Document:-
A/CN.4/L.196 and Add.1

Draft articles on succession of States in respect of matters other than treaties: titles of the draft articles, the introduction, part I and section 1, and articles 1-8 adopted by the Drafting Committee - reproduced in A/CN.4/SR.1230, SR.1231, SR.1239 and SR.1240

Topic:
Succession of States in respect of matters other than treaties

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42. In reply to Mr. Ushakov's question whether sovereignty could be restored if it had terminated lawfully, he cited the case of Poland, which, while taking the view in 1918 that there had been a succession of States, had applied the *tabula rasa* principle and held that it did not derive its rights from the predecessor State.

43. Mr. Kearney had suggested that it might be useful to include in article 7 the notion of a manifestation of intent or act of the predecessor State, to show that a change of sovereignty could be effected by other means than a devolution agreement. He agreed and would ask the Drafting Committee to take that point into account. In certain cases of decolonization, for instance, there might be some kind of charter granted by the former metropolitan Power.

44. He saw no objection to deleting the word "simply" and replacing the word "ratification" by the words "entry into force".

45. He suggested that article 7 might now be referred to the Drafting Committee.

46. Mr. RYBAKOV (Secretary to the Commission) said the Secretariat regretted the omission of the asterisks from the Special Rapporteur's report, which had been unintentional and without the approval of the Codification Division.

47. The CHAIRMAN said that, if there were no objections, article 7 would be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 8

48. *Article 8*

General treatment of public property according to ownership

All other conditions established by the present articles being fulfilled,

(*a*) Public or private property of the predecessor State shall pass within the patrimony of the successor State;

(*b*) Public property of authorities or bodies other than States shall pass within the juridical order of the successor State;

(*c*) Property of the territory affected by the change of sovereignty shall pass within the juridical order of the successor State.

49. The CHAIRMAN invited the Special Rapporteur to introduce article 8.

50. Mr. BEDJAOUI (Special Rapporteur) said that the sole purpose of article 8 was to distinguish, in regard to their treatment, between State property and property which, although public, did not belong to the State.

51. In the case of State property, the situation was simple: it passed within the patrimony of the successor State. He acknowledged that the terminology would have to be changed, because not all legal systems regarded the State as owning a patrimony and in all probability the notion of patrimony was not recognized by international law. With regard to public property of authorities or bodies other than States and property of the territory, it remained the property of those entities, but passed from the juridical order of the predecessor State into that of the successor State, for purposes of international protection, for example.

52. Article 8, which did not indicate the conditions of transfer, was not a substantive article. It was merely intended to show the difference between the right of ownership and the juridical order. If the Commission thought the article might raise more problems than it solved, he would not press for its retention.

53. In addition, in the light of the discussions held so far, he intended to suggest to the Drafting Committee that the definition of public property, in article 5, be confined to State property, and that public property belonging to authorities, public establishments and so forth should be provisionally left aside. If such a definition were adopted, it would be bound to affect article 8. In the interests of consistency, the Commission should likewise define public debts as being exclusively debts of the State; that would relieve it of the need to consider a whole range of problems to which the international community devoted much attention. In point of fact, public debts were mainly the debts of public establishments, public bodies, public corporations and so on, and rarely debts of the State as such. But perhaps the Commission could later extend its study to public property and public debts other than State property and debts.

54. The CHAIRMAN asked the Special Rapporteur to explain why he now proposed that the notion of "public property" should be replaced by that of "property of the State".

55. Mr. BEDJAOUI (Special Rapporteur) said that the discussions had shown him that it would be very difficult to deal with all public property at the same time and that it might be more useful and more reasonable to proceed by categories, beginning with State property. If the Commission succeeded in working out a certain number of rules of international law concerning such property, it would probably then be able to proceed to consider other public property. The same applied to public debts. For his part, he was prepared either to confine himself for the time being to a single category of public property—State property—or to proceed with the study of all public property as he had originally intended. He would do whatever the Commission wished.[6]

The meeting rose at 5.50 p.m.

[5] For resumption of the discussion see 1239th meeting, para. 18.

[6] For resumption of the discussion see 1231st meeting, para. 66.

1230th MEETING

Wednesday, 20 June 1973, at 11.50 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Organization of future work

[Item 7 of the agenda]

1. The CHAIRMAN said that a number of decisions had been taken by the officers of the Commission and former chairmen at a meeting that morning. First, the small group which had been appointed to deal with the question of *apartheid* from the point of view of international penal law [1] had already met and would meet again in an attempt to produce a document representing a consensus on that question.

2. Secondly, with regard to the Gilberto Amado memorial lecture, since it had proved impossible, owing to pressure of work at the International Court of Justice, to secure a lecturer from among the member Judges, it had been decided to invite one of the Commission's former members, Mr. Eustathiades, to deliver the lecture. If Mr. Eustathiades were unable to accept that invitation, the memorial lecture would be postponed until the following session, when it could be delivered in connexion with the celebration of the Commission's twenty-fifth anniversary.

3. Thirdly, since it was necessary to appoint a Special Repporteur to replace Sir Humphrey Waldock for the completion of the draft articles on succession of States in respect of treaties, it was proposed that Sir Francis Vallat be appointed to serve in that capacity.

It was so agreed.

4. Sir Francis VALLAT said he regarded his appointment as a very great honour; he would do his best to follow in the footsteps of Sir Humphrey Waldock and endeavour to bring the draft articles to a fruitful conclusion, with due regard to the comments received from governments.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196)

[Item 3 of the agenda]

(resumed from the previous meeting)

Draft articles proposed by the Drafting Committee

5. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by the Committee (A/CN.4/L.196).

Title of the draft

6. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed that the draft be entitled: "Draft articles on succession of States in respect of matters other than treaties". It was true that so far the Commission had considered only one aspect of that succession, namely, public property; but at its twentieth session it had expressed the intention to study all aspects of succession in turn, after completing consideration of the aspect to which it had given priority, mainly for reasons of order and method.[2] Consequently the draft, when completed, would deal with the whole topic of succession of States in respect of matters other than treaties, and that was, indeed, the subject-matter of the initial provisions which the Committee had grouped together under the heading "Introduction" in document A/CN.4/L.196.

7. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved the title for the draft articles proposed by the Drafting Committee.

It was so agreed.

Articles 1 and 3 [3]

8. Mr. YASSEEN (Chairman of the Drafting Committee) said he would introduce articles 1 and 3 together, since they were closely linked.

9. The texts proposed read:

Article 1

Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 3

Use of terms

1. For the purposes of the present articles:

(*a*) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*d*) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

10. Paragraph 1 of article 3, which for the time being had no paragraph 2, reproduced *verbatim* four subparagraphs of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties adopted provisionally by the Commission at its twenty-fourth session. Thus the definition of succession of States in article 3, paragraph 1 (*a*) of the present draft was identical with that adopted at the twenty-fourth session, and did not refer to the effects of succession. The Special Rapporteur had taken the view that those effects should be covered by the definition of succession of States in respect of matters other than treaties, since it was the effects, not the fact of the replacement of one State by another, that were the subject-matter of the study undertaken by the Commission. In his sixth report (A/CN.4/267), the Special Rapporteur had therefore submitted a new definition of succession. In the Drafting Committee, however, he had provisionally accepted the definition

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[1] See 1228th meeting, paras. 33 and 34.

[2] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 221, document A/7209/Rev.1, paras. 78 and 79.

[3] For previous discussion see 1219th meeting, para. 20.

adopted at the twenty-fourth session, seeing that article 1 of the present draft articles supplemented that definition by stating that "the present articles apply to the effects of succession of States in respect of matters other than treaties".

11. The Drafting Committee considered that the commentary to article 3 should state that the text adopted at the present session was incomplete. It would be advisable to indicate that in the report, by points of suspension following the text. For it would be necessary to add further definitions as the Commission proceeded with the work and possibly a paragraph 2 based on the paragraph 2 adopted at the twenty-fourth session.[4]

12. The Drafting Committee also thought that the report should stress the provisional nature of article 3. Of course, any text adopted by the Commission on first reading was provisional, since the Commission did not produce a final draft until it had received the comments of governments. But in the present case there was more to it than that. With the topic of succession of States in respect of matters other than treaties, the Commission had undertaken the preparation of a set of draft articles which were far-reaching in scope and bristled with difficulties. For the guidance of the reader, and in particular the members of the Sixth Committee of the General Assembly, the Commission had to place general provisions such as article 3 at the beginning of the draft; but it was obvious that it might need to reconsider those provisions and possibly to amend them during the first reading, as it gradually built new material into the structure of the draft. The Commission should reserve that possibility in its report to the General Assembly.

13. With regard to article 1, the Drafting Committee thought the commentary should point out that the Commission could not at present state what matters would be covered by the draft articles other than the particular matter considered at the current session. As a rough guide the commentary might mention the various subjects which the Commission had envisaged at its twentieth session—public debts, legal régime of the predecessor State, territorial problems, status of the inhabitants, and so on.

14. Mr. CALLE y CALLE referring to article 3, paragraph 1 (*a*), said he was sorry the Drafting Committee had decided to revert to the definition used in article 2 of the draft articles on succession of States in respect of treaties. He himself preferred the Special Rapporteur's formulation, since the phrase "replacement of one State by another is the responsibility for the international relations of territory", in the Drafting Committee's version, might seem to apply to the case of a protectorate whose foreign relations were administered by the protecting State.

15. Mr. SETTE CÂMARA said he wished to congratulate the Drafting Committee on having produced a text for article 3 which, while respecting the Special Rapporteur's basic ideas and doctrine, was in line with the text agreed upon by the Commission, at its previous session, for article 2 of the draft on succession of States in respect of treaties.

16. That text might not be perfect, but the hypothetical case of protectorates, mentioned by Mr. Calle y Calle, was an exceptional one and unlikely to arise in practice.

17. He was pleased to note that the Drafting Committee had decided to include sub-paragraph (*d*) on the date of the succession of States, since the Special Rapporteur's article 7 had given rise to considerable controversy, whereas the present text was in conformity with that adopted by the Commission at its previous session.

18. Mr. BILGE said that he had no objection to article 1, but he had the most serious reservations about article 3, particularly the definition of "succession of States" given in paragraph 1 (*a*). Succession of States in respect of matters other than treaties was a topic of far wider scope than succession of States in respect of treaties, so the two kinds of succession should not be defined in the same way. Succession in respect of matters other than treaties involved bilateral relations between the predecessor and successor States, which was not the case in succession in respect of treaties, and above all it related to territory and the property in it, more than to international relations.

19. The CHAIRMAN said he was in partial agreement with the new text of article 3 proposed by the Drafting Committee; in particular, he preferred the words "the replacement of one State by another" to the words "the replacement of one sovereignty by another".

20. Nevertheless, he wished to make a reservation with regard to the words "in the responsibility for the international relations of territory", because he believed that succession of States in respect of matters other than treaties should rest on a broader basis than merely responsibility for the international relations of territory. The new text of article 3 was provisional, however, and a more comprehensive definition could always be produced at a later stage.

21. Mr. KEARNEY said that the definition in article 3, paragraph 1(*a*), was a neutral one, so that it could be determined in the subsequent articles precisely what effects the succession would have on State-owned property in both the predecessor State and third States. The new text did not prejudge the rules concerning State property, and it might well be that after examining them, the Commission would wish to reconsider the definition, not only in terms of State property, but in the context of the draft as a whole.

22. Mr. QUENTIN-BAXTER said that the extensive reports of the Special Rapporteur had been vindicated, because it had been possible, against that rich background, for the Drafting Committee to frame remarkably simple texts which would be of great assistance to the Commission in its future work.

23. He welcomed the Drafting Committee's decision to propose the same definition of "succession of States" as had been adopted in the 1972 draft on succession in respect of treaties. It was true that the subject-matter was now different; it was larger and more amorphous than the subject-matter of succession in respect of treaties.

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[4] See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter II, section C, article 2.

Nevertheless, there was basic value in adopting a single definition for an expression like "succession of States", which was frequently used by international lawyers. It would be an impediment to legal argument if, whenever an international lawyer used the term "succession of States", he had to qualify it in order to show which of two meanings was to be attributed to it. The adoption of two different definitions for the two drafts would lead to confusion of thought and to the emergence of apparent disagreements which did not reflect real differences, but were merely induced by terminology.

24. The text proposed by the Drafting Committee did not affect the position of a small State which entrusted a part or the whole of its international relations to another State. Occasionally, a very small State did seek assistance from a larger State in that manner; the essential point was that a request of that kind was revocable, so that the authority remained with the donor. The text now proposed did not do any injustice to small States, which took such action in the fullness of their own competence and not with any limitation of that competence.

25. Mr. USTOR said he supported the definition in paragraph 1(*a*) of article 3, which had the merit of being in harmony with the definition in the 1972 draft on succession in respect of treaties.

26. The Drafting Committee's decision was a very important one, in that it not only dealt with the definition of succession of States, but also provided guidance for the Commission's whole work on the present topic. It served to show that, although succession of States could have many aspects and had important repercussions in internal law, the Commission's concern was with the effect of succession on international relations.

27. Mr. USHAKOV said that he had always been in favour of adopting a definition applicable to all aspects of succession of States. Although the definitions proposed in article 3 were preceded by the words "For the purposes of the present articles", their scope was not confined to the draft articles. What was defined was not each aspect of State succession taken separately—succession in respect of treaties, succession to public property, succession to public debts, and so on—but the whole phenomenon of the replacement of one State by another. He agreed that the phrase "replacement... in the responsibility for the international relations of territory" migh— not be perfect, but if the Commission later decided to amend it, it should do so having regard to the phenomenon of succession in general, not just to succession in respect of some particular matter.

28. In the case of protectorates, to which Mr. Calle y Calle had referred, there was no replacement of one State by another. The State which agreed to be protected entrusted certain administrative functions, such as responsibility for international relations, to another State. The reason why the Commission, at its twenty-fourth session, had accepted the idea of replacement in the responsibility for international relations, was that in the case of newly independent States there was no replacement of one sovereignty by another, since the former metropolitan Powers had not exercised sovereignty over their colonies, but had merely administered them. That was confirmed by Articles 73 and 75 of the United Nations Charter.

29. The definition of succession of States in article 3, paragraph 1(*a*) was therefore acceptable as a working basis, subject to possible improvement later.

30. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had adopted the definition of succession of States proposed in paragraph 1(*a*) for the sake of congruity with the draft articles on succession of States in respect of treaties. At its twenty-fourth session, the Commission had thought fit to adopt a neutral definition in order to facilitate its work. He appreciated the concern of Mr. Calle y Calle, but he did not think the formula proposed could be interpreted as referring to the case of protectorates; in such situations, there was no replacement in the responsibility for international relations, only representation for the exercise of those relations. As the words "responsibility for the international relations", it was clearly international relations that were concerned, since succession of States was governed by international law.

31. The definitions adopted by the Commission would still be entirely provisional, like those adopted at the previous session. It went without saying that they could be amended in the light of government comments and of the Commission's subsequent work.

32. Mr. BILGE said he endorsed Mr. Yasseen's last remark. The Commission was still at the very first stage of its study of succession in respect of matters other than treaties. The definitions were bound to be very provisional, and their purpose was only to make it possible to go ahead. Perhaps the two Special Rapporteurs on succession of States could confer on the question of the definitions.

33. The CHAIRMAN said that the two Special Rapporteurs would no doubt consult each other and, at the appropriate stage, agree on the question whether there should be a single definition of succession of States or two definitions, one for each draft.

34. The reservations expressed by certain members having been placed on record, he suggested that articles 1 and 3, as proposed by the Drafting Committee, be provisionally approved.

It was so agreed.

ARTICLE 2 [5]

35. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 2 reproduced *verbatim* article 6 of the draft articles on succession of States in respect of treaties. In 1972, some members had expressed doubts about the latter article,[6] but since it appeared in the draft then adopted, it was essential to include an identical article in the present draft, if only to prevent deductions *a contrario*.

[5] For previous discussion, see 1219th meeting, para. 20.

[6] See *Yearbook of the International Law Commission, 1972*, vol. I, p. 221, 1187th meeting, para. 1 *et seq.*

36. The text proposed for article 2 read:

Article 2

Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

37. Mr. USHAKOV said that he approved of the substance of article 2, but must renew the objections he had made the previous year to the drafting of the corresponding article of the draft on succession in respect of treaties.

38. The CHAIRMAN, speaking as a member of the Commission, said that he fully supported article 2, although he did not entirely agree with the reason given for its inclusion. The fact that the provision had appeared in the 1972 draft on succession in respect of treaties was not in itself a sufficient argument for its inclusion in the present draft. The two drafts dealt with comparatively different subjects and he was not convinced of the need for strict legal symmetry.

39. Mr. USTOR said that he fully agreed with the content of article 2, but thought it went without saying. To include in the present draft a provision to the effect that the articles dealt only with valid successions would create problems, because no such provision had been included in some other drafts.

40. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 2 provisionally, as proposed by the Drafting Committee.

It was so agreed.

TITLE OF PART I OF THE DRAFT, TITLE OF SECTION 1, AND ARTICLE 4

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed as the title of part I of the draft "Succession to State property", and as the title of section 1 "General provisions". So far, the Commission had discussed public property, to which the Special Rapporteur had devoted his last four reports. Public property comprised State property, the property of authorities or bodies other than States, and the property of the territory concerned. The discussion had shown, however, that the problem was extremely complex and that the difficulties must be taken one by one. The Drafting Committee and the Special Rapporteur accordingly suggested a new approach, as indicated by the title of part I. The Commission would first study State property and then the other kinds of public property.

42. Article 4 formed a corollary to the title of part I. It was very simple and intended solely to indicate that part I concerned the effects of succession of States in respect of State property.

43. The new version of article 4 read:

Article 4

Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

44. Mr. USTOR said he welcomed the Drafting Committee's proposal to restrict the scope of the draft articles in part I to the effects of succession of States in respect of State property.

45. Mr. SETTE CÂMARA said that at a later stage, it might prove convenient to replace article 4 by a simple title. If the provision was retained as a separate article, it would be necessary to have an article of the same kind in each of the following parts.

46. Mr. BEDJAOUI (Special Rapporteur) said that article 4 should be left as it was. It applied solely to the part of the draft which dealt with State property. When the Commission had finished considering that part, it would take up the parts which dealt with the other two classes of public property. An article corresponding to article 4 would have to be included in each of them.

47. The CHAIRMAN, speaking as a member of the Commission, said he hoped that, when the Commission had dealt with public property other than State property, it would consider merging all the provisions on public property if it found that the rules governing the public property of other entities were similar to those governing State property.

48. Speaking as Chairman, he suggested that the Commission provisionally approve article 4 and the titles of part I and section 1, as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

1231st MEETING

Thursday, 21 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196; A/CN.4/L.197)

[Item 3 to the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 5 [1]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 5 (A/CN.4/L.196).

[1] For previous discussion see 1223rd meeting, para. 1.

2. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 5 explained what was meant by "State property". It defined State property by reference to the internal law of the predecessor State; the Committee had considered that to be logical, since it was the internal law of the predecessor State which governed State property until the succession of States took place. In some cases the internal law of the successor State hardly existed on the date of the succession, the point in time to which article 5 referred, so that it would be illusory to define State property by reference to the internal law of the successor State. The position adopted in the article did not, of course, impair the right of the successor State to alter the definition or classification of State property in accordance with its own legal order. At the precise moment of the succession, however, it was only by reference to the law of the predecessor State that State property could be determined and classified.

3. The Drafting Committee was well aware that international practice and jurisprudence had often wavered between the internal law of the predecessor State and that of the successor State. The Committee therefore hoped that the commentary to article 5 would draw attention to the provisional nature of the text. It was, indeed, possible that, during its first reading of the draft, the Commission might decide to make the rule laid down in the article more flexible.

4. The Drafting Committee also hoped that two remarks would be made in the commentary regarding the expression "property, rights and interests" used in article 5. The first was that that expression, found in several treaties, referred only to legal rights and interests. The second was that the expression was not known to some legal systems. In view of the latter situation, the Commission might wish to explore, on first reading, the possibility of using a different expression having regard, in particular, to the whole set of provisions it adopted on property.

5. The text proposed for article 5 read:

Article 5

State property

For the purposes of the articles in the present Part, State property means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

6. Mr. QUENTIN-BAXTER said he was very pleased with the general shape of article 5 as it had emerged from the Drafting Committee. He had been one of those who believed that a relatively simple concept of State property would make a good starting point for the draft articles.

7. It was important to bear in mind, however, that the words "according to the internal law of the predecessor State" should be taken to mean the law in force in the territory which was the subject of succession.

8. New Guinea, one of the last important territories still governed by an administering authority, provided a useful example in that regard. From the outset of the Australian administration of that territory, there had been a law of New Guinea. Although that law was the ultimate responsibility of the Parliament of Australia, it was made by the administration of New Guinea and, more recently, with increasing participation by representatives of the people of the territory. That law was made to suit local conditions and the philosophy of the people; the law of New Guinea had never at any time been described as the law of Australia.

9. In every case in which the administering authority responsible for a territory faithfully carried out its duty of leading that territory towards independence, the law which applied at the municipal level was entirely distinct, and often very different, from that of the metropolitan country. That raised a problem of principle which must be taken into account.

10. That position was also based on practical considerations. State property in New Guinea had for a long time been in the ownership of the Government of New Guinea. When the territory became independent, any problem that might arise in connexion with such property would have to be solved, not in accordance with the law of Australia, but in accordance with the law of New Guinea at the moment of independence. A similar solution would have to be adopted by the courts of a third State if called upon to deal with property situated outside the territory.

11. It was also important to stress that the territory which was the subject of succession changed hands as an entity and not as a lawless territory. The introduction of a reference to the law in force in the territory at the time of succession would have the further advantage of not impairing the sovereignty of the successor State. It would be clear that the new lawgiver was free to take whatever action it wished in the territory, with due regard to the successor State's obligations under international law.

12. Another principle to be kept in mind was that the property, rights and interests which changed hands had two elements: their physical features and the law which they carried.

13. Subject to those remarks, he welcomed article 5. He expressed his gratitude to the Drafting Committee and to the Special Rapporteur, whose work was beginning to bear fruit.

14. Mr. USTOR said that he was prepared to accept article 5 in view of its provisional character, subject to some comments which he hoped would be taken into account when the time came to adopt a final draft.

15. His first remark concerned the inconsistency of using the term "property" with two different meanings. In the expression "State property", as used both in the title and in the text of the article, the term "property" covered all forms or property of the State. In the expression "property, rights and interests" it covered only part of State property. In the context it was clear that the word "property" was being used with two different meanings, and consideration should be given, in due course, to removing that inconsistency.

16. The expression "property, rights and interests" was in itself somewhat obscure. It should perhaps be assumed that the term "interests" referred to something other than rights directly pertaining to the State, or property

directly owned by it. The term could thus be taken to refer to the interest which the State had in, for example, a State enterprise or even a trust or foundation. The retention of the term "interests" was therefore likely to create difficulties and to blur the distinction between Stete property and other public property. It would thus run counter to the intention of the Drafting Committee, which was to exclude from the scope of the articles in part I items of public property which did not constitute State property.

17. Mr. YASSEEN said that the question raised by Mr. Quentin-Baxter—that of locating, within the internal legal order, the rules that were applicable—also arose in other contexts. A case in point was the law applicable under the rules of applicability in private international law, when the legal order to which certain legal situations were attached was a complex one. The general practice was to look at the whole of the legal order in order to determine which of its various component systems was applicable.

18. In his opinion, therefore, the expression "internal law of the predecessor State" was sufficient. It was for the legal order of that State to determine which rules were applicable. It would be inadvisable, in a set of draft articles on succession of States, to try to solve such a general problem as that of determining which rules were applicable within an internal legal order.

19. Mr. RAMANGASOAVINA said that when the Commission had examined the original version of article 5, he had expressed approval of the wording then proposed. Nevertheless, he found the proposed new wording preferable; it was consistent with the position taken by the Drafting Committee in the previous articles. In article 3, for example, the Committee had emphasized that succession of States was essentially a question of responsibility for the international relations of the territory to which the succession related. In the proposed article 5, the emphasis was on State property; that was in keeping with the general spirit of the draft.

20. The new wording of article 5 would enable the Commission to go ahead, whereas the previous, much contested version might have prevented it from doing so. He therefore supported the text proposed, though he thought it might be made more precise later on.

21. Mr. USHAKOV said he provisionally accepted the text proposed by the Drafting Committee, as he had provisionally accepted the text originally submitted by the Special Rapporteur.

22. He thought that the words "property, rights and interests" should be amended to read "property, with the rights and interests relating thereto", as the Special Rapporteur had proposed to the Drafting Committee. The present formula might be clear to common-law jurists, but it was not clear to other lawyers.

23. In addition, article 5 contained a contradiction. While seeking to define the general notion of State property, in fact it only defined the State property of the predecessor State, since it defined State property by reference to the internal law of that State. The first part of the definition referred to State property in general, whereas the last part referred only to the property of the predecessor State. It would be preferable to draft a definition of State property in general.

24. With regard to Mr. Quentin-Baxter's remarks on dependent territories which already had their own law, another point to note was that, when a new State became independent, there was no replacement of one sovereignty by another. In that situation it was not the internal law of the predecessor State which was applicable. More consideration should therefore be given to the case of newly independent States. However, he found the proposed text acceptable at the present stage.

25. Mr. KEARNEY said that, although the formulation adopted by the Drafting Committee for article 5 was not perfect, it would enable the Commission to go ahead with its work.

26. It should be borne in mind that the draft articles would constitute a set of residual rules. The formula in article 5 had to cover not only customary situations, but also unusual situations. He therefore favoured the retention of the expression "property, rights and interests", which provided as broad a coverage as possible in describing the different types of property.

27. To illustrate by an example the meaning of the term "interests" in the present context, he would remind members that there was a law in many countries to the effect that property of a deceased person which was not claimed by any heir within a specified time reverted to the State. The territory which was the subject of a succession of States could well contain property that was in suspense because its owner had died and the time-limit for claims by heirs had not yet expired. Such property would not be "owned" by the State on the date of the succession, yet the successor State might well become its owner if no heir appeared. It undoubtedly had what could correctly be termed an "interest" in the property.

28. The very valid point which had been raised by Mr. Quentin-Baxter would certainly have to be considered at the appropriate time, but he himself did not favour any change in the formula "according to the internal law of the predecessor State". It would not be possible to solve all the problems involved by adding to those words the formula: "as applied in the territory subject to succession". In particular, such an addition would be of no assistance in dealing with the very pertinent problem of property which was not actually in the territory and which might well be in the capital city of the predecessor State.

29. Another problem which would not be solved by such a change of language was that which might arise in the event of secession of a component state from a federal union. The seceding state would already have had its own property under its own laws while a member of the federal union, but there would also be in its territory federal property which was governed by federal law. In view of the extreme difficulty of covering all such problems, it would be preferable to retain the formula used in article 5.

30. Sir Francis VALLAT said that the point raised by Mr. Ushakov, regarding the reference in the concluding words of article 5 to property "owned by [the predecessor] State", touched on the essence of the draft articles. Those

articles dealt with the fate, in the event of a succession of States, of the property owned by the predecessor State at the date of succession. With regard to the property of an authority or of a non-State body, the presumption would be that the title would continue under internal law. In that context article 5 was fully justified. It dealt with the international problem of what happened to State property owned by the predecessor State. Any departure from that approach could only lead to confusion.

31. The reference to the internal law of the predecessor State was correct, because it was the law of that State which determined what constituted its property. It was necessary to leave aside, as a totally different question, the problems of the application of private international law and of the law applicable to the property.

32. Mr. MARTÍNEZ MORENO said that the expression "property, rights and interests" which, as pointed out by the Special Rapporteur, had been used in the Treaty of Versailles and in many other treaties, was not unknown to Latin American practice. It was used in a number of treaties between Latin American countries.

33. In the Latin American legal system it was perfectly possible to distinguish between "rights" and "property". The term "rights" was used, in contrast with "property", to describe incorporal property such as debt-claims. As to the term "interests", the example given by Mr. Kearney was an excellent one. The term had also been used on a number of occasions in Latin America in declarations relating to the law of the sea, which had referred to the interests of the coastal State in the protection and utilization of the resources of the sea adjacent to its coast.

34. In conclusion, he thought that the Drafting Committee's formulation of article 5, despite its imperfections, constituted a satisfactory provisional basis for the Commission's work.

35. Mr. SETTE CÂMARA said that the new wording of article 5 was a great improvement on the earlier text. The controversial features had been eliminated, and that would greatly assist the Commission in its work. The Drafting Committee had abandoned the negative definition originally proposed for public property and had dropped the controversial reference to property "necessary for the exercise of sovereignty by the successor State".

36. The introduction of the concept of "State property" was a step forward. "State property" could properly be regarded as a concept of international law, whereas "public property" was essentially a concept of constitutional and municipal law.

37. With regard to the expression "property, rights and interests", he was inclined to agree with the views put forward by the Chairman of the Drafting Committee and was prepared to accept that formula on a provisional basis, on the understanding that it would be construed as broadly as possible.

38. He agreed that it would be very difficult to avoid making some reference to an internal law defining State property at the moment of succession; that law could be no other than the law of the predecessor State.

39. The fate of public property other than State property—such as the property of public bodies or State enterprises—would be decided by the internal law of the successor State. That law might well completely change the status of the property in question.

40. It would be useful to retain in article 5 a somewhat vague formula capable of covering all situations, including the one to which Mr. Quentin-Baxter had referred.

41. Mr. AGO said that, in order not to hinder the adoption of the proposed text, he would accept the expression "property, rights and interests", but he greatly hoped that a more satisfactory formula would be found. The main defect of the present wording was that it placed widely different notions on the same footing. The term "property" meant rights in corporeal property; the term "rights" applied also to rights in incorporeal property, including debt-claims; the term "interests" also denoted rights. The terms "interests" was taken from systems of law, both Anglo-Saxon and continental, in which there were legally protected interests which could not be classed as true subjective rights. A particular example was lawful interests. In other words, each of the three terms denoted rights or interests recognized and protected by the law. Mr. Martínez Moreno had given an example of an interest which was not covered by the wording of article 5: a State might have an interest in protecting certain resources, but that interest might not yet be protected by law. The successor State might inherit the interest in question, but it would not be comprised in the legal phenomenon of State succession.

42. The CHAIRMAN speaking as a member of the Commission, said he fully agreed with the new method adopted by the Drafting Committee for the formulation of article 5.

43. Both the other possible methods of drafting the article had already been tried without success. The first was to give an enumeration of the property in question. The second was to define that property in negative terms, as the Special Rapporteur had done in his sixth report (A/CN.4/267), as all property not under private ownership.

44. Both those methods had led into a blind alley. The only acceptable course which remained was that adopted by the Drafting Committee of defining State property by referring back to the internal law of the predecessor State. The Drafting Committee had adopted that approach with success in its new version of article 5.

45. The formula "property, rights and interests" was the best that could be found, bearing in mind the variety of legal systems. The three terms used in that formula had one common element: they all referred to items having an economic value items of what might be called a "patrimonial character".

46. The example given by Mr. Kearney to illustrate the meaning of "interests" was a very appropriate one. The term "interest" denoted a potential right, or the expectancy of a right; no actual right existed yet but, under certain circumstances, a rights could come into existence, emerging from the "interest".

47. He approved of article 5 as formulated by the Drafting Committee and suggested that in due course

an attempt should be made to introduce the idea that the "property, rights and interests" mentioned in the text all had an economic value.

48. Mr. USHAKOV explained that he was not opposed to the words "according to the internal law of the predecessor State". He merely thought that, if the reference to the predecessor State were deleted, the definition of State property would become general. To that end, the words "predecessor State" should be replaced by the words "State in question". Once a general definition of State property had been given, the subsequent articles could specify what State property was referred to. For instance article 8, sub-paragraph (i), expressly mentioned "public or private property of the predecessor State". It should be noted, in that connexion, that in the case of a partial transfer of territory not all the property of the predecessor State passed to the successor State.

49. Mr. BARTOŠ reminded the Commission that the expression "property, rights and interests" had not only been used in the Treaty of Versailles and in the treaties supplementing it, but had given rise to discussion in 1946 before being included in the treaties of Paris.[2] At the time, some people had opposed the use of the expression because, they had thought it unnecessary to mentioned interests. They had taken the view that legal interests were assimilable to rights, whereas non-legal interests were not subject to State succession. The Paris Conference had nevertheless adopted the expression, believing it useful to mention interests which had not yet become legal in character because they took the form of rights in process of formation, future rights, or interests which it was lawful to protect. In that connexion the draftsmen of the treaties of Paris had referred in particular to the lawful interest of a State in not being deprived, by diversion, of the waters of a river crossing the territory which was the subject of the succession. They had also referred to problems relating to the subsoil and, in particular, to oil.

50. The expression "property, rights and interests" had become part of the terminology of international treaties on succession of States. If it was not used in the draft articles under discussion, difficulties of interpretation might arise. The omission of the word "interests" might suggest that interests were excluded from succession. In his view, therefore, the traditional formula "property, rights and interests" was necessary.

51. Mr. MARTÍNEZ MORENO explained that the example he had given of the interest of a coastal State in the protection and utilization of the resources of the sea adjacent to its coasts had been intended to illustrate that the term "interest" should be taken to mean a legal interest; that was the point he had wished to make, and he was thus in agreement with the view expressed by Mr. Ago.

52. In that connexion it was worth noting that, at a recent meeting at San Salvador of a group of Latin American countries known as the Montevideo group, which upheld the claim to a territorial sea or sovereignty zone of 200 miles, it had been urged that it was not the interests, but the rights of the coastal State that should be invoked.

53. Mr. RAMANGASOAVINA said there was a point connected with article 5 which needed clarification. In the event of a succession of States, the territory of the predecessor State and that of the successor States were not necessarily the same—for instance, in cases of secession or partition. The words "property, rights and interests" might suggest that everything which had belonged to the predecessor State passed to the successor State, whereas in some cases the succession comprised only part of the property.

54. The CHAIRMAN invited the Special Rapporteur to comment and make recommendations.

55. Mr. BEDJAOUI (Special Rapporteur) first thanked the Drafting Committee for the assistance it had given him in formulating article 5. The definition proposed in the article was purely provisional; it had the merit of avoiding a number of pitfalls, of enabling the Commission to go on with its work, and of indicating clearly to the Sixth Committee and the General Assembly the general direction the work was taking, which would have been impossible without a definition of public property. Of course, the definition in article 5 was just as provisional as the definition of succession of States in article 3, and the Commission would probably have to recast them both later.

56. The Commission would note that in defining State property in that way it had reverted to the method of determining public property which he had suggested in article 1 in his third report,[3] that was to say by reference to the municipal law which governed the territory affected by the change of sovereignty. The Commission would have to determine later, in a second part of the draft articles and probably in the same manner, what public property belonged to territorial authorities and then, in a third part, what constituted the property of public enterprises. At an even later stage it might perhaps revert to a definition of the kind proposed in the third report, namely, that public property was property belonging to the State, a territorial authority thereof or a public body.

57. In his third report he had referred to the municipal law "which governed the territory affected by the change of sovereignty". That brought him to the very pertinent comment by Mr. Quentin-Baxter who, taking New Guinea as an example, had pointed out that cases could arise in which colonial legislation should normally be applied in defining what constituted State property. That difficulty had not escaped his attention when he had prepared his third report. In the former colonies, however, State property was reduced to its simplest form and, above all, the property of the metropolitain State was not necessarily governed by the territorial internal law of the colony but, in a sense, came under the law of the metropolitan State itself. Barracks and military installations, for example, and generally speaking all service property

[2] See, for example, Part VII of the Treaty of Peace with Italy, United Nations, *Treaty Series*, vol. 49, p. 160.

[3] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 133, document A/CN.4/226.

called "crown property" and the services themselves, were not subject to the law of the territory. Thus difficulties were, indeed, to be encountered in determining State property by reference to colonial law.

58. Another difficulty might arise where the property of the former sovereign, who had preceded colonization, had not been regarded as public property by the colonizing State and had been abandoned to private ownership. In such a case, what law should be referred to for the purpose of defining public property in the event of succession ?

59. He had therefore thought it would be wiser to make a comprehensive and, as it were, generic reference to the internal law of the predecessor State, rather than to allude to the particular branch of that law constituted by the legislation of the colony; for the latter too represented the internal law of the predecessor State, being the legal order which the metropolitan Power itself had established in the colony. In view of their complexity, perhaps the commentary should mention those problems and specify that the law of the predecessor State should, where possible, be understood to mean the local law, but that the local law was to be distinguished from the *lex loci* in order to avoid the problem of referring to the law of a third State in which the property in question might be situated. For the time being, it would be better to keep to the formula proposed by the Drafting Committee, which made it possible for the Commission to go ahead.

60. With regard to the comments of Mr. Ustor and Mr. Ushakov, he hid not think it would be possible to avoid referring to the predecessor State; it was a legal necessity. Mr. Ushakov had explained that what he objected to was not the reference to internal law, but the reference to the internal law of the predecessor State. But if the text did not specify which internal law was meant, there would be serious uncertainty and a choice would have to be made between the laws of the two States concerned. Unfortunately, it was not possible to define property which necessarily belonged to the State. There was no property which was State property by its very nature, since the nature of State property was determined by the philosophy of each State. It was therefore impossible to mention the State without being more specific: a choice had to be made between the two States concerned. The best course would therefore be to accept the proposed definition, which in any case was only provisional.

61. With regard to the expression "property, rights and interests", which had been criticised by several members of the Commission, in particular Mr. Ustor, lawyers had been vainly seeking an alternative to it for nearly half a century. But as Mr. Bartoš had pointed out, it was a hallowed formula whose meaning and scope were well known despite its inherent uncertainties and imperfections. Perhaps the theoretical difficulties it raised could be indicated in the commentary, which might state that the Commission, having failed to find a more general definition for all public property that was compatible with the different legal systems, had considered the formula acceptable. As Mr. Castañeda had indicated, the word "interests" must be used to provide for the option which might be open to a natural or legal person—in the case in point, the State. That interest was, of course, a legal interest, as Mr. Ago had observed. In any case, the rights to which the expression "property, rights and interests" referred were all the rights which could be described as "patrimonial" or, as Mr. Castañeda had said, rights of an economic character.

62. Mr. Ustor had said that the definition of State property given in article 5 was bound to bring the Commission up against the problem of State enterprises. But a clear distinction must be made between State enterprises and State property, which were two entirely different things. The property of a State enterprise did not necessarily belong to the State, since a State enterprise had its own patrimony; and article 5 dealt with State property, not with the property of a State enterprise. Nevertheless, direct participation of the State, and State property distinct from that of the enterprise, could exist in a State enterprise. The question was whether, in such a case, that property should pass to the successor State. He had answered that question affirmatively in other articles; in article 34, for example, he had spoken of property of the State in public establishments and he intended to revert to the matter later.

63. Mr. Ramangasoavina thought that article 5, as proposed by the Drafting Committee, might give the impression that all the property of the predecessor State, including property in territory which still belonged to it after the succession, would pass to the successor State. But article 5 only defined State property; it did not deal with its allocation, which was the subject of article 9. It was the determination of the geographical area in which one State replaced another that made it possible to specify what State property passed to the successor State. He had originally intended to refer direct to the territory affected by the change of sovereignty, as shown by the definitions given in his fourth, fifth and sixth reports.[4] Mr. Reuter had dissuaded him from doing so by raising the question of property situated outside the territory.[5] He had therefore adopted a more general formula in order to avoid referring to territory; but it was quite clear, as the succeeding articles showed, that not all State property would pass to the successor State.

64. Mr. USHAKOV said that there was a difference between the internal law of a particular State and the internal law of the State in general. It was to the internal law "of the State in question" that reference should be made.

65. The CHAIRMAN noted that a number of pertinent and important observations had been made on article 5, but no fundamental objections or real reservations. In view of its wholly provisional character, therefore, he suggested that the article should be approved.

It was so agreed.

66. The CHAIRMAN said that the Commission had completed its examination of the texts proposed by the Drafting Committee in document A/CN.4/L.196. Since articles 6 and 7 were under still consideration by the Com-

[4] *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1; *ibid., 1972*, vol. II, document A/CN.4/259; and *ibid., 1973*, vol. II, document A/CN.4/267.

[5] See 1223rd meeting, para. 30.

mittee, he invited the Special Rapporteur to introduce his new version of article 9 (A/CN.4/L.197), which was intended to replace the former articles 8 and 9.

ARTICLE 9

67. Mr. BEDJAOUI (Special Rapporteur) said that since the Commission had provisionally restricted the definition of State property, article 8 had lost much of its point, and its last two sub-paragraphs served no purpose for the time being. He had therefore submitted a new article 9 in place of the former articles 8 and 9.

68. The new article read:

Article 9

The substitution of the successor State for the predecessor State shall have the effect of substituting the former for the latter, freely and without compensation, in the ownership of all State property, save as may have been agreed otherwise.

For his part, he considered that article 9 also replaced articles 15, paragraph 2; 19, paragraph 2; 23; 27; 31, paragraph 2; 34 and 38; that was to say, the scattered provisions relating to State property held by public enterprises or territorial authorities, or situated outside the territory.

69. The Commission's discussion on article 5 was an excellent point of departure, because article 9 must be examined in the light of article 5. The provision in article 9 was clearly one of international law. There was now a rule of international law which allowed the substitution of the successor State for the predecessor State in the ownership of all State property unless, of course, the two States had agreed otherwise. That was a practically uncontested rule.

70. There was, indeed, a unanimity among writers which made it possible to regard the rule laid down in article 9 as a commonly accepted rule of international law. It was true that not all the authors referred specifically to State property, but that was because of the terminology used in the system of law to which they belonged. Some spoke, for example of property in the "public domain", as opposed to property in the "private domain" of the State, borrowing those concepts from the internal law of a particular legal system. In general, however, writers—whose example had been followed by international jurisprudence—were in agreement on the rule laid down in article 9.

71. That rule was based on the principle of the viability of the State, which should be taken as a guide in all cases of succession of States—or in nearly all, for it might be thought that in some cases there was no automatic transfer of State property; he would revert to that point. Property such as roads, barracks, harbour infrastructures and State public buildings—government headquarters and ministries—could not remain in the possession of the predecessor State. They were property which the predecessor State had deemed it useful, if not necessary, to own for social purposes which it had set itself in the general interest. But what had seemed necessary or useful to the predecessor State might also prove necessary or useful to the successor State.

72. The transfer took place on the elementary principle that the replacement of one State by another was incompatible with the concurrent exercise of two State authorities over the same territory. It was difficult to accept that the predecessor State could continue to hold certain State property which sometimes involved the highest forms of the exercise of sovereignty. That was why he had first defined such property as appertaining to sovereignty or necessary for its exercise, the main purpose being to overcome the difficulties arising from the differences between legal systems: for example, the French legal system referred to the private and public domains of the State, whereas those concepts did not exist in other legal systems. But he had discarded that formula, which might lead the Commission to a dead end.

73. In his view, the definition of State property adopted in article 5 made the Commission's task easier in regard to article 9. But although there were certain State practices which had become general and made it possible to infer the existence of a rule on the subject, it had also happened that some practices had not followed the same course. Some predecessor States had given up property in their possession only against indemnity or compensation. Compensation had been spoken of mainly in connexion with property constituting the private domain of the State. But that approach was neither general nor fully accepted in practice. Without wishing to ignore the existence of such practices, he had therefore concluded that exceptional situations could be covered by special formulas such as that of article 9. An agreement, for example, could provide for the handing over of State property against compensation or could allow the predecessor State to retain certain State property with the consent of the successor State.

74. In making a reservation to the principle that State property was transferred in all cases of State succession, he had been thinking, in particular, of the case of uniting of States, in which there was not a total transfer of all State property. It was clear that the transfer of some items of property, such as currency, could take place only at the level of union, and all the texts which referred to that type of succession of States also referred to such transfer at union level. But those were special cases which could be settled by agreement, and it was generally by agreement that a union of States was formed. The reservation could therefore be dropped, since article 9 provided for an exception to the rule by specifying that matters could be agreed otherwise.

75. In conclusion, he considered that the rule laid down in article 9 existed in practice and imposed on the predecessor State a legal obligation to transfer the ownership of State property, with all the legal consequences that might entail. He had left wide scope for agreement in order to take into account the diversity of situations, and had endeavoured to look beyond the theoretical problems and draft a text which was as practical as possible and which the Commission could support.

Other business

[Item 10 of the agenda]

76. The CHAIRMAN drew the Commission's attention to a letter dated 30 April 1973, addressed to the Secretary-

General of the United Nations, containing the comments of the Prime Minister and Minister for Foreign Affairs of Tonga on the draft articles on succession of States in respect of treaties (ILC (XXV)/Misc.2).

The meeting rose at 1 p.m.

1232nd MEETING

Friday, 22 June 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Ramangasoavina, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.197)

[Item 3 of the agenda]

(resumed from the previous meeting)

ARTICLE 9 *(continued)*

1. Mr. TAMMES said that in the new text of article 9 (A/CN.4/L.197), all reference to the different categories of public property had disappeared; it was now only State property—all State property—in the territory affected which would pass to the successor State without compensation. It had been agreed that at a later stage the Commission might consider other categories of public property, as enumerated in article 8, but that for the time being it would deal only with State property. That was undoubtedly a helpful solution; but he wondered whether the new article 9, just because of its simplification, did not go rather too far.

2. In studying the history of the present article he had again gone through the Special Rapporteur's earlier reports, which gave a well-organized account of the multifarious situations which history presented to the legal mind, but he had not found much evidence, either in judicial decisions or in the writings of qualified publicists, of an absolute rule that all State property in the territory in question passed to the successor State without compensation. In his fourth report the Special Rapporteur had indeed recognized that "while the transfer without compensation of property appertaining to the public domain is not in dispute, some legal authorities maintain that public property constituting the private domain can be transferred only against payment".[1] That point of view also seemed to be confirmed by the Special Rapporteur in the commentary to article 9 in his sixth report (A/CN.4/267).

3. In that connexion an interesting example was the decision of 31 January 1953 taken by the United Nations Tribunal in Libya in the case of *Italy v. United Kingdom and Libya*.[2] That decision, which involved the interpretation of General Assembly resolution 388 (V), had quoted the following excerpts from Fauchille's *Traité de droit international public*:

"When a dismembered State cedes a portion of its territory, property which constitutes *public* property, namely property which by its nature is used for a public service, existing on the annexed territory, passes with its inherent characteristics and legal status to the annexing State; being devoted to the public services of the ceded province, it should belong to the sovereign power which is henceforward responsible for it...

"As regards *private* State property, i.e., property which the State possesses in the same manner as a private person, in order to derive income from it, it must be noted that failing any special provisions it does not become part of the property of the annexing State. In spite of the loss the dismembered State has suffered, it remains the same person as before and does not, any more than a private person, cease to be the owner of the things it possesses in the annexed territory and there is no principle preventing it from having the ownership of immovable property in that territory."

4. That decision, dealing with one category of public property, namely, alienable public property or *patrimonium disponibile*, which, as he understood it, came close to private property of the State, seemed to leave room for different kinds of treatment, and that had been the subject of the litigation.

5. In his opinion, whatever the terms used and the definitions made in internal law, such as public domain, private domain and *patrimonium disponibile*, there was at the present time no agreement in judicial decisions or other authorities on the existence of a rule so catagorical as that laid down in the new article 9. The Commission was in effect working out a rule for the progressive development of international law, and that should be clearly stated.

6. He himself was partly in favour of such a rule, in particular where it referred to the free substitution of the successor State for the predecessor State, which he understood to be an automatic substitution not requiring any agreement. There would be an undeniable burden on the successor State if private property, independently of that State's sovereign will, passed within its jurisdiction with the characteristics of foreign property.

7. As to the absence of compensation, he was not quite sure that the new rule would be the just rule in all cases of succession. It might be so in typical cases of decolonization, but perhaps it might not be so in the more numerous cases of secession which might occur in the future, and which were precisely the cases in which there was often no prior agreement.

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[1] See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 177, document A/CN.4/247 and Add.1, part II, para. (2) of the commentary to article 6.

[2] *Ibid., 1970*, vol. II, p. 173, document A/CN.4/232, para 16.

8. He therefore wondered whether, from the point of view of compensation, a distinction should not be reintroduced on the lines of that proposed by the Special Rapporteur in his original article 9 (A/CN.4/267), by including a reference to "property necessary for the exercise of sovereignty". To put it more precisely, the real point was that what belonged to the *imperium* of the State was part of the sovereign State itself and the problem of payment of indemnity did not arise although, as he interpreted Fauchille, that problem might arise in connexion with the "private domain" of the State. In any case, the problem was one which called for further reflection.

9. Mr. HAMBRO said that, as the representative of a pragmatic legal tradition, he was glad that the Special Rapporteur had been able to combine articles 8 and 9 in a new simplified article 9. He himself had had serious difficulties in accepting the expression "property necessary for the exercise of sovereignty".

10. Mr. Tammes had been right in stating that on many of the questions dealt with in the present draft articles there was no general agreement either in practice or among the learned authors. The duty of the Commission, however, was, precisely, to reach agreement where no agreement had existed before and to try to produce a text which could apply to all kinds of succession and all kinds of property.

11. At the beginning of his work the Special Rapporteur had perhaps been carried away by historical and political considerations, but it was gratifying to note that he had now reverted to a purely legal approach. The predecessor State and the successor State were, of course, always free to make their own rules, but the Commission's concern now was with the drafting of residual rules which would apply in the absence of contractual rules.

12. As Mr. Tammes had observed, it was obvious that article 9 called for further reflection, but he was prepared to accept it as a preliminary draft on condition that the Commission reconsidered it at a later stage in relation to the draft articles as a whole.

13. Mr. USHAKOV said he reiterated the opinion he had held ever since the Commission had begun studying succession of States in any form whatsoever: namely, that it was impossible to formulate rules which were uniformly applicable to all cases of succession; cases differed too widely, both in cause and in effect. Each specific situation—a transfer of territory, the accession of a State to independence, fusion or a union of States, and so forth—called for different rules. Thus the draft article 9 before the Commission at present could apply only—and then only in part—to the case of the formation of a unified State, in which all the property of the predecessor States became the whole of the property of the new State formed by the union of those predecessor States. In that case, however, there was not one, but several predecessor States and it was therefore necessary to speak of substitution for the "predecessor States". Hence draft article 9, as it stood, was not even applicable to the case of a union of States. Nor was it applicable to the case of States emerging from decolonization, since not all the property of the former metropolitan Power became the property of the newly independent State, notwithstanding article 5, which made no exception for that case.

14. In addition, as provided for in article 25 of the draft articles on succession of States in respect of treaties,[3] a newly independent State might be formed from two or more territories which had not been under the jurisdiction of the same predecessor State. Article 9 did not provide for that situation either. Moreover, the principle expressed in the words "save as may have been agreed otherwise", although correct, was not applicable to newly independent States, since only the predecessor State had existed as a sovereign State and the validity of devolution agreements was not confirmed by international law.

15. Thus it was clear that a single rule could not be applied to all cases of succession and that draft article 9 was too general to be acceptable. The Commission should not draw up the general articles until it had drafted the substantive ones.

16. The provision "freely and without compensation" was fair in principle, especially for newly independent States, but it was entirely appropriate to provide that the States concerned could decide otherwise by agreement.

17. The CHAIRMAN, speaking as a member of the Commission, said that the new article 9 represented a praiseworthy effort to simplify matters. Instead of the three categories of property covered by the former article 8 and the category covered by the former article 9, there was now only the single category "State property"

18. However, as Mr. Tammes had pointed out, that effort at simplification had not proved as simple as it had seemed at first. The essential difficulty lay in the plurality of legal systems to which public property was subject. In some countries there was the "public domain", in others "eminent domain", and in still others "original property of the nation". The Special Rapporteur had therefore done well to begin with the simplest category of all, namely, State property, though the underlying problems had not disappeared, but had merely been postponed until the subsequent parts of the draft came up for consideration.

19. Even in the case of State property, however, there might, as Mr. Tammes had suggested, be two categories subject to utterly different legal régimes. There was no difficulty in the case of public property of the State, which could pass to the successor State automatically and without compensation, but in the case of private property of the State it would, in his opinion, be unjust if certain items, such as private property situated abroad, should pass within the legal order of the successor State.

20. In the new text of article 9 the notion of "substitution" was used in two different senses. The word "substitution", at the beginning of the article, referred to a simple fact, the substitution of one State for another, whereas the word "substituting" referred to an entirely different phenomenon, namely, the transfer of property. He thought the article would gain much if the word "substituting" were replaced by the word "transferring".

[3] *Ibid., 1972,* vol. II, document A/8710/Rev.1, chapter II, section C.

21. It was his impression that the Special Rapporteur, in introducing the new text of article 9 at the previous meeting, had said that when the substitution took place it gave rise to a legal obligation to transfer State perperty;[4] he himself was of the opinion that the transfer took place *ipso jure* and automatically. He hoped that that idea could be embodied in the article.

22. Lastly, he noted that the Special Rapporteur had said in his commentary to article 9 (A/CN.4/267) that "it was difficult to find a satisfactory expression to describe property of a public character, which, being linked to the *imperium* of the predecessor State over the territory, can obviously not remain the property of that State after the change of sovereignty, or, in other words, after the termination of that *imperium*". He thought, therefore, that the Commission should give some consideration to the possibility of retaining the concept of "property necessary for the exercise of sovereignty", which had been used in the former article 9.

23. Mr. RAMANGASOAVINA said he accepted the principle laid down in draft article 9, which met the Commission's desire to simplify basic notions as much as possible and to confine itself for the time being, to State property and the substitution of one State for another. The word "substituting" was preferable to the word "transferring", proposed by Mr. Castañeda; for "substituting" expressed the idea that the successor took the place of the predecessor, with all the legal consequences that entailed, whereas the word "transferring" would allow of changes in the transferable property. It would therefore be better to retain the word "substituting".

24. On the other hand he was in favour of replacing the word "freely" by the word "automatically", in order to avoid giving the impression that the successor State bore no share of the expenses which might arise from the transfer of the property. The expression "shall devolve, automatically and without compensation", used in the former article 9, was excellent. He therefore proposed that it be stated that the substitution of the successor State for the predecessor State "shall have the effect of substituting the former for the latter, automatically and without compensation, in the ownership of all State property...".

25. Mr. KEARNEY said he was inclined to agree with Mr. Ushakov that the new article 9 covered such a wide variety of situations that it would be difficult to foresee all their consequences and to do justice to all the interests involved.

26. Mr. Ushakov had raised a particularly important point with regard to unions of States. Where such unions were of a federal character, which was the standard type, it would seem an unjust rule, for example, to make public buildings in the capitals of the component states federal property, when they might still be needed for the proper functioning of those states. Or course, in most unions those matters were governed by special agreements, but the Commission was drafting residual rules for cases in which no such agreement existed. The problem might be solved by accepting article 9 as a general principle and introducing it with some such phrase as "Subject to the provisions of subsequent articles dealing with particular forms of succession,".

27. Article 9 also raised problems concerning the kind of property that was subject to transfer upon succession. As the representative of a common-law country he saw no problem in distinguishing between the public and private property of the State. If a State operated oil refineries, for example, they were State property which should pass to the successor State; but some kinds of State property, such as military equipment, arms and bases, might give rise to more complex difficulties.

28. Article 9 did not attempt to deal with the problem of the location of the property; that was the subject of other articles such as article 15; but it might be necessary to consider the effects of articles 9 and 15 together in regard to State property. The main distinction would be between movable and immovable property: for example State-owned railways might raise the question of claims to rolling-stock which the predecessor State had removed from the territory before the succession. Likewise the widespread use of containers and "lighter-aboard-ship" vessels, which might turn up anywhere in the world, could give rise, in a State in which shipping was nationalized, to disputes that would not be covered by the present draft articles.

29. Subject to his concern about the indiscriminate application of article 9 to very difficult situations, whether with regard to the type of succession, the location of the property or the kind of property, he was prepared to accept the new version in principle, although he felt that it could not be discussed in isolation from article 15, which, in its turn, would have to be made more precise.

30. Mr. BARTOŠ said he wished to draw the Commission's attention to three points. First, a succession of States might take place through an intermediate subject of law. The unification of Germany, Italy and, in part, Yugoslavia had come about in that way. For example, Montenegro had united with Serbia before the formation of the Yugoslav State; Serbia had then joined the other States which had finally formed Yugoslavia. The question had then arisen which State was the successor to Montenegro, particularly with regard to the debts contracted with other States by the Government in exile.

31. The second point was whether there was a successor State in the case of States emerging from decolonization. Practice did not always bear out the legal logic of Mr. Ushakov's argument. It was well known that a State which was forced to grant independence often set up, beforehand, a government team with which it signed succession agreements in the first few minutes after the time at which independence took effect. That had happened in India, for example. The question arose whether the representatives with whom the administering authority dealt before independence already represented the successor State, or whether it was the agreements signed between those representatives and the administering authority which created the newly independent State. For instance, France held that it was the Evian Agreements which had created the independent State of Algeria, though Algeria did not agree.

[4] See previous meeting, para. 75.

32. The third point to which he wished to draw attention was that the word "freely" and the words "without compensation" applied to different situations. The element of gratuitousness related mainly to the expenses that might arise from the transfer, and it raised problems too complicated for the Commission to solve. On the other hand the Special Rapporteur had been right to lay down the principle that there should be no compensation, while leaving the States concerned free to depart from that principle by agreement. The principle of no compensation was fairer to newly independent States; moreover, it was simpler to proceed on that basis in order to avoid the endless complications which might arise, and had arisen in the past, from distinguishing between items of property according to whether or not they conferred the right to compensation, having been created to serve the needs of the State or those of the people—police stations or small harbour works, for example—even though the States concerned must be left free to agree on possible exceptions.

33. Mr. AGO said he thought the drafting points raised by article 9 should be referred to the Drafting Committee. Not only should the notion of "substitution" not be used in different senses, but the debatable expression "all State property" should be examined.

34. With regard to the substance of the article he shared the concern expressed by Mr. Ushakob and Mr. Kearney. There was, indeed, a wide variety of situations, which might call for solutions other than that set out in article 9. That, of course, was why the Special Rapporteur had included the words "save as may have been agreed otherwise". Normally, States settled matters by agreement, so the principle embodied in the article under discussion was in the nature of a residuary rule. The only case of State succession which precluded any agreement was certainly that in which a new State was created as a result of a revolution or civil war.

35. He wondered whether, by laying down the rule in article 9, the Commission might not run the risk of hindering the conclusion of agreements between the parties. For if it was in a party's interests that that rule should be applied in a particular case, it would oppose the conclusion of an agreement. Yet in some cases it was objectively desirable that the parties should agree on a solution other than that provided in article 9, and it should not be possible for one party to impose the rule in the article by refusing an agreement.

36. With regard to the words "all State property", the normal position was that at least some of the property of the predecessor State passed automatically and without compensation to the successor State. In some cases, however, it might not be equitable for property to pass in that way. Since, in the Special Rapporteur's opinion, the words consideration applied to both patrimonial and domanial property, it might be asked whether the principle of transfer of State property without compensation, which was fair in the case of public property, was also fait for private property. The answer to that question depended on the fact of each particular case.

37. While some members of the Commission feared thar it was not possible to lay down a general rule, he himself believed that such a rule might make the normal solution—by agreement—more difficult.

38. Mr. BILGE said he approved of the new wording of article 9, and particularly admired its structure. The provision stated either a residuary rule or a peremptory norm, depending on whether an agreement existed or not.

39. So far the Commission had encountered three main difficulties. The difficulty of the definition of public property had been partly overcome when it had agreed to consider only State property. As to the problem of compensation, the Special Rapporteur had pointed the way by providing in his draft article for the conclusion of an agreement by the States concerned, which might, of course, deal not only with compensation, but also with the property to be transferred. The third difficulty related to the application of the article to the different types of succession. Mr. Ushakov had expressed serious misgivings. He himself was more optimistic, because the rule in article 9 applied only in the absence of an agreement. States were always free to agree on a different solution; and in any case practice showed that the commonest procedure was to conclude an agreement. That enabled States to take due account of the particular requirements of the situation.

40. Unlike Mr. Ago, he did not think the principle stated in article 9 made it less likely that an agreement would be concluded. The principle was that no compensation was payable, but that was no handicap to the predecessor State, since it could always be agreed otherwise. As the Special Rapporteur had demonstrated in his reports, the principle of no compensation, which was based on the principle of viability, was widely adopted. It was justified, in particular, in the case of newly independent States. Nevertheless, States should be left free to reach agreement.

41. With regard to terminology, he thought the word "freely" should be replaced by the word "automatically". Furthermore, the term "ownership" was too limited in meaning and less satisfactory than the expression "Property necessary for the exercise of sovereignty over the territory affected by the succession of States", which had been used in the former version of article 9. Lastly, the words "all State property", which would obviously include property situated outside the territory concerned, were too general. They would be justified only where the predecessor State disappeared completely. It should perhaps be made clear in the commentary that, if the predecessor State continued to exist, all its property was not transferred to the successor State.

42. Mr. MARTÍNEZ MORENO expressed his appreciation for the effort made by the Special Rapporteur to devise a simple solution to a very complex problem.

43. The new article 9 was satisfactory in the case of newly independent States. He had some doubts, however, about its application to cases of succession arising from the dissolution of a union of States. His own country had been one of the members of the Central American Federation which had become independent of Spain in 1821. That union had unfortunately been dissolved in 1838, under almost chaotic conditions. In the circumstances it had not been possible to conclude any agree-

ment between the five new States which had emerged from the dissolution, so each new State had retained the State property situated in its territory. Certain buildings and other property situated in the former capital of the dissolved federation, however, had remained in the ownership of Guatemala. That example showed how difficult it was to apply the formula of the new article 9 in cases of dissolution of States.

44. He shared some of the misgivings which had been expressed about the use of the word "freely". Apart from the question of charges on the property, to which Mr. Bartoš had referred, it was necessary to consider cases in which part of the price was still owing on property bought by the predecessor State, as, for example, when an island had been purchased and payment was spread over several years. The word "freely", used in article 9, could give rise to misunderstanding in that connexion, since the right of the vendor State to payment would not be recognized. His own suggestion would be to introduce into the text the idea of property being transferred "as it exists and with its legal status"—a phrase taken from article 6 in the Special Rapporteur's sixth report (A/CN.4/267). In any case the commentary should contain a reference to that matter.

45. Sir Francis VALLAT said that, bearing in mind that article 9 stated a residual rule, he was prepared to accept it in principle. It set the Commission on the right path and constituted a satisfactory starting point, but there were still a number of problems which required careful consideration.

46. The first was that it would not be easy to apply the rule in article 9 to different kinds of succession. In many cases it might apply quite well, but in the case of transfer of part of a territory—a case of succession which came fully within the Commission's definition of succession of States—its application would prove most difficult. It would be necessary to examine the implications of the principle stated in article 9 for different kinds of succession, before it could be accepted as a general principle.

47. The second problem related to the location of the property, a matter of considerable importance. That matter was not dealt with either in the definition of State property in article 5 or in the present wording of article 9. The provisions of article 9 were near the mark for property situated in the territory which was the subject of State succession, but it would be difficult to apply them to property situated elsewhere; in its present form, article 9 certainly could not apply to property situated in the territory of the predecessor State.

48. Other problems arose from the nature of State property. Nowadays States assumed responsibilities in a wide variety of matters. Moreover, certain types of property moved very readily. As a result the predecessor State might suffer great hardship if all property that happened to be in the territory of the successor State at the time of the succession was transferred freely and without compensation to the successor State.

49. For property to pass "freely and without compensation" was normal in the case of public property used for government purposes. In other cases, however, some compensation was often given to the predecessor State.

50. Mr. USHAKOV suggested that, in order to cover all possible situations, article 9 should be redrafted to read:

> "The successor State shall, on the date of transfer, acquire full rights to the State property transferred to it on the occasion of a succession of States."

That wording could, of course, be amended according to whatever notion of transfer the Commission finally adopted. There should also be further provisions to indicate when and how the property was transferred.

51. Mr. AGO observed that, worded in that way, article 9 no longer served the purpose of stating a principle of transfer. The emphasis was on the date of transfer. The notion of transfer would be defined in other provisions.

52. Mr. USHAKOV said that there was no transfer, but the automatic substitution of the successor State for the predecessor State. Of course, that substitution occurred on a specific date.

53. Mr. BEDJAOUI (Special Rapporteur) said he had thought that the new version of article 9 would facilitate the Commission's task by simplifying certain problems. But some members, such as Mr. Tammes, had wondered whether the new article did not go rather too far with regard to the transfer of State property. Yet practice showed that it was not only the whole property of the State that was transferred freely, without compensation and automatically, but very often also other public property, under the same conditions. He thought that, in reality, perhaps article 9 did not go far enough and would have to be supplemented later. In that connexion he referred to the Treaty of Peace with Italy,[5] concluded in 1947, which Mr. Ago had cited in his fourth report on State responsibility (A/CN.4/264 and Add.1). Under resolutions adopted by the United Nations,[6] it had been decided to transfer to Libya and Eritrea not only State property, but also para-State property. Similarly, the Franco-Italian Conciliation Commission established to settle the dispute concerning the property of local authorities which had arisen between France and Italy at the time of concluding the Peace Treaty, had ruled that the successor State should receive, without payment, not only State property, but also para-State property, including municipal property.[7] Hence article 9 was not unduly broad, for it did not cover all the property which was very often transferred to the successor State without compensation.

54. As Mr. Kearney had pointed out, article 9 raised three problems: the type of succession, the location of the property, and the nature of State property. Property situated outside the territory did present a problem, and article 9 should be read in the light of all the articles dealing with the various types of State succession, in particular articles 15, paragraph 2; 19, paragraph 2; 23; 27; and 31, paragraph 2. Article 34, on property of the State in public establishments, and article 38, on

[5] United Nations, *Treaty Series*, vol. 49, p. 126.

[6] General Assembly resolutions 388 (V) and 530 (VI).

[7] United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publications, Sales No. 64.V.3), p. 501.

property of the State in territorial authorities, might also be borne in mind. In that connexion, Mr. Kearney had suggested that it should be specified that the transfer of all State property would be "subject to the provisions of subsequent articles dealing with particular forms of succession." The Drafting Committee might well consider a formula on those lines, which would not unduly mortgage the future. Some members of the Commission, including Mr. Castañeda and Mr. Tammes, had expressed a preference for the formula he had used previously, namely, "property necessary for the exercise of sovereignty". But in any case, whatever the formula selected, it was mainly a matter of the property necessary for the viability of the State.

55. He acknowledged that in the past there had been many cases of compensation and indemnification, particularly for property in the private domain of the State. But he did not think it could therefore be said, as Mr. Ago did, that it was unfair to transfer the private property of the predecessor State to the successor State without compensation. In his opinion the notion of equity should not be introduced in that context, because it was not applicable in all cases. In cases of decolonization, for example, equity lay in the opposite direction, since the successor State was merely taking back what had previously belonged to it, of which it had been despoiled.

56. Mr. Bartoš and, before him Mr. Ushakov, had said that they could not regard an agreement concluded between a metropolitan Power and a colony as a treaty under international law; they had cited the case of India, which had signed an agreement with the United Kingdom a few minutes after the declaration of its independence. The Commission would recall that he had dealt with that question in his first report.[8] The case of Algeria was even more complicated, because since 1958 there had been a provisional Government in exile, which the French Government had not regarded as an entity empowered to conclude an agreement with it. Thus the Evian Agreements had begun as parallel declarations, and had subsequently become an agreement.

57. Although it was true, as Mr. Ago had pointed out, that article 9 gave the successor State a great advantage, since in the absence of an agreement the rule laid down in the article was directly applicable, in his own opinion it was nevertheless a general rule which was justified and which could not be departed from too far, even by agreement.

58. The wording proposed by Mr. Ushakov, to the effect that the successor State would, on the date of transfer, acquire full rights to the State property transferred to it on the occasion of a succession of States, did not reflect what he had tried to bring out in article 9, since it did not indicate what property was transferred, which he had tried to do in his draft.

59. The CHAIRMAN said that there appeared to be a general agreement on the essential elements of the rule stated in article 9. He therefore suggested that the article should be referred to the Drafting Committee to find a formula acceptable to all members of the Commission.

[8] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 103, document A/CN.4/204, para. 63 *et seq.*

60. Mr. KEARNEY suggested that the Drafting Committee should also be authorized to examine article 15 (Property situated outside the transferred territory), since it would be very difficult to work out the text of article 9 without taking article 15 into account.

61. Mr. BEDJAOUI (Special Rapporteur) supported Mr. Kearney's suggestion, but pointed out that article 15 concerned only the particular case of a partial transfer of territory. It would be necessary to consider in general the case of property situated outside the territory and to find a generally valid formula.

62. Mr. BARTOŠ expressed reservations about the similarity between articles 9 and 15. The question dealt with in article 15 had raised many difficulties in international practice; it was very important for third States to know whether property situated outside the transferred territory was on the same footing as that situated within the territory. He was not opposed to referring article 9 to the Drafting Committee, but he fully reserved his position on that article until the Committee submitted a new text.

63. The CHAIRMAN suggested that, subject to those comments, the Commission should decide to refer article 9 to the Drafting Committee, on the understanding that the Committee would also examine not only article 15, but all the various articles dealing with property situated outside the territory subject to succession.

It was so agreed.[9]

Organization of work

64. The CHAIRMAN said that at its next meeting the Commission would take up item 5 (*a*) of the agenda: Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General. He recommended that members who wished to suggest topics for the Commission's programme should do so as soon as possible.

Gilberto Amado memorial lecture

65. The CHAIRMAN announced that the Gilberto Amado memorial lecture would be given on Wednesday, 11 July 1973, at 4.30 p.m., by Mr. C. Eustathiades, a former member of the Commission.

The meeting rose at 1 p.m.

[9] For resumption of the discussion see 1240th meeting, para. 1.

1233rd MEETING

Monday, 25 June 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

(*a*) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245).

(*b*) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)
[Item 5 of the agenda]

1. The CHAIRMAN invited the Commission to examine item 5 of the agenda. He drew attention to the "Survey of International Law" prepared by the Secretary-General (A/CN.4/245) and to the written observations submitted by three members of the Commission on its long-term programme of work (A/CN.4/254).

2. Mr. TAMMES said that the "Survey of International Law", which was the result of discussions over the last five years about the Commission's long-term programme of work, was intended to provide the Commission with a documentary and scientific basis on which to draw up a plan of work for the next generation. That had likewise been the purpose of the first *Survey of International Law* prepared in 1948.[1]

3. However, the Commission had never really got down to considering its second long-term programme to the extent of contemplating the choice of new topics and the abandonment of others. When the *Survey* had appeared, in 1971, the Commission had been in the last year of its term of office and it had been thought that a newly elected Commission would be in a better position to take decisions about the future.

4. On the basis of the *Survey* it would seem that the Commission might now be able to reach conclusions, as the General Assembly would probably expect it to do on the occasion of its twenty-fifth anniversary. Nevertheless, he wondered whether it was really possible to undertake long-term prognostication of the development of international law. Some might well be sceptical and recall the Commission's experience at the outset of its work.

5. The first *Survey* had not excluded the possibility that the Commission, under its long-term programme, might be able to codify the whole of international law, but an unexpected situation had immediately come to light. New phenomena unknown to traditional international law as expounded in the 1948 *Survey* had appeared in the form of new branches of law, such as those covered in the 1971 *Survey* by chapter III, on the law relating to economic development, chapter XIII, on the law relating to the environment, chapter XIV, on the law relating to international organizations and chapter XV, on international law relating to individuals.

6. Those new developments had had only a limited effect on the long-term programme drawn up at the first session;[2] two major topics, State responsibility and State succession, were still under consideration, while the study of other topics had been completed more or less according to plan. What the new situation had meant, however, was that the Commission would henceforth work within a narrower framework of United Nations law-making activities than had originally been conceived, except for the Commission on Human Rights, which had been planned from the outset. What had actually occurred was perhaps somewhat astonishing: the bulk of international law, as conceived in 1948 and delimited in the long-term programme, was now practically codified, so that the Commission needed major new topics to take up. On the other hand, whole new sectors of international law had meanwhile come into existence.

7. As to his own personal preferences and priorities, he considered that certain great projects of codification constituted the very structure of international law. One of those codifications, the law of treaties, had now been completed, while two others, State responsibility and State succession, were well under way. What similar broad areas were left to the Commission for doing the kind of work that was expected of it?

8. Going through the 1971 *Survey* he had singled out the topic of unilateral acts, which were dealt with in chapter VIII. As a counterpart to bilateral and multilateral acts, in other words to the law of treaties, it seemed to him that that was a neglected part of international law, although one very rich in practice. Not all aspects of that topic were ripe for codification, but the clarification of other aspects, such as unilateral promises and acts of protest, might contribute to the certainty of the law. A cautious approach to that subject-matter, not aiming directly at draft conventions, but rather at authoritative statements, as suggested by the Secretary-General in paragraph 283 of the *Survey*, might encourage the Commission to give the topic some consideration, especially since the participation of many new States in the law-making process might place in a new light a problem which had been neglected for generations.

9. There were also important subjects on which the Commission had already done some work. For example, the draft Code of Offences Against the Peace and Security of Mankind[3] had resulted from one of the early assignments given the Commission by the General Assembly. Like other work of that period it had been relegated more or less to the background of the Commission's achievements, but if it was read again in the light of later problems, the draft Code might very well be considered a possible framework for the examination of "other offences of international concern", as they were called in chapter XVII, section 4 of the Survey, as well as of certain other fundamental issues which were also involved in the law of extradition. Chapter XV, which dealt with that topic, also included a section on the right of asylum, which was still outstanding on the 1949 list.

10. In considering new topics for possible inclusion in its programme of work, the Commission would also have to consider discarding some old ones, one of which should, in his opinion, be the right of asylum. The Commission had never tackled that topic, and in the meantime the General Assembly had adopted a Declara-

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[1] Document A/CN.4/1/Rev.1 (United Nations publication, Sales No. 1948.V.1(1)).

[2] See *Yearbook of the International Law Commission, 1949*, p. 281, para. 16.

[3] *Ibid., 1954*, vol. II, p. 151, document A/2693, para. 54.

tion on Territorial Asylum,[4] while the High Commissioner for Refugees had recently sent a draft Convention on Territorial Asylum to the United Nations.

11. The possibility of returning to the Commission's earlier work in the light of subsequent experience was closely bound up with the problem of revision. Mr. Reuter had referred to that problem in a most constructive manner in paragraph 27 of his written observations (A/CN.4/254). However, it might also happen that legal concepts which had been developed elsewhere in the United Nations would have an impact on the Commission's current work, in contradistinction to what it had already accomplished. One example was provided by the Commission's recent discussion of State responsibility, during which a need had been felt to take account of modern types of responsibility, which had been referred to the Commission by other bodies engaged in the law-making process in such fields as outer space, the human environment and the sea-bed. In that situation two things might happen: either the current work of codification would be adapted in the direction of progressive development, or the current topic would generate new topics, as had already been suggested in the case of State responsibility.

12. Those new topics would reach the Commission by "feedback" from its law-making environment in the United Nations and the regional bodies, but it was impossible to predict them and submit them to the General Assembly for approval. Nevertheless they would, he was sure, provide the Commission with much work for the next twenty-five years.

13. Mr. HAMBRO said that the present debate was a very important one and dealt with a very difficult matter. He himself believed that it would be dangerous, and probably not very wise, for the Commission to try to draw up a programme of work for twenty-five years.

14. The rate of development of international law was much quicker today than it had been at the time of the first *Survey* in 1948. Progress in the scientific and technological fields was being made at an unprecedented pace. That situation, combined with the evolution of legal rules in the community of nations, made it unrealistic to try to draw up a programme of codification and progressive development of international law for a quarter of a century to come. The Commission would do better to avoid engaging in "futurology" and concentrate on the problems that should engage its attention for the next five or six years.

15. It would be generally agreed that the Commission should try to draw up laws for nations and peoples, not just for lawyers. It should avoid the danger of being unduly esoteric. Subjects should be selected with an eye to their seriousness, but should not be so charged with political implications as to make it impossible to draw up legal rules.

16. In its work of codification and progressive development of international law, the Commission had benefited from the co-operation of the new States in building up a law for all nations. Its work on the law of the sea had been a very great success, culminating in the 1958 Conventions. It would thus have been natural for the Commission to deal with the subject of the sea-bed and ocean floor, but that subject had been referred by the General Assembly to a special Committee, so that it could not be taken up by the International Law Commission.

17. The same applied to the law of the environment and the law of outer space—subjects which were of increasing importance. He believed that the problems the world had to face in regard to protection of the human environment were likely to prove much more important in the future than other matters now in the forefront of international relations. On the protection of the environment, as on outer space, however, new law was being made all the time and it would be dangerous to try to freeze the development of the law.

18. Another important subject which the Commission could not usefully take up in the near future was that of human rights. The controversies which arose on that subject showed clearly that it was not ripe for codification at the world level. The best results could be obtained at the regional level.

19. As to the topics which, in his view, were ripe for attention by the Commission, he agreed with Mr. Tammes that it would be useful to deal with unilateral acts as a continuation of some of the Commission's other work. In the immediate future, the topics of State responsibility and succession of States would continue to take up much of the Commission's time. In addition, it should study the topic of international watercourses, as the General Assembly had requested. As a sequel to its work on State responsibility, the Commission could also study the development of international law relating to ultra-hazardous activities. The subject of succession of governments seemed a natural continuation of the topic of succession of States. The Commission might perhaps follow its previous method of appointing a small working party of undertake a preliminary study of that subject. Another vast field which the Commission could usefully study was that of the recognition of States and governments, which would soon be ripe for codification.

20. Mr. SETTE CÂMARA said he doubted that, in the space of one week, the Commission would be able to deal with all the points raised in the Secretariat's excellent *Survey of International Law* and come to concrete decisions bringing its long-term programme of work up to date.

21. In 1949, on the basis of the 1948 *Survey*, the Commission had chosen for its long-term programme of work 14 topics out of the 25 suggested by the Secretariat. In the 24 years which had elapsed, the Commission had submitted final drafts or reports on only seven topics and two others were under examination, namely, succession of States and State responsibility. The remaining five topics, on which no work had so far been done, were: recognition of States and governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum. The Commission was now called upon to revise that list of remaining

[4] See General Assembly resolution 2312 (XXII).

topics, discarding those considered no longer suitable and introducing new topics to meet the current needs of international life.

22. The situation had changed a great deal since the Commission had started with a clean slate in 1949, and the 1971 *Survey* was a very different document from that of 1948. It was based on the experience of years' work by the Commission and a thorough analysis of the modern realities of international law, and it took into account the general practice of the law of the United Nations and the evolution of international law over that period. It had benefited from the existence of a body of codified international law, much of it based on the Commission's own drafts. It gave due attention to the needs of co-ordination between the codified provisions of international law and the new branches of law which were emerging.

23. When the Commission had discussed the 1948 *Survey* it had been under pressure to draw up its first programme of work. The present situation was completely different; the Commission had its hands full with the topics of succession of States, State responsibility, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations. The limited progress achieved on those topics at the present session clearly showed that the Commission was occupied to the limit of its capacity. The work was advancing only slowly, and that fact would be reflected in the Commission's report to the General Assembly; in the circumstances it would not be appropriate for the Commission to submit to the Assembly an extensive and ambitious programme of work. Moreover, it was doubtful whether such a programme could be worked out in the very few days available for the review.

24. He considered that the *Survey* should be fully discussed, chapter by chapter, starting with the five topics still on the Commission's list. That would involve examining, first, sections 4, 5 and 6 of chapter I and the whole of chapter XV. Only when that had been done would the Commission be able to decide which topics should be retained. It should then take up the other chapters of the *Survey* to select items for a revised list of topics. Some of those chapters dealt with traditional fields of international law in which customary rules, international regulations and State practice abounded. Others related to new subjects such as the law of the air, the law of outer space and the law relating to the environment, in considering which great care must be taken to ascertain whether the experience of States had yet attained the degree of firmness needed to provide guidance for progressive development or codification. Chapter III of the *Survey*, concerning the law relating to economic development, deserved immediate attention and special priority.

25. It should be borne in mind that, over its 24 years of existence, the Commission had developed its own methods of work, which were directed to the drafting of specific texts with a view to their acceptance by States for adoption in future conventions. Subjects unlikely to be accepted by States should therefore be rejected.

26. In conclusion, he thought the Commission would need at least a month to draw up a long-term programme of work. It could not reject or adopt topics without a thorough discussion of each of them. Consideration of item 5 of the agenda should therefore be postponed until the twenty-sixth session, when it should be given the attention it deserved. However, if the Commission saw fit to start examining the item at the present session, he would be prepared to make a few comments on most of the subjects dealt with in the *Survey*. He would also wish, in that case, to comment on item 5 (*b*).

27. The CHAIRMAN said that at the twenty-fourth session he had suggested that each member should submit a brief list of topics which he considered to deserve priority. It was not his idea that the Commission should take a quick decision by a sort of poll. However, the discussion would probably reveal that certain topics were generally regarded as deserving attention.

28. At the meeting of the officers and former chairmen of the Commission it had been pointed out that one week was too short a period in which to discuss the *Survey*. It had been noted, however, that the item had been on the agenda for three successive sessions and that the Commission had not yet had time to take it up. It could give a week to discussion of the item at the present session, but might not have any time at all for it at the twenty-sixth session.

29. Mr. REUTER said that on the substance of the matter he had submitted his observations in writing, as members of the Commission had been asked to do (A/CN.4/254).

30. Those members who had spoken before him all seemed to think that the Commission should not make very long-term plans. It was rather difficult not to do so, however; for assuming that any important topic needed five to seven years' study and that the Commission could not handle two major topics at the same session, if it chose three topics it would in fact be adopting a programme of work for 20 years or so. What mattered now was not that the Commission should review all the topics proposed for study, which would be a waste of time, but that each member should arrange those topics in what he considered the most appropriate order of priority, so that the general feeling could be ascertained and the Commission, while remaining at the disposal of the General Assembly, could indicate to it two or three topics which might be given priority. Experience having shown that two major topics could not be dealt with at the same session, but had to be taken at alternate sessions, a few subjects of lesser importance and narrower scope should be selected in addition to the major topics.

31. He acknowledged that the Commission should not deliberately reject topics which were of unduly pressing concern, such as human rights, the environment, outer space and the sea-bed; but the General Assembly and the Security Council had seen fit to entrust them to other organs and it would be unseemly for the Commission to propose that it should deal with them. Unless, of course, it was asked to do otherwise, the Commission would do better to choose less urgent topics, which might be of less direct concern to peoples and nations—which were

more in need of peace and food than of legal texts—but were ripe for codification. His own choice, as he had stated in his written observations, would be the industrial use of watercourses and the immunities of foreign States and bodies corporate.

32. Mr. BARTOŠ said he endorsed Mr. Reuter's comments. The Commission's task was to contribute to the codification of international law as a whole, but it should not try to codify topics which were not yet ripe for codification unless the General Assembly asked it to do so. For however rational they might be, codified rules remained inoperative where principles had been codified prematurely, before they had been universally accepted or established by practice. For instance, the provisions of the Conventions on Fishing and Conservation of the Living Resources of the High Seas, which had been drawn up for reasons that were perhaps more political than legal, were not being applied, because they had not yet become custom. He therefore approved of Mr. Reuter's choices. The topics selected should not be those whose codification would enable the ideas of particular States to prevail, but those which were of general concern to all nations.

33. The Commission should nevertheless beware of being too traditionalist and conservative. It must find a happy medium between codifications and progressive development of international law.

34. Sir Francis VALLAT said he wished to make a few preliminary remarks and would not comment on the substance. It was extremely hard to choose among the many subjects suggested in the *Survey*. There were certain considerations which should guide the Commission in that difficult task. It was necessary to look beyond the subjects at present being studied by the Commission, in order to see which topics were likely to be suitable for codification and progressive development in the future.

35. Experience had shown that the time needed to prepare a topic was inevitably very long. It had taken, in all, no less than 18 years for the Commission's work on the law of treaties to come to fruition. The best results had been obtained by the Commission when its consideration of a topic had been preceded by very thorough initial research conducted a considerable time before a draft was submitted to it. The Commission should therefore choose a few topics which it could take up for study on completing its current programme of work. The General Assembly expected the Commission, on the basis of the 1971 *Survey*, to provide some indication of the direction of its future work.

36. He agreed with the two previous speakers that the Commission should not be over-ambitious. Its aim should simply be to select three, or possibly four topics of importance, to be given priority after it completed the work in hand. If the Commission could take such a decision, the present discussion would be extremely useful.

The meeting rose at 4.40 p.m.

1234th MEETING

Tuesday, 26 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

later: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

(*a*) Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General

(*b*) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(continued)

1. The CHAIRMAN welcomed Mr. Tabibi, who had been unable, for health reasons, to attend the previous meetings. He invited the Commission to continue consideration of item 5 of the agenda.

2. Mr. USTOR said that the Statute of the International Law Commission made a clear distinction between codification and progressive development of international law. Article 18 required the Commission to survey the whole field of international law, but solely with a view to selecting topics for codification, and article 15 restricted codification to fields where there had already been extensive State practice, precedent and doctrine. Work on progressive development was undertaken by the Commission solely at the request of the General Assembly, but the Assembly had only rarely availed itself of its powers under article 16 of the Commission's Statute. Action had been taken by the Commission at the Assembly's request in only eight cases,[1] and in some of them the initiative had really come from the Commission itself.

3. However, experience had shown that codification and progressive development were practically inseparable, so that the distinction between those two aspects of the Commission's work had not been maintained in practice. It followed that, in attempting to draw up its future programme, the Commission was not bound by the strict interpretation of articles 15, 16 and 18 of its Statute, but had complete liberty to survey the whole field of international law and to choose not only subjects from fields in which there had already been extensive State practice, precedent and doctrine, but also subjects which had not yet been regulated by international law or in regard to which the law had not yet been sufficiently developed in the practice of States.

[1] See foot-note 6 to paragraph 5 of the "Survey" (A/CN.4/245).

4. It had to be recognized at the same time that the choice was of considerable political importance; that was perhaps why, in both article 16 and article 18 of the Statute, the power of decision had been left with the General Assembly. The Commission only had the power to make recommendations, and in doing so it would certainly wish to take the wishes of States into account; in that connexion he drew attention to paragraph 8 of the *Survey* (A/CN.4/245). It might be said, more simply, that codification and progressive development were not an end in themselves, but a means to an end—the end being the peaceful and just organization of the international community. On that basis, the General Assembly would be inclined to choose subjects closely connected with topical problems of international peace and security and with the economic development of the world, particularly that of the developing countries.

5. Topics of that kind, however, were fraught with political implications and were not ripe for codification and progressive development. In addition, they were linked with highly technical questions. The answer to those objections was that the matters in question were urgent and important; that the world political climate had greatly improved; and that the Commission was a forum in which the most delicate problems could be discussed calmly and objectively. As to technical questions, the Commission's achievements in dealing with the law of the sea, with its difficult technical aspects, were a sufficient reference. The General Assembly might therefore be induced to refer to the Commission the most diverse and difficult topics, which were more in the realm of progressive development than in that of codification.

6. The Commission, however, had to bear in mind its limited possibilities and the short time available to it. Its agenda was full for many years to come. Moreover, although codification and progressive development were inseparable, topics which came more within the scope of codification than of progressive development could be clearly distinguished.

7. Hence it might well be asked whether it was advisable to draw up a long-term programme of work. A long-term programme was no more than a list of topics with which the Commission proposed to deal at some time in the future. What mattered was not so much the programme itself as the priority given to each topic. A list of topics already existed in the excellent Secretariat *Survey*, and the Commission could always choose topics from it in the light of the progress of its current work. It would hardly be advisable to add any more topics to the 40 or so already listed in the *Survey*. His own view was that the Commission should place on its agenda every year the consideration of new items for inclusion in its programme and report whatever it decided to the General Assembly.

8. If the majority of members so desired, however, the Commission could perhaps also indicate some topics —but only a few—which it intended to study in the not too distant future. They could include the topic of international watercourses and that of State responsibility for damage caused by acts which were not wrongful under international law.

9. He would also recommend, although it was not a topic for codification, renewed consideration of ways and means of making the evidence of customary international law more readily available. In accordance with article 24 of its Statute, the Commission had placed that subject on the agenda for its second session and had discussed it on the basis of an excellent working paper.[2] It would be extremely useful if that study could be revised or supplemented to bring it up to date. That work would have the advantage of revealing what national publications existed regarding State practice. If a circular note was addressed to governments asking whether such a publication existed in their country, it might induce States which did not have such publications to start them.

10. The Commission could also remind the General Assembly that it remained open at all times to any proposal referred to it by the Assembly under article 16. It might also refer to the now almost forgotten article 17, which entitled Member States, the principal organs of the United Nations, specialized agencies and even "official bodies established by inter-governmental agreement" to submit proposals and draft multilateral conventions to encourage the progressive development of international law and its codification. For example the International Court of Justice, as a principal organ of the United Nations, could well make interesting suggestions with regard to the Commission's future programme.

11. In conclusion, should the Commission refrain from drawing up a long-term programme of work such as that adopted in 1949, it could still decide to place on its agenda every year an item entitled "Consideration of the inclusion of new items in the Commission's programme of work". That would ensure continuity.

12. Mr. KEARNEY said he would merely add some brief comments to the observations he had already submitted in writing (A/CN.4/254). The present discussion had largely centred on what the Commission's work should be, with some indication of how that work should be done. In considering those questions it was well to remember that the Commission was the major organized body concerned with the codification of international law.

13. In the last 25 years the situation had changed considerably. Many new problems had emerged, some of them relatively unprecedented. Some of those problems had been entrusted to a variety of specialized bodies, and that situation had to be accepted as a fact. Moreover, in view of the Commission's methods of work, it was clearly impossible for it to take up many of the new subjects.

14. At the same time the Commission should not avoid a subject simply because there was little practice, custom or judicial precedent relating to it. Such an approach would mean abandoning part of the task assigned to the Commission. It would reduce the Commission to the secondary role of dealing only with subjects outside the active areas of international life.

15. The question arose what action the Commission should take on the 1972 *Survey* and what it should report to the General Assembly concerning its long-term programme of work. In his opinion the Commission should

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[2] See *Yearbook of the International Law Commission, 1950*, vol. II, p. 24, document A/CN.4/16.

not decide on an exclusive list of topics which would preclude consideration of all others. But because of the extensive preparatory work required to deal with any topic, it would be wise to try to select certain topics as having the highest priority having regard to the needs of the international community. That would make it possible to plan the work ahead.

16. As Sir Humphrey Waldock had been wont to say, the Commission could deal with only one major and one minor topic at each session. That being so, the Commission had work on hand for 8 to 10 years to come. If it were to add three major topics and three less important topics to its present workload, it would in effect be covering the next 20 years. In that connexion, he stressed that a ten-week session was totally inadequate for the task of codifying a major portion of international law. The solution to that problem depended on convincing the General Assembly of the need for a change in the Commission's methods of work. One possibility, which would not involve undue expense, would be for a small committee to meet before each session to prepare matters for discussion by the Commission. The Commission itself would then be able to work more quickly.

17. The CHAIRMAN, speaking as a member of the Commission, said that the excellent Secretariat *Survey* amply showed, in paragraph 19, how the present situation differed from that of 1949.

18. In 1949 the Commission's task had been to codify traditional international law on subjects on which there had already been extensive State practice. The 14 topics then selected, out of the 25 originally proposed, had reflected that situation. The present problems, on the other hand, called for more energetic and systematic action than the creation of law solely by means of treaties and through the growth of customary law. Legal rules had to be framed for new activities, or to regulate activities traditionally regarded as lying within the discretion of States. Consequently, the Commission must take the international community's present needs into account when bringing its long-term programme of work up to date.

19. In the circumstances, it would be a mistake to select topics on the basis of the traditional criteria: extensive State practice, a large number of judicial decisions, legal writings that were more or less uniform, and possibly even relevant treaties.

20. It was worth noting that the Commission had not always been guided by those criteria when selecting topics for codification and progressive development. From 1949 to 1958, for example, it had done useful work concerning the continental shelf, a topic which met none of those criteria. The only relevant State practice had been that of 12 States in the Americas, one half of which had acknowledged the sovereignty of the coastal State over the superjacent waters of the continental shelf, while the other half had regarded those waters as part of the territorial sea or of the high seas as the case might be. Writers had been divided on the subject, and the only treaty had been the one concluded by the United Kingdom with Venezuela in 1942 on the subject of the continental shelf beneath the Gulf of Paria. The Commission had nevertheless undertaken a codification of the topic in response to the clear needs of the international community and to the urgings of the General Assembly. That work had culminated in the 1958 Geneva Convention on the Continental Shelf.[3]

21. The same situation had arisen with regard to the problem of fisheries. The International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome in 1955, had acknowledged by a vote of 18 to 17, with 8 abstentions, "the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast".[4] That narrow vote had sufficed to initiate the movement which had led to the acknowledgement of that special interest in article 6 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.[5]

22. Such a result had been possible because the concept of the special interest of the coastal State had been incorporated in articles 4 to 6 of the draft articles relating to the conservation of the living resources of the sea,[6] prepared by the International Law Commission under the able leadership of Mr. J. P. A. François, the Special Rapporteur for the topic of the law of the sea. That piece of progressive development of international law thus had its origin not in any State practice or precedent, of which there was little or none, but simply in the decision taken by the 1955 Rome Conference to adopt a principle that went well beyond mere technical considerations.

23. Similarly, the Treaty adopted by the General Assembly on activities in outer space[7] did not reflect any existing State practice. It was a legal framework for future State practice, deliberately adopted by the General Assembly in response to the needs of the international community.

24. That experience should be borne in mind when selecting topics for the long-term programme of work. Moreover, the topics selected should be those which were likely to attract the interest of the majority of countries.

25. That being said, he wished to consider briefly the five topics not yet examined by the Commission, out of the 14 accepted by the General Assembly in 1949.[8] The first, that of recognition of States and governments, was one which the Commission had never tried to codify owing to lack of interest on the part of the General Assembly. The second, that of the jurisdictional immunities of States and their property, was an appropriate subject for codification and the Commission could well select it, even though it was not perhaps especially important or urgent. Some aspects of the third of those topics, namely, jurisdiction with regard to crimes com-

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

[4] See *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea* (1955) (United Nations publication, Sales No. 1955.II.B.2), para. 18.

[5] United Nations, *Treaty Series*, vol. 559, p. 286.

[6] See *Yearbook of the International Law Commission, 1955*, vol. II, p. 33.

[7] See General Assembly resolution 2222 (XXI).

[8] See *Yearbook of the International Law Commission, 1949*, p. 281.

mitted outside national territory, had been codified by a number of recent treaties; the remaining aspects did not offer a promising field for the Commission. The position was somewhat similar with regard to the fourth topic, that of the right of asylum, since the adoption of a Declaration on territorial asylum by the General Assembly in 1967.[9] That left the topic of the treatment of aliens, which the General Assembly must have had in mind when inviting the Commission to deal with the topic of State responsibility. On taking up the topic of State responsibility, however, the Commission itself had, of course, decided not to deal with substantive rules such as those governing the treatment of aliens.

26. He himself would suggest that the Commission should include the treatment of aliens in its programme of work; it was an important topic, some aspects of which were being codified piecemeal by a number of international bodies, including UNCTAD.

27. Among the subjects mentioned in the *Survey*, those in chapter III, on the law relating to economic development, were of great importance, but did not lend themselves readily to codification by the International Law Commission.

28. As to topics in chapter II, on the law relating to international peace and security, he did not believe that the Commission was disqualified from dealing with them. It should be remembered that in 1949 the Commission had adopted a draft Declaration on Rights and Duties of States.[10]

29. With regard to the law of the sea, the matters now outstanding were almost entirely within the realm of progressive development. The 1958 Geneva Conventions, which had emerged from the Commission's work, had already codified much of the traditional law of the sea. Hence there did not appear to be an important role for the Commission still to play in that sphere. Results could be achieved only by give and take, in the course of strenuous negotiations at the Conference to be held at Santiago in 1974. That was more a matter for representatives of States than for the Commission.

30. On the other hand, the question of the environment could lend itself to useful action by the Commission. The main difficulty arose from the diversity of sources and forms of pollution. The question of pollution of the sea by oil had been dealt with in a recent Convention,[11] and the Commission might well endeavour to identify five or six legal principles on the protection of the environment.

31. Another suitable topic for study by the Commission, was that of the objective liability of States for lawful acts. The topic was in urgent need of codification and was of especial interest to States owing to the problems it presented daily.

32. To sum up, he would suggest that the Commission should recommend to the General Assembly the inclusion of four new topics in its long-term programme of work: first, the treatment of aliens; secondly, principles of law relating to the environment; thirdly, State responsibility for lawful acts; and fourthly, the law of the non-navigational uses of international watercourses.

33. He fully agreed that it was desirable not to overload the Commission's long-term programme of work, since three or four topics would keep it occupied for about 15 years.

34. Mr. TSURUOKA associated himself with the congratulations addressed to the Secretariat on the preparation of the *Survey*. The need to review the Commission's long-term programme of work was undeniable. The international situation had changed greatly since 1949 and new problems had arisen which called for regulation by international law.

35. Changes had also taken place within the United Nations, including the setting up of bodies to consider certain legal questions, and he wondered whether the Commission could leave the codification and progressive development of international law on those questions to other bodies. It might be feared that the Commission would have nothing but secondary matters to deal with if it allowed that trend to gain ground. It should be remembered, however, that the Commission was composed of jurists representing the different legal systems of the world and had always been successful in codifying the fundamental rules of international law. Unlike other bodies of its kind, it was not called upon to legislate in areas where immediate solutions were required; it should confine itself to the basic problems of international law. Consequently, the proliferation of bodies dealing with urgent and, in many cases, important matters was not a threat to the Commission's work.

36. Seven of the 14 topics on the 1949 programme had already been dealt with in final drafts or reports, and two others were under study, namely, State responsibility and succession of States. The Commission would still have to devote much time to those two topics, but it was obvious that the list of subjects for study should now be extended.

37. In drawing up a new list the Commission should be guided by two considerations. In the first place it should take into account the needs of the international community with regard to the codification and progressive development of international law. The Commission was the servant of the international community; it should not engage in purely academic studies, but should concentrate on the practical value of the provisions it proposed. Secondly, the Commission should select topics which were sufficiently ripe for codification or progressive development. It should not legislate at all costs, even if some situations did demand immediate solutions, nor should it succumb to the temptation of examining problems of urgent concern to the world. On the contrary, it should confine its work to those spheres of international law in which at least some rules of customary law could be identified.

38. With regard to the topics to be included in the new list, the Commission might well retain the five topics on the 1949 programme which it had not yet studied, namely, recognition of States and governments; jurisdictional immunities of States and their property;

[9] General Assembly resolution 2312 (XXII).

[10] See *Yearbook of the International Law Commission, 1949*, p. 287.

[11] See *International Legal Materials*, vol. XI (1972), No. 2, p. 262.

jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and the right of asylum. However, there was no disguising the fact that the question of recognition of States and governments would raise political difficulties, and that jurisdiction with regard to crimes committed outside national territory would present many problems.

39. As to new topics, he would recommend State responsibility for lawful acts, which he considered ready for study by the Commission. His other preferences were for international law relating to international watercourses; the law relating to the peaceful settlement of disputes, in particular conciliation procedure, which had recently gained in importance; and extradition.

40. If the Commission placed the question of unilateral acts on its list, the study of that topic would involve distinguishing between the different spheres to which such acts might belong. The denunciation of treaties, for instance, was closely bound up with the law of treaties.

41. He supported Mr. Kearney's suggestion that a small committee should be set up to meet before each session and prepare the Commission's work.

Mr. Yasseen took the Chair.

42. Mr. AGO, after congratulating the Secretariat on the high quality of the *Survey of International Law*, pointed out that the Commission differed from other United Nations bodies with responsibility for considering questions of international law in that it had been established expressly to deal with the codification and progressive development of international law, had general competence in that matter, and was a permanent organ. Its task was different from those of the special bodies set up to study specifically designated new subjects or matters of immediate interest as the need arose. Consequently, it had no need to seek popularity by drafting conventions in areas to which international law had not yet penetrated. He was glad that other bodies were dealing with legal questions, as that relieved the Commission, whose programme of work was already very heavy.

43. A radical change had taken place in the composition of the international community in the 1960s, as a result of the accession to independence of a very large number of States which, not having participated in the formation of the international law in force, considered, with some justification, that they were entitled to call its content in question. In the sphere of international jurisdiction, for example, what they mistrusted was not the judicial settlement of disputes as such, but the rules—especially unwritten rules—which the courts had to apply.

44. The role of the Commission had radically changed as well. To continue a technical task begun in the 1930s was no longer enough. Codification had become a necessity for imparting certainty to the law, above all unwritten law, and for strengthening its foundation with the co-operation of all members of the international community. That had been done, for example, by the Vienna Conference on the law of Treaties, and the Commission should therefore concentrate on codifying the main branches of international law.

45. So far, the Commission's codification work had resulted in Conventions on the law of the sea, diplomatic law and the law of treaties. So far as the law of the sea was concerned, the effects of the rules drawn up had unfortunately been of short duration. No doubt the Commission might be partly responsible for that, but he nevertheless regretted that the topic had not been assigned to it again, for he was still convinced of the need for continuity in the criteria and methods used in codifying a given topic and in revising the codification to bring it up to date. In the sphere of diplomatic law there were still a few questions outstanding which the Commission could deal with in order to round off the Convention on Diplomatic Relations, the Convention on Consular Relations and the draft articles on the representation of States in their relations with international organizations. As to the law of treaties, the Commission would practically have covered the whole topic when it completed its studies of succession in respect of treaties, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations.

46. That left two major topics whose codification the Commission had undertaken and which would occupy it for many years yet: succession in respect of matters othen than treaties, the study of which had only just begun and would certainly cover a number of matters besides State property; and State responsibility which, with the law of treaties, was the most extensive and important topic that the Commission had taken up, even though it had confined itself to responsibility proper, that was to say responsibility for internationally wrongful acts. Thus it could be seen that the Commission's present programme of work was already a long-term programme.

47. In those circumstances, the Commission should exercise the utmost caution in placing new topics on its agenda. For example, it would be unwise to take up the study, however interesting it might be, of questions such as the law relating to economic development, the law of outer space, international criminal law and so on, which required highly specialized knowledge and for which other bodies might be better qualified. The Commission would do better to concentrate on tasks whose scope was better adapted to its abilities. In addition to the major topics it had under study, two or three of which would occupy it at each session, the Commission would also do well to have, at the most, two or three other subjects in reserve.

48. Of the topics proposed, he would select the law relating to international watercourses, in particular rivers, which was a technical subject of great importance for many States; unilateral acts, which formed a logical sequel to multilateral acts, or treaties; and wrongful acts. If really necessary, the Commission could also adopt the topic mentioned by Mr. Castañeda, of liability for damage resulting from acts which he would not describe as "lawful", but rather as not yet prohibited by the international law in force. Lastly, the Commission would sooner or later certainly have to study the status of aliens, but it should not do so too soon, so as not to re-introduce confusion between international responsibility and the law of aliens, after having done everything possible to dispel it. It went without saying that the General Assem-

bly, if it saw fit, could add to those subjects any other matters it wished the Commission to study.

49. Mr. USHAKOV said he did not think the Commission should formally decide forthwith what topics it wished to include in its programme of work. No one could say what topics would be suitable for codification or would require it in 10 years' time. Besides, the Commission had chosen its subjects of study itself only at the beginning of its life; later, the initiative had always come from the General Assembly. That applied, for example, to the question of treaties concluded between States and international organizations or between two or more international organizations, and to the law of the non-navigational uses of international watercourses. Moreover, the General Assembly could hardly be asked to decide now, that in 10 or 15 years' time the Commission was to study one or another of the topics it proposed. Again, some of the topics which might be proposed, such as the law relating to the environment or the law of the sea, were either too far-reaching or had already been entrusted to other bodies, but one or more of their aspects might be referred to the Commission by the General Assembly. It was, indeed, for the Assembly to decide not only the subjects to be studied, but the most suitable bodies to study them.

50. It would therefore be better not to draw up a long list of possible topics for study or to decide formally what topics should be codified, but to report to the Assembly that, having examined the excellent *Survey of International Law* prepared by the Secretary-General, the Commission was submitting, for the consideration and information of the Assembly, several topics which its discussions had shown to be important.

Mr. Castañeda resumed the Chair.

51. The CHAIRMAN, speaking as a member of the Commission, pointed out that at its first session the Governing Council of the United Nations Environment Programme had unanimously adopted a report which included the following passage:

> "So far as the topic of the international law regarding the environment was concerned, the suggestion was made that the General Assembly should be invited to consider the codification and progressive development of environmental law and possibly to refer the topic to the International Law Commission."[12]

The meeting rose at 1 p.m.

[12] See *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 25* (A/9025), para. 60.

1235th MEETING

Wednesday, 27 June 1973, at 10.10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

(*a*) Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General

(*b*) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(continued)

1. Sir Francis VALLAT said that Mr. Ustor had been right to remind the Commission that it should always bear in mind the provisions of its Statute. The Statute should be taken as it stood, at least until the General Assembly chose to amend it. In the context of the *Survey*, articles 16, 17, 18 and 24 were particularly relevant. Article 16, which dealt with the progressive development of international law, gave the initiative primarily to the General Assembly, while article 18, which dealt with the codification of international law, gave the initiative primarily to the Commission and placed upon it the duty of surveying the whole field of international law with a view to selecting topics for codification.

2. Article 18, paragraph 2, provided that, when the Commission considered that the codification of a particular topic was necessary or desirable, it should submit its recommendations to the General Assembly. He believed that the time had come for the Commission to submit such recommendations; the only question was whether a particular topic was ripe for codification. The real difficulty was to determine the area on which the Commission should concentrate. Some guidance on that point was given in article 15, which provided definitions of the expressions "progressive development of international law" and "codification of international law". That article read:

> "In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systemization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."

3. It was perhaps difficult to be precise about the distinction between new and old subjects of law and between general and specific rules of law—in other words, between the foundation and the superstructure of the Commission's work. For example, the law of treaties clearly fell within the Commission's area, while the law of outer space and the ocean floor were in a different category. The Commission's object, as he saw it, should be to complete and fill out the main framework of inter-

national law and in so doing it should rely on the Statute as a useful guideline.

4. Useful guidance was also to be found in General Assembly resolution 2926 (XXVII). In operative paragraph 3 of that resolution the General Assembly had recommended that the International Law Commission should continue its work on State responsibility, succession of States in respect of treaties and of matters other than treaties, the most-favoured-nation clause and the question of treaties concluded between States and international organizations. In operative paragraph 4 the Assembly had approved the programme and organization of work of the Commission's twenty-fifth session, including the decision to place on the provisional agenda for that session an item entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General". He interpreted those paragraphs as meaning that the General Assembly expected the Commission to produce some positive proposal for the future in the broad field of codification.

5. Operative paragraphs 5 and 6 of the resolution were also very important. Paragraph 5 noted that the Commission intended to decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses, while paragraph 6 requested the Secretary-General to submit a study on the legal problems relating to the non-navigational uses of international watercourses. Since the General Assembly obviously wished to know what place the Commission intended to give that topic in its long-term programme of work, it was up to the Commission to provide a satisfactory answer. As long ago as 1970, in its resolution 2669 (XXV), the General Assembly had recommended

> "that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate".

6. He fully agreed that the Commission should take up the subject of international watercourses, on which sources of law were abundant and some preparatory work had already been done. That subject, which involved some aspects of the environment and represented a blending of technology with legal study, would call for new methods and be a real test of the Commission's strength.

7. With regard to the question of priority, he thought it would be a mistake to organize the work on international watercourses in such a way as to interfere with the Commission's current programme. It would be better to organize the preliminary stage of that work and leave the question of priority to be decided by the General Assembly or the Commission at a later stage. For the time being, priority should be given to the international law relating to States, although the law relating to international organizations should not be excluded. That would represent a natural extension of the work from the law of treaties and State responsibility to unlilatera acts and the treatment of aliens.

8. The approach to the subject of unilateral acts required further definition and selection. Some help might be obtained from the first sentence of paragraph 279 and the last sentence of paragraph 280 of the 1971 *Survey* (A/CN.4/245). Mr. Kearney, in section VIII of his observations on the Commission's long-term programme of work (A/CN.4/254), had said that difficulties might be expected to arise in the realm of unilateral acts and that they were perhaps not a subject which should be recommended for study. He himself was not quite so pessimistic, but was inclined to support Mr. Kearney's suggestion that such a study might be undertaken by some organization other than the Commission, such as the International Law Association or the *Institut de droit international.*

9. As to his own preferences concerning the topics which the Commission should tackle, the first was succession of governments, which would be a natural development of the Commission's work on succession of States. In practice, problems concerning succession of governments occurred much more often than those concerning succession of States. His second preference, the jurisdictional immunities of foreign States and of their organs, agencies and property, was a topic on which vast experience had already been accumulated and one which affected both States and private persons, especially business concerns. In recent years, there had been a growing divergence in the practice of States with respect to immunities, and it was highly desirable that the Commission should attempt to find suitable solutions.

10. In regard to methods of work, he was not a revolutionary and believed that the Commission should continue to use those methods which had proved successful in the past, while always maintaining a certain flexibility. He recommended two methods in particular: first, the use of expert studies in fields having scientific aspects, such as that of international watercourses; secondly, increased recourse to the assistance of other professional bodies which could prepare the ground for the Commission on certain subjects.

11. Mr. QUENTIN-BAXTER said that the law relating to international watercourses seemed to be the kind of subject with which the Commission was pre-eminently qualified to deal and that, in his opinion, it should take a special decision in response to the request made to it by the General Assembly.

12. Unilateral acts formed an interesting topic which was a natural counterpart to the Commission's work on the law of treaties. It should be approached with caution, however, since it impinged on many other fields of law in which there had been dynamic developments in recent times, such as the law of the sea. The Commission should plan to take up the topic of unilateral acts in the not too distant future and meanwhile should encourage the collection of suitable material.

13. Sir Francis Vallat had mentioned the subject of jurisdictional immunities, which was a counterpart to the Commission's work on diplomatic and consular immunities. The subject was one rich in practice, and

did not call for so much caution as unilateral acts. A very definite need was felt among States for some international guideline on jurisdictional immunities, and he considered it a subject eminently suitable for the Commission's list.

14. He thought it would be a mistake to define methods of work too closely, for they needed to be adjustable in the light of experience. He could understand the reluctance of the older members of the Commission to accept dogmatic views about the need for change, but it was only proper that the Commission should face the possibility that it might have to consider international law in a wider context and perhaps slightly widen its span of topics. It would not be a satisfactory solution to extend either the length or the number of the Commission's sessions, since it was dependent on a quorum of members who had many other calls on their time. Nevertheless it might be appropriate to consider whether certain minor innovations could be made in the Commission's working methods.

15. With regard to the relationship between the Commission and the General Assembly, he noted that in recent years there had been a proliferation of other law-making bodies in specialized fields. For example, the General Assembly had entrusted the topic of the law of the sea to its main political Committee, and the question of the environment to another organ. The Commission thus had reason to feel some slight anxiety lest it be excluded from too many fields of law.

16. In responding to the recent request of the Commission on Human Rights,[1] the International Law Commission should make it clear that it did not intend to abdicate its responsibilities and confine itself to topics on which the issues were already settled and only scholarship was called for. After all, the members of the Commission were what might be called the guardians of international law; they worked on the basis of notions of pure law as opposed to mere political considerations, and nobody could take their place. He therefore considered that the Commission, while showing a proper responsiveness to the General Assembly's own wishes, should concentrate primarily on the traditional fields of international law. The Commission should make it clear to the General Assembly that the place of law in the international community was largely in its care, although it was fully conscious of the importance of the General Assembly itself as the embodiment of the existence and growth of law in that community.

17. Mr. CALLE y CALLE said he had listened with interest to the statements of members of the Commission, against the background of the 1971 *Survey of International Law*. The Commission's task was to compare what had been accomplished in the past with what could still be done in the future to create a legal order for the international community. The Commission should first explain to the General Assembly why some topics had not been dealt with, and say whether or not they should be discarded. It should also propose to the Assembly a new list of topics which would take into account the present needs of the international community.

18. In his opinion the Commission should not be a mere depositary of residual tasks or a secondary organ of the United Nations. In recent years there had been a proliferation of organs to which the General Assembly had entrusted specific tasks, such as the definition of aggression, questions relating to human rights and the question of the sea-bed and ocean floor. A most important achievement of one such body had been the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[2]

19. Over the past 25 years the Commission had developed its own methods of work, but he thought that in its report to the General Assembly it should express its willingness to accept new topics and begin new studies. The Commission was, after all, the servant of the General Assembly; in particular, it should be prepared to serve the new Member States and to deal with new areas of law where much practice already existed.

20. Among the topics which he considered of particular importance was the right of asylum, which had not yet been taken up by the Commission although it was of interest to the international community in general. The Declaration on Territorial Asylum[3] had been adopted in 1967, but that instrument was transitional in character and it would be necessary to adopt more obligatory rules in the future. There was an abundance of precedent available regarding asylum, especially in Latin America, where many bilateral conventions containing provisions on that subject had been concluded.

21. The Commission should comply with the General Assembly's request and undertake to codify the law relating to international watercourses, on which much material had already been collected by the Secretary-General. The law relating to economic development was of particular importance. It was necessary to identify the legal principles regulating the basic duty of economic co-operation between States. Such co-operation was urgently needed to ensure a fair standard of living for the peoples of under-developed countries and to solve their tremendous social problems. It was necessary to protect their natural resources and to prevent illicit interference with them by large multinational corporations.

22. The Declaration adopted by the United Nations Conference on the Human Environment at Stockholm in 1972[4] should be translated into legal rules determining the rights and duties of States in that field. Mr. Castañeda had already drawn attention to the suggestion made in the Governing Council of the United Nations Environment Programme that the General Assembly should be invited to consider the codification and progressive development of environmental law and possibly to refer the topic to the International Law Commission.[5]

23. He thought the topic of the jurisdictional immunities of foreign States and of their organs, agencies and

[1] See 1201st meeting, paras. 1 and 4-6 and 1228th meeting, paras. 33-36.

[2] See General Assembly resolution 2625 (XXV).

[3] See General Assembly resolution 2312 (XXII).

[4] See document A/CONF.48/14, section I.

[5] See previous meeting, para. 51.

property, should also be examined, because there had been a number of recent cases in national courts concerning expropriated enterprises. A considerable amount of material was available on that subject, particularly in the Council of Europe and various Latin American bodies.

24. The topic of recognition of States and governments was also of great interest, especially in so far as it concerned the collective recognition of new States and of national liberation movements struggling to give their peoples the full sovereignty to which they were entitled.

25. Mr. Tammes had expressed himself in favour of tackling the subject of unilateral acts. Important studies had already been carried out on that subject which, by reason of its complexity, needed legal systematization.

26. Lastly, among the less important subjects calling for the Commission's attention was that of extradition. In the past it had been considered preferable to leave that matter for settlement by bilateral agreements, but in view of the very large number of conventions and treaties concluded on the subject it was undoubtedly ripe for codification. A multilateral convention would certainly help to bring order into that field and to improve judicial co-operation concerning the punishment of criminals. In view of the many new forms of international crime, such as those involving narcotics, genocide, attacks on diplomats and the hijacking of aircraft, such a convention would be extremely useful to the international community.

Mr. Castañeda took the Chair.

Co-operation with other bodies

(A/CN.4/272)

[Item 8 of the agenda]

(resumed from the 1228th meeting)

Statement by the Observer for the Asian-African Legal Consultative Committee

27. The CHAIRMAN welcomed the Observer for the Asian-African Legal Consultative Committee and invited him to address the Commission.

28. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said that as the Chairman of his Committee was prevented from attending by his new duties as Prime Minister of Sierra Leone, the honour fell to him, as Secretary-General of the Committee, to convey to the Commission the admiration which the Asian-African community felt for its work, and the hope of that community that the Commission's recommendations would be even more widely followed in the future.

29. The close ties between the two bodies had been further strengthened by the presence of an observer for the Commission at the Committee's fourteenth session, held at New Delhi in January 1973. Mr. Tabibi, the observer, had not only reported on the Commission's work, but had also made valuable contributions to the substantive discussions on a number of items on the Committee's agenda. Mr. Castañeda, the Commission's present Chairman, had also attended the Committee's fourteenth session as observer for Mexico, and his statement on the concept of the patrimonial sea and the Santo Domingo Declaration had been a most valuable contribution. The Committee looked forward to welcoming him as the Commission's observer at its fifteenth session, to be held in Tokyo in January 1974. At its fourteenth session the Committee had had the satisfaction of welcoming 40 delegations of observers from States in the Americas and Europe.

30. The agenda for the Committee's fourteenth session had been a heavy one but, as at the previous two sessions, most of the plenary meetings had been taken up with the discussion on the law of the sea. Between sessions continuous consultations had been carried out by correspondence and working group meetings, between the Secretariat, the governments of States members of the Committee and the governments of other Asian and African countries. Extensive documentation had been prepared, abundant material had been collected, and an analysis had been made of the proposals before the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor, to help the governments of Asian and African States to prepare for the 1974 Conference on the Law of the Sea.

31. Another topic on the Committee's agenda had been the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, on which the Commission had prepared a set of draft articles at its previous session. The Committee had unfortunately not been able to discuss that question, because member governments had not had enough time to consider it in the light of the Commission's 1972 recommendations. State succession and State responsibility had also been on the Committee's agenda, as well as the question of pollution of international rivers. Since the latter subject was a new one, it would be some time before any specific proposals could be made on it.

32. The Committee had held a useful exchange of views on the organization of legal advisory services in Foreign Offices—a subject of great interest to developing countries in the region. It was most grateful to the observer delegation from the United States of America for its detailed description of the system functioning in that country. The Committee had decided to organize, at the appropriate stage, a meeting of Foreign Office legal advisers to exchange views and information.

33. Sub-Committees had dealt with the questions of the use of the waters of international rivers for agricultural purposes and prescription in international sales. After the Committee's fourteenth session, its Special Study Group on Landlocked States had met for five days and had put forward tentative draft proposals on some matters affecting such States. A meeting would be held at Geneva in a few days' time to enable the governments of Asian and African States to consult on the eve of the session of the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor.

34. Although the Committee worked primarily for its member States, it had extended its assistance during the

past three years to non-member States in Asia and Africa, many of which sent observers to its sessions and other meetings and regularly received the Committee's documents. Although the Committee worked mainly in English, its more important documents were now being translated into French, and simultaneous English-French interpretation was provided at all meetings.

35. The Secretariat of the Committee had arranged for a publisher in the United States to issue a publication on the constitutions of African States, which gave a brief account of constitutional developments in Africa. It was hoped thereby to arouse greater interest in African affairs and to focus attention on the process of constitutional development on that continent.

36. He had listened with great interest to the discussion on the Commission's long-term programme of work. Whatever the Commission might decide on that subject, he was sure that its work would always command the same respect as the draft articles on the law of treaties, the law of the sea and diplomatic and consular relations.

37. On behalf of the Asian-African Legal Consultative Committee, he invited the Chairman of the Commission to attend as an observer the Committee's fifteenth session, to be held at Tokyo in January 1974.

38. The CHAIRMAN warmly thanked the observer for the Asian-African Legal Consultative Committee for his statement. The increasing importance of the Committee's work was shown by the number of observers who had attended its fourteenth session. As one of those observers, he had been able to appreciate the high standard of the documentation provided for the session, particularly that on the law of the sea, which was very complete and most useful to jurists in all countries. The Committee's discussions on the law of the sea were certain to produce important proposals for the 1974 Conference.

39. Among the many items on the Committee's agenda he noted with interest the organization of a meeting of legal advisers to Foreign Offices. Exchanges of information at that level would be extremely useful.

40. Mr. TSURUOKA said that the success of the Asian-African Legal Consultative Committee's work was largely due to the devoted efforts of Mr. Sen, its Secretary-General. The membership of the Committee and the number of observers attending its meetings were increasing, and the scientific level of its work was rising higher and higher. He was very glad to find the links between the Committee and the Commission growing stronger from year to year and hoped that tendency would be accentuated in the future.

41. Mr. YASSEEN said that, under its statutes, the Committee placed on its agenda all the items which were on the Commission's agenda. The Commission could thus be kept informed of the trends developing in a vast region of the world embracing two continents, the oldest and the newest. Exchanges of views in the Committee between representatives of those two continents had led to conclusions which, on more than one occasion, had been helpful to the Commission and to certain codification conferences. In particular, the Committee had made useful contributions to the preparation of the drafts on the law of treaties and on diplomatic relations. It had set itself the task of synthesizing the views of its member States on the codification drafts prepared by the Commission.

42. He hoped that the Committee would continue to work on those lines and that its links with the Commission would become even stronger. In conclusion, he wished to pay a tribute to the hard work, learning and ability of Mr. Sen, the Committee's Secretary-General.

43. Mr. TABIBI thanked the Observer for the Asian-African Legal Consultative Committee for his enlightening statement and paid a tribute to the contribution he was making, as Secretary-General of the Committee, to the cause of international law.

44. The Committee's fourteenth session had been a particularly important one because it had devoted most of its time to the law of the sea. The Committee's work would certainly contribute to the success of the 1974 Conference on that subject, as it had to the success of the Vienna Conference of the Law of Treaties. The good tradition of close contact between the Commission and the Committee should be maintained in their mutual interest.

45. Mr. KEARNEY reiterated the regret he had expressed at the opening meeting of the present session, at having been prevented at the last moment from attending the New Delhi session of the Asian-African Legal Consultative Committee. He was very grateful to Mr. Tabibi for having so well represented the Commission on that occasion. He had been glad to hear from Mr. Sen that the Committee had been further strengthened and its staff expanded, which would help it to continue its excellent work. He extended his best wishes for the success of the Committee in the performance of its tasks.

46. Mr. SETTE CÂMARA, speaking also on behalf of Mr. Calle y Calle and Mr. Martínez Moreno, two other Latin American members of the Commission, said that they associated themselves with the welcome given to the Observer for the Asian-African Legal Consultative Committee and with the praise addressed to the Committee for its work.

47. The very up-to-date documentation prepared by the Committee on the law of the sea would be most useful. He was glad to see signs that the work on that subject being done in Asia, Africa and Latin America was being usefully co-ordinated. He was also interested to note that the Committee had had the courage to take up the very difficult subject of the protection of diplomats. The results of the practical steps it had taken to give technical assistance to Foreign Office legal advisers would be watched with keen attention in Latin America, as would its work on the uses of the waters of international rivers. In conclusion, he expressed the hope that the co-operation between the Committee and the Commission would grow even closer.

48. Mr. USHAKOV, speaking also on behalf of Mr. Ustor, congratulated the observer for the Asian-African Legal Consultative Committee on his excellent statement. He himself had attended the Committee's eleventh session, in 1970, and had then had occasion to

admire the high quality of its work and the very full documentary material prepared for each of its sessions. That material was of interest to all international lawyers, and in particular to the members of the Commission. He hoped that the Committee would go on to ever greater successes.

49. Mr. HAMBRO, speaking also on behalf of Mr. Ago, Mr. Bilge, Mr. Reuter and Mr. Tammes, who, like himself, came from States members of the Council of Europe, said that they wished to associate themselves with the tributes paid to the Asian-African Legal Consultative Committee for the quality of its work and to Mr. Sen for his most interesting and admirably concise statement. They welcomed the friendly collaboration which had grown up between the Committee and the Commission and which, among other advantages, served to avoid the creation of regional international law in competition with general international law.

50. Mr. QUENTIN-BAXTER, speaking also on behalf of Sir Francis Vallat, said that they both took a special interest in the work of the Asian-African Legal Consultative Committee, whose very large membership included the great majority of Commonwealth countries. The lawyers of those countries brought to the Committee notions of law with which they were both very familiar and very much in sympathy. The Committee served a huge area which contained a great many countries, including some of the oldest and some of the newest in the world.

51. He was impressed at the very practical approach consistently adopted by the Committee in its work. The Committee was performing a great service to the Commission, and giving it real support and encouragement.

The meeting rose at 1.5 p.m.

1236th MEETING

Thursday, 28 June 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later: Mr. Milan BARTOŠ
later: Mr. Jorge CASTAÑEDA

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

Co-operation with other bodies
(A/CN.4/272)
[Item 8 of the agenda]
(continued]

Asian-African Legal Consultative Committee
(continued)

1. Mr. RAMANGASOAVINA congratulated the observer for the Asian-African Legal Consultative Committee on his excellent statement. The Committee brought together the new ideas in the sphere of international law which were gaining acceptance in Africa and Asia. It was encouraging for the Commission that observers from such regional bodies should attend its sessions regularly, for they approached their work in the same spirit as it did.

2. The two observers who had already addressed the Commission at its current session had intimated, with regard to the law of the sea, that the younger States were claiming a greater role in the exploitation of their natural resources. That quite natural trend, which was soon to lead to revision of the Geneva Conventions on the law of the sea, might cause concern to the Commission, which had prepared the drafts of those instruments with especial care only about 15 years previously. It must be acknowledged, however, that in fact the situation had greatly changed in the meantime and that it had become necessary to harmonize the different positions in order to achieve the purposes of the United Nations Charter, namely, to maintain peace and to develop friendly relations among nations.

3. Mr. BARTOŠ said that his country, Yugoslavia, was keenly interested in the work of the Asian-African Legal Consultative Committee. He welcomed the fact that the Committee followed developments in the work being done on general international law and regularly informed the Commission of the position in regard to questions of interest to African and Asian countries. The Committee was composed of a large number of countries in the non-aligned group, to which Yugoslavia itself belonged. The excellent statement by the observer for the Committee showed that States wished to work together to develop an international law that was universal in outlook and conducive to co-operation between States. He wished the Committee every success in its future work.

Mr. Bartoš took the Chair.

(*a*) Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General

(*b*) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)
[Item 5 of the agenda]
(resumed from the previous meeting)

4. The CHAIRMAN invited the Commission to resume consideration of agenda item 5.

5. Mr. RAMANGASOAVINA congratulated the Secretariat on its excellent *Survey of International Law* (A/CN.4/245), which reviewed the Commission's work over its 25 years of existence and what remained to be done. The document gave an account not only of the work done by the Commission, but also of the debates and decisions of the General Assembly.

6. It must be admitted, however, that judged by the extent of the texts it had prepared since its establishment,

the Commission's achievements were rather slight. Furthermore, a process of obsolescence was affecting some of its work, in particular, the 1958 Conventions on the law of the sea. International society was changing rapidly, of course, and international law with it, so it was not surprising that even such carefully prepared texts should already be called in question. That might not be a cause for concern, but all the same it should incite the Commission to caution.

7. The Commission devoted only 10 weeks to its work every year, and some of its members could not attend the whole session owing to other commitments. In view of the short period at its disposal, the Commission should keep to topics which it was sure of being able to deal with in a reasonable time.

8. The obsolescence of the Conventions on the law of the sea should not be regarded as a setback for the Commission. The review of those instruments, which were essentially a codification of customary rules, was necessary because new States had become members of the international community and their aspirations and interests must be taken into consideration, having regard to the prodigious advances in science and technology. It was that course of events which had led the General Assembly to convene a conference on the law of the sea in 1974.

9. What was worrying, on the other hand, was the proliferation of special committees set up to study matters that would normally fall within the competence of the Commission. Those committees owed their existence to the fact that the Commission was often thought to be overloaded with work, too slow or too conservative. As to the review of the law of the sea, some had found it surprising that the Commission had not been given that task, which was a logical sequel to its previous work. Others had taken the view that the newer States were not sufficiently represented on the Commission for it to achieve anything useful in that sphere. He merely reported those opinions, but would suggest that criticism of the Commission for the slow pace of its work might be justified and that perhaps the opinions of members from new States did not carry enough weight in the Commission's deliberations.

10. With regard to the choice of topics for its programme of work, the Commission would recall that its Chairman, at the conclusion of the debate on State responsibility in the Sixth Committee, at the General Assembly's twenty-fifth session, had assured the members of the Committee that, in response to the wishes expressed by some of them, the Commission would give due consideration to the question of responsibility for lawful acts.[1] However, the Commission had had three important topics before it at its current session and had made little progress with the draft articles on State responsibility, of which it had discussed only a very few. It was to be feared that the General Assembly might one day withdraw that topic from the Commission and entrust it to a special committee. The Commission had already been supplanted by special committees in the study of many interesting subjects, including questions of the law of the air—more particularly hijacking of aircraft—and the law of outer space. The study of many other topics, such as the law relating to the environment, the legal aspects of pollution, international criminal liability, and extradition, might fall within the Commission's purview, but it must first complete the study of the topics already on its programme of work.

11. Mr. TABIBI congratulated the Secretariat on the excellent *Survey* it had put before the Commission, which contained a full progress report on the codification and progressive development of international law, not only by the Commission but by other bodies as well.

12. The formulation of a long-term programme of work for the coming quarter of a century was a very delicate task. The world was moving very fast, and not only in matters of science and technology. Thus in one short week the United States had concluded several important treaties which would have been unthinkable only a few years previously. It would be recalled that certain topics had at one time been regarded as "cold war items" and therefore intractable. The General Assembly, which had the final say in the Commission's work, clearly expected the Commission to review its long-term programme in the light of experience and make suggestions.

13. Of the topics on the 1949 list,[2] two were under consideration by the Commission and several others had not yet been examined. There was a clear need to revise that list, but in doing so it would be well to remember that the work on a topic such as State responsibility would take about nine years to complete. He agreed with Mr. Ustor that, in selecting topics, the Commission should concentrate on those which met the needs of the world community, in so far as they were ripe for codification, and take them up for study in the spirit of the United Nations.

14. In his opinion the Commission should take up two kinds of subject: those connected with the maintenance of international peace and security within the meaning of Article 1 of the Charter, and those connected with economic rights.

15. A number of the subjects proposed in 1949 were connected with peace and security. They included: fundamental rights and duties of States; draft code of offences against the peace and security of mankind; pacific settlement of international disputes; and the question of international criminal jurisdiction. The last-named topic had long been regarded as altogether intractable, but perhaps tension had now been reduced sufficiently for it to be taken up.

16. Under the heading of economic rights it would now be appropriate to include the law of the sea. The Conference to be held at Santiago in 1974 would be mainly concerned with the economic aspects of that law, which were now in the forefront and had not been settled by the 1958 Conventions. Other economic items could be

[1] See *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1193rd meeting, para. 47.

[2] See *Yearbook of the International Law Commission, 1949*, p. 281, para. 16.

mentioned, such as sovereignty over natural resources and the law of the environment.

17. He was inclined to agree with Mr. Kearney that what was needed was not merely to select topics, but also to review the Commission's methods with a view to speeding up its work. One possibility was for the Commission to hold longer sessions of, say, 15 or 20 weeks instead of the present 10 weeks, which had proved insufficient. Another possibility was for the Commission to hold two separate sessions each year.

18. The term of office of members of the Commission also needed reconsideration. Its extension from the present five years to seven years would make for greater continuity. A longer tenure of office was also desirable for Special Rapporteurs; the replacement of a Special Rapporteur always created difficulties and sometimes delay.

19. Greater use of subsidiary bodies, such as subcommittees and working groups, was another idea worthy of attention. The European Committee on Legal Co-operation had not adopted the system of special rapporteurs; all its preparatory work was done by its secretariat and by subsidiary bodies.

20. It was also essential to strengthen the Codification Division; that was the only way to ensure that all documents were ready three months ahead of the session. Unfortunately the Legal Department of the United Nations, which at its inception in 1947 had been one of the strongest branches of the Secretariat, was the only one to have been reduced in size while other departments had greatly expanded. Even its name had been changed to the "Office of Legal Affairs".

21. Another method of work which had been used by the Commission in its early days might be worth reviving: that of consultation with experts. The choice of an expert was always a delicate problem, but was not insoluble. It should always be possible to find a qualified person sufficiently impartial to be generally acceptable.

22. At a time when the Sixth Committee of the General Assembly would be celebrating the International Law Commission's twenty-fifth anniversary, the Commission was in duty bound to contribute to the formulation of its long-term programme of work. It should either set up a committee to draft a list of topics or include in its report a survey of topics calculated to provoke fruitful discussion in the Sixth Committee.

23. The CHAIRMAN said that all the suggestions made by Mr. Tabibi should be noted, since the Commission's present methods of work could not produce really satisfactory results. It was important that the Commission's report to the General Assembly should contain suggestions for extricating the Commission from its present impasse.

24. Mr. MARTÍNEZ MORENO said he associated himself with the tributes paid to the Secretariat for its very comprehensible and well-documented *Survey*.

25. In the course of a debate in which the participants had shown a keen sense of their responsibilities, he had learned that it took, on an average, between seven and nine years for the Commission to complete its work on a topic and produce a set of draft articles. In the circumstances, he thought the Commission should proceed with great caution in drawing up a list of topics for its long-term programme.

26. In his view, the Commission should concentrate primarily on the topics at present on its agenda: State responsibility; succession of States; the most-favoured-nation clause; and the question of treaties concluded between States and international organizations or between two or more international organizations.

27. He understood the point of view of Mr. Calle y Calle, who wanted the Commission to take up important subjects of topical interest, but it was necessary to be prudent and to select only one or two such subjects.

28. In selecting topics it was necessary to apply certain criteria. The first was that the Commission should refrain from examining subjects which were already under examination by other bodies: for example, the definition of aggression, the law of outer space, and economic development and co-operation. The Commission should also refrain from taking up topics which were best discussed on a regional basis. An obvious example was the right of asylum, on which the Latin American States had a common position. Personally, he would be very glad if other regions of the world took the same position, but he had to admit that the time had not yet come to take up the topic at the world level, since there might be a risk of weakening that very necessary right. He endorsed the remark made by Mr. Reuter in paragraph 12 of his written observations (A/CN.4/254) that the choice of topics entailed "not only a technical evaluation of the scope of the subject-matter, but also a practical evaluation of the interest it might have for Governments and a political evaluation of the chances of reaching a wide consensus on the basic issues". Technical, practical and political aspects must all be borne in mind in the selection of topics if the Commission was to make a success of its work.

29. He believed that the law relating to the environment was a suitable topic for inclusion in the Commission's programme and that the General Assembly would welcome a suggestion to that effect. The practical and political aspects of the topic justified its consideration by the Commission. It was true that the topic presented many technical problems, but they could be rendered more manageable by dealing with only one or two aspects of that very complicated branch of law to begin with.

30. Unlike some members of the Commission, he was not in favour of including the topic of international watercourses in the programme. There was a great diversity of opinion on that topic in legal writings. The problem of the unity of river basins, and that of the difference between international rivers and international lakes, for example, had given rise to considerable difficulties. Another reason for caution was that a number of internation disputes were still pending with regard to international watercourses and they could only be further complicated if the Commission were to undertake a study of the topic and adopt rules on the matters in dispute.

31. On the other hand, he would welcome the inclusion of the treatment of aliens as a topic in the Commission's

long-term programme of work. With the growth of economic integration and the emergence of common markets and free trade areas, increasing emphasis was being placed on the free movement of goods. The free movement of human beings was much more important, but at times did not receive as much attention. In Latin America it had been recognized that nations and aliens had equal civil rights.

32. He had been very interested to hear the suggestions made by Mr. Tabibi, particularly those concerning the strengthening of the Codification Division, consultation with experts and the lengthening of the Commission's sessions. He proposed that those valuable suggestions should be referred to the officers and former chairmen of the Commission.

33. Mr. BILGE commended the Secretariat on its *Survey of International Law*, which gave a comprehensive picture of present-day international law and indicated the topics susceptible of codification.

34. In reality, the Commission had little freedom of action in regard to its programme of work. It could only amend its existing programme, not draw up a new one. It was already examining a number of important topics which would keep it busy for a long time to come.

35. It should also be noted that even some of the topics listed in 1949 were not yet ripe for codification. It was true that there were many topics of current interest, but it must not be forgotten that the Commission's programme comprised both subjects which the Commission itself selected for study and subjects referred to it by the General Assembly. The latter group consisted mainly of current topics, calling for progressive development of international law rather than codification, and it was important that the Commission should leave room for more subjects of that kind which the General Assembly might entrust to it. In addition, it had to take into account the work of other bodies dealing with international law. That work generally concerned specific questions, particularly questions of human rights, and sometimes called for an effort to reconcile the interests of different States. Before undertaking the study of new topics, the Commission should also take into consideration the questions raised incidentally by topics under study. Examples were the question of responsibility for lawful acts, which arose in connexion with State responsibility, and the succession of governments or political régimes, which was connected with succession of States. All those considerations must lead the Commission to be prudent in its choice.

36. Of the five topics on the 1949 list on which no preparatory work had yet been done, he would give priority to the question of the jurisdictional immunities of States and their property. That topic was now open to codification, and the usefulness of codifying it was emphasized in paragraph 68 of the *Survey*. An added argument for its codification was that the worlo seemed to have accepted the principle of co-existence of political and economic systems.

37. As a second topic he would reject, for the time being, the question of jurisdiction with regard to crimes committed outside national territory, which seemed too dispersed for codification in general rules. He preferred the right of asylum which, although a subject primarily of interest to Latin American countries, was one of worldwide importance and had implications for other subjects which the Commission was studying or would have to study.

38. As to the treatment of aliens, that subject seemed to be rather superseded by human rights and did not deserve any priority. He even doubted whether it should remain on the Commission's programme of work.

39. The question of recognition of States and governments should be set aside for the time being, for although it had legal consequences, it raised many political problems which did not lend themselves to regulations by law.

40. The Commission should limit its choice to two or three topics. It should not take too much notice of criticism of its rate of work. A set of draft articles worked out slowly was better than one prepared in haste and difficult to apply.

Mr. Castañeda took the chair.

Co-operation with other bodies

[Item 8 of the agenda]

(resumed)

Statement by the observer for the European Committee on Legal Co-operation

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

42. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Commission's relations with the European Committee on Legal Co-operation, the Asian African Legal Consultative Committee and the Inter-American Juridical Committee, and the relations of those three Committees with one another were very important for the synchronized development of international law. He went on to comment on some of his Committee's activities which had a bearing on the Commission's programme of future work as it might be derived from the *Survey of International Law* (A/CN.4/245).

43. With regard to the fulfilment in good faith of the obligations of international law assumed by States, a problem arose in relation between the obligations created by internal law and those created by international law: that of the indirect effects of an international judgement in internal law. The European Court of Human Rights had recently taken a position on the application of article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] according to which an international court—in that instance the European Court of Human Rights—which found that an international obligation to a private person had been violated, could subsequently grant "just satisfaction" if internal law alone could not eliminate the consequences

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

of the breach of the international obligation. The Court, which had granted such "just satisfaction" for the first time in 1972, had recently been called upon to construe that judgement on a point directly relating to its effects in internal law. The members of the Commission would receive a copy of the Court's interpretation, which had a number of interesting aspects, in particular with regard to the implicit power of an international court to construe its own judgements and to the concept of good faith, to which Mr. Verdross, a former member of the International Law Commission, had referred in his dissenting opinion.

44. As to the jurisdictional immunities of States, the European Convention recently concluded on the subject would probably enter into force in 1974. Although its application was limited geographically, the Convention had the merit of bridging the gap between the different conceptions of the jurisdictional immunities of States held by the common-law countries and the countries of the European continent, only the latter countries recognizing the distinction between acts *jure gestionis* and acts *jure imperii.* The Convention did not take one side or the other, but affirmed the jurisdictional immunity of the acts of a foreign State except in matters enumerated in the Convention. It thus laid down procedure based on a negative list. The Convention also placed an obligation on States to comply with the judgements of foreign courts and made provision for the settlement of disputes.

45. With regard to extra-territorial questions involved in the exercises of jurisdiction by States, the Committee he represented was endeavouring to bring national systems of criminal law into line, as required by the ratification of the Hague Convention and the Montreal Convention of the International Civil Aviation Organization, by expanding the competence of courts in certain States members of the Council of Europe to deal with acts committed abroad. Attention should also be drawn to two other recent criminal law Conventions governing the transfer of proceedings from one State to another and the recognition and enforcement of foreign sentences. Such an arrangement was, of course, only workable between countries having the same conception of the role of criminal law. On the other hand, in the matter of recognition and enforcement of judgements rendered in civil cases, the situation was less "politicized", in the best sense of the term. A guide to the recognition and enforcement of foreign judgements by States members of the Council of Europe was in preparation and would appear in 1974. The conventions he had mentioned would be annexed.

46. The European Committee on Legal Co-operation was particularly interested in the question of State responsibility, for although it had been obliged to consider it on several occasions, it had not been able to define its position on the subject, either in the European Convention on Information on Foreign Law or, more recently, during the preparation of a draft European convention for the protection of international watercourses against pollution. The latter text, which concerned both the law of international watercourses and the law relating to the environment, was intended to settle a number of problems.

47. The first problem was that of the balance to be struck between uniform rules for all the future contracting parties—the 17 States members of the Council of Europe—and the particular obligations to be laid down for the riparian States of a particular watercourse. Hence the idea of preparing a "master convention" with two purposes: first, to draw up standards of quality for water, to be observed by all contracting parties, relating to both concentration (maximum tolerable content of undesirable substances in watercourses) and emissions (prohibition or limitation of the discharge of dangerous substances), and to provide for adjustment of those minimum standards, by agreement between the parties interested in a particular watercourse, so as to raise them to the level regarded as necessary to ensure that the waters in question could be used for certain purposes, such as drinking water supply; and secondly, to place an obligation on the contracting parties interested in a particular international watercourse to enter into negotiations for the conclusion of a co-operation agreement satisfying certain criteria and objectives laid down in the convention.

48. The second problem to be solved was the settlement of disputes regarding the interpretation or application of the future convention, of co-operation agreements and of any instruments drawn up pursuant to such agreements. The existing draft provided for compulsory arbitration at the request of one party. Owing to almost insurmountable technical difficulties, the idea of establishing a single procedure for settling disputes to which there were more than two parties, and, in particular, more than one respondent, had had to be abandoned. It was provided, however, that when there were several identical or related claims, contacts between the arbitral tribunals set up should be encouraged.

49. The third problem was that of balancing the charges to be borne by the contracting parties, which was rendered difficult by their respective geographical situations. With regard to compliance with the minimum standards laid down by the convention, the intention was to ask downstream States to assume certain obligations even if the watercourse for which they were responsible did not cross another common frontier with another contracting party: for example, in the case of estuaries.

50. Lastly, it would be necessary to solve the problem of the relationship between the pollution of fresh water and the telluric pollution of coastal waters. It was proposed to supplement the convention, which was limited to inland waters, by a convention against the telluric pollution of coastal waters, which would be prepared, at a diplomatic conference to be convened by the French Government late in 1973, by the States signatories of the Oslo Convention of 1972 for the Prevention of Marine Pollution by Dumping from Ships and Aircraft.

51. With regard to the law of treaties, the European Committee on Legal Co-operation would shortly answer Mr. Reuter's questionnaire. It was looking for ways to speed up procedures for the ratification of multilateral conventions and to reduce the number of reservations. In addition, an exchange of views on the techniques of international codification was to be held soon.

52. A collection of the European conventions concluded up to the end of 1971, with an analytical index, had just been published in two volumes and would be sent to the members of the Commission. Of the 15 States parties to the European Convention on Human Rights, 12 had so far recognized the jurisdiction of the European Commission of Human Rights and the European Court of Human Rights.

53. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his very interesting statement, which was particularly useful to the Commission at a time when it was planning its programme of future work.

54. Sir Francis VALLAT warmly thanked the observer, both on his own behalf and on behalf of the other members of the Commission from countries which were members of the Council of Europe, for an excellent description of the Council's legal work as such, and in relation to the work of the Commission. He was glad to note that, in drawing up its conventions and legal rules, the Council took great care not to impinge on the field of customary law, which came within the Commission's province. He had been especially interested to hear of the Committee's work on the subjects of jurisdictional immunities of States and pollution of international watercourses.

55. Mr. REUTER warmly thanked the observer for the European Committee on Legal Co-operation, for his outstanding statement and for the generosity of his Committee in providing the members of the Commission with documents of undeniable interest. The description of the European Committee's activities held many lessons for the Commission. In particular, the Commission might well adopt the technique of working out, side by side, a set of peremptory general rules and a set of more flexible rules agreed upon between the main parties concerned. If that procedure had been found necessary and convenient for 17 States which were close neighbours, it was all the more so for the international community. The fact that the Council of Europe had established a general system for the protection of human rights did not prevent it from taking up problems of more limited scope. Similarly, while the Commission had to take up major questions of international law, it should also, from time to time, study more limited subjects which could be quickly disposed of.

56. Mr. USTOR, speaking also on behalf of Mr. Ushakov, said it was a great pleasure every year to hear Mr. Golsong's report on the manifold activities of the European Committee on Legal Co-operation. It was especially interesting for members from eastern Europe to learn what was being done by legal bodies in western Europe at a time when preparations were under way for the European Conference on Security and Co-operation, the purpose of which would be to lower the barriers between the two parts of the old continent and to unite their peoples in their common interest and for the benefit of mankind.

57. Mr. MARTÍNEZ MORENO, speaking for the Latin American members of the Commission and for Mr. Yasseen, who had been unable to be present when Mr. Golsong had made his statement, said it was an honour for him to welcome the observer for the European Committee on Legal Co-operation. Mr. Golsong's statement had confirmed that Europe was still in the vanguard of legal science and could count on worthy successors to such great jurists of its past as Vitoria and Grotius.

58. He had been particularly pleased to hear about the recent judgement of the European Court of Human Rights awarding pecuniary compensation to a private person who had been unable to obtain satisfaction in national courts. Latin American jurists followed the work of the European Commission of Human Rights with keen interest, for the Central American Court of Justice, founded in 1907, had been the first international tribunal of that kind in the world and had been open to private persons.

59. Mr. KEARNEY thanked Mr. Golsong not only for his very interesting statement but also for the cordial reception which he—Mr. Kearney—had met with on attending the meeting of the European Committee on Legal Co-operation at Strasbourg in the autumn of 1972. On that occasion he had been impressed by the number and variety of the Committee's activities in both public and private international law.

60. Mr. TSURUOKA, speaking also on behalf of Mr. Tabibi and Mr. Ramangasoavina, thanked Mr. Golsong for his remarks, which had been most enlightening to the Commission, and congratulated the European Committee on Legal Co-operation on its achievements.

61. Mr. BILGE said that the work of the European Committee on Legal Co-operation was most helpful to the Commission in its own fields of study. He welcomed the increase in the number of States which accepted the jurisdiction of the European Commission and the European Court of Human Rights, he hoped that their number would increase still further and that the European Convention for the Protection of Human Rights would be fully applied.

62. Mr. QUENTIN-BAXTER expressed his gratitude to the observer for the European Committee on Legal Co-operation for his detailed account of the Committee's many activities. He had been particularly touched to hear of the work being done by the Committee in the field of human rights.

The meeting rose at 1.0 p.m.

1237th MEETING

Friday, 29 June 1973, at 11.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

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

(a) Review of the Commission's long-term programme of work: "Survey of International Law" (A/CN.4/245) prepared by the Secretary-General

(b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses

(A/CN.4/244/Rev.1; A/CN.4/245; A/CN.4/254; A/CN.4/270)

[Item 5 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to resume consideration of item 5 of the agenda.

2. Mr. SETTE CÂMARA reminded the Commission that the General Assembly, in its resolution 2926 (XXVII), had noted that the Commission intended, in the discussion of its long-term programme of work, "to decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses". The advance report submitted by the Secretary-General pursuant to that resolution (A/CN.4/270) contained only a plan of the report being prepared to supplement the 1963 report on "legal problems relating to the utilization and use of international rivers". The supplementary report, like the previous one, would provide information on internal laws, bilateral and multilateral treaties, decisions of international tribunals and studies made by non-governmental organizations. The new report would also include studies by intergovernmental organizations and information concerning the problem of pollution of international waterways. Information from States, was coming in very slowly, however. Eight States had given information on treaties and only one had supplied information on national legislation, Only three international organizations had complied with the request to furnish material concerning their work on the subject, and the Secretariat reported that no decisions of international tribunals, other than those included in the initial report, had been found (A/CN.4/270, para. 9).

3. At the previous session he had pointed out that the Commission needed to have access to the supplementary report before deciding what priority to give the topic. The existing studies[1] had been published in 1963 and were based on evidence provided by a very limited number of States, since at the time only five States had sent information to the Secretariat. The very limited response to the recent Secretariat requests for information showed that there was no feeling of urgency among States concerning the codification of the rules governing international watercourses. The matter was one on which international agreements abounded: no less than 253 treaties governing the non-navigational uses of international watercourses were included in the Secretariat survey of Legislative Texts and Treaty Provisions[2] and the rules applicable varied from place to place and from river to river. It was essential that the Secretariat should digest the voluminous material announced in its advance report, so as to enable the Commission to extract valid rules of international law from the fluid mass of State practice. What was more, the Secretariat stated in its Survey of International Law that at the General Assembly's fourteenth session the view had been expressed that an attempt to codify the matter would be premature and that it should be left to the International Law Commission to decide whether the subject was an appropriate one for codification (A/CN.4/245, para. 286).

4. It was common knowledge that interest in the subject, which had been dormant for 12 years, had been awakened by the adoption of the "Helsinki Rules" by the International Law Association in 1966.[3] Those rules constituted a useful piece of academic research, but included some very controversial features, such as the doctrine of the unity of river basins, which might prevent developing countries from exploiting their water resources, since the use of even the smallest tributary would depend on the consent of the other States in the river basin concerned. To take a specific case, practically the whole territory of Brazil was included in two river basins: that of the Amazon and that of the river Plate. The doctrine of the unity of river basins would mean that the construction of a small hydroelectric power station on any one of the thousands of small rivers in Brazil would require the consent of all the other States in the basin concerned. Brazil had a balanced approach to the problem, for it was the upstream State in the river Plate basin and the downstream State in the Amazon basin, the largest river basin in the world.

5. The Helsinki Rules dealt with the problem of pollution and the Commission itself, in its 1972 report, had concluded that "the problem of pollution of international waterways was of both substantial urgency and complexity".[4] Pollution was undeniably an important question; it was the by-product of centuries of heedless exploitation of natural resources, and the world had to devise means of controlling it. But world-wide concern over the problem went back only a few years; it could not be said that there were already international rules that were ripe for codification. The Stockholm Conference had produced a set of principles,[5] but had revealed wide divergencies between industrialized and developing countries in their approach to pollution control. The Governing Council of the United Nations Environment Programme had recently discussed a number of problems relating to pollution, but only in a very preliminary way. The Commission had not received any specific recommendation to undertake the codification of rules on the pollution of watercourses, though it had recognized that the problem was both urgent and complex.

6. In his opinion no decision could be taken on the priority to be given to the subject until the supplementary report was received and the Commission had had time to study it thoroughly. The Commission should therefore wait until its next session before even discussing the problem of priority.

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[1] Document A/5409 (3 vols.).

[2] ST/LEG/SER.B/12 (United Nations publication, Sales No. 63.V.4).

[3] The International Law Association, *Report of the Fifty-second Conference (1966)*, p. 484.

[4] See *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, chapter V, para. 77.

[5] See document A/CONF.48/14, section I.

7. As to methods of work, Mr. Kearney's proposal seemed to provide a way for the Commission to reach some conclusions about the revision of the 1949 list. It was essential to arrange systematically, and analyse, the many and often conflicting suggestions which had been made during the discussion and the individual preferences which had been expressed, in order to arrive at conclusions that would represent the consensus of the Commission. Some members preferred the minor subjects, others the major ones. Some would choose the traditional problems of international law; others would prefer new and up-to-date subjects. He therefore supported the idea of setting up a small committee to meet for a few days immediately before the Commission's twenty-sixth session.

8. Mr. HAMBRO said he found Mr. Sette Câmara's comments thought-provoking, but feared that if the Commission should decide not to give priority to the question of the non-navigational uses of international watercourses, that might cause some surprise in the Sixth Committee.

9. He had also been interested by the various suggestions made concerning the Commission's methods of work. He hoped that emphasis would be placed on the usefulness of obtaining expert technical advice, as had been done on the question of the continental shelf. On the other hand he could not agree to the suggestion that the Commission should lengthen its sessions from 10 to 20 weeks. After all the Sixth Committee was not unaware of what went on in the Commission and might very well conclude that it was already difficult enough to persuade members to remain for a ten-week session. Membership in the Commission conferred such prestige that all members were in great demand for other tasks and would have difficulty in devoting more time to the work of the Commission itself.

10. He thought the Commission was slowly approaching a consensus on its future programme of work; he hoped it would not be necessary to vote on the matter.

11. Mr. KEARNEY said he agreed with Mr. Hambro that the Commission was reasonably close to a consensus on its future programme of work. However, that programme would necessarily be influenced by the current programme, which included some topics that had so far been considered only in part.

12. State responsibility was undoubtedly the most fundamental and the broadest topic on the Commission's list, and attention might well be given to those aspects of it which had not yet been dealt with by the Special Rapporteur. For instance, once the ground-work had been completed on the basis of the Special Rapporteur's draft, the Commission might consider State responsibility for the violation or breach of treaties and for the discharge of obligations which might be the consequence of termination of a treaty. Another aspect of the topic might be the problem of the abuse of rights giving rise to various kinds of liability. A third aspect, not at all well regulated, was the question of determination of damages. The Commission might also wish to decide on an order of progress for various other aspects of State succession, such as publicly owned property other than State property, public debts and nationality.

13. In addition, he thought that consideration should be given to the subject of the jurisdictional immunities of foreign States. Legislation was pending in the United States Congress which provided for a drastic revision of the Government's approach to the question of State immunity. Under that legislation, decisions would be left to the courts and not to the Department of State, and immunity—not only from jurisdiction, but also from execution—would be excluded from a very broad range of the economic activities of foreign States.

14. As to the law relating to international watercourses, he differed from Mr. Sette Câmara with regard to the urgency of the problem of pollution. Man had always polluted his sources of fresh water by using them to dispose of waste materials of all kinds; but now, suddenly, in almost every part of the world, there was a fear that the use of fresh water for waste disposal had outstripped, or was outstripping, the capacity of rivers and lakes to dispose of the waste. In order to judge whether that fear was justified and to determine whether action to preserve the quality of fresh water supplies was urgently needed, it might be helpful to review the basic factors that had given rise to pollution at an ever-expanding rate. The ultimate cause was the scientific revolution of the twentieth century and its three major consequences. The first was population growth which, by all estimates, would increase the world population to 4,000 million by 1980, while the amount of fresh water would remain the same. The second was the change in the location of people: the urban population had increased from 500 million in 1940 to nearly 1,500 million in 1973. Within the next 10 or 15 years about half the world's population would be living in urban areas. Urban development had always depended on the availability of sufficient quantities of water for domestic purposes and, to an increasing extent, for industrial purposes. The third consequence was industrialization, which had created a host of new products that were playing an even greater role than population growth and urbanization in degrading the river systems.

15. In the past, the process of river life had made the river a useful and available means of waste disposal. The flowing water had helped to dispose of the organic waste, which had then been broken down by bacteria into inorganic waste, by the use of oxygen. In turn, plant life had consumed the inorganic waste and recycled oxygen into the water. But in many places that system was collapsing under the threefold pressure of population growth, urbanization and industrialization. When the overloaded river systems broadened into lakes, for example, and the flow of water slowed down, algae feeding on substances in sewage, such as phosphorus and nitrogen, had multiplied spectacularly, as could be seen in Lake Erie in North America and Lake Constance in Europe.

16. In that situation the urgency of the need to reduce water pollution was obvious, but the question was whether it was also necessary to deal with that problem from the point of view of international law. In his opinion, in attempting to frame any legal rules it would be necessary to rely on scientific, engineering, economic and financial studies on a large scale. Such studies were

already being carried out in the river basins of the Lower Mekong, the Senegal, the Chad, the Nile, the Upper Paraguay, the river Plate, the Rhine and the Moselle. In North America, two commissions had long been established in that field, namely, the Mexican-United States Boundary and Water Commission and the Canadian-United States International Joint Commission.

17. It was interesting to note, however, that a panel of experts convened by the United Nations to study the question of integrated river basin development had reached the following conclusions in a report published in 1970:

"The vital character of current and impending disputes on international streams has been shown in chapter IV where it is pointed out that lack of accepted international law on the use of these streams presents a major obstacle in the settlement of differences, with the result that progress in development is often held up for years, to the detriment not only of the countries concerned but of the economy of the world in general." [6]

That panel, composed of outstanding experts on water uses from Colombia, France, the Netherlands, Pakistan, the Soviet Union, the United Kingdom and the United States, had consisted of scientists, with one lawyer.

18. It was evident, therefore, that the world was faced with a serious gap in an area of international law where lack of law could have disastrous effects upon one of the essentials for human life—fresh water. The pressure of population growth, industrial growth and urban growth upon water supplies would inevitably continue to mount. Where international river basis were concerned, co-operative action by all riparian and boundary States would be necessary to ensure that the available water was kept tolerably clean. As the experts' report had made clear, legal principles would have to be established to provide a working basis for that essential international co-operation.

19. The first step might be to consider what legal principles appeared to be applicable. The obvious ones would seem to be those drawn from the topic of State responsibility. For example principle 21 of the Stockholm Declaration on the Human Environment provided *inter alia* that:

"States have... the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States...".

An analysis of that principle showed, however, that the responsibility of the State in such situations differed basically from State responsibility as defined in draft article 1 on the subject prepared by the Commission's Special Rapporteur.[7] In the first place a substantial problem of attribution was involved. In most States the pollution of a river basin derived from a variety of public and private sources, with the State organs as such playing a large, but not necessarily dominant role. Even if the broad range of attribution in the Special Rapporteur's draft article 7 [8] was adopted, so that acts of municipal sewage systems, public irrigation systems and publicly owned industrial corporations were attributed to the State, it was likely that in many international rivers a large part of the pollutants would be discharged from private sources. Those sources would not be attributable to the State unless, under the Special Rapporteur's draft article 11,[9] the State organ in question "ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so".

20. It would then be necessary to consider the second requirement of State responsibility, namely, that the State's conduct constituted failure to comply with an international obligation. In dealing with responsibility for river pollution, however, the first fact to be faced was that rivers had been used for waste disposal from time immemorial. States obviously had a right to use rivers for such purposes; the question was what limitations could be placed on that right, rather than whether the State had violated its international obligations. That was not to say that such international obligations did not exist. For example, a State which knowingly permitted the discharge of poisonous elements such as mercury into a river, in quantities which resulted in death in the downstream State, would, in his opinion, be considered as having violated its obligations under existing international law.

21. Thus the classical principles of State responsibility were not particularly helpful in dealing with river pollution, and it was necessary to look for other sources of law. Although a considerable amount of practice had been developed in that field, there were certainly no generally accepted customs drawing a clear line between what was permissible and what was not. However, by turning to generally accepted legal principles, reliance could be placed on the ancient principle of *sic utere tuo ut alienum non laedas*. In the field of pollution that principle might have been expressed for the first time in the *Trail Smelter* arbitration case of 1941 between Canada and the United States, when the tribunal had held that no State had the right to use or permit the use of its territory in such manner as to cause serious injury by fumes in or to the territory of another or the properties or persons therein.[10]

22. That principle had been supported by many jurists and had found expression in the formulations of a number of legal societies, such as the Madrid declaration of 1911 of the Institute of International Law, that Institute's amplifying statement of 1961 [11] and the International Law Association's Helsinki Rules of 1966 on the Uses of the Waters of International Rivers. Regional studies on the subject included draft articles prepared by the Inter-American Juridical Committee and proposals by the

[6] *Integrated River Basin Development* (United Nations publication, Sales No. E.70.II.A.4), p. 44.

[7] See 1202nd meeting, para. 16.

[8] See document A/CN.4/264 and Add.1, annex I.

[9] *Ibid.*

[10] See *The American Journal of International Law*, vol. 35, 1941, p. 684.

[11] See *Annuaire de l'Institut de droit international*, vol. 24, p. 365 and vol. 49 (II), p. 370.

Economic Commission for Europe, the Council of Europe and the Asian-African Legal Consultative Committee. The draft rules under consideration in the competent sub-committee of the last-mentioned body had been somewhat along the lines of the Helsinki Rules, but had differed from them in one important respect: while the Helsinki Rules had imposed an obligation on States to abate existing pollution, the draft before the Sub-Committee had not included that requirement, because of the limited resources of developing countries.

23. In dealing with river pollution it was necessary to devote much attention to the scientific and economic aspects of the subject. One illustration of the complexities of those aspects was to be found in the Agreement of 1972 between the United States and Canada on Great Lakes Water Quality,[12] which first laid down certain general objectives, and then more specific ones, such as those concerning microbiology, dissolved oxygen, total dissolved solids, iron, phosphorus, radioactivity and so on. It was obvious, therefore, that any legal study of the subject of river pollution would call for the closest co-operation with such scientific agencies as WHO, FAO and others.

24. He hoped that recital of facts would convince members of the Commission that scientists, engineers and economists were in real need of principles of international law to guide them in their work. In that work, international lawyers should act as catalytic agents in inculcating some unity of approach to the various aspects of the question. In his opinion the Commission would be the most suitable body to undertake that task; but if it decided not to do so, urgent action would obviously be called for on the part of some other body.

25. Mr. YASSEEN said that, since the questions under examination by the Commission were enough to keep it occupied for several years, there was no urgent need to consider its future programme of work; but it would be useful to do so, in order to be prepared, if only psychogically, to take up other topics when the time came. The Commission should therefore report to the General Assembly that the general review it had made was without prejudice to its existing programme of work —State responsibility, succession in respect of treaties, succession in respect of matters other than treaties, the most-favoured-nation clause, and treaties concluded between States and international organizations or between two or more international organizations—and that it intended to complete that programme, but might add a few more topics to it.

26. In selecting those topics the Commission should bear in mind that it did not have the same latitude in the progressive development of international law as it had in codification. Whereas it had a fair degree of freedom in regard to codification, it had to await the instructions of the General Assembly on questions of progressive development. Perhaps it might suggest to the General Assembly those of the topics already on its general programme of work to which it would like to give priority once the current work was completed. He had several such topics to suggest.

27. In the first place, jurisdictional immunities of foreign States and their property should be taken up as soon as possible after the Commission had completed its current work. Secondly, unilateral acts in international law should occupy a high place on the Commission's general programme of work: it was a subject of great practical importance, since it involved estoppel, waivers, and other notions which had been the subject of many arbitral awards and judicial decisions.

28. In the third place came the question of international watercourses, since it had been expressly referred to the Commission by the General Assembly in a resolution which, although couched in very measured terms, was nevertheless clear and must be interpreted as reflecting the Assembly's wish to accord some degree of priority to the examination of that topic.

29. When the time came, the Commission would also have to tackle the problem of risk, of which it was difficult to say whether it was a matter for codification or for progressive development, but which was more or less directly connected with the question of responsibility, at least in the minds of many lawyers.

30. With regard to the topics which came under the heading of progressive development, it must be recognized that the Commission had no monopoly of codification or of progressive development, and that many other bodies had been specially set up to perform those tasks. It would be best to leave aside any matters which had been entrusted to other bodies: for example, the law of outer space and the new aspects of the law of the sea.

31. There remained the question of the environment. He would not deny that there were some principles of international law relating to the subject, particularly where pollution was concerned, but the question had already been assigned to a recently established specialized body which, as the Chairman had pointed out, envisaged the possibility of inviting the General Assembly to refer to the Commission, for codification, the fundamental principles relating to the environment. It would therefore be better to await the outcome of that proposal and merely state in the report that the Commission regarded the law relating to the environment as a possible topic for study.

32. Mr. AGO said he fully supported Mr. Kearney's plea for the Commission to study the law relating to international watercourses. It was, indeed a topic of the greatest importance, to which the Commission, more than any other body, could give really objective legal treatment. He wished, however, to reply to some remarks Mr. Kearney had made concerning State responsibility.

33. The Commission would recall that during its discussion on State responsibility it had agreed on what should and what should not be covered by its study and what the various stages of that study should be. It had decided to codify the whole topic if possible, on the understanding any element alien to responsibility would be excluded, and to proceed in a particular order. He was therefore unable to support Mr. Kearney when he said that priority should be given to the study of responsibility arising from the violation of treaties. The Commission had established that responsibility was the consequence

[12] See *International Legal Materials*, vol. XI, No. 4, p. 694.

of the violation by a State of an international obligation. An international obligation could derive from a treaty, a customary rule or other source, and one of the first rules the Commission would meet with when it took up the chapter on violation, was that there was no difference in a violation according to whether the obligation violated arose from one source or from another. It would therefore be a departure from the basic criterion, and even a setback to the codification of responsibility, to attempt to study the violation of treaties before the violation of other obligations.

34. Mr. Kearney had also mentioned the problem of abuse of rights. When the Commission had discussed the question of responsibility, it had made one point clear: if there was a rule of international law to the effect that, at least in certain matters, the possessor of an international right could not go beyond a certain limit in exercising that right, then there was an international obligation not to abuse the right, and any violation of that obligation, as of any other obligation under international law, gave rise to international responsibility. But the real problem was not one of responsibility. It was a substantive problem, a problem of a primary rule, namely, whether there was or was not a rule of international law which set a limit to the exercise of a right. He was becoming more and more convinced that the problem of abuse of rights deserved study by the Commission, but that it did not come within the framework of responsibility and should be studied separately.

35. The question of the determination "*dommages*" —which did not correspond exactly to the English term "damages"—would be dealt with when the Commission took up the determination of the consequences of a wrongful act, which was the last stage in the study of responsibility. That question would thus find its place in the Commission's programme of work in due course.

36. As to pollution and its relationship to responsibility, he emphasized that the problem of river pollution was not one of responsibility, so could not be solved as part of the study of responsibility. That was why Mr. Kearney had not found in the draft articles on responsibility the answers to the questions he had raised. There was nothing surprising in that, since the question to be decided was whether there were any rules of international law to prevent States from engaging in certain activities calculated to produce the results complained of, or whether the Commission wished to establish such rules where none existed. The matter would be relatively simple if the activities of States or public authorities alone were involved, but it was also necessary to consider whether there were, or whether the Commission wished to establish, rules of international law obliging States to prohibit privates persons from carrying on certain activities or to require them to take certain precautions. If such rules existed and pollution was the result of State activity, the State which had violated the obligation deriving from those rules incurred international responsibility, and if a private person caused pollution by acting contrary to the rules which the State should have prescribed for him, the State would incur responsibility for failure to take the necessary measures to prevent the pollution. There again, the problem was anterior to that of responsibility; it should be studied, but outside the framework of responsibility.

37. The CHAIRMAN said that the officers and former chairmen of the Commission, at a meeting held that morning, had examined the question of the long-term programme of work and concluded that it would be extremely difficult to reach a consensus on a list of topics for recommendation to the General Assembly. Furthermore, it had been considered undesirable to adopt a list by voting.

38. In those circumstances, it was recommended that the report to the General Assembly should include a passage giving a detailed account of the Commission's discussion. The passage would record the fact that some members had stressed the importance of certain topics; it would also note that none of the members had suggested the inclusion of some other topics, such as the right of asylum and the recognition of States and governments, which remained outstanding from the 1949 list. The proposed passage would begin with a paragraph stating that the Commission's current agenda included State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause and the question of treaties concluded between States and international organizations, which would take up much of the Commission's time in the years ahead. The passage would not constitute a decision, but would simply inform the General Assembly of the discussion held, leaving it to the Assembly to decide which topics should be included in the Commission's long-term programme of work and to lay down priorities.

39. The question of international watercourses was, of course, another matter, for it was already included in the Commission's programme of work.

40. If there were no comments, he would take it that the Commission decided to adopt those suggestions.

It was so agreed.

The meeting rose at 1 p.m.

1238th MEETING

Monday, 2 July 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

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

Succession of States in respect of matters other than treaties

[Item 3 of the agenda]

(resumed from the 1232nd meeting)

1. Mr. BEDJAOUI (Special Rapporteur) said it would be useful if the Secretariat could help in getting together

the information needed for continuation of the work on succession of States in respect of matters other than treaties. The many studies prepared by the Secretariat on other topics had proved extremely valuable. The research stage was over so far as the question of public property was concerned, but a study might be undertaken on public debts. In view of the great number of treaties on that subject, the study might be confined to treaties concluded since the Second World War; it could also review the state of international and internal jurisprudence and, if possible, the practice of governments and international organizations. Since the work would take about two years, the Commission should decide now whether it wished the Secretariat to undertake such a study.

2. Mr. KEARNEY said he had no objection to the proposal, but suggested that the Secretariat study should not be confined to problems which had arisen since the Second World War. Apart from any other considerations, those problems were inextricably bound up with those which had arisen after the First World War.

3. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to entrust the Secretariat with the study requested by the Special Rapporteur, but that it approved Mr. Kearney's suggestion.

It was so agreed.

Most-favoured-nation clause

(A/CN.4/257 and Add.1; A/CN.4/266; A/CN.4/L.203)

[Item 6 of the agenda]

(resumed from the 1218th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee (A/CN.4/L.203).

TITLE OF THE DRAFT

5. Mr. YASSEEN (Chairman of the Drafting Committee) said he would first introduce the title of the draft. It would be recalled that at its nineteenth session, in 1967, the Commission had placed the present topic on its programme of work as "The most-favoured-nation clause in the law of treaties".[1] At its twentieth session the Commission had taken the view that it should focus on the legal character of the clause and the legal conditions governing its application, and that it should clarify the scope of the clause as a legal institution in its various practical applications.[2] In the light of that opinion, the title of the topic on the successive agenda of the Commission and in the resolutions of the General Assembly had become simply "The most-favoured-nation clause". The Drafting Committee had found no reason to depart from that formulation.

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

It was so agreed.

ARTICLES 1 and 3

7. *Article 1*

Scope of the present articles

The present articles apply to most-favoured-nation clauses contained in treaties between States.

Article 3

Clauses not within the scope of the present articles

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form, or (2) to a clause contained in an international agreement by which a State undertakes to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, or (3) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to a State, shall not affect:

(*a*) The legal effect of any such clause;

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

(*c*) The application of the provisions of the present articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties.

8. Mr. YASSEEN (Chairman of the Drafting Committee) said he would introduce articles 1 and 3 together, because they were closely linked. The two articles had been prepared by the Drafting Committee on the basis of the instructions received from the Commission, although the Commission had not held a preliminary discussion on a text for such provisions. They were based on the corresponding articles—articles 1 and 3—of the Vienna Convention on the Law of Treaties[3] and of the draft articles on succession of States in respect of treaties adopted by the Commission on first reading at its previous session. The purpose of article 1 was to limit the scope of the draft articles; that of article 3 was to remove any misconception that might arise from the express limitation of their scope.

9. Mr. USHAKOV said he approved of article 1, but the draft articles applied to the consequences of most-favoured-nation clauses rather than to the clauses themselves. It should therefore be indicated in the commentary that the wording of article 1 might be amended later.

10. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve articles 1 and 3 as proposed by the Drafting Committee.

It was so agreed.

[1] See *Yearbook of the International Law Commission, 1967*, vol. II, p. 369, document A/6709/Rev.1, para. 48.

[2] *Ibid., 1968*, vol. II, p. 223, document A/7209/Rev.1, para. 93.

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

ARTICLE 2

11. *Article 2*

Use of terms

For the purposes of the present articles:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "Granting State" means a State which grants most-favoured-nation treatment;

(*c*) "Beneficiary State" means a State which has been granted most-favoured-nation treatment;

(*d*) "Third State" means any State other than the granting State or the beneficiary State.

12. Mr. YASSEEN (Chairman of the Drafting Committee) said that, as was customary, article 2 defined the sense in which terms were used in the draft articles. It was based on the draft article 1 proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). The reason why the Drafting Committee considered it useful at that stage to propose definitions of the terms used in the articles it had adopted was mainly to facilitate understanding of the articles to be included in the report to the General Assembly. In accordance with the Commission's practice, the article on the use of terms would be supplemented if necessary at later stages of the work. The final text of article 2 would be established after all the articles of the draft had been formulated.

13. Article 2 contained a definition of the term "treaty" which was taken from the Vienna Convention on the Law of Treaties. In addition, it defined the term "granting State" as a State which granted most-favoured-nation treatment, and the term "beneficiary State" as a State which had been granted such treatment. The verb "grant" had been used to make it clear that not only was the treatment effectively accorded and enjoyed, but the legal obligation and the corresponding right relating to the treatment were created.

14. Finally, the article defined, for the purposes of the other articles—and for those purposes only—the term "third State". The Drafting Committee was well aware that in the draft articles on succession of States in respect of treaties the Commission had preferred the term "other State party" to the term "third State", which could not be used because it had already been made a technical term in the Vienna Convention on the Law of Treaties. The Committee had considered, however, that the reasons why that term could not be used with a different meaning in a draft that was essentially within the framework was the Vienna Convention were not necessarily applicable in the present case.

15. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve article 2, as proposed by the Drafting Committee, on the understanding that other definitions could be added later.

It was so agreed.

ARTICLE 4 [4]

16. *Article 4*

Most-favoured-nation clause

Most-favoured-nation clause means a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations.

17. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 4 defined the meaning of the expression "most-favoured-nation clause". It was based on paragraph 1 of the article 2 proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). The Drafting Committee had retained the expression "most-favoured-nation clause", which had become a technical term in treaty practice. As the Commission wished the effect of the clause to be examined in its various practical applications, the Drafting Committee had decided to add the words "in an agreed sphere of relations". The Drafting Committee had found it preferable to replace the words "one or more granting States" by the words "a State" and the words "one or more beneficiary States" by the words "another State". It had also decided to delete paragraph 2 of the original article, since the idea it expressed would be better placed in the commentary.

18. Mr. BILGE said he hoped the commentary would explain why a separate provision had been devoted to the definition of the most-favoured-nation clause, when the other definitions were grouped together in article 2.

19. Mr. USTOR (Special Rapporteur) said that the commentary to article 4 would explain that the definition of the expression "most-favoured-nation clause" had been placed in a separate article because it was the cornerstone of the whole draft.

20. The CHAIRMAN said that, in the light of that explanation, he took it that the Commission agreed to approve article 4 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 5 [5]

21. *Article 5*

Most-favoured-nation treatment

Most-favoured-nation treatment means treatment by the granting State of the beneficiary State or of persons or things in a determined relationship with that State, not less favourable than treatment by the granting State of a third State or of persons or things in the same relationship with a third State.

22. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 5, which defined the meaning of the expression "most-favoured-nation treatment", was based on paragraph 1 of the article 3 originally proposed by the Special Rapporteur in his third report (A/CN.4/257). Article 5 dealt with the treatment accorded by the granting State both to the beneficiary State itself and to persons or things in a determined relationship with that State, by reference to treatment likewise accorded to a

[4] For previous discussion see 1215th meeting, para. 11.

[5] *Ibid.*

third State or to persons or things in the same relationship with a third State.

23. The Committee had decided to delete paragraph 2 of the Special Rapporteur's original article in case the enumeration "treaty, other agreement, autonomous legislative act or practice" might be considered exhaustive.

24. Mr. KEARNEY said he feared that the reference in the concluding words "to persons or things in the same relationship with a third State" might be somewhat confusing. It was unlikely that persons or things would be found in exactly the same relationship with a third State. The intention was undoubtedly to refer not so much to the same relationship as to a relationship of a similar nature. Wording such as "the same type of relationship" might be more appropriate.

25. Mr. USHAKOV said that the words "in the same relationship" were obscure in themselves. They referred back to the words "in a determined relationship with that State", but an explanation should be given in the commentary.

26. Mr. USTOR (Special Rapporteur) said that the point raised by Mr. Kearney had been discussed in the Drafting Committee, which had not been able to find any better expression. The commentary would explain that the words "in the same relationship" had the meaning attached to them by Mr. Kearney.

27. Mr. KEARNEY said that for the time being he could accept that solution. On second reading, the wording could be clarified in the light of governments' comments.

28. Mr. USHAKOV considered that to explain the words "the same relationship", it would be necessary to add the words "as the persons or things in a determined relationship with the beneficiary State" at the end of the article. Since the point was purely one of drafting, it could be left till later.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 5 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 6[6]

30. *Article 6*

Legal basis of most-favoured-nation treatment

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.

31. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 6 corresponded to the article 4 originally proposed by the Special Rapporteur in his third report (A/CN.4/257). After careful consideration the Drafting Committee had decided to retain that provision, which confirmed a generally accepted and well-established rule. In order to make the rule explicit enough to constitute the main safeguard it was intended to be, the article stressed the need for the existence of a legal obligation as the basis of the right of a State to be accorded most-favoured-nation treatment by another State.

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

It was so agreed.

ARTICLE 7[7]

33. *Article 7*

The source and scope of most-favoured-nation treatment

The right of the beneficiary State to obtain from the granting State treatment accorded by the latter to a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State. The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State.

34. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 7 corresponded to the article 5 originally proposed by the Special Rapporteur in his third report (A/CN.4/257 and Add.1). It related both to the source of most-favoured-nation treatment and to the nature and scope of the treatment. On the first point, the Drafting Committee had considered that the idea of the actual source of the beneficiary State's right to enjoy a certain treatment was better conveyed by the expression "the right... to obtain" than by the original expression "the right... to claim". In addition the Drafting Committee had thought it useful to specify that the most-favoured-nation clause in question was the clause in force between the granting State and the beneficiary State.

35. The second sentence of the article clearly indicated that it was the treatment extended by the granting State to a third State that determined the treatment to which the beneficiary State was entitled under the most-favoured-nation clause.

36. Mr. KEARNEY said that, in the second sentence of the article, it was necessary to make it clear that the treatment referred to was treatment extended not only to the third State itself, but also to persons or things "in a determined relationship with that State", to use the language of article 5.

37. Sir Francis VALLAT said it would have to be explained in the commentary that the words "under that clause" in the second sentence referred to the possible limitation of the extent of the treatment by the terms of the clause itself. The commentary would also have to explain that the words "is determined by the treatment", used in the same sentence, meant "is determined by reference to the treatment". The idea which it was intended to convey was that the standard for determining the treatment of the beneficiary State was the treatment actually extended to the third State.

[6] For previous discussion see 1216th meeting, para. 57.

[7] For previous discussion see 1217th meeting, para. 62.

38. Mr. USTOR (Special Rapporteur) said that the commentary would deal with the valid points raised by Mr. Kearney and Sir Francis Vallat. The background to article 7 was that the contracting parties were States and that the treatment in question would be given to persons or things only through States.

39. The treatment to which the beneficiary State was entitled was determined by the relations between the granting State and the third State, but it would be granted within the framework of the most-favoured-nation clause. If that clause specified certain limitations, or—an important matter which would be dealt with in later articles—if it set certain conditions for the granting of the treatment, the agreement between the granting State and the third State would operate within the limits set by the most-favoured-nation clause.

40. Lastly, the commentary would explain that the treatment extended by the granting State was the standard which determined the scope of the treatment which the beneficiary State was entitled to claim.

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that, in fact, the treatment accorded to the third State constituted the standard for determining the scope of the treatment which the beneficiary State could claim. Obviously, one treatment could not be determined "by" another treatment. But that raised a very difficult drafting problem, and the Drafting Committee had been unable to accept the English formula "with reference to", which he personally would have preferred.

42. Mr. REUTER said he could agree to the necessary explanations being given in the commentary, but he wished to draw attention to the difference between the first and second sentences of article 7. The first sentence involved a legal link between the beneficiary State and the granting State. The second sentence, on the other hand, referred to a factual situation, so that it was incorrect to speak of the "the treatment extended by the granting State to the third State". The treatment was not necessarily extended to the third State; it might be extended to private persons. In regard to the first sentence, it could be held that, even if the beneficiaries of the treatment were private persons, a legal link existed between the two States.

43. The CHAIRMAN asked the Special Rapporteur whether it would be possible to explain in the commentary the point raised by Mr. Reuter.

44. Mr. USTOR (Special Rapporteur) said that Mr. Reuter's point was a valid one. It was for the Commission to decide whether it should be covered by changing the wording of the article or by giving an explanation in the commentary.

45. Mr. YASSEEN (Chairman of the Drafting Committee) considered that the difference pointed out by Mr. Reuter called for clarification in the commentary.

46. Mr. USHAKOV said he thought that if article 7 was read in conjunction with article 5 it was clear that the treatment referred to in article 7 meant not only the treatment extended to a third State, but also the treatment extended to persons or things.

47. In the first sentence of article 7 he would like the words "arises from the most-favoured-nation clause" to be amended to read "arises only from the most-favoured-nation clause". The purpose of that amendment was not to emphasize the source of the right of the beneficiary State, but to stress that its right could not arise in any other way.

48. Sir Francis VALLAT said it was desirable that the English and French texts should be fully in accord. In the first sentence of the article, the word "accorded" was rendered in French by the word "*accordé*". In the second sentence, however, the same French word was used to render "extended". There was a difference in English between the two terms. The term "accorded" implied a legal obligation; the word "extended" referred to a *de facto* situation. He believed that that difference in wording correctly reflected an intended difference in meaning. He therefore suggested that the French wording should be adjusted to correspond with the English.

49. Mr. REUTER associated himself with Sir Francis Vallat's comments and suggested that, in the second sentence of article 7, the word "*accordé*" should be replaced by the word "*appliqué*" in order to bring the French text into line with the English. He considered that the words "persons or things" should be added at the end of that sentence.

50. Mr. USTOR (Special Rapporteur) said he would prefer to leave the second sentence as it stood, because any change in it could alter the meaning of the first sentence as well. It could be explained in the commentary that the word "treatment" was intended to refer to the treatment defined in article 5.

51. Mr. YASSEEN (Chairman of the Drafting Committee) said he did not think article 7 could be left as it stood. Either the concluding words, "to the third State", should be deleted, or the whole of the formula employed in article 5 should be used. In the former case, that formula would be implied.

52. Mr. USHAKOV referring to the distinction drawn by Mr. Reuter between the first and second sentences of article 7, agreed that the text should be amplified and that it was not enough to read it in conjunction with article 5. Article 5 did not refer to the treatment extended by the granting State to the third State in the terms used at the end of article 7.

53. Mr. USTOR (Special Rapporteur) said that Mr. Yasseen's proposal did not solve the problem. It relied on part of the definition of most-favoured-nation treatment given in article 5. The second sentence of article 7, however, applied to almost any type of treatment extended to the third State or to persons or things in a determined relationship with that State. His suggestion would therefore be to insert the expression "most-favoured-nation" before the word "treatment" at the beginning of the second sentence and, at the end of that sentence, to replace the reference to "the third State" by a reference to "the third State or to persons or things in a determined relationship with that State".

54. Sir Francis VALLAT proposed that the concluding words of the article, "to the third State", should be replaced by the words: "to the third State, or to persons or things in the determined relationship with the latter State". It was necessary to use the definite article "the",

because the phrase referred back to the relationship mentioned in article 5.

55. Mr. USTOR (Special Rapporteur) accepted that proposal.

56. Mr. USHAKOV thought that the first sentence of article 7 should also be amplified by inserting, after the words "a third State", the words "or to persons or things in a determined relationship with a third State".

57. Sir Francis VALLAT said that, if the words he had proposed for addition at the end of the second sentence were also inserted in the first sentence, the word "accorded" in the first sentence would have to be changed to "extended".

58. Mr. BILGE suggested that, in view of the length of the new wording, article 7 should be divided into two paragraphs.

59. Mr. YASSEEN (Chairman of the Drafting Committee) approved of that suggestion.

60. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 7 with the changes proposed by Sir Francis Vallat and Mr. Ushakov and on the understanding that the second sentence would become a separate unnumbered paragraph.

It was so agreed.

61. Mr. MARTÍNEZ MORENO said that he had agreed to the approval of the draft articles, in particular articles 4 and 5, on the clear understanding that the Special Rapporteur would submit, at a later stage, articles dealing with the exceptions. He was interested, in particular, in the exceptions relating to developing countries and to common markets and customs unions.

62. The CHAIRMAN said that the reservation by Mr. Martínez Moreno would be placed on record.

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

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

63. The CHAIRMAN invited the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations to introduce his first and second reports (A/CN.4/258 and A/CN.4/271).

64. Mr. REUTER (Special Rapporteur) said that his main purpose in introducing his first and second reports was to elicit the Commission's views on several questions which had arisen during his preparatory work and on which it was important that the Commission should give him some guidance.

65. The first question was one of method. The Vienna Conference on the Law of Treaties [8] and the General Assembly, in resolution 2501 (XXIV), had recommended that a set of draft articles on treaties to which international organizations were parties should be prepared in consultation with the principal international organizations. It should be decided what form that consultation was to take. It was probably too early to attempt to solve the substantive problem, namely, how a set of draft articles could acquire legal force for the international organizations concerned. That in turn raised the questions whether international organizations should normally be called upon to become parties to a multilateral treaty; whether the Commission wished to confine itself to a formula for which there were precedents, such as that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies;[9] or whether, if neither of those solutions was adopted, a recommendation by the General Assembly could suffice.

66. He was not suggesting that the Commission should settle those questions immediately. However, it had been necessary to enlist the help of the international organizations at the start of the work, so with the agreement of the Secretary-General he had sent a questionnaire, the text of which was annexed to his second report, to the international organizations which had been invited to submit observations on the draft articles on the law of treaties and to participate in the Vienna Conference. He had informed the organizations that unless they indicated otherwise, their replies would remain confidential. For the time being, therefore, it was not proposed to publish those replies; but since the information thus obtained had been used in his second report, and since the Commission's discussions were public, there was every reason to hope that the international organizations would authorize publication later.

67. After three years of preliminary work, he should be in a position to submit a set of draft articles to the Commission at its twenty-sixth session. He would very much like to have the benefit of further comments by international organizations, on the understanding that they would be treated with the same discretion for another year. Greatly as he desired publication of the extremely interesting documents he had received from certain organizations, in particular the United Nations, he was bound to tell the Commission that the international organizations generally had most serious misgivings about the future draft articles, because they feared that the rules to be formulated might deprive them of some of their freedom of action. That anxiety was justifiable, and his main concern was to win the confidence of the international organizations. He thought that the Commission's work would have the effect, not of making life even more difficult for the secretariats of the international organizations, but of consolidating the legal position of the agreements concluded by those organizations and giving them a status they seemed to lack. That was the first question on which he would like to have the views of the members of the Commission.

68. The second question concerned the scope of the topic entrusted to him. That scope was determined by

[8] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (United Nations publication, Sales No. E.70.V.6), p. 178, para. 38 *et seq.*

[9] United Nations, *Treaty Series*, vol. 33, p. 262.

the Vienna Convention on the Law of Treaties.[10] It had always been understood that it was his task to ascertain what adaptations of substance or form would be required to make the Convention applicable to treaties concluded by international organizations. But that position of principle made it necessary to consider certain particular aspects of the topic.

69. He had asked himself whether there were not some questions completely foreign to the Vienna Convention which concerned international organizations only: for example, the question of agreements concluded by subsidiary organs, since the definition of an international organization given in article 2 of the Vienna Convention did not apply to such organs. He did not propose, however, that the Commission should pursue the study of that question, for the replies to the questionnaire had shown that it was not yet ripe for study.

70. There was also the question of representation. The Vienna Convention devoted a number of articles to the representation of States by natural persons, particularly the articles concerning powers, but it left aside the more general question of the representation of one State by another in international law. He had considered whether international organizations could, for example, represent a territory for the purpose of concluding treaties. Although practice did not exclude that possibility, the replies to the questionnaire had generally been negative; some organizations had even shown lack of interest in the question, which they considered too theoretical; but the United Nations had made an admirable survey, which deserved to be published, since a new phenomenon was now appearing, in particular in connexion with Namibia. The question was not ready for codification, of course, and it would be pointless to pursue it further. The reason why he had put questions in the questionnaire which might seem strange, was to prevent anything important from being overlooked.

71. Still with regard to the scope of the topic entrusted to him, he would like to have the Commission's opinion on the definition of the term "international organization". He himself proposed to keep to the definition given in the Vienna Convention—a fairly wide definition which covered all international organizations—rather than revert to the notion of an organization of universal character which the Commission had adopted in the draft articles on the representation of States in their relations with international organizations. His reason was that the Vienna Convention laid down, for agreements concerning international organizations, certain rules which applied to all organizations. If, on the pretext of codification, the Commission were to prepare a draft concerning a certain class of international organizations only, it would create a second source of international law alongside the Vienna Convention, and there would still be yet a third: uncodified customary practice. That would make the codification a failure. So either the Commission should follow the Vienna Convention very closely, in which case it could provide the complement to that Convention which the General Assembly had requested, or, if it found that to be impossible, it should not submit a draft at all. The Commission should bear in mind that it was required to formulate general provisions, not special rules. For whereas in law States enjoyed absolute sovereign equality, international organizations differed widely according to whether they were universal, regional, technical or of some other kind.

72. The third question he wished to refer to the Commission was whether the draft articles should deal with the capacity of international organizations to conclude treaties. The Commission was aware that there were two schools of thought on the question. According to the first, that capacity was inherent in the very notion of an international organization, no international organization existed without international capacity, and the most immediate of an organization's capacities was the capacity to conclude international agreements. That capacity could not, of course, be as extensive as the capacity of States, but was commensurate with the functions of the organization. That conception was based on the jurisprudence of the International Court of Justice, which continued that of the Permanent Court of International Justice, and was valid mainly for the United Nations. According to the second school of thought, the capacity of an international organization depended on its statutes in each individual case—not on the constituent instrument, but on the relevant rules. It was held to be a matter for the constitutional law of the organization concerned, just as the constitution of a federal State could not be interpreted according to rules laid down in the constitution of another federal State. In his view it would be better not to propose too ambitious a formula; first, because the topic under study concerned agreements and not the capacity of organizations in general, and secondly, because the Commission, in its work on the codification of the law of treaties, had always been divided on the question and had preferred to leave it aside. However, he would follow whatever instructions the Commission saw fit to give him on that point.

73. The problem of capacity indirectly raised the question of the effects of agreements concluded by international organizations, particularly the effects for member States. It would be illogical to affirm that international organizations had very extensive capacity and at the same time to attribute the widest possible effects to the agreements they concluded, even including that of binding the member States. For if the organization as such had the capacity to conclude treaties, the rules of the Vienna Convention would apply and the member States of the organization should not be found by the agreements it concluded. He therefore submitted two solutions for the Commission's consideration. If the agreements concluded by international organizations were to produce effects with regard to the member States, they could do so in two different ways. First—according to a theory he did not at present favour, which had been adopted by Professor René Jean Dupuy in a report recently submitted to the Institute of International Law—they could do so under the agreement itself; that meant saying that member States were not third States, and the provisions of the Vienna Convention on that point would then have to be

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

clarified or amended. Secondly, they could do so under the organization's constituent instrument, and not under the agreement itself; if the statutes or practice of an organization included a rule that agreements concluded by the organization were binding on its member States, there was no derogation from the Vienna Convention, since that rule was none other than the *pacta sunt servanda* rule laid down in the Convention. A famous example was that of the constituent instrument of the European Economic Community, an article of which provided that agreements concluded by the Community were binding on Member States.[11]

74. At present he was inclined to favour the second solution, which did not depart from the principles of the Vienna Convention and reserved to each organization the right to model the effects of the agreements it concluded according to its own rules. For example, the member States of an international financial organization which borrowed or lent funds would never consent to the agreements concluded by the organization being directly binding on them. It was thus a matter of interpreting the relevant rules of the organization. Conversely, it was unthinkable that agreements concluded by an organization of the Customs union type should not be binding on the member States, for otherwise third States would never sign any agreement with the union. For the time being, therefore, he had adopted the position which afforded the greatest possible flexibility.

75. Lastly, he would like to have the Commission's views on a matter which was not entirely within the scope of the topic under study, but which might later lead the Commission to broaden it. That was the question, not of agreements concluded by an international organization, but of the effects on an international organization of agreements concluded by certain States. It was now very common for States to entrust a new function to an international organization by treaty. That had been done in all the major treaties on nuclear safety, for example. Unless they adopted that rational solution, States would only have a choice of two alternatives, both of which were impracticable: either to revise the constituent instrument of the organization, or to establish a new organization by the treaty whenever it created the need for one. The question was whether the provisions on third States in the Vienna Convention should be strictly applied to such treaties, that was to say whether the written consent of the organization was required. The practice was much more flexible. The consent of the organization was essential, but the formalities prescribed by the Vienna Convention for protecting States against the effects of treaties concluded without their consent seemed excessive. He himself would be in favour of recognizing the mechanism of the collateral agreement, but making it as flexible as possible.

76. Mr. USHAKOV asked the Special Rapporteur whether a distinction should not be made in the future draft articles between treaties concluded between States and international organizations and treaties concluded between international organizations.

77. Mr. REUTER (Special Rapporteur) replied that, if the Commission agreed that questions concerning the capacity of international organizations should be handled with discretion, it would seem unnecessary to distinguish between two classes of treaty. Apart from certain questions of drafting and difficult issues such as those of powers and the effects of agreements, the subject was very simple. Agreements between organizations or between States and organizations should, broadly speaking, be subject to the rules of the Vienna Convention, which established the consequences of the consensual principle. So far, he had found no reason to draw any distinction. Perhaps reasons for doing so would appear later, depending on what instructions he received from the Commission as to the questions it wished him to handle. In its work on the law of treaties, however, the Commission had always taken great care not to introduce any classification of treaties. Although a classification might follow indirectly from certain articles, it was never expressly established.

The meeting rose at 5.50 p.m.

1239th MEETING

Tuesday, 3 July 1973, at 10.5 a.m.

Chairman: Mr. Milan BARTOŠ

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

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.196/Add.1)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN, inviting the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.196/Add.1), said that unfortunately, the Special Rapporteur was unable to be present, so Mr. Yasseen, the Chairman of the Drafting Committee, had been asked to take his place so far as possible.

2. He called on the Chairman of the Drafting Committee to introduce draft article 6.

[11] See article 228 of the Treaty establishing the European Economic Community, United Nations, *Treaty Series*, vol. 298, p. 90.

ARTICLE 6[1]

3. Mr. YASSEEN (Chairman of the Drafting Committee) said that the drafts of articles 6, 7 and 8 adopted by the Drafting Committee the previous day, differed considerably from the corresponding articles in the Special Rapporteur's sixth report (A/CN.4/267). The main reason for the difference was that the provisions proposed by the Special Rapporteur had related to all public property, whereas the Commission had decided to deal, for the time being, with only one category of such property, namely State property.

4. Article 6 stated the rule that a succession of States entailed the extinction of the rights of the predecessor State and the simultaneous arising of the rights of the successor State to State property. Hence the article did not speak of State property "transferred to the successor State", but of "such of the State property as passes to the successor State". As the last phrase clearly showed, it was not the purpose of the article to determine what State property passed to the successor State. That would be done by other provisions in part I of the draft articles.

5. The text proposed by the Drafting Committee for article 6 read:

Article 6

Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

6. Mr. SETTE CÂMARA asked why the Drafting Committee had abandoned the traditional concept of the "transfer" of State property in favour of the wording "passes to the successor State".

7. Mr. YASSEEN (Chairman of the Drafting Committee) said that the word "transfer" was a legal term and described a legal operation. The transfer of a right presupposed the existence of that right and its continuation. Since the rule stated in article 6 confirmed the extinction of the rights of the predecessor State and the arising of those of the successor State, it would be difficult to imagine a transfer. The Drafting Committee had therefore looked for a neutral term which did not prejudge the question of transfer or evoke any idea of a legal operation. It had preferred to speak of property which "passed" rather than property which was "transferred".

8. Mr. SETTE CÂMARA thanked the Chairman of the Drafting Committee for his enlightening explanation; he himself had no difficulties with article 6, though he thought there was certainly some "transfer" of property involved.

9. Mr. QUENTIN-BAXTER said he could understand why the Drafting Committee had considered it advisable to avoid using the word "transfer", which would imply an act on the part of the previous owner. As he understood article 6, the succession in itself was what caused the passing of State property to the successor State, thus involving a certain element of automaticity. He had some doubts and hesitations about the article, but it would have to be read in conjunction with article 8. He was inclined to regret the disappearance of the Special Rapporteur's original article 8, since in his opinion all the draft articles should be based on the notion of a juridical order which continued even if it changed.

10. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had preferred the term "passing" to the term "transfer", as having the advantage of being neutral and of reflecting reality. True, the term was not confirmed by usage, but it did not have the same connotation as "transfer". As to article 8, he would reply to Mr. Quentin-Baxter's remarks when the Commission examined that provision.

11. Mr. MARTÍNEZ MORENO said he was glad to note that the Drafting Committee had eliminated the word "transfer". Most of the Latin American codes, which were based on the Code Napoléon, made a distinction between transfer *inter vivos (transferencia)* and transmission *mortis causa (transmisión)*.

12. Mr. REUTER said he accepted the draft article 6 submitted by the Drafting Committee, as the new text was an advance on the previous version. However, he had reservations on the general conception reflected in the article. In his view, the opening of succession entailed the extinction of the principle of sovereignty and the birth of a new principle of sovereignty. Immediately after that change, the content of the legislation remained the same. There was always a period, be it long or short, during which all the previous legislation remained in force in the name of another sovereignty. It could therefore be said that the legal order changed, but that the material content of the laws was not immediately modified on that account. What changed was the holder of certain rights deriving from the legislative system provisionally kept in force. Since it was very difficult to express those ideas succinctly, he was prepared to accept the text proposed, but he would try to find better wording at the second reading.

13. The CHAIRMAN expressed the hope that the Special Rapporteur would take Mr. Reuter's comments into account for the second reading of the draft articles.

14. Mr. SETTE CÂMARA reminded the Commission that Mr. Reuter had previously expressed the view that, in a case of succession, there was prolongation of one legal order into another;[2] perhaps something might be inserted in the commentary to deal with that transitory situation.

15. Mr. YASSEEN expressed his admiration of Mr. Reuter's penetrating analysis. For his part, however, he thought that from the point of view of substance it could not be held that the legal order in force immediately after the opening of succession was that of the predecessor State. The legal order in force, although identical with that of the predecessor State, was that of the successor State.

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[1] For previous discussion see 1226th meeting, para. 29.

[2] See 1227th meeting, paras. 32-35.

16. The CHAIRMAN suggested that the Special Rapporteur should take account of the ideas expressed by Mr. Reuter and supported by Mr. Sette Câmara, and that he should include them in the commentary. If there were no objections, he would take it that the Commission decided to approve draft article 6 provisionally.

It was so agreed.

17. Mr. USHAKOV said that, although he had not raised any objection to the approval of draft article 6, that provision seemed to him to have a very limited effect, if any. It did not determine the moment at which the rights of the predecessor State were extinguished and those of the successor State arose. There was nothing to preclude the idea that the extinction and arising of rights occurred long before or long after the moment of succession. It would be retorted that it was self-evident that they occurred at the moment of succession, but for lawyers nothing was self-evident. However, he would not press for his opinion to be reflected in the commentary.

ARTICLE 7 [3]

18. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft article 7.

19. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 7 simply provided that the date of the passing of State property was that of the succession of States. The latter date was defined in article 3, subparagraph (*d*), [4] as "the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

20. Article 7 was a residuary provision; in practice, the predecessor and successor States sometimes agreed to choose another date for the passing of State property. Some members of the Committee had therefore proposed the insertion, at the beginning of the article, of the proviso "Unless it may be otherwise decided". They had deliberately used the term "decided" and not "agreed" in that formula, because the date of the passing of property could be fixed not only by agreement between the States concerned, but also by a decision taken, for example, by the Security Council. Other members, without denying the residuary character of the rule stated in article 7, had thought that the proposed proviso had no place there. They had maintained that in some types of succession, for example decolonization, no agreement was possible between the predecessor State and the colonial territory, because the latter was not yet a State. Since article 7 was a provision of general scope it ought not, in their opinion, to contain any proviso for partial application. Since it had not been possible to reach any agreement on that point, the Committee had placed the proviso between square brackets, leaving it to the Commission to decide whether or not to retain it.

21. The text proposed by the Drafting Committee for article 7 read:

Article 7
Date of the passing of State property

[Unless it may be otherwise decided] the date of the passing of State property is that of the succession of States.

22. Mr. USHAKOV said that he approved of the proposed article, including the phrase in square brackets. With regard to its effect, however, he held views contrary to those of all the other members of the Drafting Committee. In his opinion article 7 was limited to determining the date of the passing of State property. It was not a substantive article, for it did not lay down any rule of law. In drafting that provision, the other members of the Drafting Committee had thought they were stating another rule which might be formulated to read: "Unless otherwise provided in these articles, the State property of the predecessor State is transferred to the successor State on the date of the succession of States". In its present form, however, article 7 did not lay down any obligation to transfer State property.

23. To illustrate his point he referred to the date of marriage as conceived in Soviet law. That date was the date of the registration of the marriage with the competent authority. The rights and duties of the spouses came into being on that date, but they were not derived from that date. In the case of article 7, the determination of the date of the passing of State property did not mean that the State property had to be transferred on that date; it could be transferred at any time before or afterwards. Incidentally, that was why the phrases in square brackets, "Unless it may be otherwise decided", had been added.

24. Article 7 in fact contained only a definition, which ought rather to be placed in article 3 on the use of terms.

25. In conclusion, he accepted draft article 7, because it contained a definition of the date of the passing of property which was entirely acceptable. But it did not contain anything else, and the commentary should not refer to a rule, which in fact was not stated.

26. Mr. SETTE CÂMARA congratulated the Drafting Committee on having found a new and simpler way to deal with the question of the date of the passing of State property. He did not consider it necessary to retain the words in square brackets "Unless it may be otherwise decided"; if they were retained, a similar proviso would have to be inserted in all the draft articles.

27, Mr. RAMANGASOAVINA said he approved of the principle that the date of the passing of State property should be that of the succession of States.

28. The phrase in square brackets stated a condition which was always understood in that type of article and was therefore unnecessary. As the Chairman of the Drafting Committee had explained, the word "decided" had been preferred to the word "agreed", because it was possible that a decision might be taken, for example, by the Security Council. He saw no reason why the word "agreed" should not be used, for even in the event of arbitration or of a decision by the Security Council, the two States concerned would have to agree on the date of the passing of the State property. The term "agreed" was appropriate even if a third party was involved. The word "decided", on the other hand, implied a unilateral act and might give the impression

[3] For previous discussion see 1228th meeting, para. 56.

[4] See 1230th meeting, para. 9.

that one of the two States concerned could take a unilateral decision on the date of the transfer of State property. The word "agreed", which would prevent any misunderstanding, would therefore be preferable to the word "decided".

29. Mr. REUTER said he approved of the text proposed for article 7 and was inclined to favour the deletion of the phrase in square brackets, for the reason given by Mr. Sette Câmara.

30. The meaning which the Commission proposed to attach to the article under consideration should be clearly reflected in the commentary. Personally he thought that what the Commission had in mind was not the physical passing of State property, but the replacement of one sovereignty by another. It was in fact possible that the predecessor State might retain physical responbility for the State property after the date set for its passing to the successor State. In such cases, the predecessor State administered the property for the successor State and had to give an accounting of its administration when the property was physically handed over. As Mr. Ushakov had pointed out, article 7 did not lay down a rule of law, but was more in the nature of a definition.

31. Under article 3, the date of the succession of States meant "the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates". He doubted whether there was a single date in every case, particularly in cases of decolonization. It was conceivable that the replacement of the colonial Power by the new State might take place on different dates according to the third States involved. Article 7 assumed the existence of a single date. Hence it might perhaps be advisable to specify that the date of the passing of State property was the date upon which the predecessor State recognized its replacement in the responsibility for international relations. If article 7 was to be interpreted in that sense, that should be made clear in the commentary.

32. Mr. KEARNEY said he could understand Mr. Ramangasoavina's objection to the use of the word "decided", which was not consistent with the language used in the draft articles on the law of succession in respect of treaties. He suggested that perhaps a general article should be inserted at the beginning of the draft, to the effect that nothing in the following articles should be construed as placing a limitation on the rights of either the predecessor or the successor State.

33. Mr. TABIBI said that article 7 should be deleted; it would not solve any problems, but it might well create some. It was impossible in practice to lay down a clear-cut date of succession. Article 7, as now worded, could give rise to difficulties for successor States which were developing countries. For example, the State property in question might consist of installations or factories whose operation required technical knowledge, and the successor State would need some time to make the necessary arrangements for taking over such property.

34. More flexibility was required for other reasons as well. Succession to State property could give rise to some very complex problems, particularly where there was more than one successor State. An interesting example was provided by the British Embassy at Kabul, which had been paid for with money from the Indian Treasury and had been claimed in 1947 by both India and Pakistan. Each of those countries had put forward what it regarded as valid grounds for claiming that it should succeed to the property, but twenty-five years had elapsed and the matter was still unsettled. The Embassy thus remained in the possession of the United Kingdom.

35. In view of all the difficulties likely to arise, he urged that article 7, in its present wording, should be dropped. The only provision that could be adopted on the subject was one to the effect that the date of the passing of State property was for the successor State and the predecessor State to determine by agreement between them.

36. Mr. PINTO said that he had no objection to article 7, with or without the proviso in square brackets. He merely wished to express some concern regarding the wording of that proviso.

37. It was clearly useful to make provision for the parties concerned to agree otherwise regarding the date of the passing of State property. He had no strong feelings as to whether that provision should take the form of a separate article covering the whole draft or of a clause reproduced in each article. He had misgivings, however, about the use of the word "decided", although he well understood the reasons given by the Chairman of the Drafting Committee for using it instead of the word "agreed". A formula should be found which would not prejudge the way in which the date would be established. He suggested the phrase: "Unless it may be otherwise established as between the parties". That form of words would mean that the date would not necessarily be established by the parties themselves. But it would still leave the main problem to be solved, namely, between whom the agreement would be concluded, or by whom the decision would be made.

38. That remark applied not only to article 7, but also to article 8 and other articles of the draft. In some places the appropriate expression would be: "Except as the parties otherwise agree". Where the context left no doubt as to the identity of the parties, the short formula "Unless otherwise agreed" could be safely used. If it was intended to refer to an agreement between the successor and the predecessor States, the proviso should expressly say so. If other interests were involved, different language would have to be used. Those remarks applied with even greater force to the concluding proviso, also in square brackets, of article 8.

39. The problems to which he had referred would have to be solved in due course, either by means of a general article or by a suitable saving clause in each article.

40. Sir Francis VALLAT said that he agreed with the provision in article 7, as proposed by the Drafting Committee; in principle, the date of the passing of State property should be the date of succession.

41. Clearly circumstances would vary from one case to another and the date of succession might not be the appropriate date in certain cases. He was therefore

in favour of retaining the opening proviso. As the discussion had clearly shown, provision would have to be made in one way or another for a different decision on the question of the date. It could be done then or later; in the text of article 7, in the commentary or in a general article.

42. With regard to the technique of drafting, he did not agree with Mr. Ushakov that article 7 contained a definition, which would be better placed in article 3. Article 7 was a clarification of the contents of article 6. It was not an explanation of the sense in which a term was used in the draft as a whole, and therefore had no place in article 3 on the use of terms.

43. Mr. EL-ERIAN said he could accept article 7 as proposed by the Drafting Committee, with or without the opening proviso. He was inclined, however, to favour retaining the proviso, because it would introduce an element of flexibility into the article.

44. A distinction should be made between the transfer of the territory and the procedure for the passing of State property. He thought the proviso "Unless it may be otherwise decided" should cover cases of the type mentioned by Mr. Tabibi. From his experience with the 1953 Committee of Experts set up by the United Nations to deal with the problems arising out of the taking over of former Italian property by Libya, then newly independent, he could vouch for the complexity of the problems involved. In those cases, what mattered was to lay down a principle, and article 7 did so. The opening proviso was sufficiently flexible to cover all the difficulties that might arise in practice.

45. Mr. HAMBRO said he could accept article 7 as proposed by the Drafting Committee.

46. The opening proviso, however, was unnecessary. The Commission had already agreed that all the draft articles were residuary rules. It would therefore create confusion to insert a saving clause of that type in one article and not in others. All the provisions in the draft articles were subject to the condition that no agreement to the contrary should exist.

47. The Drafting Committee should be asked to frame a general article safeguarding the possibility of an agreement to the contrary, for application to all the provisions of the draft. It was wholly unnecessary to discuss the saving clause separately in connexion with each article.

48. Mr. BILGE said that he agreed with the general idea expressed in article 7, but wondered whether it was justifiable to speak of the "passing of State property", when the Commission had accepted, in article 6, the principle of the extinction of the rights of the predecessor State. It was no longer a matter of passing, but of acquisition of property. Subject to that terminological amendment, he accepted the residuary rules specifying or fixing the date of such acquisition.

49. He was in favour of retaining the clause in square brackets, provided that the word "decided" was replaced by a more neutral term expressing the idea of both agreement and decision.

50. Mr. USHAKOV said that in its present form article 7 was meaningless and had no legal effect. The date of the passing of State property would differ from one case of succession to another—transfer of territory, fusion or union and so forth—and might be fixed in various ways —for example, by agreement—in each specific case. Hence it was the subsequent articles which would have to indicate, for each case of succession, the date on which the property passed and the manner in which that date must be fixed.

51. Mr. QUENTIN-BAXTER said he supported the idea for including in the draft a general provision to the effect that parties having full capacity to do so could vary the rules laid down in the articles. In many cases, however—and they were by no means limited to cases of decolonization—there was no opportunity for the parties to conclude an international agreement to vary the rules governing the way in which succession occurred.

52. The use of the word "decided" constituted recognition that article 7 was intended to cover more than just the ordinary case; provision had to be made for practical arrangements to vary the date of the passing of State property. Thus although the opening proviso was valid, the word "decided" was unacceptable because, as Mr. Ramangasoavina had pointed out, it could be misleading. It could be construed as referring to a unilateral decision, which was not, of course, the intention of the drafters.

53. He therefore suggested that the opening proviso should be replaced by some such wording as: "Subject to arrangements made between the predecessor State and the successor State".

54. Mr. TSURUOKA said he was in favour of retaining article 7 as proposed by the Drafting Committee. In order to allay the misgivings of some members of the Commission, perhaps the word "decided" in the phrase in square brackets could be replaced by "agreed or decided".

55. The CHAIRMAN,* speaking as a member of the Commission, observed that the purpose of article 7 was to settle, in international law, situations which were not regulated by treaty; it was not, as some members of the Commission seemed to think, to provide for the case in which property passed under a treaty.

56. As to the phrase in square brackets, he thought it should be retained in the form proposed by the Drafting Committee. The reasons put forward by the Chairman of the Drafting Committee to justify the use of the word "decided" in preference to the word "agreed", which presupposed the existence of an agreement, were convincing and confirmed by practice.

57. As to the question whether or not the date of the passing of State property coincided with the date of the succession of States, the date of transfer of territory should not be confused with the performance of certain operations connected with that transfer. That point should be explained in the commentary.

58. Speaking as Chairman, he invited the Chairman of the Drafting Committee to reply to the objections raised.

59. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had tried to

* Mr. Bartoš.

draft a provision which would meet the wish, expressed by most of the members of the Commission, that the draft articles should indicate, but not expressly fix, a date for the passing of State property upon a succession. The date which the Committee had considered most appropriate was the date of succession, which was defined in another article. However, the rules the Commission were formulating were not mandatory; the parties could always decide otherwise. But since an agreement was not possible in some cases, it was also necessary to provide for the possibility that the date would be fixed by a competent body in the international legal order. The Drafting Committee had merely followed the trend of the discussion in the plenary Commission.

60. The clause in square brackets was a saving clause which derived from the very nature of the rule laid down. Whether the Commission decided to retain it or not, would really make no difference. States would always be free to fix, by mutual agreement, a date other than that of succession, just as a competent body in the international legal order could always decide on a different date. If the Commission decided to delete that clause, however, it would have to give the necessary explanations in the commentary.

61. The CHAIRMAN observed that the majority of the members of the Commission were in favour of retaining the clause in square brackets, subject to the replacement of the word "decided" by a more appropriate term. The Commission was only giving the draft articles a first reading, however, and would be free to go back on its decision later. At all events the Special Rapporteur would mention all the objections in the commentary.

62. Mr. KEARNEY said that the Commission should not rely on the commentary to indicate the need for correcting a word like "decided", to which valid objection had been raised by most of the members. His own suggestion was that it should be replaced by the word "agreed", which was used in article 8, and that the commentary to article 7 should indicate that the Commission nevertheless had in mind such special circumstances as decisions of United Nations organs which might deal with the passing of State property.

63. The CHAIRMAN said that the commentary would make it clear that the Commission's decision was not final and that it would take its final decision when it gave the draft articles their second reading.

64. Mr. BILGE said he maintained his reservation on the word "passing", which was not correct once the principle of the extinction of the predecessor's rights had been recognized.

65. Mr. EL-ERIAN said he shared Mr. Kearney's apprehensions regarding the use of the word "decided" in article 7, as opposed to the word "agreed" in article 8. It might perhaps be possible to construe the word "agreed" broadly enough to cover cases decided in United Nations organs, since in a sense those decisions represented agreements.

66. In any event, he was not in favour of leaving the opening proviso in square brackets. It was true that on a few occasions the Commission had adopted that method in the past to offer governments and the General Assembly alternative texts, but that had always been done by way of exception, and the practice should remain exceptional.

67. The CHAIRMAN said that the commentary would state that the Commission had hesitated between several terms.

68. Mr. USHAKOV said he was in favour of retaining the square brackets. The article did not specify who could take the decision in question. To delete the square brackets would be absurd from the legal standpoint. Their retention, on the other hand, would indicate that the Commission had deliberately selected a very vague form of words whose meaning it intended to clarify later.

69. The CHAIRMAN said the Commission need only ask the Special Rapporteur to state in the commentary that several members had opposed the opening proviso and that the Commission would take a decision on it at the second reading, when it had received the comments of governments.

70. If there were no objections, he would take it that the Commission decided to approve article 7 as proposed by the Drafting Committee, to retain the words appearing in square brackets and to delete the brackets.

It was so agreed.[5]

The meeting rose at 1 p.m.

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[5] See also next meeting, para. 53.

1240th MEETING

Wednesday, 4 July 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later: Mr. Jorge CASTAÑEDA

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

Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.196/Add.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 8

1. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 8 replaced articles 8 and 9 submitted by the Special Rapporteur in his sixth

report (A/CN.4/267) and in document A/CN.4/L.197.[1] The purpose of the article was not to determine what State property passed to the successor State, but to lay down the substantive rule that the successor State received that property free.

2. As the Special Rapporteur had pointed out during the discussion, some writers distinguished in that respect between the public and private domains of the State, and held that only property in the public domain passed to the successor State free, while property in the private domain gave rise to compensation. That doctrine had never been universally applied, because many legal systems made no distinction between the public and private domains of the State. Moreover, in the systems which did make that distinction, the greater part of the State property, as defined in article 5, belonged to the public domain.

3. Article 8 contained two clauses in square brackets, on which the Drafting Committee had been unable to agree. The first reserved the rights of third parties. Some members of the Committee had considered that unnecessary, because the draft articles would contain provisions concerning those rights. They had also maintained that, if the saving clause appeared in article 8, it would have to be repeated in many other provisions.

4. The second clause in square brackets—"unless otherwise agreed"—had attracted the same criticism in the Drafting Committee as a similar formula used in article 7.

5. The proposed article was very different from the previous articles 8 and 9, the purpose of which had been to determine State property. In view of the difficulty of doing so, since State property varied according to the type of succession, the Drafting Committee had decided, in agreement with the Special Rapporteur, that the new article should not lay down any criteria for determining such property, but should simply state the rule that the property in question passed from the predecessor State to the successor State without compensation. The criterion to be applied in determining State property would be laid down later for each type of succession.

6. The new text proposed for article 8 read:

Article 8
Passing freely of State property

[Without prejudice to the rights of third parties] State property passing in accordance with the present articles shall pass from the predecessor State to the successor State without compensation [unless otherwise agreed].

7. Sir Francis VALLAT said he supported the inclusion of article 8 in the draft, subject to some small changes. The article stated the essential principle, namely, that State property which passed from the predecessor State to the successor State did so without compensation. That principle had to be stated, because article 6 specified the effect of succession on rights to State property, but did not say whether that effect occurred with or without compensation. Experience had shown that, where no provision was made on that point, sooner or later disputes would arise as to whether compensation should be paid of not.

8. It was necessary, however, to include two safeguards to cover certain particular cases. The first was contained in the opening proviso placed in square brackets, and concerned the rights of third parties. It was a safeguard and no more; it did not say what the effect of those rights would be. Its purpose was simply to state that the absence of compensation as between the predecessor State and the successor State did not mean that the rights of third parties could be disregarded. Under some systems of law there might be no private rights, so the rights of private individuals would not survive. Under other systems, where private rights did exist, the saving clause would protect them. The question was one to which the Commission would have to revert in connexion with later articles.

9. The second safeguard was embodied in the concluding proviso "unless otherwise agreed", also in square brackets. In that connexion, Mr. Bartoš had drawn attention to the fact that in certain cases a tribunal might have to decide the question of compensation. Hence it seemed desirable—although normally the purpose of the proviso would be to safeguard variation by agreement—to make provision for the possibility of variation by decision. He therefore suggested that the concluding proviso should be expanded to read: "unless otherwise agreed or decided" and that a suitable explanation should be included in the commentary.

10. Lastly, to be consistent with article 6, he proposed that the words "in accordance with the present articles" should be amplified to read "in accordance with the provisions of the present articles".

11. Mr. USHAKOV suggested that the second proviso should be retained without the square brackets and that, for the sake of clarity, the words "by the predecessor State and the successor State" should be added after the words "unless otherwise agreed".

12. With regard to the substance of the article, he supported the principle that the property should pass without compensation, but he doubted whether it was possible to draft a general rule applicable to all cases of State succession. Such a rule would not be applicable, for example, to the case of transfer of territory, which was governed by the general principle of agreement between the parties, or to the case of fusion of two States, in which there could be no compensation since all the property of each State became the property of the State resulting from the fusion. In addition, the proviso expressed by the words "unless otherwise agreed by the predecessor State and the successor State" would not be applicable in the case of accession to independence, since there could be no question of agreement between the former metropolitan Power and the former colony. A rule ceased to be general once it was outweighed by exceptions. The Commission would therefore have to provide for each case of succession separately.

13. The first proviso in square brackets was meaningless. It specified neither what third parties nor what rights were meant and was therefore open to the broadest, and

[1] For previous discussion see 1229th meeting, para. 48 and 1231st meeting, para. 67.

even to absurd, interpretations. If the Commission thought it necessary to safeguard certain rights of certain third parties, it should state clearly what rights and third parties they were.

14. Mr. EL-ERIAN supported Sir Francis Vallat's suggestion that the words "or decided" should be added at the end of the concluding proviso. During the discussion on article 7, he had suggested that the word "agreed" might perhaps be construed broadly enough to cover the case of a decision.[2] On further consideration, however, he thought that such an interpretation would be reading too much into the word "agreed".

15. He shared Mr. Ushakov's apprehensions about the problem of mentioning compensation, in view of cases of fusion of States. Those cases were by no means hypothetical: one such fusion was at present under serious discussion in the capital of his country. It was therefore necessary to clarify the point in the commentary.

16. He was not certain that a specific reference to agreement by the predecessor State and the successor State would suffice. There might be cases in which the agreement of a third State would be also necessary.

17. Mr. REUTER said that with regard to the second clause in square brackets, he would refer the Commission to the comment he had made on the similar proviso in article 7.[3]

18. For the body of the article he proposed the following wording: "... the passing of State property from the predecessor State to the successor State shall take place without compensation ...". That drafting change did not affect the substance of the article.

19. With regard to the substance, he could accept the principle laid down, but with many reservations and on condition that it would be stated in the commentary that in reality the rule laid down was one which generally was valid. That being so, it might be more straightforward to say in the body of the text that the passing of State property "shall generally take place without compensation", thus indicating that the Commission left room for wide departures from the principle.

20. The reservations which, in his opinion, should be made to the principle, related to the diversity of types of succession, the nature of the property, the location of the property and the real rights of third parties—the latter point being covered by the first clause in square brackets. That proviso could be interpreted in two different ways. His own interpretation was that the rights contemplated were rights created internationally by the predecessor State. If that State had granted real rights to a subject of international law, the succession did not affect them; the rights of the third parties were grounded in international law itself. The other interpretation—and that was the point on which opinions might differ—was that the rights in question might be rights of private persons created by the internal law of the predecessor State; but in so far as that law disappeared, the rights of those third parties would also disappear. The Commission would be considering later whether the rights of private persons should be safeguarded, but the two hypotheses were different.

21. It would therefore be best to replace the opening proviso by the words "Subject to the provisions of the present articles", to mention in the commentary the differences of opinion to which it had given rise and to state that the Commission would consider the question of the rights of third parties later. Article 8 would read: "Subject to the provisions of the present articles, the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided".

22. The CHAIRMAN,* speaking as a member of the Commission, said that the new wording proposed by Mr. Reuter greatly improved the drafting, without affecting the substance of the article in any way. He was therefore quite willing to accept it.

23. Mr. MARTÍNEZ MORENO said that he approved of article 8 as proposed by the Drafting Committee, but would have no objection to the rewording proposed by Mr. Reuter provided that, either in the text or in the commentary, it was made perfectly clear that the provisions of article 8 were without prejudice to the rights of third parties. He had in mind the hypothetical case of a predecessor State which had bought an island from another State and had agreed to pay the price in instalments; if its territory passed to a successor State while instalments were still outstanding, it would be necessary to safeguard the rights of the third State which was the seller. In the absence of such a safeguard, article 8 might deprive that State of the right to claim the outstanding instalments.

24. He approved of Sir Francis Vallat's suggestions that the form of words used in article 6, "in accordance with the provisions of the present articles", should be adopted, and that the words "or decided" should be added at the end of the article after the word "agreed".

Mr. Castañeda took the Chair.

25. Mr. RAMANGASOAVINA said he approved of the general principle laid down in article 8, as proposed by the Drafting Committee. As to the two saving clauses, he found the final one acceptable in the amended form suggested by Sir Francis Vallat and Mr. Reuter. He had serious doubts, however, about the clause reserving the rights of third parties. In his opinion, the rights and property of third parties were automatically safeguarded in the case under consideration because only State property was involved, so that the clause was not justified. On the other hand, it was open to a broad interpretation which might provide justification for such controversial notions as that of acquired rights. The idea of succession without compensation applied solely to State property which passed from the predecessor State to the successor State, to the exclusion of property of third parties; for a State could not transfer what did not belong to it. The principle of succession without compensation therefore meant that everything which belonged to the predecessor

[2] See previous meeting, para. 65.

[3] See previous meeting, para. 29.

* Mr. Yasseen.

State must pass to the successor State without requiring, for example, the discharge of encumbrances.

26. Members of the Commission should bear in mind that article 8, as submitted by the Drafting Committee, was much watered down as compared with the corresponding texts previously proposed by the Special Rapporteur. They should avoid watering it down still further by expressly reserving the rights of third parties.

27. He found the wording proposed by Mr. Reuter perfectly acceptable, since the reservation of the rights of third parties, although implied, was not expressly stated.

28. Mr. TABIBI said he thought the wording proposed by Mr. Reuter had the drawback of not specifically safeguarding the rights of third States. It was not sufficient to include a reference to the matter in the commentary. The Drafting Committee's idea of embodying a proviso in the article itself was far preferable.

29. With regard to the rights of private persons he drew attention to grazing rights, which had existed from time immemorial in many parts of the world. It was quite common for herdsmen in semi-arid zones to have to send their beasts to graze on the other side of an international boundary. Rights of that kind were of vital importance to the people concerned and had to be preserved in the event of a succession of States.

30. Mr. KEARNEY said that on the fourth of July he could not refrain from giving the example of his own country in connexion with the statement made during the discussion that a newly independent State could not make a succession agreement with the former metropolitan Power. The United States had in fact made an agreement with its predecessor State, and that agreement had lasted, in part at least, for some 180 years. It was possibly the first agreement of that kind entered into by a newly independent State and, as such, seemed to constitute a valid precedent.

31. As to the text of article 8, he supported Sir Francis Vallat's suggestion that the concluding word "agreed" should be amplified to read "agreed or decided". Even in that form, however, the passage would remain ambiguous, and at some later stage it would be necessary to make it clear who "agreed" and who "decided". At the present stage—that of first reading—he could accept the proposed formula, provided that it was accompanied by a suitable explanation in the commentary.

32. As to the opening proviso, he urged the retention of a precise reference to the rights of third parties, as proposed by the Drafting Committee, in preference to the more general language "Subject to the provisions of the present articles", proposed by Mr. Reuter.

33. It was a common practice of the World Bank and of regional banks to make advances for the construction of such properties as dams, and to subject the resulting property to a negative pledge. The pledge did not represent a monetary claim, but carried with it the right to ensure eventual repayment by means of a limitation on the use or disposition of the property. Obviously that kind of right would continue to be attached to the property on its transfer to a successor State. It was necessary to make it clear that there was no intention of interfering with third-party rights of that kind. An important safeguard of that nature should be placed in the text of the article itself, rather than be relegated to the commentary.

34. Mr. QUENTIN-BAXTER also supported the addition of the words "or decided" at the end of article 8. He agreed with Mr. Kearney about the ambiguity of the words "agreed or decided", but was prepared to accept that formula for the time being, on the understanding that the Commission would revert to the matter at the second reading.

35. He saw no place in article 8 for the opening proviso on the rights of third parties. Nevertheless, he would be prepared to accept its retention on the understanding that it would be kept in square brackets to draw attention to the very tentative nature of the draft. He agreed with Mr. Ramangasoavina that the property of a third party who was a private person could under no circumstances be State property, so that it would not be affected by the substantive provision of article 8. Hence there was no more reason to introduce a safeguard into that article than into many other articles of the draft.

36. The rights of third parties depended on the survival of the precedessor State's juridical order, at least until the new State chose to change it. The problem was a very real one and the Commission would sooner or later have to deal with it. The present difficulties had arisen from the fact that the Commission was dealing with a narrowly defined type of property—State property—but in the process was encountering problems of a general character which could not very well be set aside.

37. Mr. BILGE said that, as the Commission had already discussed the principle stated in article 8 when examining the new wording of article 9 submitted by the Special Rapporteur,[4] it was not necessary to revert to the matter. With regard to the text of article 8 proposed by the Drafting Committee, he merely reiterated the reservations he had expressed concerning articles 6 and 7.[5] In his view, there was neither passing nor transfer of property, but acquisition without compensation.

38. Mr. USTOR said he had reservations regarding article 8, which was almost superfluous and practically in contradiction with article 6. Article 6 specified that State succession entailed "the extinction" of the rights of the predecessor State. That being so, no problem of compensation could arise. The successor State's position could be compared to that of a person who inherited property from a deceased relative; it was obvious that the heir did not have to pay "compensation" for the property he inherited.

39. If article 8 was to be retained at all, the opening proviso should be expressed in the general terms proposed by Mr. Reuter: "Subject to the provisions of the present articles".

40. With regard to the last clause, he supported Sir Francis Vallat's proposal that the word "agreed" should be amplified to read "agreed or decided".

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[4] See 1231st meeting, para. 67 *et seq.* and 1232nd meeting.

[5] See previous meeting, para. 48.

41. Mr. SETTE CÂMARA said that, shorn of the two provisos in square brackets, the substantive provision of article 8 amounted to very little. It simply stated a very general rule which was subject to many obvious exceptions following from the different types of succession. In a fusion of two States, of course, there was no place for the payment of compensation.

42. As to third parties, it seemed to him that the passing of State property from the predecessor State to the successor State could not possibly affect the rights of third parties, including private persons, in any way. The problems which might arise in practice should be examined in connexion with later articles of the draft.

43. Article 8 was not really necessary. If the Commission decided to retain it, however, he would support the simpler and clearer wording proposed by Mr. Reuter.

44. Mr. TSURUOKA, noting that most members of the Commission accepted the principle stated in the text proposed by Mr. Reuter for article 8, appealed to his colleagues to approve that text. At the first reading it was more important to agree on substance than on form, for it was understood that drafting changes could always be made later. Moreover, the wording proposed by Mr. Reuter ensured that provisions would be devoted to the rights of third parties. For the time being it would be better not to make any substantive changes in article 8 that might cause confusion.

45. The CHAIRMAN, speaking as a member of the Commission, said that for the opening proviso he preferred the more general formula proposed by Mr. Reuter. He shared Mr. Ustor's misgivings regarding the use of the term "compensation", which did not adequately reflect the true position. Nevertheless, he would not oppose its retention at the present stage, on the understanding that the matter would be examined with care on second reading.

46. Speaking as Chairman, he noted that there was unanimous agreement on Mr. Reuter's wording for the substantive provision of article 8: "... the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided."

47. There was, however, a difference of opinion on the opening proviso. Some members preferred the Drafting Committee's formula "Without prejudice to the rights of third parties"; others preferred Mr. Reuter's more general formula "Subject to the provisions of the present articles". He therefore suggested that he should informally take the sense of the meeting on the choice between those two formulations. If there were no objections, he would take it that the Commission agreed to adopt that procedure.

It was so agreed.

48. The CHAIRMAN, having taken the sense of the meeting, noted that nine members favoured the Drafting Committee's wording and five members Mr. Reuter's wording of the opening proviso. The Drafting Committee's wording for the proviso would therefore be attached to Mr. Reuter's wording for the substantive provision, and the two together would form the text of article 8 adopted on first reading.

49. Mr. YASSEEN pointed out that it was necessary to insert the words "in accordance with the provisions of the present articles" after the words "to the successor State".

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the text of article 8 in the form which he had indicated, with the addition suggested by Mr. Yasseen.

It was so agreed.

51. Mr. MARTÍNEZ MORENO proposed that, in order to make the title consistent with the text of the article, the word "freely" should be deleted from the title and the words "without compensation" should be added at the end.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the title of article 8 to read: "Passing of State property without compensation".

It was so agreed.

ARTICLE 7 (Date of the passing of State property) *(resumed from the previous meeting)*

53. Sir Francis VALLAT said that, in consequence of the adoption of the new text for article 8, the opening proviso of article 7 should be reconsidered. He proposed that the words "otherwise decided" in article 7 should be replaced by the words "otherwise agreed or decided".

54. The CHAIRMAN said that, if there were no objections he would take it that the Commission agreed to make the opening proviso of article 7 consistent with the closing proviso of article 8, as proposed by Sir Francis Vallat.

It was so agreed.

The meeting rose at 1.5 p.m.

1241st MEETING

Wednesday, 4 July 1973, at 3.50 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(resumed from the 1238th meeting)

1. Mr. PINTO congratulated the Special Rapporteur on his admirable reports. He was fully cognizant of the variety of international organizations and of their