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Summary record of the 1227th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1973, vol. I

take place in accordance with the terms of an agreement rather than with those of the articles.

72. Mr. BILGE said he approved of the idea expressed in paragraph 2 of article 6, which had become the sole paragraph. It must be expressly stated in the draft that public property was transferred to the successor State as it stood. That was perhaps an obvious truth, but since difficulties had arisen over the point in practice, it was not useless to repeat it.

73. However, the idea of transfer in good faith should also be introduced into the text; the words "by the predecessor State" should therefore be inserted after the words "public property shall be transferred", since that wording would call for a certain conduct showing goodwill on the part of the predecessor State. It should also be indicated in the commentary that the provision was intended to ensure the physical conservation of public property.

74. Mr. REUTER clarifying his position, said he agreed with Sir Francis Vallat and other members of the Commission that the rights of third parties—which could be not only States, but also, for example, international organizations—must be respected. The problems now facing the International Bank for Reconstruction and Development, as a result of certain open successions, showed that that reservation was an entirely practical one. The question of the rights of private persons should also be reserved.

75. He believed, above all, that it was natural for articles 6 to 10 to be considered in conjunction with each other. The comment he had made on the word "transfer" was a comment of substance in the sense that the true problem, which the Commission would have to discuss later, was whether the two terms of the change, namely, the property as it existed in the patrimony of the predecessor State and then its attribution to the patrimony of the successor State, should be determined—as was done very explicitly in article 8—or whether it was enough to determine that the rights of the predecessor State were extinguished and that its property, subject to the rights of third parties, passed under the sovereignty of the successor State. The Commission would have to decide whether it was really possible to say that public property passed into the patrimony of the successor State. That was open to question, for it was not certain that the concept of the patrimony of the State existed in international law, or even in all national systems of law.

76. Mr. QUENTIN-BAXTER said that, like Mr. Bilge, he assumed that the Commission was not concerned at the present stage with the problem of equitable distribution.

77. He had no objection to the idea expressed in paragraph 2 of article 6, the sole remaining paragraph; but he had some doubt whether the provision was necessary. Clearly, the successor State received only what the predecessor State had to give. He shared, however, Mr. Reuter's objections to the concept of "transfer" of property.

78. The question of continuity was of fundamental importance. The territory affected by the succession was acquired by the successor State with its physical features and the law that it carried. It was the lawgiver that changed; the power to make the law was put in other hands.

79. In the draft on succession in respect of treaties, which it had adopted in 1972, the Commission had placed the emphasis on the replacement of one State by another. He thought that, in article 6, the concept of replacement in the ownership of public property should be introduced. The concept of replacement was different from that of transfer, and more suitable for present purposes.

The meeting rose at 12.35 p.m.

1227th MEETING

Thursday, 14 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

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

Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

(continued)

ARTICLE 6 (Transfer of public property as it exists) *(continued)*

1. The CHAIRMAN invited the Special Rapporteur to reply to the comments of members on article 6.

2. Mr. BEDJAOUI (Special Rapporteur) said the debate had clearly shown that opinions were too definite to allow of any hope of reaching unanimity on the present text of article 6. Before discussing what should be done with the provision, he would reply to the comments that had been made.

3. Mr. Ushakov had criticized the text for being too rigid, in that it excluded the possibility of agreement to a different effect between the parties.[1] He admitted that and would try to find a remedy with the help of the Drafting Committee. Agreement between the parties was obviously important, because the rules the Commission was drawing up were residuary rules.

4. Mr. Ushakov had also considered that the Commission should not, for the moment, dwell on article 6, which dealt with the general régime of property—a subject also regulated by the following articles. Bearing in mind the Draft prepared by Sir Humphrey Waldock, he (Mr. Bedjaoui) wondered whether it had always been

[1] See previous meeting, para. 47.

the Commission's practice to hold over general articles such as article 6. He himself had no views on that point and would leave it to the Commission to decide what procedure should be followed.

5. Mr. Kearney had raised the problem of equitable distribution of property.[2] That was outside the scope of article 6, however, and would be considered by the Commission when it took up other articles.

6. He agreed with Mr. Bilge that it would be useful to introduce the notion of transfer in good faith by inserting the words "by the predecessor State".[3] He, too, valued that notion, and he had spoken in previous reports of the "*période suspecte*" immediately preceding succession.[4]

7. Mr. Martínez Moreno had raised the question of possible contradictions between articles 6 and 9 and between article 6 and article 8, sub-paragraph (*c*).[5] He himself could not see any contradiction between articles 6 and 9. Article 9 did not refer to the rights of third parties, whether States or private persons; it simply stated that, as between the predecessor and successor States, there occurred, automatically and without compensation, a devolution of the property belonging to the predecessor State, which then passed into the "patrimony" of the successor State. Whereas article 6 introduced the question what became of the rights of third parties, whether States or private persons, article 9 raised the question whether or not the successor State should indemnify or compensate the predecessor State for the property transferred.

8. He could not see any contradiction between article 6 and sub-paragraph (*c*) of article 8 either. Article 8 was not a substantive article. Its sole purpose was to clarify the problem. He had intended to convey that there were three categories of property: on the one hand, the property of the predecessor State, of which the successor State must be able to acquire full ownership; on the other hand, the property of public authorities and property belonging to the territory, which did not pass to the successor State in full ownership. The latter property remained within the patrimony of the authority or territory, though obviously it was no longer governed by the legal order of the predecessor State, but came under the general and exclusive jurisdiction of the successor State, which might see fit, for instance, to protect it internationally.

9. With regard to Mr. Reuter's comments on the word "transfer"[6] the relevant terminology, as derived from treaties, varied considerably. Property was "transferred", "transmitted" or "delivered"; the terms "cession" and "retrocession" were used; and property was said to "pass" or "be received". But it was not only the terminology that was in question, and he agreed with Mr. Reuter on the substance of the matter, subject to two reservations. He did so because what he had proposed in article 6 did not reflect his inner convictions, which he had had to hide; it was the result of the course he had adopted in his successive reports in order to meet the wishes of the Commission. He was therefore grateful to Mr. Reuter for having raised the question again.

10. In his second report, concerning acquired rights, he had pointed out that there was not a transfer of sovereignty, but a substitution of one sovereignty for another,[7] with the many legal consequences that produced, one of which was embodied in article 6. He therefore agreed that there was replacement of sovereignty. In article 6, however, it was no longer a question of replacement of States, which was by then an accomplished fact, but of what happened to property, that was to say the transfer of property. There was a material transfer which, for most property, was effected through inventories and records. It was not rights in the property, but the property itself that was transferred. True, the expression "legal status" might perhaps suggest that the rights in the property were transferred along with the property itself. That was the second point of difference between Mr. Reuter's position and the position which he himself had had to abandon when drafting article 6.

11. If the matter was indeed to be put in terms of replacement, as he would prefer, it would be necessary to go the whole way and recognize that the rights of ownership of the predecessor State were extinguished. The old terminology was very clear on that point and some modern treaties—for example, the domanial agreement of 1965 between France and Cameroon—were equally explicit. Yet there was not simply a change of owner. Parallel with the extinction of the rights of the predecessor State, new rights were created for the successor State. Since the rights of the predecessor State were extinguished, they could not, by definition, be exercised by another. The successor State did not exercise the rights of the predecessor State in its stead; it exercised new rights of its own, derived from its sovereignty, as it had replaced that of the predecessor State; so there could be no foundation for respect by the successor State of acquired rights in themselves.

12. The argument had very far-reaching implications. He had advanced it in his second report, but the Commission's reactions had forced him to retreat it. Even the less specific formula he had subsequently proposed in his fourth report,[8] under which the successor State would not have been obliged to regard itself as bound by the rights of third parties, had not met with the Commission's approval and he had therefore suggested the expurgated version of the present article 6. But of course he would be only too happy to move forward again, if such was the Commission's general wish.

13. For instance, he might propose to the Drafting Committee a formula such as: "The fact of the replacement of the predecessor State by the successor State

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[2] *Ibid.*, para. 66.

[3] *Ibid.*, para. 73.

[4] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 104, document A/CN.4/204, paras. 68 and 69; *1970*, vol. II, p. 141, document A/CN.4/226, paras. (35)-(37); *1971*, vol. II (Part One), p. 173, document A/CN.4/247 and Add.1, paras. (23)-(27).

[5] See previous meeting, paras. 59 and 62.

[6] *Ibid.*, paras. 35-39 and 75.

[7] See *Yearbook of the International Law Commission 1969*, vol. II, p. 77, para. 29.

[8] *Ibid.*, *1971*, vol. II (Part One), p. 167, document A/CN.4/247 and Add.1, art. 2, para. 2.

entails the extinction of the rights of the former in public property and, simultaneously, the creation of rights of the successor State in the same property". But it would not be possible to say that the rights of the predecessor State in the property and those of the successor State, or the contents of their respective rights, were the same. He was reluctant even to express a general reservation stating that the extinction of the rights of the predecessor State was without prejudice to the rights of third States or private persons; if he had done so in the present article 6, it was only to meet the wishes of the majority of the Commission.

14. It remained for the Commission to decide whether it wished to refer article 6 to the Drafting Committee, which would take that difficulty into account and seek the most neutral formula reserving certain situations contemplated in later articles, or to reopen the discussion on the substance.

15. Mr. AGO said that the Commission had made progress in clarifying the subject under study by eliminating from the article any question of replacement of sovereignty, which was entirely a matter of international law, whereas the situations contemplated in article 6 came under internal law. The consequences they might have in international law derived solely from the existence of certain rights in internal law. The Special Rapporteur had proposed a formula which was correct, but which needed to be made clearer.

16. The Special Rapporteur spoke of the transfer of property and of rights. In his own view, it was only rights that were transferred. Property passed only with the right attaching to it, which could be a right of ownership or some other real right. Since it was generally rights of ownership that were concerned, property was referred to, but in fact it was always rights that were transferred.

17. Moreover, he was not sure that there was no connexion between the extinction of the rights of the predecessor State and the creation of the rights of the successor State. If that were so, there would be a legal hiatus between the extinction of the rights of the predecessor State and the creation of the rights of the successor State in the property in question. What took place was definitely a "transfer" or "passage", and the phenomena of extinction and creation of rights of States were not entirely independent of each other.

18. Nor did he wholly agree with the Special Rapporteur when he said that the content of the rights of the predecessor State and the successor State were not necessarily the same. Once the successor State had replaced the predecessor State in its rights, it was, of course, free to act as it wished, but at the actual moment of the transfer the successor State received only what the predecessor State had possessed. In that respect, there was complete equivalence.

19. The Drafting Committee should be asked to try to find a formula which would provide an acceptable working basis.

20. Mr. USHAKOV drew attention to the fact that it was the Commission's custom not to consider general articles until it had examined the substantive articles of a draft. That procedure had been followed in 1971, in the work on relations between States and international organizations, and in 1972, in examining the draft articles on succession of States in respect of treaties. In 1971, it had been after considering all the draft articles proposed that the Commission had decided to set apart a number of general provisions.

21. On occasions when the Commission discussed general provisions before completing consideration of the substantive articles and referred those provisions to the Drafting Committee, the latter could not put them into final form until the whole draft had been examined. He would not object to article 6 being referred to the Drafting Committee, but must point out that the Committee would be unable to deal with it until much later.

22. The general articles proposed in the draft under discussion, which applied solely to succession to public property, might perhaps later be drafted in such a way as to cover the whole subject of succession of States in respect of matters other than treaties.

23. Mr. YASSEEN said that he thought Mr. Ushakov's concern would be justified if the Commission were examining a draft on second reading with a view to drawing up a final text; but it was examining Mr. Bedjaoui's draft only on first reading, so that the work was purely provisional. That being so, there was no reason why the general articles should not be discussed before the substantive articles; in any case, the general articles also contained substantive rules, though of a more general nature than those in the other articles.

24. If the Commission was to make any progress, it was essential to begin by discussing the general articles. Of course, if a general provision was referred to the Drafting Committee, it would consider it in the light of the discussion on the other articles. It should not be forgotten, either, that the draft would be reconsidered in the light of the comments of Governments, which might give rise to major changes in its arrangement.

25. The CHAIRMAN, speaking as a member of the Commission, said that the problem was to find a criterion to distinguish from the others those rules which were of a general character and which should therefore be considered before the others.

26. Personally, he thought the most general of all the rules in the draft articles, and the one which should have been considered first, was not that contained in article 6, but the rule in article 8. It was the rule which stated that, in the event of a succession, the public property of the predecessor State passed into the patrimony of the successor State. The question of the date, dealt with in article 7, and that of the legal status of the property, dealt with in article 6, should be examined after article 8. Nevertheless, he would not object to the procedure suggested by the Special Rapporteur of dealing first with article 6, especially as the articles were being examined on first reading. At a later stage, the various provisions would have to be rearranged.

27. The Special Rapporteur had suggested that the Commission should take a decision on the question whether, in the event of a succession, there was a transfer of property or only extinction of the right of the predecessor State and creation of the right of the successor

State. He was not at all certain that the Commission needed to decide precisely that question, but it was difficult not to see a process of transmission in that situation. Although analogies with private law were often misleading, he would venture to mention the example of a sale. It could perhaps be said that the seller's title to the object sold was extinguished and that the buyer's right was created on the sale being effected. Nevertheless, it was rare for anyone to regard a sale transaction in that manner; what was apparent was the transmission of the right to the object sold.

28. Possibly the best course would be to refer article 6 to the Drafting Committee so that an effort could be made to find language more acceptable to all members, possibly avoiding the term "transfer".

29. Mr. REUTER said he had no objection to article 6 being referred to the Drafting Committee. The article raised two main questions, one of them practical and the other theoretical, which were interrelated.

30. The practical question, which had been raised chiefly by members who represented the common-law system, was the protection of the interests of third States, international organizations and even private persons. He believed that it was essential to protect the rights of third parties, no matter what conception of the phenomenon of succession to public property was adopted. The Commission should therefore take a clear decision on that point.

31. The theoretical question was not purely one of terminology, as it might seem. It was true, as the Special Rapporteur had pointed out, that the terminology was not settled; that uncertainty was reflected in the draft articles themselves. Thus, in the title of article 6, the Special Rapporteur had used the word "transfer", which implied the presence of two entities, one giving and the other receiving. In the body of article 8, however, it was said that property "passed within" the patrimony or the juridical order of the successor State. The verb "to pass" (in the French text "*tomber*") suggested a unilateral operation. The Drafting Committee should see to the unification of the terminology.

32. The theoretical question related to the change of sovereignty and of internal legal order. It appeared to be generally recognized that a State succession involved the extinction of one sovereignty and the birth of another, the two operations being separate. Perhaps it would be better to speak, in that case, of "replacement" of sovereignty, a phenomenon which occurred at the date of succession. Article 8 also envisaged the replacement of one juridical order by another. Should the extinction of one juridical order and the birth of another be regarded as so dependent on sovereignty that they took place automatically and simultaneously with the replacement of one sovereignty by another? Logically, that should be so, since the juridical order was the expression of sovereignty. Practice indicated, however, that the successor State recognized for a certain time the material content of the previous juridical order, which subsisted as such. Thus the régime of ownership did not change at the very moment of replacement of sovereignty; it was only after a certain lapse of time that the successor State took the necessary adaptation measures.

33. Article 8 provided that "Public or private property of the predecessor State shall pass within the patrimony of the successor State". It should be noted, however, that the notion of patrimony did not necessarily exist in every internal juridical order. If the term "patrimony" was intended to signify an international law concept, the provision meant that the property in question was placed at the disposal of the successor State. That was tantamount to saying that the property passed within its "juridical order", the expression used in the same article with regard to the other two categories of public property. Hence there did not seem to be any need to provide for a special régime for State property by using the term "patrimony" instead of the expression "juridical order".

34. Of course, if one juridical order did not replace the other completely at the time of the replacement of sovereignty, the régime of State property of the predecessor State would continue to be applied for some time by the successor State and there would thus be no *vacuum juris*. But it was difficult to accept that the juridical order of the predecessor State subsisted after the succession only for State property. However, the words "as it exists and with its legal status", in article 6, implied that the juridical order of a predecessor State continued only for State property.

35. To sum up, he was not at all certain that the replacement of sovereignty was automatically accompanied by replacement of one legal order by the other on the date of succession, since the successor State could decide to maintain the rules of the juridical order of the predecessor State for a certain time and then replace them by its own legal rules. If that idea was accepted by the Commission, it would be desirable to reserve the rights of international organizations and third States, and to amend the wording of article 6 to stipulate simply that, upon a State succession, the rights of the predecessor State were extinguished and its juridical order applied until the successor State had made its own juridical order applicable.

36. Mr. USHAKOV, reverting to the question of the procedure to be followed and referring to Mr. Yasseen's remarks, said it was true that the Commission was only just beginning to examine the Special Rapporteur's draft, but the general articles were not all of the same order. Article 4, which determined the sphere of application of the draft, had to be formulated at once because it defined the scope of the study, but its formulation could not be quite final. It might prove necessary to add a saving clause specifying that certain questions were outside the scope of the draft, as had been done in the corresponding provision of the draft on the most-favoured-nation clause.[9] Article 5, which dealt with the definition and determination of public property, was absolutely necessary at the present stage, although it was of a general character.

37. With regard to article 6, he doubted whether it was advisable to retain the words "In accordance with the provisions of the present articles", because State succession was also governed by general rules of international law. It might even be necessary to supplement article 6

[9] See 1238th meeting, para. 7.

by a saving clause. If article 6 was sent to the Drafting Committee at once for redrafting, however, it would be difficult to foresee, at the present stage, what saving clause would be required.

38. Mr. AGO urged that if the Commission was to formulate articles it must know exactly what basis it was working on. It had to decide whether it would consider that the cessation of sovereignty brought about the termination of the pre-existing legal order, even if that meant admitting that the legal order of the successor State inherited the rules of the predecessor State, or that the pre-existing legal order continued after the succession.

39. Moreover, the Commission must bear in mind the possible consequences of the provisions it was preparing and, in particular, consider, when drafting an article such as article 6, whether it constituted a rule of international law or merely a scientific statement of what often happened in reality. For if article 6 contained a rule, failure to comply with it could be a wrongful act entailing the responsibility of its author.

40. Mr. USTOR said that the question raised by Mr. Reuter and Mr. Ago was closely connected with the idea put forward by Mr. Ushakov. Clearly, when State property was affected by a succession it passed from the legal order of the predecessor State to that of the successor State. Where the successor was a newly independent State, it often took time for its new legal order to become fully developed.

41. There were, however, cases of succession other than those which Mr. Reuter appeared to have had in mind. There were many examples in history of territorial changes in which both the predecessor State and the successor State were old established countries. The legal order of the successor State would in those cases apply immediately to the territory which had changed hands. As suggested by Mr. Ushakov, all the different cases would have to be examined with an inductive approach before a general rule valid for all cases could be framed.

42. Subject to those comments, he would be prepared to see article 6 referred to the Drafting Committee on the understanding that the text that emerged would be a very provisional one.

Co-operation with other bodies

[Item 8 of the agenda]

(resumed from the 1205th meeting)

Statement by the observer for the Inter-American Juridical Committee

43. The CHAIRMAN invited Mr. Vargas Carreño, observer for the Inter-American Juridical Committee, to address the Commission.

44. Mr. VARGAS CARREÑO (Observer for the Inter-American Juridical Committee) said he first wished to congratulate the Commission on the important contribution it was making to the codification and progressive development of international law. On behalf of his Committee, he wished to emphasize the importance it attached to collaboration with the Commission, which had hitherto found expression mainly in exchanges of visits by observers.

45. At its last session, held in January and February 1973 at its headquarters in Rio de Janeiro, the Committee had had the pleasure of receiving Mr. Kearney, who had then been Chairman of the Commission, as observer. Mr. Kearney's statements had been very helpful to the members of the Committee, as they had enabled them to learn at first hand about the work being done by the Commission. The Committee hoped that the Commission would arrange to be represented at its next session, either by the Chairman, or, if that was not possible, by another observer. Contacts of that kind could be highly beneficial to both bodies, whose purposes, though at different levels, were the same.

46. One of the Committee's tasks was the codification and progressive development of international law at the regional level. But it was impossible to formulate regional principles and rules of law without taking into account the rules and principles which were of universal application. The interdependence of States brought about by the present multiplication of international relations had facilitated the universalization of international law, which, with the Vienna Convention on the Law of Treaties, had come to regard as void or terminated, as the case might be, treaties concluded between groups of States which violated *jus cogens*, being in conflict with peremptory norms of a general character.

47. However, although there should not be any conflict on the same subject-matter between general international law and regional legal systems, the latter might nevertheless have their own legal institutions, such as the right of diplomatic asylum in Latin America and other questions which were not settled by general international law.

48. On the other hand, in its work of codifying and progressively developing international law, the Commission should take account of the practices and doctrinal formulations of the various regions and legal systems of the world, especially when those practices and formulations came from inter-State juridical bodies.

49. Following the revision of the Charter of the Organization of American States (OAS), the Committee had become one of the central organs of that organization. It was now carrying out its work mainly by means of resolutions and draft conventions, which it either prepared on its own initiative or at the request of the main organs of the OAS, namely, the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs.

50. At its 1970 session, the Committee had decided to place on its agenda the topic of the law of the sea, with a view to facilitating the adoption of common positions by the Latin American countries. After considering the topic at several sessions, the Committee had unanimously adopted a resolution which attempted to reconcile contradictory positions and bring out the points of agreement of the Latin American countries.

51. Starting from the fact that the 200-mile maritime jurisdiction was a reality accepted or endorsed by the great majority of Latin American States, the debates

had centred on the legal character to be ascribed to the zone. While some members of the Committee had argued in favour of the concept of territorial sea, or full sovereignty of the coastal State, over a distance of 200 nautical miles, others had proposed that the area should be divided into two zones, the first being territorial sea of a breadth of not more than twelve miles, and the second extending up to 200 miles.

52. The second zone might be called the "patrimonial sea" or "economic zone"; within it the coastal State would exercise its jurisdiction only in matters relating to the protection and exploitation of natural resources, and would have to respect the freedoms of navigation and overflight and freedom to lay submarine cables and pipelines.

53. The attempt to reconcile those two opposing views had resulted in a document which, in some respects, was contradictory. For example, the Committee's resolution began by stating that the sovereignty or jurisdiction of the coastal State extended beyond its territory and its internal waters over the adjacent sea for not more than 200 nautical miles, as also over its air space and the sea-bed and ocean floor. Thus, by acknowledging State sovereignty over all the area included in those 200 miles, including air space, the resolution recognized the concept of the territorial sea. Later on, however, the validity of the claim to 200 nautical miles was recognized only for those States which respected the freedom of navigation and overflight beyond the twelve-mile limit, which was obviously inconsistent with the concept of a territorial sea of 200 miles.

54. In the same document the Committee then proceeded to distinguish between two zones within the 200-mile limit, though it did not denominate or qualify them. In the first of those zones, which extended for twelve nautical miles, vessels of any State would have the right of innocent passage, while in the second zone, which extended from the outer limit of the first zone for a total distance of 188 miles, the vessels and aircraft of any State would enjoy the rights of free navigation and overflight, although that right would be subject to the regulations of the coastal State.

55. In another passage, the Committee's resolution stated that vessels and aircraft which passed through or over international straits which were customarily used for international navigation and which connected two free seas, should enjoy freedom of navigation and overflight similar to that recognized for the second zone of 188 miles. In other words, although the right of free passage was assured, the coastal State had the power, within the jurisdiction it exercised over those straits, to impose its own regulations with respect to the safety of navigation and maritime transport. However, the rule supported by the Committee did not affect the legal situation of certain straits, passage through which was regulated by specific international agreements.

56. Another aspect of the document which was worth mentioning because of its *lex ferenda* elements, was that of the various submarine areas. The Committee's resolution indicated that there were three areas of the sea-bed and ocean floor, which entailed a modification of the international law of the sea in force.

57. In the first area, up to a distance of 200 miles, the coastal State exercised sovereignty and jurisdiction over the sea-bed and subsoil of the sea. The second area, beyond the 200-mile limit and up to the edge of the continental slope, was legally termed the "continental shelf"; in it, the coastal State exercised sovereignty for purposes of exploration and exploitation of natural resources. Lastly, beyond those two areas, which were subject to State jurisdiction, the sea-bed and ocean floor and their resources constituted the "common heritage of mankind", as acknowledged by General Assembly resolution 2749 (XXV).

58. The Committee's resolution of February 1973 also contained a number of proposals relating to other questions of the law of the sea which, in the interests of brevity, he would not discuss, though he was prepared to reply to any questions from members of the Commission.

59. At its 1973 session, the Inter-American Juridical Committee had also approved a draft inter-American convention on extradition. At present, the majority of American States were bound by bilateral extradition treaties and by a multilateral convention on the subject which had been adopted by the Seventh International Conference of American States, held at Montevideo in 1933.[10] The fact that a number of American States had not ratified the 1933 Montevideo Convention and, above all, the need to amend that Convention in the light of forty years' experience of its application, had led the OAS Assembly to request the Inter-American Juridical Committee to prepare a new draft convention on extradition.[11]

60. In summarizing the main clauses of the draft approved by the Committee in February 1973, he would leave aside the procedural provisions, which made up the majority of the 28 articles. The first article specified the obligation of each contracting State to extradite to another Contracting State which made the request, any person charged, prosecuted or sentenced by the judicial authorities of the requesting State. It was necessary that the alleged offence should have been committed in the territory of the requesting State; if it had been committed elsewhere, the requesting State must have had, at the time, jurisdiction under its own laws to try a person for such an offence committed abroad.

61. For the purpose of determining what offences were extraditable, the Committee's draft provided two criteria. The first was the penalty legally applicable for the alleged offence, irrespective of the denomination of the offence and of the existence of extenuating or aggravating circumstances. Only offences punishable at the time of their commission by imprisonment for a minimum of one year, under the law of both the requesting and the requested State, would constitute extraditable offences. The second criterion consisted of lists of offences which each contracting State might attach as an annex to the future convention at the time of signature or ratification. A State could amend its list, but without retroactive effect

[10] League of Nations, *Treaty Series*, vol. CLXV, p. 47.

[11] *International Legal Materials*, vol. XII, number 3 (May 1973), p. 537.

unless the amendment benefited the alleged offender. Where that system applied, an offence would be extraditable only if it had appeared on the lists of both the requesting State and the requested State before the commission of the alleged offence.

62. The draft went on to deal with the case in which one of the two States concerned had opted for the penalty criterion and the other for lists. For an offence to be extraditable, it would then be necessary for it to appear on the list of the State which had opted for lists and, in addition, to be punishable by at least one year's imprisonment under the laws of both States.

63. The draft provided that there would be no extradition in certain circumstances. First, where the person concerned had already served a sentence equivalent to the prescribed penalty, or had been pardoned, amnestied, acquitted, or discharged in respect of the alleged offence; secondly, where the statutory time-limit for prosecution or for the execution of the penalty under the laws of either the requesting State or the requested State had expired before extradition; thirdly, where the person concerned was due to be tried by a special or *ad hoc* court in the requesting State; and fourthly, where, under the laws of the requested State, the alleged offence was classed as a political offence or was connected with such an offence.

64. The last exception was particularly important, because it followed a well-established Latin American practice according to which the State called upon to decide whether to extradite or grant asylum was competent to rule unilaterally on whether the alleged offence was a political or an ordinary offence.

65. However, the draft did not preclude extradition for the crime of genocide or for any other offence which was extraditable under a treaty in force between the requesting and the requested State.

66. Another very important limitation embodied in the draft was that neither the death penalty nor a life sentence could be imposed on any person surrendered to a State under its provisions.

67. The final clauses specified that the future Convention should be open for signature not only by States members of the Organization of American States, but also by any other State which so requested.

68. It was possible that at its next session, the OAS General Assembly might convene a specialized conference of plenipotentiaries to examine the draft convention on extradition.

69. Finally, he wished to draw attention to the fact that the Inter-American Juridical Committee had on its agenda a number of items that were closely connected with topics under consideration by the Commission. In the near future the Committee would be considering the questions of the immunity of the State from jurisdiction and of the nationalization of foreign property from the standpoint of international law—questions clearly connected with the international responsibility of the State, which the Commission was now examining. That was an additional reason for the keen interest with which he and the other members of the Committee followed the Commission's work.

70. The CHAIRMAN, after thanking the observer for the Inter-American Juridical Committee for his lucid and detailed statement, said that the Committee, with thirty-five years' experience in the work of legal codification, was perhaps the oldest body of its kind in the world.

71. Co-operation between the Committee and the Commission, which was already long established and fruitful, mainly took the form of exchange visits of observers. The reasons for that co-operation could be easily explained: on the one hand it was not possible to establish rules of regional law without reference to universal rules, while on the other hand the Commission could benefit by learning how regional rules were applied to concrete circumstances. The rules concerning the continental shelf, for example, had had their origin on the Latin-American continent.

72. As the observer had pointed out, attempts to find common solutions at the regional level were attended by many difficulties. For example, the efforts of the Latin American countries to reach agreement on the law of the sea had called for many compromises and had not always been successful, as was shown by the resolution adopted by the Committee on 9 February 1973, at its last session in Rio de Janeiro. It was interesting to note that the observer for the Committee had made a great study of the problem of the "economic zone", or, to use the term which he himself had invented, the "patrimonial sea".

73. The Committee's draft convention on extradition contained one very novel feature, namely, provision for lists of extraditable offences to be agreed upon by the parties. With regard to that draft convention, it should, of course, be borne in mind that it was a long-standing Latin American tradition that extradition did not apply to political offences. The only possible exceptions would be the crimes of genocide or crimes which were the subject of specific treaties.

74. He hoped that the present co-operation between the Commission and the Committee would be maintained and strengthened in the future.

75. Mr. YASSEEN said that the importance of co-operation between universal and regional bodies entrusted with the codification and development of international law was beyond question. International law was always one and the same, but that was not incompatible with the existence of regional systems, for the unity of the international legal order asserted itself through certain universally accepted rules which all regions had to respect. It was that unity of the international legal order which determined the freedom enjoyed by each region to formulate rules concerning certain situations peculiar to itself. The scope of regionalism could thus be considered as being determined by the results of the co-operation between regional and universal bodies.

76. Latin America had always made most valuable contributions to the progressive development of international law and had been the source of a number of ideas which had been adopted by the International Law Commission in formulating its own rules. For example, the system of reservations to treaties formulated by the

Commission, which had found its way into the Vienna Convention, had been largely inspired by Latin American practice.

77. He thought that co-operation between the Inter-American Juridical Committee and the International Law Commission could be made even more fruitful. The Committee could give it its opinion on the work accomplished by the Commission. Any comments the Committee might make on that subject would be very useful, since they would combine the attitudes of the different countries of Latin America. He was glad to see that the Inter-American Juridical Committee was studying questions that were very close to the topics being examined by the International Law Commission, in particular, the very important topic of State responsibility. He appreciated that co-operation and hoped it would increase.

78. Lastly, he wished to say how happy he had been to work with Mr. Vargas Carreño, the present observer for the Inter-American Juridical Committee, both in the Sixth Committee of the General Assembly and in various other international bodies, and how much be appreciated his devotion to the cause of the codification and progressive development of international law.

79. Mr. KEARNEY said he was delighted to meet an old friend in the person of the observer for the Inter-American Juridical Committee, whose hospitality he had enjoyed at the Committee's last session in the charming city of Rio de Janeiro. He, too, was well aware that Mr. Vargas Carreño could be called the father of the "patrimonial sea", though he suspected that certain evil tongues might insinuate that it was an illegitimate child. He strongly supported the idea that the Chairman of the Commission should attend the next session of the Committee as an observer.

The meeting rose at 1 p.m.

1228th MEETING

Friday, 15 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

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

Co-operation with other bodies

[Item 8 of the agenda]

(continued)

INTER-AMERICAN JURIDICAL COMMITTEE *(continued)*

1. The CHAIRMAN invited members who had not already done so to comment on the statement by the observer for the Inter-American Juridical Committee.

2. Mr. MARTÍNEZ MORENO said that as a Latin American member of the Commission, he was pleased to greet the distinguished Chilean jurist, Mr. Vargas Carreño, as observer for the Inter-American Juridical Committee.

3. There could be no doubt that close co-operation between the Commission, which worked at the world level of international law, and the Committee, which worked at the regional level, would be highly beneficial to both bodies. As to doctrine, the dispute about whether there was such a thing as American international law was obsolete. The great majority of writers, even Americans, were inclined to believe that there was only one universal international law; but that was no obstacle to the recognition of American institutions of international law, both practical and theoretical.

4. As examples, he could cite the development of the Latin American rules of *uti possedetis* for the demarcation of international frontiers; the principle of freedom of navigation of rivers, even before the Congress of Vienna; the principle of political asylum; and the doctrine of recognition of *de facto* governments. It should also be remembered that Latin America had come out in favour of the self-determination of peoples and the legal equality of States at a time when other continents still put their trust in political balance.

5. He was pleased to note that the observer for the Committee, while recognizing that there were certain legal practices peculiar to Latin America, had agreed that there was general agreement among the jurists of that continent that international law was unique and universal.

6. At its last session, the Committee had made an outstanding effort to reach agreement on such a highly complex matter as the regime of the territorial sea. The result had been a generous compromise in which the members, while supporting the idea of an "economic zone" extending 200 miles beyond the coastal State, had also accepted the right of free or innocent passage through international straits. Those efforts of the Committee, it was encouraging to note, offered some assurance that the next conference on the law of the sea, to be held at Santiago de Chile in 1974, would have some flexible material before it, designed to harmonize the rights and interests of the world community with the higher rights of coastal States to the conservation and use of the natural resources of the sea adjacent to their shores.

7. The Committee's draft convention on extradition also contained new elements, such as the requirement that an extraditable offence must be punishable by at least one year's imprisonment, and provision for lists of extraditable offences to be supplied by both parties. It was interesting to note that the majority of Latin American States, despite their traditional support of the right of asylum, were now agreed that the nationality of the person whose extradition was requested could not be invoked as a reason for denying extradition, unless the law of the requested State expressly provided otherwise.

8. Lastly, he congratulated the observer for the Committee on his excellent statement and expressed the hope