sections 1, 2 and 3 of the latter, as proposed by the Drafting Committee (A/CN.4/L.300), read:

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in part II apply to such an agreement.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Articles 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such a party.

5. Any State or international organization which become a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. Agreements to modify multilateral treaties between certain of the parties only

1. Two more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty, and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present draft articles.

2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present draft articles.

3. The termination of a treaty, its denunciation or the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present draft articles. The same rule applies to suspension of the operation of a treaty.

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a

treaty between one or more States and one or more international organizations under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having renounced the right to invoke that ground.

3. The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization.

SECTION 2. INVALIDITY OF TREATIES

Article 46. Violation of provisions regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty between one or more States and one or more international organizations has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case referred to in paragraph 1, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.

4. In the case referred to in paragraph 3, a violation is manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization.

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the other negotiating organizations or to the negotiating States and other negotiating organizations or to the negotiating States, as the case may be, prior to his expressing such consent.

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if

the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

Article 49. Fraud

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating organization, the State or the organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. Corruption of a representative of a State or of an international organization

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52. Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Article 55. Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties, after consultation with the other contracting organizations, or with the other contracting States and the other contracting organizations, or with the other contracting States, as the case may be.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty, and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter, and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it, either:

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

3. Mr. RIPHAGEN (Chairman of the Drafting Committee) reminded members that part IV of the draft articles, comprising articles 39 to 41, had been submitted by the Special Rapporteur, at the twenty-ninth session of the Commission, in his seventh report (A/CN.4/312), and that part V, comprising articles 42 to 60, had been submitted at the current session, in his eighth report (A/CN.4/319).

4. In reviewing those draft articles, the Drafting Committee had borne in mind the need to maintain the relationship with the Vienna Convention on the Law of Treaties.² For that reason, and for ease of comparison between the two texts, the draft articles proposed by the Drafting Committee had the same numbering as the corresponding articles of the Vienna Convention. The Drafting Committee had likewise borne in mind that the Commission wished to maintain, as far as possible, the precision and flexibility of wording of the Vienna Convention, while taking account of the special features of the participation of

² *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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

international organizations in treaties. Where appropriate, therefore, the terminology of the corresponding articles of the Vienna Convention had been used. However, to take account of the fact that the draft articles dealt with three different types of treaty, the Drafting Committee had decided to add the words "as the case may be" where necessary, namely, in articles 40, 47, 54 and 57. Furthermore, the phrase "any State or international organization already a party", in paragraph 4 of article 40, had been considered unnecessary in the context, and had therefore been replaced by the words "a party", which appeared elsewhere in that article. To ensure conformity with the definitions in article 2,³ the word "international" had been deleted from the expression "international organization" wherever that expression referred to a contracting or negotiating organization. Similarly, the word "international" had been added or deleted, as appropriate, throughout the draft, so that the expression "international organization" was used in a particular paragraph or subparagraph only in the first instance, the word "organization" being used thereafter. The square brackets in the Special Rapporteur's draft enclosing references to other articles had been removed wherever the articles had been adopted at the current session. Subject to those minor drafting changes, the Drafting Committee had retained the texts of articles 40, 43, 44 and 47 to 60, which therefore called for no further comment.

5. Turning to the other articles proposed by the Drafting Committee, he said that article 39 consisted of two paragraphs, whereas the article submitted by the Special Rapporteur had consisted of only one, as did the corresponding article of the Vienna Convention. In paragraph 1, the words "by agreement" had been replaced by the words "by the conclusion of an agreement". The latter wording was considered to be more explicit and did not affect the sense of the provision, because of the reference to the rules laid down in part II of the draft. The phrase "except in so far as the treaty may otherwise provide" had been deleted, in view of the doubts expressed by members. The conventional freedom of the parties was safeguarded by the rules laid down in part II of the draft, and was specifically referred to in article 40, so there seemed to be no need to retain that safeguard in article 39 as well. The purpose of the new paragraph 2 was to reaffirm an essential rule regarding the consent of international organizations; no change of substance was involved.

6. For article 41, the Drafting Committee had preferred the second of the two variants proposed by the Special Rapporteur in his seventh report (A/CN.4/312).

7. Article 42 had been amended for the sake of clarity and precision. Paragraph 1 of the original draft had

been divided into two paragraphs, dealing respectively with treaties between two or more international organizations and treaties between one or more States and one or more international organizations, and paragraph 2 of the original draft had accordingly been renumbered as paragraph 3. Paragraph 3 of the original draft, which reserved possible obligations deriving from the United Nations Charter, particularly from Article 103, had been deleted. A similar reservation was made in article 30, paragraph 6. In view of the comments made by members of the Commission, the Drafting Committee had considered that it would be inadvisable, at present, to make the same reservation in other articles where it would be appropriate; it was of course understood that the Commission might wish, at a later stage, to consider the addition of a general article by which the safeguard clause relating to Article 103 of the Charter would be extended to the whole draft.

8. In his eighth report (A/CN.4/319), the Special Rapporteur had submitted two variants for article 45. Variant A made no distinction between the case of a State and that of an international organization and thus did not differ from article 45 of the Vienna Convention, apart from minor drafting changes. Variant B made the case of a State subject to the same rules as those laid down in the Vienna Convention, but treated an international organization differently in regard both to principle and to practice since, under its terms, it would be more difficult for an international organization than for a State to lose the right to invoke certain facts. Paragraph 1, as proposed by the Drafting Committee, which dealt with States, maintained the rule laid down in article 45 of the Vienna Convention, both for express acceptance or agreement (subparagraph (a)) and for acquiescence by conduct (subparagraph (b)). Paragraph 2, which dealt with international organizations, also maintained the Vienna Convention rule for express acceptance or agreement and for the effects of conduct, but the phrase "acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be" had been replaced in subparagraph (b) by the words "renounced the right to invoke that ground". That amendment had been introduced to take account of members' comments on the need to protect the treaty partners of international organizations against the conduct of their organs, and to avoid the impression of passivity and ease that might be given by the concept of acquiescence.

9. With regard to the application of paragraph 2, and in particular subparagraph (b), the Drafting Committee had decided, *ex abundante cautela*, to add a new paragraph 3 restating the general principle that the agreement and conduct of the international organization must be governed by its relevant rules. It had been agreed that, where States were concerned, article 45 should apply to the cases covered by articles 46 to 50 and article 60, as well as by the future article 62, which would correspond to article 62 of the Vienna Convention. With regard to international organizations, however, one member had reserved his position on the reference, in paragraph 2 of the article, to article 46.

³ For the text of all the draft articles adopted so far by the Commission, see *Yearbook... 1978*, vol. II (Part Two), pp. 124 *et seq.*, document A/33/10, chap. V, sect. B, 1.

10. The Special Rapporteur had also proposed two variants for article 46. The difference between variants A and B was that the latter included an additional paragraph 4, defining a “manifest” violation in the case of an international organization. The other three paragraphs were identical in both variants save that, in variant B, the order of paragraphs 2 and 3 had been reversed. The Drafting Committee had decided to retain the four paragraphs of variant B. Paragraph 1, relating to the consent of a State, was identical with paragraph 1 of the original draft, except that the phrase “between one or more States and one or more international organizations” had been added after the word “treaty”, in accordance with the usage adopted throughout the draft. Paragraph 2 corresponded to paragraph 2 of variant B, but the words “the preceding paragraph” had been replaced by “paragraph 1”.

11. Paragraph 3 corresponded to paragraph 3 of variant B and to paragraph 2 of variant A, but the phrase “and concerned a rule of the organization of fundamental importance” had been deleted. In that connexion, the Drafting Committee had taken account of the opinion of those members who considered that international organizations should be protected even more than States in the event of a violation of the rules of the organization governing their competence to conclude treaties, all such rules being of fundamental importance. It had also taken note of the views of those members of the Commission who considered that a determination of what was “manifest” must necessarily be subjective, but that only the violation of a fundamental rule could be “manifest”, so that in effect the two conditions became one.

12. Paragraph 4 corresponded to paragraph 4 of variant B, but the Drafting Committee had preferred to define a violation as manifest not by reference to the “normal practice” of an organization, in view of the difficulties that would create, but by reference to the treaty partners of an organization. The phrase following the words “a violation is manifest” had therefore been amended to read “if it is or ought to be within the cognizance of any contracting State or any other contracting organization”. The organization would thus be in a position to invoke, as invalidating its consent, not only a violation which was known to its treaty partners but also a violation which, even though it ought to have been within their cognizance, was not known to them because they had failed to satisfy the requirement of reasonable diligence.

13. The CHAIRMAN invited the Commission to consider the articles proposed by the Drafting Committee one by one.

PART IV (Amendment and modification of treaties)

The title of part IV was adopted.

ARTICLE 39⁴ (General rule regarding the amendment of treaties)⁵

⁴ For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1978*, vol. I, pp. 177 *et seq.*, 1507th meeting.

⁵ For text, see para. 2 above.

Article 39 was adopted.

ARTICLE 40⁶ (Amendment of multilateral treaties)⁷

14. Mr. VEROSTA proposed that, to make the French text of paragraph 2 correspond more closely to the English, the position of the words “selon le cas” should be changed, so that the French text would read: “Toute proposition tendant à amender un traité multilatéral dans les relations entre toutes les parties doit être notifiée à tous les Etats et à toutes les organisations contractantes ou, selon le cas, à toutes les organisations contractantes...”.

15. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to approve that amendment.

It was so decided.

Article 40, as amended in the French version, was adopted.

ARTICLE 41⁸ (Agreements to modify multilateral treaties between certain of the parties only)⁹

Article 41 was adopted.

PART V (Invalidity, termination and suspension of the operation of treaties)

SECTION 1 (General provisions)

The titles of part V and section 1 were adopted.

ARTICLE 42¹⁰ (Validity and continuance in force of treaties)¹¹

16. Mr. USHAKOV proposed that the words “of the present draft articles”, in the three paragraphs of article 42, should be replaced by the words “of the present articles”, so that the provision would be in conformity with the rest of the text in the three languages.

17. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to approve that amendment.

It was so decided.

Article 42, as amended, was adopted.

ARTICLE 43¹² (Obligations imposed by international law independently of a treaty)¹³

Article 43 was adopted.

⁶ For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1978*, vol. I, pp. 182 *et seq.*, 1508th meeting, paras. 1–27.

⁷ For text, see para. 2 above.

⁸ For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1978*, vol. I, pp. 185 *et seq.*, 1508th meeting, paras. 28 *et seq.*, and 1509th meeting, paras. 1–20.

⁹ For text, see para. 2 above.

¹⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1546th meeting, paras. 11–42, and 1547th meeting, paras. 1–35.

¹¹ For text, see para. 2 above.

¹² For consideration of the text initially submitted by the Special Rapporteur, see 1547th meeting, paras. 36 *et seq.*

¹³ For text, see para. 2 above.

ARTICLE 44¹⁴ (Separability of treaty provisions)¹⁵

Article 44 was adopted.

ARTICLE 45¹⁶ (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)¹⁷

18. Mr. USHAKOV repeated the reservations on paragraph 2 which he had expressed in the Drafting Committee. He considered the reference to article 46 incorrect because an organization could not act in contravention of its own rules and, in particular, of its constituent instrument. To be correct, the reference should be to articles 47 to 50.

19. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted article 45, with the reservation expressed by Mr. Ushakov.

It was so decided.

SECTION 2 (Invalidity of treaties)

The title of section 2 was adopted.

ARTICLE 46¹⁸ (Violation of provisions regarding competence to conclude treaties)¹⁹

Article 46 was adopted.

ARTICLE 47²⁰ (Specific restrictions on authority to express or communicate consent to be bound by a treaty)²¹

Article 47 was adopted.

ARTICLE 48²² (Error)²³

Article 48 was adopted.

ARTICLE 49²⁴ (Fraud)²⁵

Article 49 was adopted.

ARTICLE 50²⁶ (Corruption of a representative of a State or of an international organization)²⁷

Article 50 was adopted.

ARTICLE 51²⁸ (Coercion of a representative of a State or of an international organization)²⁹

Article 51 was adopted.

ARTICLE 52³⁰ (Coercion of a State or of an international organization by the threat or use of force)³¹

Article 52 was adopted.

ARTICLE 53³² (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))³³

Article 53 was adopted.

SECTION 3 (Termination and suspension of the operation of treaties)

The title of section 3 was adopted.

ARTICLE 54³⁴ (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)³⁵

Article 54 was adopted.

ARTICLE 55³⁶ (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)³⁷

Article 55 was adopted.

ARTICLE 56³⁸ (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)³⁹

Article 56 was adopted.

ARTICLE 57⁴⁰ (Suspension of the operation of a treaty under its provisions or by consent by the parties)⁴¹

Article 57 was adopted.

ARTICLE 58⁴² (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)⁴³

Article 58 was adopted.

¹⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1548th meeting, paras. 1-5.

¹⁵ For text, see para. 2 above.

¹⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1548th meeting, paras. 6 *et seq.*, 1549th meeting, paras. 5 *et seq.*, and 1550th meeting, paras. 1-21.

¹⁷ For text, see para. 2 above.

¹⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1550th meeting, paras. 22 *et seq.*, 1551st meeting, and 1552nd meeting, paras. 3-24.

¹⁹ For text, see para. 2 above.

²⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1552nd meeting, paras. 35 *et seq.*, and 1553rd meeting.

²¹ For text, see para. 2 above.

²² For consideration of the text initially submitted by the Special Rapporteur, see 1557th meeting, paras. 1-9.

²³ For text, see para. 2 above.

²⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1557th meeting, paras. 10-26.

²⁵ For text, see para. 2 above.

²⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1557th meeting, paras. 27 *et seq.*

²⁷ For text, see para. 2 above.

²⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1558th meeting, paras. 1-4.

²⁹ For text, see para. 2 above.

³⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1558th meeting, paras. 5 *et seq.*

³¹ For text, see para. 2 above.

³² For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 3-14.

³³ For text, see para. 2 above.

³⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 15-24.

³⁵ For text, see para. 2 above.

³⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 25-33.

³⁷ For text, see para. 2 above.

³⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 34-39.

³⁹ For text, see para. 2 above.

⁴⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 15-24.

⁴¹ For text, see para. 2 above.

⁴² For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 40-44.

⁴³ For text, see para. 2 above.

ARTICLE 59⁴⁴ (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)⁴⁵

Article 59 was adopted.

ARTICLE 60⁴⁶ (Termination or suspension of the operation of a treaty as a consequence of its breach)⁴⁷

Article 60 was adopted.

20. The CHAIRMAN observed that the Commission had completed its work on item 4 of the agenda for the current session. He congratulated the Special Rapporteur and thanked the Drafting Committee and its Chairman.

21. He reminded the Commission that it had previously considered the possibility of communicating the text of the completed articles to States for detailed study.

Co-operation with other bodies (concluded)* [Item 13 of the agenda]

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

22. The CHAIRMAN invited Mr. Furrer, Observer for the European Committee on Legal Co-operation, to address the Commission.

23. Mr. FURRER (Observer for the European Committee on Legal Co-operation) said that at its thirtieth session, in November 1978, the European Committee had had the privilege of hearing a statement by the Chairman of the International Law Commission. Since then, the Committee had met in July 1979 in Strasbourg, where it had elected a new Chairman, Mr. Pontoppidan, Permanent Under-Secretary of State at the Ministry of Justice of Denmark, and had constituted a new Bureau. Its work had been concerned with two major topics: immunity of States and peaceful settlement of international disputes.

24. The Committee had taken up the 1972 European Convention on State Immunity, in order to examine the prospects for its ratification by a large number of States members of the Council of Europe. The exchange of views on that Convention had not produced any criticism of the solutions it proposed, even though attention had been drawn to the complexity and high degree of technicality of the régime it established, those characteristics being, perhaps, the cause of the difficulties some countries apparently had in ratifying the instrument. In regard to immunity from

jurisdiction, the Convention adopted a particular combination of exceptions, principles and references to the practice of States, the principle of immunity not appearing until article 15, after the enumeration of the many cases in which a foreign State could not invoke immunity. Furthermore, it was provided that, if a State followed a practice which was more restrictive than the régime of the Convention, it could maintain that practice by making an express declaration; nevertheless, the said practice could not be applied to acts of foreign States performed in the exercise of governmental authority (*acta jure imperii*).

25. Where execution was concerned, the Convention in no way touched upon the immunity of foreign States from attachment. On the other hand, it confirmed the obligation of States parties to give effect to judgements rendered against them, unless they were based on the exercise of jurisdiction considered to go beyond the terms of the Convention. The Convention also contained a chapter on procedure.

26. That instrument had been ratified by four States: Austria, Belgium, Cyprus and, on 3 July 1979, the United Kingdom. The prospects for further ratifications were good, seven other countries having adopted a favourable attitude and stated that their preparations were already well advanced. The Convention thus appeared to be a clear manifestation of the will of a large number of European States regarding immunity of jurisdiction.

27. The Convention provided for the compulsory reference of disputes concerning its interpretation or application to the International Court of Justice. However, the additional protocol attached to the Convention replaced that jurisdiction by that of a European court consisting of members of the European Court of Human Rights, which was also competent to hear appeals by private persons who considered themselves to have been injured because a contracting State had not given effect to a judgement delivered against it in conformity with the Convention. The additional protocol had been ratified by Austria, Belgium and Cyprus, but would enter into force only after five ratifications had been received. It could be regarded, to some extent, as the forerunner of European machinery in that sphere.

28. The Committee had also considered the 1957 European Convention for the Peaceful Settlement of Disputes, which had been applied in very few cases, although there was no lack of disputes. A number of members of the Parliamentary Assembly of the Council of Europe had taken the initiative of suggesting that the Convention be revised with a view, in particular, to substituting the jurisdiction of the European Court of Human Rights for that of the International Court of Justice in legal disputes, and to giving the European Court certain powers of arbitration in non-legal disputes. That suggestion, however, had not been favourably received by the Committee.

29. Among the other activities of the Committee carried on in conformity with the main principles of the Council of Europe, which was working to facilitate the

⁴⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1559th meeting, paras. 45-47.

⁴⁵ For text, see para. 2 above.

⁴⁶ For consideration of the text initially submitted by the Special Rapporteur see 1559th meeting, paras. 48 *et seq.*

⁴⁷ For text, see para. 2 above.

* Resumed from the 1568th meeting.

enjoyment of human freedom and to guarantee to everyone the protection of his rights and interests, mention might be made of the following: preparation of a new draft convention for the protection of individuals with regard to automatic processing of personal data; the new draft convention on recognition and enforcement of decisions relating to the custody of children and on restoration of custody of children recently adopted by the Committee; and the work of the Council of Europe on territorial asylum and refugees, which should help to resolve, on the basis of the United Nations conventions for the protection of refugees, the problems of the country of first asylum and the country of final settlement, regarding which it would be desirable for States to adopt certain common principles.

30. Finally, in May 1979, the Committee of Ministers of the Council of Europe had drafted the text of a European framework convention on transfrontier co-operation between local authorities. That instrument was the first multilateral treaty by which several States solemnly granted their local or regional authorities the right to enter into treaty relations, at their discretion, with their counterparts in a neighbouring State, on matters of public interest such as regional, rural and urban development, infrastructure planning and protection of the environment. The instrument was a considerable innovation, and was particularly welcome to all persons responsible for frontier regions who had to resolve practical problems such as those relating to the use and purification of water, and the protection of its quality.

31. He reminded the Commission that it had a permanent invitation to send representatives to, and to participate in, the sessions of the European Committee on Legal Co-operation, the next of which was to be held from 26 to 30 November 1979. He hoped that the Chairman of the Commission would be able to accept that invitation.

32. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his statement and said that the Commission was glad to know that the Committee made a continuing study of the main problems of international law on the Commission's agenda. The previous year, he had had the honour of being present at the Committee's deliberations, and he had then been able to observe the great interest it took in the activities of the Commission. He requested Mr. Furrer to reiterate to the Committee his thanks for the welcome it had accorded him on that occasion.

33. There was no doubt that the Commission, too, could benefit from the work of the Committee in making further progress in the codification of international law. He requested Mr. Furrer to inform the Committee that a representative of the Commission would be able to attend its session in November 1979. Lastly, he remarked on the value of exchanges of that kind for the maintenance of co-operative relations between the various bodies working on the progressive codification of international law.

34. Mr. REUTER stressed that co-operation in a restricted area offering favourable conditions facilitated the formulaion of satisfactory solutions. Without being overoptimistic, he was nevertheless convinced that, if other regions of the world followed the example given by the European Committee on Legal Co-operation, the Commission would be able, in the perhaps not too distant future, to be more ambitious in its aims than it was at present. In particular, he thought the formula of open co-operation adopted by the Council of Europe might one day prove useful to the Commission. For example, the path marked out by the convention on transfrontier co-operation between local authorities was extremely promising. The different regions of the world should follow the example of the European Committee, in the interests of the progress of international law.

The meeting rose at 11.30 a.m.

1577th MEETING

Thursday, 26 July 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued)* (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. SCHWEBEL (Special Rapporteur) reminded the Commission that, in introducing his first report on the topic (A/CN.4/320 and Corr.1) at its 1554th meeting, he had pointed out that the document was designed to lay a factual basis for treating the subject in a manner that responded to the physical realities of water. He had further indicated that, to deal with it successfully, the Commission must dispose of two paramount problems: on the one hand, the diversity of watercourses and the need for special régimes suited to their varying characteristics and, on the other, the present lack of agreement among States and in the

* Resumed from the 1556th meeting.

Commission on the geographical scope of international watercourses.

2. The solution he had proposed to the first problem entailed the drafting of a series of articles that would deal with specific uses and abuses of watercourses and their effects, as well as with other matters of detail (1554th meeting, paras. 12 and 13). He had visualized that the Commission could best evolve the more general principles of law concerning watercourses after it had considered the specific uses and effects of water, and that such a scheme would enable it to take proper account of the physical realities of water and of the hydrologic cycle.

3. To deal further with the problem of the diversity of watercourses, he had suggested the device of a framework convention combined with user or system agreements; the former would set out universal principles governing international watercourses and the latter would lay down the particular obligations associated with the special characteristics of the individual watercourse. He had proposed a nexus between the framework convention and the related user agreements and had suggested that, where none of the States of a particular watercourse was a party to the framework convention the said States should remain free to conclude such agreements as they wished in regard to that watercourse.

4. Concerning the second main problem, that of the scope of the term "international watercourse", he had proposed that the Commission, since it was divided on that issue, should postpone consideration of that problem: if no agreed definition could be reached at a later stage, the Commission might insert an optional clause in the framework convention that would permit States parties to the convention to select, according to their purpose, one of three definitions: a river forming or traversing an international boundary, a river system, or a drainage basin (*ibid.*, para. 11).

5. While he had advanced the draft articles contained in his report mainly as food for thought, they had attracted a measure of support. A few members of the Commission had suggested that the proposed article on the scope of the draft should be adopted at the current session, in an appropriate form. Most had appeared to favour the idea of a framework convention combined with user agreements, but the general view had been that the nexus between the two should be reconsidered, particularly as some members thought it might impose obligations on third States. Most members who had spoken on his proposals for data collection and exchange had favoured them, although some had found the proposed provisions unduly ambitious. They would prefer not to impose on States even a minimal obligation to collect and share watercourse data, but they would require States to co-operate in data collection and exchange, at least in relation to watercourses subject to international exploitation.

6. What he therefore needed most at present was guidance from the Commission as to the direction in which he should proceed. There were at least four possibilities. First, he could initially prepare reports

and draft articles on particular uses of water such as irrigation or power production. Having described the technicalities of the subject, he would identify any principles suitable for inclusion in a framework convention and suggest possible elements of complementary user agreements. That would be a novel approach and had been criticized during the first stage of the Commission's debate on the topic as being unduly technical. Nevertheless, it was that approach which the Commission seemed to have contemplated in its questionnaire¹ and its earlier consideration of the matter. Secondly, he could concentrate on certain abuses of water and topics such as pollution or salt-water intrusion. Such a course was appealing; there was widespread agreement, for instance, that the international community must act against pollution, but any study of the problem of pollution would doubtless immediately raise the question of the drainage basin. As a third possibility, he could draft general principles concerning international watercourses, as had the International Law Association and the Institut de droit international. He did not wish to suggest that the Commission should necessarily adopt either the drainage basin concept or the particular principles which those bodies had espoused, but it might well develop principles flowing from good-neighbourly relations and the like. Fourthly, he could look into institutional arrangements for international co-operation with respect to international watercourses, but that might best be left at least until the conclusion of the conference of river commissions which the United Nations was to convene at Dakar in May 1980.

7. Whatever the Commission's choice of approach, he would not necessarily be able to prepare his second report in time for the thirty-second session. He would be grateful if the Commission would authorize him to discuss with the Secretariat the possibilities of providing him with technical advice, preferably from within the United Nations system at little or no cost. If that proved impossible, he would welcome the Commission's support for budgetary authorization of the expenditure that would become necessary for outside assistance.

8. Mr. BARBOZA congratulated the Special Rapporteur on a report which, with its wealth of scientific and technical information, constituted a very fine starting point for the study of an area of law that urgently required codification and progressive development and was closely connected with the rules governing good-neighbourly relations. It was to be hoped that the Commission's future draft articles would help to prevent conflicts concerning a resource essential to the survival of every human society.

9. The first of the two main views about the scope of the draft articles was that they should be limited to international rivers as defined in the Final Act of the Congress of Vienna.² The second was that they

¹ See *Yearbook...* 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.I, para. 6.

² See A/CN.4/320, para. 43.

should deal with either drainage basins or river basins. Those who supported the first approach placed the political factor of frontiers above the optimal exploitation of the basin and the equitable sharing of its water. The Special Rapporteur's report and the debates on the topic in the Sixth Committee of the General Assembly showed that there was no universally accepted definition of the term "international watercourse". The Commission could therefore reasonably assume that the General Assembly, in requesting it to study the law on international watercourses, had allowed it some discretion to interpret that term. He believed that the Commission should proceed on that basis, subject to the obvious exclusion from the study, as pointed out by the Special Rapporteur in paragraph 57 of his report, of rain, sea water, clouds, fog, snowfall and hail. His own view was that the term "international watercourse" should be taken to mean drainage basin, for the population explosion of recent years and the consequent huge increase in the need for water, as well as the improvement in man's knowledge of the hydrologic cycle, made it essential to treat the basin as a single entity if the requirements of all riparian States were to be met to the highest possible degree.

10. Those who advocated limiting the articles to international rivers as defined at the Congress of Vienna in 1815 claimed that each riparian State had absolute sovereignty over the portion of an international watercourse that lay within its territory; in support of that contention, they invoked the cherished principles of territorial sovereignty and sovereignty over natural resources. Yet to claim that the articles should apply to drainage basins was not to attack either of those principles. First, the way in which territorial sovereignty could be exercised was governed by the object of that sovereignty. Water could neither be occupied by nor support fixed structures, and the water in international watercourses, like air, moved from one State to another. If it could be considered in State A as the property of that State, it could also, once it had flowed into State B, be considered the property of that State, although it was exactly the same water. On the other hand, while such water undoubtedly constituted a natural resource, it must be seen as a shared natural resource. What was important, therefore, was to determine how that resource could be shared equitably. To give one riparian State absolute sovereignty over the water in an international watercourse would be to usurp the sovereignty over the same natural resource of all the other riparian States.

11. He favoured the idea that the Special Rapporteur should draft a framework convention, but it should be one that laid down only very general principles, so that it would be applicable to a broad range of situations. If the Commission agreed that the water in international watercourses must be treated as a shared natural resource, the framework convention should contain a reference to the fundamental principle of law, *sic utere tuo ut alienum non laedas*, which was the keystone of the law of good-neighbourly relations and could be considered as applicable to all situations connected with the use of the water of international

watercourses for power production, fishing, domestic purposes or irrigation, or connected with pollution. That principle formed part of customary environmental law and had found expression in a wide range of instruments, including the Convention relating to the development of hydraulic power affecting more than one State,³ the Helsinki Rules,⁴ resolutions and recommendations of the General Assembly and of the United Nations Conference on the Human Environment, a declaration of the Fourth Conference of Heads of State or Government of Non-Aligned Countries,⁵ and in bilateral agreements.

12. If the framework convention were to contain a provision prohibiting such use of international watercourses as caused serious injury to downstream States, it must also contain a provision determining when serious injury had been caused. That would help to allay the fear that downstream States might otherwise have a right of veto over any use of a shared watercourse by upstream States. The framework convention should therefore provide for the prior notification of projected uses of water that might cause serious injury—a concept which, in the light of the *Lac Lanoux* arbitral award,⁶ included social disruption—and for the peaceful settlement of disputes relating to such uses. He approved the Special Rapporteur's suggestion that riparian States should exchange data on the watercourse they shared; such data should relate not only to natural changes in the watercourse but also to changes induced artificially. A further rule that should be included in the framework convention, again drawn from customary law, was that of the reasonable and equitable use of shared water resources.

13. The problem of the nexus to be established to ensure that the Commission's draft convention would be regarded as one on whose principles other agreements would be aligned was very complex. In his view, article 5 should be amended; as other speakers had said, it would restrict the contractual freedom of States not parties to the framework convention. With regard to article 6, it was to be feared that paragraph 2 might lead to difficulties. The solution might be to oblige States parties to the framework convention which also participated in user agreements to declare expressly in those agreements that they would be subject to the framework convention. It could nevertheless be anticipated that it would be difficult to persuade other user States to accept such a stipulation. According to the summary record of the Commission's 1554th meeting, Mr. Riphagen would appear to have said that, if the Commission's convention recognized the relevant customary rules of international

³ *Ibid.*, para. 86.

⁴ *Ibid.*, para. 34.

⁵ *Documents of the Fourth Conference of Heads of State or Government of Non-aligned Countries* (Algiers, September 1973), "Economic declaration", sect. XII (A/9330, p. 71).

⁶ See 1554th meeting, foot-note 8.

law, those rules would be incorporated in user agreements. That was a perfectly valid point.

14. Mr. USHAKOV, referring to the title of the topic, said that the expression "international watercourses" would be better rendered in French by "cours d'eau internationaux" than by "voies d'eau internationales". Only flowing water should be taken into consideration, otherwise the Commission would face very great difficulties. It would be dangerous to extend the study to lakes, even though some lakes connected waterways, or to marine currents such as the Gulf Stream, or to groundwater. The Commission would do best to confine itself to the concept of "fleuves" and "rivières", for which the sole corresponding concept in English was "rivers".

15. According to article 1, paragraph 1, of the text proposed by the Special Rapporteur, the draft articles would apply "to the uses of the water of international watercourses". In his view, it was not the water of international watercourses that was used but the watercourses themselves, whether for navigation or for other purposes, such as floating timber or producing energy. If the term "non-navigational uses" really referred to the uses of international watercourses as such and not of their water, it would follow that only States adjoining a certain watercourse could use that watercourse, to the exclusion of other States in the basin. It was obvious that the use of groundwater by those other States could affect the watercourse, even if they did not use the watercourse as such.

16. In paragraph 1 of draft article 1, the Special Rapporteur proposed that the scope of the draft articles should extend to problems connected with uses of international watercourses, such as flood control, erosion, sedimentation and salt-water intrusion. However, such problems arose irrespective of the manner in which international watercourses were used. Thus it was possible to control flooding caused by a given watercourse without tying that problem to the uses being made of the watercourse, whatever they might be. The problems referred to in the paragraph were ultimately associated with the existence of watercourses and their conservation, rather than with their uses. Article 1, paragraph 1, might therefore simply read:

"The present articles apply to the uses of international watercourses."

17. Finally, the Commission should refrain from tackling questions concerning the use of international watercourses for agricultural purposes or energy production. As its members were not experts in those subjects, they would immediately encounter insurmountable difficulties. In any case, it would probably serve no useful purpose to study those questions, since they concerned only a limited number of States. Only a small number of rivers were used for agricultural purposes or energy production. The Commission should therefore confine itself to drawing up general rules that would be valid for all non-navigational uses of watercourses and would serve as guidelines for

States. It was ultimately for riparian States to regulate the uses of a given watercourse as they saw fit.

18. Mr. YANKOV expressed his appreciation to the Special Rapporteur for his highly competent report. He was particularly gratified that the document contained such a wealth of factual material and that it advanced stimulating ideas that would be of great value in the Commission's discussions.

19. With regard to the scope of the future draft articles, all the possible approaches to their preparation suggested by the Special Rapporteur were good. It would be unfortunate if the future instrument concentrated solely, for example, on certain uses of water and their effects, or on institutional arrangements. What the Commission required was what the Third United Nations Conference on the Law of the Sea had termed an "umbrella convention". The instrument should contain general rules concerning in the first instance the rights and obligations of riparian States, whether situated upstream or downstream, and to some extent provisions concerning the rights and obligations of third States. He did not agree with Mr. Ushakov that the position of third States was irrelevant to the Commission's work; those States would be particularly concerned in matters relating to the aquatic environment, since the pollution which was a by-product of modern technology and urbanization knew no political boundaries.

20. The Commission should be as precise as possible in defining the kind of bodies of water to which the convention should apply. It would be helpful to employ a term such as "international watercourses" or "international river systems", the latter being a concept that the Commission would have to use on numerous occasions.

21. The general rules to be included in the draft convention should be of a kind applicable to differing situations. He did not think the convention should go beyond stating general rules that could guide those who drafted bilateral or regional agreements, in other words, "user agreements". In view of the complexity of such agreements, he doubted whether it would be appropriate to establish a legal nexus between them and the Commission's convention, as the Special Rapporteur sought to do through draft articles 5 and 6.

22. In addition to the subjects listed by the Special Rapporteur in paragraph 1 of his report, the convention should include articles on such matters as responsibility for damage, international co-operation in the non-navigational uses of international waterways and, since the majority of international river systems were in the developing world, scientific and technical co-operation. Such co-operation might well concern pollution, which the Special Rapporteur had suggested should be addressed in connexion with particular uses of international watercourses. That might not be an altogether satisfactory approach, for there might well be general rules on the pollution control and preservation and protection of the aquatic environment that did not relate solely to the uses of international watercourses.

23. In conclusion, he wished to emphasize that the Commission should draft exclusively general rules. The Special Rapporteur had rightly noted in paragraph 63 of his report the immense diversity of the physical characteristics of international watercourses and of the human needs they served. It would therefore be impossible to legislate in such a way as to take account of all the specific features of every part of the world.

24. Mr. CALLE Y CALLE pointed out that water was a natural resource to which all States had a right, and that the international community had a legitimate interest in preventing its misuse or destruction. In chapter I of his report, therefore, the Special Rapporteur had rightly sought to create an awareness of the value of water.

25. The Commission's task was to codify the existing rules of customary law, in particular the rules laid down in bilateral conventions and, to a lesser extent, the rules laid down in multilateral conventions. However, not all watercourses forming part of a particular river basin were international, nor were they all subject to the same treatment. Rather than seek to lay down abstract general principles, therefore, the Commission should establish rules susceptible of application to specific international watercourses. It should not be forgotten that the sovereignty of States over watercourses flowing through their territories was *sui generis* since, unlike land, which could be easily divided, watercourses constituted a shared resource.

26. From the outset, there had been two main approaches to the subject: one restrictive and confined to international watercourses, the other, and broader, including the whole drainage basin. A small tributary could of course affect all the other watercourses of a basin, but to infer from that that a State was entitled to be consulted on the use of any other of the watercourses was a major step that should be considered with caution. That was an added reason for laying down rules directly applicable to a particular watercourse.

27. As far as the scope of the topic was concerned, the Commission should concentrate on establishing rules that would ensure a proper balance between the rights of user States. Such rules would necessarily be residual, since many States were already bound by bilateral conventions. In that connexion, it was logical to permit a user State not party to the articles to be a party to a user agreement, as provided for in draft article 5, but it was unnecessary to add the proviso that one or more user States parties to that user agreement must be parties to the articles. The rules formulated by the Commission should be without prejudice to the right of user States to agree on such other rules as they wished, provided those rules did not conflict with the articles and served the essential purpose of filling the many gaps in the law. That did not mean that a State could deliberately damage the watercourse of another State or prevent its use, for by so doing it would incur liability under other rules of international law, for instance, those pertaining to large-scale pollu-

tion of the environment. The principle *sic utere tuo ut alienum non laedas* should underlie the articles as a whole.

28. Mr. DÍAZ GONZÁLEZ said that the title of the study which the General Assembly had requested the Commission to undertake suggested that the study should be confined to international watercourses. The Special Rapporteur's report, however, dealt in addition with the far wider concept of the geographical basin, a concept that had formed the basis of a number of regional agreements, including some concluded in Latin America, which took account of a series of factors unrelated to the use of water as such. As far as the draft articles were concerned, therefore, it would be difficult to isolate the various aspects of the problem, as it did not seem possible to speak of the uses of water without considering its misuses as well. The many problems involved in the deterioration of the environment would undoubtedly have an influence on any rules formulated to govern the use of international watercourses. The international community was particularly concerned with water pollution, and irrigation and energy production called for consideration as well. All that would mean a long and patient study. In the circumstances, it would seem wisest for the Commission to begin by laying down general principles on the uses of international watercourses that could serve as a basis for further work on specific aspects of the topic. That phase could be begun later, in the light of results achieved by other international bodies. The Commission needed expert advice on the scientific and technical aspects of the topic, but members must not forget that the principles involved must be formulated by the Commission itself on the basis of the comments made by Governments.

29. A reference had been made to tributaries which formed part of a basin but were not international watercourses. The Commission might be interested to know that Venezuela, in agreement with Colombia, had invested a large sum in the preservation of the river basin in Colombia, since the waters flowing through Venezuela, although not themselves international, fed international watercourses.

30. Sir Francis VALLAT said that, during the earlier discussion of the item, he had been optimistic that the Commission would agree that it should study the use of the water of international watercourses, and he remained convinced of the correctness of that approach. Now, however, there appeared to be a distinct tendency to recommend that the Special Rapporteur should concentrate on specific uses. He hoped the members of the Commission would give the matter adequate thought before deciding on the directives to be given to the Special Rapporteur.

31. Mr. USHAKOV said that, if the Commission were to study the conservation of international bodies of water, it must also study problems connected with basins and more far-reaching questions, since conservation covered a wider field than mere utilization. Moreover, a basin did not consist solely of surface water and groundwater, but could include glaciers sit-

uated in one country which fed strictly national watercourses in another. That aspect of the problem should also receive the Commission's attention.

The meeting rose at 12.50 p.m.

1578th MEETING

Friday, 27 July 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Sir Francis VALLAT considered, after due reflection, that the Commission had neither the time nor the means to reach any conclusions at its current session, and he would therefore reserve his comments for a future occasion. He also considered that certain elements were lacking, which were needed to enable the Special Rapporteur to pursue his work and the Commission to arrive at conclusions on certain key issues at its next session. He continued to believe that the topic was crucial, and that the Commission would be judged in the future more by its work on the non-navigational uses of international watercourses than by its work on any other topic. That was an added reason for treating the subject with some caution until the Commission had decided on the main lines of approach.

2. Mr. VEROSTA recalled that he had previously (1556th meeting) referred to the need to identify the rights and duties of States under international law, as laid down in treaties on the navigational uses of international watercourses, on the construction of power plants on international watercourses and on specific issues such as pollution. Some of the rules embodied in those treaties had already been referred to during the discussion. One was that the upper riparian State had a duty to allow a normal volume of water, appropriate to the season, to flow out of its territory, while the lower riparian State had a corresponding right to receive a normal volume of water, appropriate to the

season, from the upper riparian State. Another rule was that the water in international watercourses should not be polluted. As Mr. Barboza (1577th meeting) had said, the general principle underlying all such rules was that the non-navigational uses of an international watercourse by the upper riparian State must not damage the rights and interests of the lower riparian State.

3. It was clear that a systematic analysis of all the relevant treaties was required. That would be no easy task, but he would remind members that the Special Rapporteur for the subject of consular relations had analysed no fewer than 1,700 treaties on consular relations, on the basis of which a detailed list of consular functions had been drawn up in article 5 of the Vienna Convention on Consular Relations.¹ Two kinds of bilateral and multilateral treaty ought to be analysed in the first instance: treaties on the navigational uses of international watercourses which also laid down certain rules on non-navigational uses; and treaties on the use of international watercourses for the generation of electric power. A number of treaties concluded in Latin America had already been mentioned, and he would also draw attention to the international agreements on power plants concluded between Austria and the Federal Republic of Germany, between Yugoslavia and Romania, and between Austria and Yugoslavia. Similar rules were to be found in the agreements concluded between certain States of North America. Treaties on the administration of lakes as international watercourses might also have a bearing on non-navigational uses such as fishing and tourism.

4. If material of that type could be made available, it would greatly assist the Commission in its task.

5. Mr. THIAM said he perceived two important questions at that stage of the discussion: that of the scope of the topic and that of the object in view.

6. The Commission must define what it meant by "watercourses": whether that expression covered only rivers and streams, or also basins and tributaries, lakes and canals. He thought it necessary to avoid both too restrictive and too broad an interpretation, and believed that, even if the definition were confined to rivers and streams, it would be difficult to avoid studying at least those drainage basins that played an essential part in economic integration, which in modern times was of primary concern to all countries interested in the use of international waterways in various parts of the world, as shown by the example of the Senegal river.

7. Perhaps the same applied to lakes; for although not watercourses, they were nevertheless waterways, as was shown by the example of Lake Chad, which was more than a mere body of water between the riparian States and provided them in particular with a means of co-operation, not to say economic integration. It would seem, therefore, that the Commission would be justified in including rivers, basins, lakes and other waterways in its study.

¹ United Nations, *Treaty Series*, vol. 596, p. 268.

8. As to the object of its work, the Commission should first endeavour to draw up a code for the use of international watercourses—conceived as a code of good conduct for all users, and not only for the riparian States—in which it would try to define the respective rights and obligations of the users of international watercourses even before defining the precise content of the latter concept.

9. Whatever method might be chosen, he thought that the task would be a complex one because of the extreme diversity of the aspects that would have to be considered.

10. Mr. TABIBI fully agreed that the subject was one of crucial importance, in which both upper and lower riparian States had a major interest. In view of the complexity of the task, it was the duty of all concerned to co-operate with the Special Rapporteur. He noted that there had been little response to the questionnaire circulated to Member States by the Secretary-General,² and would therefore suggest that the Secretariat again request Member States to submit their comments.

11. Mr. BARBOZA explained that he had not intended to recommend that the Commission should lay down general principles. His point had been that it was a rule of customary law that a sovereign State had the right to do as it saw fit with the waters that flowed through its territory, provided that no harm was done to its riparian neighbours. That rule was based on the general rule of international law that a State should so use its territory as not to cause damage to the territory of another State.

12. Mr. SUCHARITKUL said that the draft articles proposed by the Special Rapporteur would provide a sound basis for the Commission's future work and were in general acceptable to him. In particular, the definition of a "user State" given in draft article 2 seemed to be entirely logical. If that definition were extended to States that only contributed to the waters of an international watercourse, then, to take the Mekong basin as an example, the countries in which the northern parts of the Himalayas were situated, although not user States, would also be covered.

13. He agreed that all the uses of international watercourses should be considered, but would suggest that an order of priority be established.

14. Reference had been made to the fundamental principle of international law that every State enjoyed permanent sovereignty over its natural resources. The topic with which the Commission was concerned, however, was the uses of "international" watercourses, which meant that those uses were not confined to one State. He would therefore be inclined to go further and refer to the equally fundamental principle of good-neighbourliness, which was enshrined in the final communiqué of the Afro-Asian Conference

held in Bandung in 1955.³ In that connexion, Mr. Thiam had rightly stressed the importance of economic co-operation.

15. Lastly, he emphasized the importance of making the relevant scientific data available to assist the Special Rapporteur in his work. The material produced by the various United Nations regional expert committees on water resources, which met annually, could serve to lay the foundations for just and equitable principles of international law.

16. Mr. SCHWEBEL (Special Rapporteur), summing up the main points of the discussion, said that the difference of opinion regarding the scope of the term "international watercourse" persisted. There had been new and significant support for a definition based on the drainage basin, but there had also been renewed opposition to such a definition. In that connexion, the question had been raised whether international watercourses included lakes, glaciers and groundwater. As far as lakes were concerned, it had rightly been assumed that the General Assembly had referred to international watercourses, rather than to rivers, in order to ensure that at least lakes and canals fed by or feeding rivers would be covered by the Commission's work. Lake Léman and the river Rhône sufficed to show the sense of that. There might be no valid reason for excluding glaciers, which contributed both to overland flow and to groundwater. Characteristically, groundwater flowed, although exceptionally there could be confined aquifers; and it was a scientific fact that rivers were fed mainly by groundwater flow, not by surface flow.

17. The idea of a framework convention with a complementary role for user agreements had attracted further support, but the question had been raised of the extent to which the one—and which one—would govern the other. Other questions concerning the nexus between the framework convention and user agreements also remained to be decided.

18. Of the possible approaches to be adopted in preparing a further report, the formulation of general principles of the law of the non-navigational uses of international watercourses had received the widest support. In that connexion, the cardinal principle of using one's own so as not to harm others, and the concept of shared natural resources, had been stressed. The discussion had to be appraised, however, in conjunction with the Commission's earlier discussion (1554th to 1556th meetings), when a consideration of particular uses had received the widest support. It had also been agreed at earlier stages of the Commission's work that the Commission should deal with particular uses of water, as was clear from the questionnaire circulated to Member States and from the answers thereto.⁴ That was a matter calling for most careful reflection, and he had taken due note of Mr. Yankov's

² *Yearbook... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

³ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

⁴ See *Yearbook... 1976*, vol. II (Part One), pp. 147 *et seq.*, document A/CN.4/294 and Add.1, and *Yearbook... 1978*, vol. II (Part One), document A/CN.4/314.

point that all aspects of the subject would have to be considered at some stage, including uses, abuses and effects, competing priorities among uses, general principles, co-operative institutions and measures for the peaceful settlement of disputes.

19. The question had been raised whether the draft articles should deal not only with the uses of international watercourses but also with the uses of the water of international watercourses—a distinction which he had not thought to be profound. Reference had likewise been made to related problems such as flood control, erosion, sedimentation, salt-water intrusion and estuaries. In view of the approach adopted by the Commission so far, and of the response of States to the questionnaire, there was every expectation that the Commission would deal with such related problems, the importance of which must not be minimized. As far as any distinction between the uses of international watercourses and the uses of the water of international watercourses was concerned, the latter expression had been used in his report solely for purposes of clarification. It had been taken for granted, however, that the Commission was meant to deal, and was dealing, with the uses of the water of international watercourses. Of the uses referred to in question D of the questionnaire, some, such as swimming, fishing and timber floating, were clearly direct uses of the watercourse, but most were not. For example, water used for irrigation was water diverted from watercourses, and the use of water for the production of nuclear energy, or for building or manufacturing, was a use of the water of a watercourse, not a direct use of the watercourse itself.

20. In view of the terms of the questionnaire and the answers to it, he believed that the contention that the Commission should confine itself to uses of the watercourse as such could not be upheld. Moreover, the possibility of excluding the uses of the water of international watercourses from the scope of the Commission's work had not been entertained earlier, and he saw no reason for now allowing such an exclusion.

21. Another point stressed during the discussion had been the problem of pollution, and it had been noted that pollution could not be dealt with effectively if measures were confined to riparian States. The need to analyse the provisions of the relevant treaties had rightly been emphasized. It had also been observed that the draft articles should provide for the responsibility of States which caused injury, and for technical assistance to developing countries.

22. The need to take account of the physical characteristics of water, and to obtain the necessary technical and scientific advice, had been generally recognized, and the Commission appeared to be largely in favour of dealing with the navigational uses of international watercourses when they affected, or were affected by, other uses. The majority also apparently took the view that the subject was ripe for codification.

23. He trusted that at its next session the Commission would be able to crystallize the measure of agreement achieved, so that it would be possible to deal constructively with the various elements of the law of

the non-navigational uses of international watercourses. He agreed that it would be desirable for the questionnaire to be circulated again to those member States that had not yet responded to it.

24. Lastly, he trusted that the Commission's report to the General Assembly would contain a detailed account of the discussion, especially as no articles had been adopted for the Assembly's consideration.

25. The CHAIRMAN thanked the Special Rapporteur and congratulated him on his work on a complex subject which touched simultaneously on legal, political, technical and economic questions.

26. He explained that the Commission's report to the General Assembly would give an account of the discussions and would mention the need to draw the attention of certain States to the questionnaire adopted by the Commission at its twenty-sixth session.⁵

27. He noted that the Commission had thus completed its consideration of item 5 of its agenda.

The meeting rose at 10.55 a.m.

⁵ See foot-note 2 above.

1579th MEETING

Monday, 30 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (concluded)*
(A/CN.4/318 and Add.1–4, A/CN.4/L.297/Add.1)
[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)****

ARTICLES 31 AND 32

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 31 and 32 as adopted by the Drafting Committee (A/CN.4/L.297, Add.1), which read:

* Resumed from the 1573rd meeting.

** Resumed from the 1567th meeting.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that articles 31 and 32 corresponded to the articles proposed by Mr. Ago in his eighth report (A/CN.4/318 and Add.1-4, para. 153).¹ Those articles had dealt respectively with "*force majeure*" and "fortuitous event", but the Drafting Committee had decided, in the light of the Commission's discussions, to rearrange their contents and to introduce some drafting changes, without in any way altering their meaning as originally intended. Article 31 now dealt with both *force majeure* and fortuitous event, while article 32 dealt with the case of distress.

3. Paragraph 1 of the Committee's article 31 covered the provisions contained in paragraph 1 of articles 31 and 32 presented by Mr. Ago. The Committee had thought it appropriate to deal in a single provision with both *force majeure* and fortuitous event, in view of the characteristics common to those excluding circumstances, particularly the element of impossibility. That element, which in the original text had been qualified, with regard to *force majeure*, by the word "absolutely", was now qualified by the word "materially", which was intended to convey the idea of an objective rather than a subjective criterion for determining the situation of impossibility. In order further to stress the element of impossibility, the Committee had considered it necessary to add that the event that gave rise to the potentially wrongful act of the State must have been "beyond its control". It had emphasized the causal relationship between the *force majeure* or unforeseen event and the State's conduct by using the words "was due". The Committee had also decided to refer, in the last part of the paragraph, to "the State", rather than to "the author of the conduct attributable to the State", since, according to the provisions of chapter II of the draft, and in particular

article 5,² the conduct of any State organ having that status under the internal law of the State was to be considered as an act of the State under international law. The Committee had also considered that it would be more appropriate to say that a fortuitous event would make it impossible for a State "to know", rather than "to realize", that its conduct was not in conformity with an international obligation. Finally, while the Committee had decided to retain, provisionally, the word "external", which Mr. Ago had employed in his article 32, it wished to draw the Commission's attention to the general opinion of its members that the term might be superfluous, particularly in view of the text proposed for paragraph 2 of article 31.

4. Paragraph 2 reproduced, in simplified form and with the drafting changes necessitated by the use of somewhat different terminology in paragraph 1, the provision originally restricted to *force majeure* in paragraph 3 of Mr. Ago's article 31. The Committee, bearing in mind the elements common to both *force majeure* and fortuitous event that were present in paragraph 1 of article 31, had considered it appropriate to extend to fortuitous event the provision that made that paragraph inapplicable when the State in question had contributed to the situation of material impossibility.

5. Paragraph 1 of article 32 covered the case of distress, which Mr. Ago had treated in paragraph 2 of his article 31. The Committee had tried to make the rule more precise and clear by referring to a situation of "extreme" distress, rather than merely to a situation of distress, and to "persons entrusted to his care", rather than to "those accompanying him". Paragraph 2 of article 32 combined elements of Mr. Ago's article 31, paragraphs 2 and 3, and fulfilled a function similar to that of paragraph 2 of the new article 31.

6. The Drafting Committee had been seized of a proposal to add to the draft a new article, reading:

"The preclusion of the wrongfulness of an act committed in the conditions provided for in articles 31 and 32 is without prejudice to the possible substitute obligations of the State and the possible legal consequences of the act under other rules of international law."

It had considered that such an article might be applicable not only to the proposed articles 31 and 32, but also to other articles concerning circumstances precluding wrongfulness, such as the article to be drafted on "state of emergency". It had therefore decided to refrain from examining the proposed text at the current session, on the understanding that the Commission would consider the inclusion in the draft of such a general article at a later stage of its work on State responsibility.

7. The CHAIRMAN invited the Commission to examine the articles proposed by the Drafting Committee one by one.

¹ Texts reproduced in the summary record of the 1569th meeting, para. 1.

² See 1532nd meeting, foot-note 2.

ARTICLE 31³ (*Force majeure* and fortuitous event)⁴

8. Mr. TSURUOKA, referring to article 31, paragraph 1, observed that the term “conduct” had so far generally been applied to an organ of the State rather than to the State itself. Perhaps it might be better to replace it by the word “act”. The Commission might even go a step farther and insert, after the words “in conformity with that obligation or”, the words “for the author of the conduct constituting that act”.

9. Mr. USHAKOV expressed concern about the use, in the last phrase of paragraph 1 of the French text, of the expressions “rendre matériellement impossible” and “se rendre compte”.

10. Mr. RIPHAGEN (Chairman of the Drafting Committee), replying to Mr. Tsuruoka, explained that it was because of the comments made by certain members of the Commission and by the majority of the members of the Drafting Committee that the expression “the author of the conduct” had not been used. It had been possible to avoid that expression mainly because of the existence of paragraph 2, which referred to the case in which organs other than the author of the conduct had contributed to the situation of material impossibility. As to replacing the word “conduct” by the word “act”, that might be considered when the Commission proceeded to standardize the expressions used, during its second reading of the draft articles.

11. With regard to the repetition of the verb “rendre”, pointed out by Mr. Ushakov, it was true that it was awkward, but it would be difficult to avoid using either of the expressions in which that verb appeared.

12. Mr. TSURUOKA said he would not press his proposals, especially as last minute changes were often dangerous, but he still believed that the wording of article 31 ought to be improved later.

13. Mr. AGO said he was convinced that it would be dangerous to change the wording of the article. The insertion in paragraph 1 of the words proposed by Mr. Tsuruoka might indeed prove useful, but neither the Drafting Committee nor the Commission would be prepared to accept it at the moment. Moreover, if the word “conduct” were to be replaced by the word “act” in the last phrase of the English version of paragraph 1, that word would be used twice in the same phrase, and in two different senses. Lastly, the expression “se rendre compte”, to which Mr. Ushakov had drawn attention, seemed to him perfectly correct in French. In short, it would be better not to change the wording of article 31.

14. Sir Francis VALLAT, supported by Mr. VEROSTA, stressed that the terminology used in article 31 was quite in conformity with the content of article 3,

according to which there was an internationally wrongful act of the State when certain “conduct consisting of an action or omission” was attributable to the State under international law.

15. The CHAIRMAN, noting that no member of the Commission had formally proposed an amendment, proposed that if there were no objections the Commission should adopt article 31 proposed by the Drafting Committee.

It was so decided.

ARTICLE 32⁵ (Distress)⁶

16. Mr. BARBOZA proposed that the Spanish title of article 32 should be amended to read “Peligro extremo”, which was the expression normally used to render the legal term “distress”.

17. During the Drafting Committee’s discussion of the article, he had argued that the situation it covered was not so much one of *force majeure* or fortuitous event, as a particular case of “state of emergency” affecting an organ of a State. A person faced with a situation of the kind contemplated in the article would find himself with no choice but to violate an obligation of the State he represented, if he was to save his own life or that of the persons entrusted to his care. In other words, he would be faced with a situation that corresponded to the traditional definition of a “state of emergency”; he would have to choose to sacrifice something that was protected by law in order to save something else that was protected by law, but that was considered to be in a higher category. However, that situation could be treated in an article of the kind proposed, partly because there was an impressive body of doctrine which held that it fell within the ambit of *force majeure*, and partly because, however the situation was described, its practical consequences would be the same.

18. Mr. AGO observed that the situation covered by article 32 was not one of *force majeure*. The fact that it followed an article dealing with *force majeure* and fortuitous event, and preceded an article dealing with state of emergency, clearly showed that article 32 dealt with a different case.

19. Mr. USHAKOV found article 32 acceptable subject to three reservations. First, the Commission should perhaps reconsider the article when it had a draft article on state of emergency before it, since the situation of distress was really only a case of state of emergency. It might then perhaps be possible to drop the expression “the author of the conduct which constitutes the act”. Lastly, it was probably going too far to provide that the author of that conduct must have “no other means” of saving his life or that of persons entrusted to his care. It would be enough if no other means occurred to him.

³ For consideration of the texts initially presented by Mr. Ago, see 1569th meeting, paras. 1–23, 1570th meeting, paras. 64 *et seq.*, and 1571st to 1573rd meetings.

⁴ For text, see para. 1 above.

⁵ For consideration of the text initially submitted by Mr. Ago, see 1569th meeting, paras. 1–23, 1570th meeting, paras. 64 *et seq.*, and 1571st to 1573rd meetings.

⁶ For text, see para. 1 above.

20. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 32 proposed by the Drafting Committee, the Spanish title having been amended as proposed by Mr. Barboza.

It was so decided.

21. The CHAIRMAN pointed out that the Drafting Committee had considered it inadvisable, for the time being, to consider the new article it had been proposed to add. That proposal concerned not only articles 31 and 32 but all the articles in chapter V, so that it would have to be studied later.

The meeting rose at 4 p.m.

1580th MEETING

Tuesday, 31 July 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Review of the multilateral treaty-making process (General Assembly resolution 32/48 para. 2) (concluded)* (A/CN.4/325)

[Item 6 of the agenda]

REPORT OF THE WORKING GROUP

1. The CHAIRMAN said that, at a closed meeting, the Commission had approved the report of the Working Group on review of the multilateral treaty-making process (A/CN.4/325), established in response to the request of the General Assembly. The report would be sent that day to the Secretary-General for publication as a separate document, the closing date for submission of comments by the Commission having been fixed at 31 July. The report would also be published in the Commission's *Yearbook* as one of the documents of the thirty-first session.

2. If there were no objections, he would take it that the Commission approved those steps.

It was so decided.

3. Sir Francis VALLAT said that all the members of the Working Group on review of the multilateral treaty-making process would no doubt wish to join him in expressing their appreciation to Mr. Quentin-Baxter,

Chairman of the Working Group, as well as to the Secretariat, and in particular Mr. Romanov, Secretary to the Commission, for their excellent work.

Draft report of the Commission on the work of its thirty-first session

4. The CHAIRMAN invited the Commission to consider its draft report on its thirty-first session, beginning with chapter I.

CHAPTER I. *Organization of the session* (A/CN.4/L.301 and Corr.1)

5. Mr. DADZIE (Rapporteur), introducing chapter I of the draft report, said that it followed broadly the form of previous reports. Paragraphs 1 and 2 indicated the content of the report, and sections A, B, C, D and E dealt, respectively, with the composition of the Commission, its officers, the Drafting Committee, the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the Working Group on review of the multilateral treaty-making process. Section F, on the juridical status of the members of the Commission at the place of its permanent seat, was a new section which had been included to record the developments that had taken place in that matter since the Commission's report on its thirtieth session. The two remaining sections, G and H, followed the normal form of the Commission's reports on the work of its sessions.

Paragraphs 1-4

Paragraphs 1-4 were adopted.

Paragraph 5

6. Sir Francis VALLAT said that the statement in paragraph 5 did not give a correct picture of the actual position regarding attendance by members. He felt bound to raise the question since, unless there was an improvement, the work of the Commission would suffer seriously.

7. One possible solution would be to add a foot-note referring to the paragraphs dealing with the report of the Planning Group. Such a foot-note might read: "On the question of attendance, see paragraphs ... below."

8. Mr. TSURUOKA supported that proposal.

9. Mr. YANKOV agreed that paragraph 5 was not altogether satisfactory. He proposed that, in addition to the foot-note suggested by Sir Francis Vallat, a sentence should be added to the paragraph reading: "Some members were not able to attend all the meetings of the Commission."

It was so decided.

Paragraph 5, as amended, was adopted.

Paragraphs 6-12

Paragraphs 6-12 were adopted.

* Resumed from the 1546th meeting.

Paragraph 13

10. Sir Francis VALLAT proposed that the last phrase of paragraph 13, reading “which would facilitate the staying of its members in Geneva during its sessions”, should be amended to read “which would facilitate the performance of their functions by its members during the sessions at Geneva”. That would more accurately reflect the purpose for which a certain status was conferred on members of the Commission.

It was so decided.

Paragraph 13, as amended, was adopted.

Paragraphs 14 and 15

Paragraphs 14 and 15 were adopted.

Paragraph 16

11. Sir Francis VALLAT was a little doubtful about the first sentence of paragraph 16, since it could create a wrong impression regarding the nature of the Commission's treatment of items 8 and 9. He therefore proposed the addition, at the end of that sentence, of the phrase “which were considered only from the point of view of organization”.

12. Mr. RIPHAGEN supported that proposal, provided that it was supplemented by a brief description of the Commission's work on those two agenda items in the chapter of the report entitled “Other decisions and conclusions of the Commission”.

It was so decided.

Paragraph 16, as amended, was adopted.

Chapter I, as amended, was adopted.

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.304)

A. Introduction

Paragraphs 1–5

Paragraphs 1–5 were adopted.

Paragraph 6

13. Sir Francis VALLAT, referring to the last sentence of paragraph 6, proposed the deletion of the word “felicitous” and the addition of the words “in the context” after the word “clarity”.

It was so decided.

Paragraph 6, as amended, was adopted.

Paragraph 7

14. Sir Francis VALLAT said that the reference, in the last sentence of paragraph 7, to “compromise solutions” was not appropriate in the context of codification articles. He therefore proposed the deletion of the word “compromise”.

It was so decided.

Paragraph 7, as amended, was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Section A, as amended, was adopted.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

TEXT OF ARTICLES 39–60, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTY-FIRST SESSION

ARTICLE 39 (General rule regarding the amendment of treaties)

15. Sir Francis VALLAT, referring to paragraph 1 of article 39, thought that the omission of the phrase “except in so far as the treaty may otherwise provide”, which appeared in article 39 of the Vienna Convention on the Law of Treaties,¹ could give rise to questions of interpretation. It was not his intention, however, to propose any amendment.

ARTICLE 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)

16. Mr. VEROSTA proposed that subparagraph (b) of article 54 should be amended and replaced by the text of the corresponding provision of the Vienna Convention, namely, “at any time by consent of all the parties after consultation with the other contracting States”, supplemented by the words “or with the other contracting organizations, or with the other contracting States and the other contracting organizations, as the case may be”.

17. Mr. USHAKOV said that such amendments could more easily be made during the second reading of the draft articles.

Section B was adopted.

Chapter IV, as amended, was adopted.

CHAPTER VII. Jurisdictional immunities of States and their property (A/CN.4/L.307)

Paragraphs 1–12

Paragraphs 1–12 were adopted.

Paragraph 13

18. Sir Francis VALLAT, referring to the first sentence of paragraph 13, said it was his understanding that there was to be no further discussion of the report in question. He therefore proposed the deletion of the word “preliminary”.

It was so decided.

Paragraph 13, as amended, was adopted.

Paragraph 14

19. Mr. YANKOV, referring to the first sentence of paragraph 14, said that the phrase “of which little had been known” was too categorical in the context, par-

¹ *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. 287.

ticularly as it had been suggested that the practice of newly emergent nations should be the subject of closer analysis. He suggested the addition of the word "relatively" before the word "little", which would reflect the position more accurately.

20. After a brief exchange of views in which the CHAIRMAN, Mr. BARBOZA and Mr. DÍAZ GONZÁLEZ took part, Mr. RIPHAGEN proposed the deletion of the phrase "of which little had been known".

It was so decided.

Paragraph 14, as amended, was adopted.

21. Sir Francis VALLAT said that the expression "several types of power", in the second sentence of paragraph 15, seemed to be divorced from the concept of governmental authority and to have connotations of physical power which were not intended. Moreover, the word "several" was inappropriate, since there were not many different forms of governmental authority. He therefore proposed that the expression in question be amended to read "various types of governmental power".

It was so decided.

Paragraph 15, as amended, was adopted.

Paragraph 16

22. Mr. RIPHAGEN, referring to the last sentence of paragraph 16, proposed that the word "other" be deleted, since whether or not the "act of State" doctrine was a matter of internal law was open to question.

23. He further proposed that, in the French text, the English expression "act of State" should be used rather than "acte de gouvernement", which was a doctrine peculiar to French administrative law.

It was so decided.

24. Mr. BARBOZA proposed that, to bring the Spanish text of the same sentence into line with the English and French versions, the word "meramente", or "puramente", should be added before the words "de derecho interno".

It was so decided.

Paragraph 16, as amended, was adopted.

Paragraph 17

25. Mr. YANKOV proposed the addition, in the second sentence of paragraph 17, of the words "of the functions" before the words "of the State".

It was so decided.

26. Mr. USHAKOV expressed astonishment at the reference to the widening functions of the State. He proposed the deletion of the words "the theories as to", in the first sentence of paragraph 17.

It was so decided.

27. Sir Francis VALLAT suggested that the words "the concept of", in the same sentence, should also be deleted.

It was so decided.

28. Mr. THIAM did not think it accurate to state, in the last sentence but one, that "no generally accepted criterion had been found", since what had been said was merely that no generally accepted criterion had yet emerged.

29. The CHAIRMAN said that the slight differences between the English and French texts should be eliminated by aligning the latter text with the former.

Paragraph 17, as amended, was adopted.

Paragraph 18

30. Mr. QUENTIN-BAXTER proposed that, to improve the drafting of the second sentence of paragraph 18, the phrase "States were best familiar with" should be replaced by "States knew best".

It was so decided.

31. Mr. USHAKOV, referring to the first sentence of paragraph 18, said that the Commission did not expect "guidance" from Governments of Member States; he proposed that that word be deleted.

32. Sir Francis VALLAT said that that involved a minor point of substance. It was not yet known whether the purpose of the questionnaire would be simply to seek information or also to obtain the views of Governments on particular points. His feeling was that Governments should be asked in the questionnaire to indicate their preferences in certain matters.

33. The CHAIRMAN suggested that the word "guidance" be replaced by the word "information".

It was so decided.

Paragraph 18, as amended, was adopted.

Chapter VII, as amended, was adopted.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (General Assembly resolution 33/139, part I, para. 5; General Assembly resolution 33/140, para. 5) (concluded)* (A/CN.4/L.310)

[Item 7 of the agenda]

REPORT OF THE WORKING GROUP

34. Mr. YANKOV (Chairman of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier) introduced the Working Group's report on its discussions during the Commission's current session (A/CN.4/L.310). The report comprised an updated analytical summary of the general views of Governments on the elaboration of a protocol on the subject and the comments and proposals of Governments and of the Commission on possible elements of a protocol. The sections in question had been prepared largely on the basis of a working paper drafted by the Secretariat, to whose officers the Working Group wished to express

* Resumed from the 1546th meeting.

appreciation for their most valuable assistance. The report also mentioned a number of points which, in the view of the Working Group, should be included in the tentative list, established by the Commission,² of issues requiring specific study.

35. From its examination of the comments of Governments and of the Commission, as well as of the (expanded) tentative list of issues requiring particular attention, the Working Group had determined that there were many questions relating to the status of the diplomatic courier and the unaccompanied diplomatic bag concerning which no provisions, or only general provisions, were contained in existing international conventions. It had therefore concluded, as stated in section V of its report, that work on the topic should be continued and that the Secretariat should be asked to prepare a further report on the lines of the aforementioned working paper, in which it would analyse such additional written comments as might be received from Governments and such views as might be expressed during the thirty-fourth session of the General Assembly. That report would serve as an aid in the preparation of draft articles by the Working Group or by a special rapporteur, as the Commission might decide.

36. The CHAIRMAN noted that the Working Group recommended that the Commission should insert in its report to the General Assembly the five sections making up the Group's report. Since sections I to III dealt with facts (history of the study of the question by the Commission, views expressed by Governments and comments made by the Commission in 1978), the Commission might decide to approve them without discussion.

It was so decided.

Sections I-III were adopted.

37. The CHAIRMAN invited the members of the Commission to consider section IV (Additional items to be included in the tentative list of issues) and section V (Conclusions and recommendations).

38. Sir Francis VALLAT hoped—and he was sure that other members of the Commission who had not been members of the Working Group also hoped—that the list of additional issues contained in section IV of the Working Group's report was not to be considered exhaustive, as its present title might be taken to suggest.

39. He hoped, too, that whoever continued the work on the topic would not take the descriptions of the "additional items" listed in section IV too literally, lest he overreach what must be the objective of codification in the field in question by providing for privileges and immunities more extensive than those necessary for the exercise of the functions of a diplomatic courier or the smooth passage of a diplomatic bag.

40. He believed that the topic of the status of the diplomatic courier and of the unaccompanied diplomatic bag was one with which the General Assembly wished the Commission to deal expeditiously, and that the time had now come to take practical steps to do so. The Commission should therefore appoint a special rapporteur for the topic forthwith. He hoped that, by taking advantage of the valuable work done by the Working Group, that special rapporteur would be able to submit draft articles and commentaries to the Commission at its next session.

41. Mr. YANKOV (Chairman of the Working Group) said that the operative word in the title of section IV of the Working Group's report was "tentative". He agreed with the previous speaker that the time had now come for the Commission to take practical steps to advance its work on the topic, and that care should be taken not to extend the rules applicable to the point where the diplomatic courier became what might be termed a "super-ambassador" or "super-diplomatic-agent".

42. Mr. USHAKOV proposed that, to take account of a comment by Sir Francis Vallat, section IV should be entitled "Additional items to be studied".

43. He was in favour of the appointment of a special rapporteur.

44. Mr. THIAM, Mr. TSURUOKA and Mr. VEROSTA supported Mr. Ushakov's views.

45. Mr. RIPHAGEN said that, to avoid restricting the special rapporteur, the words "on the basis of the list of issues identified by the Commission", appearing at the end of section V, should be deleted.

46. The CHAIRMAN, noting that the members of the Commission were in favour of appointing a special rapporteur rather than reconstituting the Working Group, said that if there were no objections he would take it that the Commission decided to adopt sections IV and V of the report, the title of section IV being amended as proposed by Mr. Ushakov, the subparagraph of section V, paragraph 16, concerning the reconstitution of the Working Group being deleted and the subparagraph concerning the appointment of a special rapporteur being amended as proposed by Mr. Riphagen.

It was so decided.

The report of the Working Group (A/CN.4/L.310), as amended, was adopted.

Organization of future work

[Item 12 of the agenda]

47. The CHAIRMAN announced that, after consultations, the Enlarged Bureau had recommended that the Commission should appoint Mr. Riphagen as Special Rapporteur for the topic of State responsibility in place of Mr. Ago, who had recently been elected member of the International Court of Justice.

² Yearbook... 1978, vol. II (Part Two), p. 139, document A/33/10, para. 143.

48. If there were no objections, he would take it that the Commission decided to accept that recommendation.

It was so decided.

49. The CHAIRMAN announced that, after consultations, the Enlarged Bureau had recommended that the Commission should appoint Mr. Díaz González as Special Rapporteur for the second part of the topic "Relations between States and international organizations" in place of Mr. El-Erian, who had recently been elected member of the International Court of Justice, on the understanding that the title of the topic would subsequently be formulated in more explicit terms.

50. If there were no objections, he would take it that the Commission decided to accept that recommendation.

It was so decided.

51. The CHAIRMAN said that, after consultations, the Enlarged Bureau had recommended that the Commission should appoint Mr. Yankov, Chairman of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as Special Rapporteur for that topic.

52. If there were no objections, he would take it that the Commission decided to accept that recommendation.

It was so decided.

53. The CHAIRMAN said that if there were no objections he would take it that the Commission wished to hold its next session from 5 May to 27 July 1980, as recommended by the Enlarged Bureau.

It was so decided.

54. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to authorize him to present its report on its thirty-first session to the General Assembly, and to represent it at the regular sessions of the bodies with which the Commission maintained continuous relations, on the understanding that, if he were unable to attend a session, he might appoint another member of the Commission to replace him.

It was so decided.

Draft report of the Commission on the work of its thirty-first session (*continued*)

CHAPTER V. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.305)

A. Introduction

Paragraphs 1-6

Paragraphs 1-6 were adopted.

Paragraph 7

55. Sir Francis VALLAT drew attention to the need for an editorial change in the first sentence, to indicate the passage quoted from the resolution mentioned.

Paragraph 7, as amended, was adopted.

Paragraphs 8-25

Paragraphs 8-25 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraphs 26 and 27

Paragraphs 26 and 27 were adopted.

1. NATURE OF THE TOPIC

Paragraphs 28-33

Paragraphs 28-33 were adopted.

2. SCOPE OF THE TOPIC

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

56. Mr. TABIBI proposed that the word "new" should be deleted from the first sentence, since the position mentioned had been shared by the previous Special Rapporteur for the topic.

It was so decided.

Paragraph 35, as amended, was adopted.

Paragraphs 36-42

Paragraphs 36-42 were adopted.

3. QUESTION OF FORMULATING RULES ON THE TOPIC

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

Paragraph 45

57. Sir Francis VALLAT proposed that the end of the fourth sentence should be amended to read "since they would be founded on customary law".

It was so decided.

58. Sir Francis VALLAT observed that the phrase "both under traditional and contemporary law", in the seventh sentence, suggested a proposition to which he could not subscribe, namely, that two bodies of law were involved and that one had entirely superseded the other.

59. Mr. RIPHAGEN proposed the deletion of the phrase.

It was so decided.

Paragraph 45, as amended, was adopted.

Paragraphs 46-48

Paragraphs 46-48 were adopted.

4. METHODOLOGY TO BE FOLLOWED IN FORMULATING RULES ON THE TOPIC

Paragraphs 49-55

Paragraphs 49-55 were adopted.

5. COLLECTION AND EXCHANGE OF DATA WITH RESPECT TO INTERNATIONAL WATERCOURSES

Paragraphs 56-58

Paragraphs 56-58 were adopted.

6. FUTURE WORK ON THE TOPIC

Paragraph 59

60. Mr. YANKOV proposed the insertion, in the last sentence, of the word “particularly” before the words “to developing countries”.

It was so decided.

Paragraph 59, as amended, was adopted.

Paragraphs 60–63

Paragraphs 60–63 were adopted.

Section B, as amended, was adopted.

Chapter V as a whole, as amended, was adopted.

The meeting rose at 1.10 p.m.

1581st MEETING

Wednesday, 1 August 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Tabibi, Mr. Thiam, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Draft report of the Commission on the work of its thirty-first session (*continued*)

CHAPTER II. *Succession of States in respect of matters other than treaties* (A/CN.4/L.302 and Add.1–4)

B. Draft articles on succession of States in respect of matters other than treaties (A/CN.4/L.302/Add.1–3)

COMMENTARY TO THE INTRODUCTION TO PART I (A/CN.4/L.302/Add.1)

The commentary to the introduction to part I was approved.

ARTICLES 1–3 (A/CN.4/L.302/Add.1)

Commentary to article 1 (Scope of the present articles)

The commentary to article 1 was approved.

Commentary to article 2 (Use of terms)

The commentary to article 2 was approved.

Commentary to article 3 (Cases of succession of States covered by the present articles)

The commentary to article 3 was approved.

PART II (STATE PROPERTY)

ARTICLES 4–14 (A/CN.4/L.302/Add.2)

Commentary to article 4 (Scope of the articles in the present part)

The commentary to article 4 was approved.

Commentary to article 5 (State property)

The commentary to article 5 was approved.

Commentary to article 6 (Rights of the successor State to State property passing to it)

The commentary to article 6 was approved.

Commentary to article 7 (Date of the passing of State property)

The commentary to article 7 was approved.

Commentary to article 8 (Passing of State property without compensation)

The commentary to article 8 was approved.

Commentary to article 9 (Absence of effect of a succession of States on third party State property)

The commentary to article 9 was approved.

Commentary to the introduction to section 2 (Provisions relating to each type of succession of States)

The commentary to the introduction to section 2 was approved.

Commentary to article 10 (Transfer of part of the territory of a State)

The commentary to article 10 was approved.

Commentary to article 11 (Newly independent State)

The commentary to article 11 was approved.

Commentary to article 12 (Uniting of States)

The commentary to article 12 was approved.

Commentary to article 13 (Separation of part or parts of the territory of a State) and article 14 (Dissolution of a State)

Paragraph (6)

1. Mr. VEROSTA questioned the truth of the historical facts described in the first sentence of paragraph (6), and the advisability of referring to them as an example of the dissolution of a State.

2. Sir Francis VALLAT pointed out that when the Commission gave examples it was not bound by the way in which they were classified.

3. The CHAIRMAN suggested that a small group composed of Mr. Verosta, Sir Francis Vallat, the Chairman of the Drafting Committee and a representative of the Secretariat should convene after the meeting and try to improve the wording of the first sentence of paragraph (6).

It was so decided.

C. Draft articles on succession of States in respect of matters other than treaties: addendum (A/CN.4/L.302/Add.4)

INTRODUCTION AND GENERAL COMMENTARY

The introduction and general commentary were adopted.

Commentary to article A (State archives)

The commentary to article A was approved.

Commentary to article C (Newly independent State)

The commentary to article C was approved.

4. Mr. USHAKOV, noting that there was no article B, proposed that article C should be identified by the letter "B".

It was so decided.

Section C, as amended, was adopted.

CHAPTER III. *State responsibility* (A/CN.4/L.303 and Add.1-6)

A. *Introduction* (A/CN.4/L.303)

1. *HISTORICAL REVIEW OF THE WORK*

Subsection 1 was adopted.

2. *SCOPE OF THE DRAFT*

Subsection 2 was adopted.

3. *GENERAL STRUCTURE OF THE DRAFT*

Subsection 3 was adopted.

4. *PROGRESS OF THE WORK*

Paragraphs 13-15

Paragraphs 13-15 were adopted.

Paragraphs 16 and 17

5. Mr. RIPHAGEN asked whether his interpretation of paragraphs 16 and 17 as limiting the responsibility of the new Special Rapporteur for the topic to part II of the draft was correct.

6. The CHAIRMAN said he believed that the Commission intended the new Special Rapporteur to take responsibility for the whole of the draft.

7. He proposed that, to remove any doubt as to that intention, each sentence of the existing paragraph 17 should constitute a separate paragraph.

It was so decided.

Paragraph 16, and paragraph 17 as amended, were adopted.

Paragraph 18

Paragraph 18 was adopted.

Subsection 4, as amended, was adopted.

Section A, as amended, was adopted.

B. *Draft articles on State responsibility* (A/CN.4/L.303 and Add.1-6)

1. *TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION* (A/CN.4/L.303)

Subsection 1 was adopted.

CHAPTER VI. *Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (A/CN.4/L.306 and A/CN.4/L.310)

8. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted the proposal contained in document A/CN.4/L.306 to the effect that chapter VI of its report should comprise the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accom-

panied by diplomatic courier (A/CN.4/L.310), with the amendments to that report which the Commission had adopted at its 1580th meeting.

It was so decided.

Chapter VI was adopted.

CHAPTER IX. *Other decisions and conclusions of the Commission* (A/CN.4/L.309 and Add.1)

A. *Relations between States and international organizations (second part of the topic)* (A/CN.4/L.309)

9. Sir Francis VALLAT said it was regrettable that the Commission had not so far mentioned at any single point in its report the names of all the members it had appointed as special rapporteurs at the current session. Such a combined reference would be of assistance to readers of the report and would serve to show, by drawing attention to the number of special rapporteurs who had been appointed during the session, the importance that the Commission attached to the institution of special rapporteur.

10. Mr. VEROSTA suggested that a sentence be added to section A mentioning the appointment of two other special rapporteurs and the numbers of the paragraphs of the report in which details of those appointments were given.

It was so decided.

Section A, as amended, was adopted.

B. *Programme and methods of work of the Commission* (A/CN.4/L.309)

Paragraphs 2-13

Paragraphs 2-13 were adopted.

Paragraph 14

Paragraph 14 was adopted.

Section B was adopted.

Sections C-G (A/CN.4/L.309/Add.1)

11. Mr. ROMANOV (Secretary to the Commission) explained that the sections of chapter IX contained in document A/CN.4/L.309/Add.1 should be designated C to G, rather than B to F.

C. *Relations with the International Court of Justice*

Section C was adopted.

D. *Co-operation with other bodies*

1. *INTER-AMERICAN JURIDICAL COMMITTEE*

Paragraph 4

12. Mr. CALLE Y CALLE suggested that, as in the case of the observers for other bodies, the first reference to the Observer for the Inter-American Juridical Committee should include his full name.

It was so decided.

Paragraph 4, as amended, was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Subsection 1, as amended, was adopted.

2. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Subsection 2 was adopted.

3. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

Subsection 3 was adopted.

Section D, as amended, was adopted.

E. Date and place of the thirty-second session

Section E was adopted.

F. Representation at the thirty-fourth session of the General Assembly

Section F was adopted.

G. International Law Seminar

Paragraphs 17-21

Paragraphs 17-21 were adopted.

Paragraph 22

13. Mr. QUENTIN-BAXTER suggested that the words "free of charge" should be deleted from the first sentence, as being superfluous.

It was so decided.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Additional paragraph

14. The CHAIRMAN suggested that section G should be completed by the addition of a last paragraph expressing the Commission's gratitude to Mr. Raton, Director of the Seminar, and to his assistant, Mrs. Petit, for their work in organizing the Seminar.

It was so decided.

Section G, as amended, was adopted.

Chapter IX, as amended, was adopted.

The meeting rose at 11.35 a.m.

1582nd MEETING

Thursday, 2 August 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Pinto, Mr. Riphagen, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Draft report of the Commission on the work of its thirty-first session (*continued*)

CHAPTER II. Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/L.302 and Add.1-4)

A. Introduction (A/CN.4/L.302)

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

Paragraphs 1-23

Paragraphs 1-23 were adopted.

Paragraph 24

1. The CHAIRMAN proposed the addition, at the end of paragraph 24, of the following sentence: "At its 1581st meeting, the Commission decided to change the designation of article C to article B."

It was so decided.

Paragraph 24, as amended, was adopted.

Paragraphs 25-29

Paragraphs 25-29 were adopted.

Subsection 1, as amended, was adopted.

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

Subsection 2 was adopted.

Section A, as amended, was adopted.

B. Draft articles on succession of States in respect of matters other than treaties (*continued*) (A/CN.4/L.302/Add1-3)

PART II (STATE PROPERTY) (*concluded*)

ARTICLES 4-14 (*concluded*) (A/CN.4/L.302/Add.2)

Commentary to article 13 (Separation of part or parts of the territory of a State) *and article 14* (Dissolution of a State) (*concluded*)

Paragraph (6) (*concluded*)

2. The CHAIRMAN reminded the Commission that at its previous meeting a working group had been appointed to review the wording of paragraph 6 of the commentary to articles 13 and 14. He invited the Chairman of the Drafting Committee to report on the group's conclusions.

3. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the working group was of the opinion that the reference to cases of dissolution of States should be omitted. It therefore proposed that the beginning of the first sentence of paragraph (6) should be amended to read: "An old example of State practice is to be found in the treaty of 19 April 1839 concerning the Netherlands and Belgium, article XV of which provided as follows:..." It further proposed that, in the second sentence of the paragraph, the words "upon the dissolution of the" should be replaced by "in the case of the".

It was so decided.

Paragraph (6) was approved.

The commentary to articles 13 and 14 was approved.

Part II, as amended, was adopted.

PART III (STATE DEBTS)

ARTICLES 15-23 (A/CN.4/L.302/Add.3)

Commentary to article 15 (Scope of the articles in the present part)

The commentary to article 15 was approved.

Commentary to article 16 (State debt)

Paragraphs (1)-(43)

Paragraphs (1)-(43) were approved.

Paragraphs (44) and (45)

4. Mr. RIPHAGEN proposed that the last sentence of paragraph (44) should be deleted, and that the first two sentences of paragraph (45) should be replaced by the following text:

“The Commission adopted article 16, despite the reservations as to its subparagraph (b) expressed by some members, in whose view ‘State debt’ should be limited to financial obligations arising at the *international* level. Furthermore, in the view of some members of the Commission, subparagraph (b) should not extend to ‘any other financial obligation chargeable to a State’ when the creditor was an individual who was a national of the debtor predecessor State, be it a juridical or natural person. Other members, however, favoured subparagraph (b) in view of the volume and importance of the credit currently extended to States from foreign private sources.”

At the beginning of the next sentence, the word “besides” should be deleted.

It was so decided.

Paragraphs (44) and (45), as amended, were approved.

The commentary to article 16, as amended, was approved.

Commentary to article 17 (Obligations of the successor State in respect of State debts passing to it)

The commentary to article 17 was approved.

Commentary to article 18 (Effects of the passing of State debts with regard to creditors)

The commentary to article 18 was approved.

Commentary to the introduction to section 2 (Provisions relating to each type of succession of States)

The commentary to the introduction to section 2 was approved.

Commentary to article 19 (Transfer of part of the territory of a State)

The commentary to article 19 was approved.

Commentary to article 20 (Newly independent State)

The commentary to article 20 was approved.¹

Commentary to article 21 (Uniting of States)

The commentary to article 21 was approved.

Commentary to article 22 (Separation of part or parts of the territory of a State) *and article 23* (Dissolution of a State)

Paragraphs (1)-(5)

Paragraphs (1)-(5) were approved.

Paragraph (6)

5. Mr. VEROSTA proposed that, to avoid disputes as to the accuracy of its terms, the phrase “the break-up

of the Belgian-Dutch State (1830)” should be deleted.

It was so decided.

Paragraph (6), as amended, was approved.

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

6. Mr. VEROSTA proposed that the first sentence should be deleted and that the beginning of the second sentence should be amended to read: “The ‘Belgian-Dutch question’ of 1830 had necessitated ...”.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9)-(22)

Paragraphs (9)-(22) were approved.

Paragraph (23)

7. Mr. VEROSTA objected to the use of the expression “the Belgian-Dutch State”, in the fifth sentence.

8. The CHAIRMAN suggested that Mr. Riphagen and Mr. Verosta should be asked to provide the Commission, at its next meeting, with an alternative to that expression.

It was so decided.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were approved.

Paragraph (26)

9. The CHAIRMAN suggested that Mr. Riphagen and Mr. Verosta should be requested to provide the Commission with an alternative to the phrase “the break-up of the Kingdom of the Netherlands”, which appeared in the second sentence.

It was so decided.

Paragraphs (27)-(29)

Paragraphs (27)-(29) were approved.

CHAPTER III. State responsibility (*continued*) (A/CN.4/L.303 and Add.1-6)

B. Draft articles on State responsibility (*continued*) (A/CN.4/L.303 and Add.1-6)

2. TEXT OF ARTICLES 28-32, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTY-FIRST SESSION (A/CN.4/L.303/Add.1-6)

Commentary to article 28 (Responsibility of a State for an internationally wrongful act of another State) (A/CN.4/L.303/Add.1)

Paragraphs (1)-(17)

Paragraphs (1)-(17) were approved.

Paragraph 18

10. Mr. USHAKOV proposed that the last part of the last foot-note to paragraph (18), following the words “committed by it”, should be replaced by the words “since the organization of the federal State cannot be considered as entailing the Member State’s submission

¹ See also 1583rd meeting, paras. 4-7.

to the power of direction or control of the federal State". In his view, there was no subordination in the organization of a federal State.

It was so decided.

Paragraph (18), as amended, was approved.

Paragraphs (19)-(37)

Paragraphs (19)-(37) were approved.

The commentary to article 28, as amended, was approved.

Commentary to the introduction to chapter V (Circumstances precluding wrongfulness) (A/CN.4/L.303/Add.2)

The commentary to the introduction to chapter V was approved.

Commentary to article 29 (Consent) (A/CN.4/L.303/Add.3)

The commentary to article 29 was approved.

Commentary to article 30 (Countermeasures in respect of an internationally wrongful act) (A/CN.4/L.303/Add.4)

The commentary to article 30 was approved.

Commentary to article 32 (Distress) (A/CN.4/L.303/Add.6)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2)-(13)

11. Mr. TSURUOKA observed that paragraph (2) contained a reference to draft article 31. He reminded members that he had already drawn attention to some confusion in the various uses of the words "conduct" and "act". He recommended that the Commission remain vigilant on that point, for although homogeneity seemed to prevail from article 3 to article 19, the same did not apply to articles 20, 21 and 31. It might perhaps be desirable to explain the use of those terms clearly in the commentary so as to ensure some degree of concordance in the text as a whole.

12. Mr. AGO explained that paragraph (2) of the commentary referred to article 31 solely in order to point out that, in a situation of *force majeure* or fortuitous event, the conduct of the State was involuntary, whereas an element of will certainly existed in the situation of distress.

Paragraphs (2)-(13) were approved.

Paragraph (14)

13. Replying to a question put by Mr. RIPHAGEN, Mr. AGO explained that, in the commentary to article 31, to which reference was made in paragraph (14) of the commentary to article 32, mention was made of the need to insert in chapter V of the draft a clause stating that preclusion of the wrongfulness of an act of a State by reason of the circumstances of its commission did not affect the possible responsibility of the State on grounds other than the act, whose wrongfulness was precluded by the provisions of the draft articles.

14. Mr. USHAKOV thought the Commission should resume consideration of article 32 when it examined the draft provisions on state of emergency, because it was distress of the State that gave rise to emergency.

He noted that there was a tendency to introduce two separate concepts of distress, that of the State organ and that of the State itself, and that such a dichotomy might cause difficulties.

15. Mr. AGO pointed out that he had already inserted some comments along those lines in the relevant chapter, and that he intended to go into the two types of situation in the commentary in due course.

Paragraph (14) was approved.

The commentary to article 32 was approved.

CHAPTER VIII. Review of the multilateral treaty-making process (A/CN.4/L.308)

Chapter VIII was adopted.

The meeting rose at 12.50 p.m.

1583rd MEETING

Friday, 3 August 1979, at 10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Pinto, Mr. Riphagen, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

Draft report of the Commission on the work of its thirty-first session (concluded)

CHAPTER II. Succession of States in respect of matters other than treaties (concluded) (A/CN.4/L.302 and Add.1-4)

B. Draft articles on succession of States in respect of matters other than treaties (concluded) (A/CN.4/L.302/Add.1-3)

PART III (STATE DEBTS) (concluded)

Commentary to article 22 (Separation of part or parts of the territory of a State) and article 23 (Dissolution of a State) (concluded)

Paragraphs (23) and (26) (concluded)

1. The CHAIRMAN reminded members that at the previous meeting Mr. Riphagen and Mr. Verosta had been requested to find adequate wording for the passages of paragraphs (23) and (26) relating to the Netherlands and Belgium.

2. Those two members of the Commission proposed that the words "the case of the dissolution of the Belgian-Dutch State where the two successor States refused", appearing in the fifth sentence of paragraph (23), should be replaced by the words "the already quoted case of 1830/1839, where the Nether-

lands and Belgium refused", and that the words "especially in the case of the break-up of the Kingdom of the Netherlands", in the second sentence of paragraph (26), should be deleted.

3. If there were no objections, he would take it that the Commission accepted those amendments.

Paragraphs (23) and (26), as amended, were approved.

The commentary to articles 22 and 23, as amended, was approved.

Commentary to article 20 (Newly independent State) (concluded)

Paragraph (59)

4. The CHAIRMAN, referring to the foot-note to paragraph (59), which referred to paragraphs (25)-(27) of the commentary to article 11 (A/CN.4/L. 302/Add.2), explained that those paragraphs reproduced the substance of two paragraphs of the commentary to article 20 adopted in 1977; they had therefore not been reproduced in paragraph (59).

Paragraph (64)

5. The CHAIRMAN drew the attention of the members of the Commission to paragraph (64), which read:

When adopting article 20 at first reading, one member of the Commission was unable to support its text and expressed reservations.

The views of that member and those of other members had been fully described in the commentary approved in 1977.¹

6. Since one member of the Commission who had not approved the text of article 20 and who had expressed reservations thereon had been unable to participate in the meetings of the current session at which that article had been examined, the Commission might wish to replace paragraph (64) of the commentary to article 20 by paragraphs (68) and (69) of the commentary to the corresponding article reproduced in its report on the work of its twenty-ninth session (1977), in order to record fully the positions taken on the article.

7. After an exchange of views in which Mr. USHAKOV, Mr. YANKOV, Mr. VEROSTA and Mr. DÍAZ GONZÁLEZ took part, the CHAIRMAN suggested that the Secretariat be authorized to contact the persons concerned with a view to recording in paragraph (64), if that were desired, the views expressed in 1977, as reflected in paragraphs (68) and (69) of the commentary to the corresponding article adopted in 1977.

It was so decided.

Subject to that reservation, paragraph (64) was approved.

The commentary to article 20, as amended, was approved.

Part III, as amended, was adopted.

Section B, as amended, was adopted.

Chapter II, as amended, was adopted.

CHAPTER III. *State responsibility (concluded)* (A/CN.4/L.303 and Add.1-6)

B. *Draft articles on State responsibility (concluded)* (A/CN.4/L.303 and Add.1-6)

2. *TEXT OF ARTICLES 28-32, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTY-FIRST SESSION (concluded)* (A/CN.4/L.303/Add.1-6)

Commentary to article 31 (Force majeure and fortuitous event) (A/CN.4/L.303/Add.5)

Paragraphs (1)-(38)

Paragraphs (1)-(38) were approved.

Paragraph (39)

8. Following comments by Mr. RIPHAGEN and Mr. VEROSTA, Mr. AGO proposed that the last sentence of paragraph (39) should be amended to read: "In the opinion of the Commission, a thorough study of such obligations could be made within the framework either of part II of the report on State responsibility for wrongful acts or of the report on liability arising out of acts not prohibited by international law."

It was so decided.

Paragraph (39), as amended, was approved.

Paragraph (40)

9. Mr. USHAKOV, referring to the fifth sentence of paragraph (40), proposed that the words "adopt conduct in conformity" should be replaced by the words "act in conformity", which corresponded to the wording of article 31, paragraph 1, and had the merit of not containing the word "conduct".

It was so decided.

Paragraph (40), as amended, was approved.

Paragraph (41)

Paragraph (41) was approved.

Paragraph (42)

10. Mr. TSURUOKA said that at the second reading the Commission would have to re-examine carefully the use of the words "conduct" and "act". In particular, the expression "the State committing the act", which occurred in the first sentence of paragraph (42), was unsatisfactory.

11. Mr. AGO suggested that that expression be replaced by the words "the State having committed the act".

It was so decided.

12. Mr. RIPHAGEN stressed the need to reserve the situation of an injured State which took countermeasures.

¹ See *Yearbook... 1977*, vol. II (Part Two), p. 94, document A/32/10, chap. III, sect. B.2, article 22, paras. (68) and (69) of the commentary

Paragraph (42), as amended, was approved.

The commentary to article 31, as amended, was approved.

Subsection 2, as amended, was adopted.

Section B, as amended, was adopted

Chapter III, as amended, was adopted.

13. The CHAIRMAN put to the vote the draft report of the Commission on the work of its thirty-first session as a whole, as amended.

The draft report as a whole, as amended, was adopted.

Closure of the session

14. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-first session of the International Law Commission closed.

The meeting rose at 11.45 a.m.

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