YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1972

Volume I

Summary records of the twenty-fourth session
2 May—7 July 1972

UNITED NATIONS
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UNITED NATIONS
New York, 1973
INTRODUCTORY NOTE

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

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

The Special Rapporteurs' reports discussed at the session and certain other documents, including the Commission's report to the General Assembly, are printed in volume II of this Yearbook.
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**Draft articles submitted by the Special Rapporteur:**
- Article 1 (Transfer of territory) (second reading)...
- Article 4 (Successor State's unilateral declaration regarding its predecessor State's treaties)...
- Article 5 (Treaties providing for the participation of a successor State)...
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- Article 7 (Participation in multilateral treaties in force) and Article 8 (Participation in multilateral treaties not yet in force)...

**Draft articles proposed by the Drafting Committee:**
- Articles 1 and 2...

**Statement by the Observer for the European Committee on Legal Co-operation:**
- Draft articles submitted by the Special Rapporteur (continued)...
- Article 21 (Other dismemberments of a State into two or more States)...

**Co-operation with other bodies (resumed from the 1175th meeting):**
- Draft articles submitted by the Special Rapporteur...
- Article 21 (Other dismemberments of a State into two or more States)...

**Succession of States in respect of treaties (resumed from the 1181st meeting):**
- Draft articles submitted by the Special Rapporteur...
- Article 21 (Other dismemberments of a State into two or more States)...

**Second report of the Working Group:**
- Draft articles on the protection and punishment of crimes against diplomatic agents and other internationally protected persons (continued)...
- Article 21 (Other dismemberments of a State into two or more States)...

**Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (continued):**
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1192nd meeting
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2. State practice as evidence of the law relating to succession in respect of treaties
3. The concept of "succession of States" which emerged from the study of the topic
4. Relationship between succession in respect of treaties and the general law of treaties
5. The principle of self-determination and the law relating to succession in respect of treaties

1193rd meeting
Monday, 3 July 1972, at 3.25 p.m.

Draft report of the Commission on the work of its twenty-fourth session

Chapter II. Succession of States in respect of treaties
A. Introduction
1. Summary of the Commission's proceedings
2. State practice as evidence of the law relating to succession in respect of treaties
3. The concept of "succession of States" which emerged from the study of the topic
4. Relationship between succession in respect of treaties and the general law of treaties
5. The principle of self-determination and the law relating to succession in respect of treaties

1197th meeting
Thursday, 6 July 1972, at 9.35 a.m.

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Article 22 (Boundary regimes)
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Adoption of the draft articles on succession of States in respect of treaties
Vote of congratulations and thanks to the Special Rapporteur
Draft report of the Commission on the work of its twenty-fourth session (resumed from the previous meeting)

1198th meeting
Thursday, 6 July 1972, at 3.15 p.m.

Draft report of the Commission on the work of its twenty-fourth session

Chapter III. Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

1199th meeting
Friday, 7 July 1972, at 10.5 a.m.

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B. Draft articles on succession of States in respect of treaties (approval of commentaries)
MEMBERS OF THE COMMISSION

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<tr>
<td>Mr. Roberto Ago</td>
<td>Italy</td>
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<tr>
<td>Mr. Gonzalo ALCÍVAR</td>
<td>Ecuador</td>
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<td>Mr. Milan BARTOŠ</td>
<td>Yugoslavia</td>
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<td>Mr. Mohammed BEDJAOUI</td>
<td>Algeria</td>
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<td>Mr. Suat BILGE</td>
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<td>Mr. Jorge CASTANEDA</td>
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<td>Mr. Edvard HAMBRO</td>
<td>Norway</td>
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<tr>
<td>Mr. Richard D. KEARNEY</td>
<td>United States of America</td>
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<tr>
<td>Mr. Nagendra SINGH</td>
<td>India</td>
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<td>Mr. Robert QUENTIN-BAXTER</td>
<td>New Zealand</td>
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<td>Mr. Alfred RAMANGASOAVINA</td>
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<td>Mr. Paul REUTER</td>
<td>France</td>
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<td>Mr. Zenon ROSSIDES</td>
<td>Cyprus</td>
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<td>Mr. José María RUDA</td>
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<td>Mr. José SETTE CÂMARA</td>
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<td>Mr. Arnold J. P. TAMMES</td>
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<td>Mr. Doudou THIAM</td>
<td>Senegal</td>
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<td>Mr. Senjin TSURUOKA</td>
<td>Japan</td>
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<tr>
<td>Mr. Nikolai USHAKOV</td>
<td>Union of Soviet Socialist Republics</td>
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<tr>
<td>Mr. Endre USTOR</td>
<td>Hungary</td>
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<tr>
<td>Sir Humphrey WALDOCK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
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<td>Mr. Mustafa Kamil YASSEEN</td>
<td>Iraq</td>
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OFFICERS

Chairman: Mr. Richard D. KEARNEY
First Vice-Chairman: Mr. Endre USTOR
Second Vice-Chairman: Mr. Alfred RAMANGASOAVINA
Rapporteur: Mr. Gonzalo ALCÍVAR

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

The Commission adopted the following agenda at its 1149th meeting, held on 2 May 1972.

1. Succession of States:
   (a) Succession in respect of treaties
   (b) Succession in respect of matters other than treaties

2. State responsibility

3. Most-favoured-nation clause

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

5. Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (para. 2 of section III of General Assembly resolution 2780 (XXVI))

6. (a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245)
    (b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolution 2780 (XXVI))

7. Organization of future work

8. Co-operation with other bodies

9. Date and place of the twenty-fifth session

10. Other business
INTERNATIONAL LAW COMMISSION
SUMMARY RECORDS OF THE TWENTY-FOURTH SESSION
Held at Geneva from 2 May to 7 July 1972

1149th MEETING
Tuesday, 2 May 1972, at 3.25 p.m.

Chairman: Mr. Senjin TSURUOKA
later: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustó, Sir Humphrey Waldock, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN, after declaring the twenty-fourth session of the International Law Commission open, said that in accordance with the decision taken at its last session, he had represented the Commission at the twenty-sixth session of the General Assembly, where the Sixth Committee had considered the Commission's report from 8 to 21 October and on 11 and 12 November.

2. The Sixth Committee had devoted the closest attention to the draft articles prepared by the Commission on relations between States and international organizations and in particular to the question of the final phase of the codification of that topic. The opinion had been expressed that, in order to complete its study, the Commission should once more examine the question of the right of representation of States, since the draft articles had not dealt with that question.

3. Representatives generally had endorsed the limitation of the draft articles to the representation of States in their relations with international organizations of a "universal character", but it had been suggested that relations with regional organizations should be studied at a later stage.

4. A number of representatives had expressed approval of the structure of the draft, notably the reduction of the original number of articles. Several had expressed their approval of the consolidation of the provisions concerning permanent missions and permanent observer missions; some, on the other hand, had expressed reservations regarding that consolidation on the grounds that it tended to obscure the fundamental difference, in character and function, of such missions.

5. On 28 July 1971, the Commission had decided to recommend that the General Assembly convene an international conference of plenipotentiaries to study the draft articles and conclude a convention.1 The Sixth Committee had devoted a considerable part of its debate to the procedure to be followed in the final phase of the codification of the subject-matter. The Commission's recommendation to convene an international conference had been supported by some representatives on the grounds that a conference would provide the coherence and uniformity indispensable for a constructive study of so complex a draft, that a conference would enable delegations to concentrate their attention, and that it would be inconvenient for countries with small delegations if the convention were drawn up by the Sixth Committee.

6. On the other hand, a number of representatives had taken the view that the Sixth Committee should be asked to prepare the final draft of a convention for adoption by the General Assembly. The reasons put forward in support of that proposal had been that the Sixth Committee, being composed of experts representing all States Members of the United Nations, had the necessary experience to carry out the task, that an international conference would involve additional expenditure for the United Nations, which was in a difficult financial situation, that the future work programme of the Sixth Committee was not particularly heavy, and that another conference in addition to those already scheduled might impose too great a burden on the representatives of States.

7. The view had prevailed, however, that the final decision should be left to the next session of the General Assembly. The Assembly had accordingly decided to invite Member States, and Switzerland, as a host State, to submit, not later than 1 June 1972, their written comments and observations on the procedure to be adopted for the elaboration and conclusion of a convention, and on the substance of the draft articles. The same invitation had been extended to the Secretary-General of the United Nations and the Directors-General of the specialized agencies. The item had been placed on the provisional agenda for the twenty-seventh session of the General Assembly, where the question of procedure would be discussed and decided.

8. The representative of Austria had announced that his Government would be prepared to act as host to the conference, if convened, on the same conditions as had applied to the Vienna conferences on diplomatic intercourse and immunities, consular relations and the law of treaties.

9. With regard to the topic of succession in respect of treaties, satisfaction had been expressed at the Com-

mission's intention, stated in its report on its twenty-third session, to complete the first reading of the draft articles on that topic at its next session. General approval had been expressed of the Commission's conclusion that the topic should be dealt with within the framework of the law of treaties, while certain representatives had urged that it should be studied in conjunction with succession in respect of matters other than treaties.

10. Approval of article 1 of the draft, on the use of terms, especially the term “succession”, had been expressed by certain representatives. As to article 6, opinions had differed on the question whether the general rule regarding a new State's obligations in respect of its predecessor's treaties should suffer exceptions regarding “dispositive”, “territorial” or “localized” treaties. On the one hand, the opinion had been expressed that no exception to the general rule should be admitted, while, on the other hand, it had been maintained that such treaties were binding on the successor State and should therefore constitute exceptions to the general rule.

11. The General Assembly had recommended that the Commission endeavour to make progress in its consideration of the topic of succession of States in respect of matters other than treaties.

12. It had also recommended that the Commission continue its work on State responsibility and try to make substantial progress in 1972 towards the preparation of draft articles on that topic. It had been agreed that the Commission should continue its study of the most-favoured-nation clause and of treaties concluded between States and international organizations or between two or more international organizations.

13. With regard to the question of persons entitled to special protection under international law, some representatives had urged that it called for immediate attention. Others, however, had opposed the idea of preparing draft articles on the question, on the ground that the protection of diplomatic and consular officers was already adequately provided for in international law and that what was needed was not another international instrument, but effective application of the existing law.

14. After due deliberation, the General Assembly had decided to request the Commission to study the question with a view to preparing a set of draft articles dealing with offences against diplomatic and other persons entitled to special protection under international law, for submission to the Assembly at the earliest date which the Commission considered appropriate. Member States had also been requested to submit their comments to the Secretary-General so that the Commission might take them into account in studying the question.

15. Satisfaction had been expressed at the excellent way in which the seventh session of the Seminar on International Law had been conducted. Several representatives had announced their government's intention to contribute to the cost of the next Seminar.

16. Satisfaction had also been expressed at the continuing co-operation with other bodies. At the meeting of the Inter-American Juridical Committee, the Commission had been represented by Mr. Sette Câmara. He (the Chairman) had been unable to attend the November session of the European Committee on Legal Co-operation, but, at the invitation of its Secretary, he had visited the European Committee in January. He had also attended the thirteenth session of the Asian-African Legal Consultative Committee, held in Lagos from 18 to 25 January.

17. Lastly, he had the pleasure to announce that the sum of US $3,000 had been paid in December 1971 by the Brazilian Government as its 1971 contribution to the Gilberto Amado Memorial Fund.

Election of Officers

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

19. Mr. AGO, after paying a tribute to the outgoing Chairman for the able manner in which he had performed his duties, proposed Mr. Kearney, whose keen intelligence, sound common sense and sympathetic understanding were well known to all members. Mr. Kearney also possessed a rare capacity for hard work, as he had clearly shown at the previous session in the Commission's work on relations between States and international organizations.

20. Sir Humphrey WALDOCK said he took great pleasure in seconding that proposal. He wished to associate himself particularly with the tribute paid by Mr. Ago to Mr. Kearney for his great contribution to the success of the Commission's work on relations between States and international organizations, as Chairman of the Working Group. He would be sadly missed on the Drafting Committee.

21. Mr. USHAKOV, Mr. NAGENDRA SINGH, Mr. BARTOŠ, Mr. CASTAÑEDA—speaking also on behalf of Mr. Alcivar and Mr. Sette Câmara—Mr. THIAM and Mr. REUTER associated themselves with the tributes paid to the outgoing Chairman and supported the proposal of Mr. Kearney for the office of Chairman.

Mr. Kearney was unanimously elected Chairman of the Commission.

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

23. Mr. USHAKOV proposed Mr. Ustor.

24. Mr. NAGENDRA SINGH seconded the proposal.

25. Mr. BARTOŠ, Mr. ALCIVAR, Mr. REUTER, Mr. THIAM and Sir Humphrey WALDOCK supported the proposal.

Mr. Ustor was unanimously elected First Vice-Chairman.

26. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.
27. Mr. THIAM proposed Mr. Ramangasoavina.
28. Mr. REUTER seconded the proposal.
29. Mr. NAGENDRA SINGH and Mr. USHAKOV supported the proposal.

Mr. Ramangasoavina was unanimously elected Second Vice-Chairman.

30. The CHAIRMAN called for nominations for the office of Rapporteur.
31. Mr. SETTE CÂMARA proposed Mr. Alcivar.
32. Mr. USHAKOV seconded the proposal.
33. Mr. BARTOS, Mr. NAGENDRA SINGH, Mr. THIAM and Mr. ROSSIDES supported the proposal.

Mr. Alcivar was unanimously elected Rapporteur.

34. The CHAIRMAN said it was a pleasure for him to pay a tribute to the outgoing Chairman, whose leadership had enabled the Commission to accomplish a substantial amount of work under difficult circumstances at the previous session.
35. He thanked members for their kind words about himself and said that the spirit of friendship and cooperation which had always prevailed in the Commission, and the support which he was sure he would receive from the other officers, encouraged him to look forward to a successful session despite the heavy agenda.
36. Mr. USTOR and Mr. ALCÍVAR thanked the members who had proposed and supported their nominations.
37. The CHAIRMAN said he wished to extend a warm welcome to the four new members of the Commission: Mr. Bilge, Mr. Hambro, Mr. Quentin-Baxter and Mr. Rossides, all of whom were already well known to the members of the Commission as international lawyers and as participants in the work of the United Nations. He also welcomed the new Secretary to the Commission, Mr. Rybakov, who had replaced Mr. Movchan as Director of the Codification Division of the Office of Legal Affairs.
38. Mr. BILGE, Mr. HAMBRO, Mr. QUENTIN-BAXTER and Mr. ROSSIDES congratulated the Chairman and the other officers on their election and thanked the Chairman for his kind welcome.
39. Mr. RYBAKOV, after thanking the Chairman for his warm welcome, said he could assure him that the Secretariat would continue to co-operate closely with the Commission as it had done in the past.

Adoption of the Agenda

40. The CHAIRMAN invited the Commission to adopt its provisional agenda (A/CN.4/252).
41. Mr. AGO said that, although it was customary to adopt the agenda without detailed discussion of its composition or of the order in which the items were listed, he wished to point out that it was essential for the Commission to give priority to two items. The first was item 1 (a), succession of States in respect of treaties, which had always been regarded as a priority item and consideration of which was already fairly far advanced. As the Special Rapporteur for the topic would be called away to other functions and have to leave the Commission the following year, further progress must be made before he left. The second item was item 5, the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. That item had been specially referred to the Commission by the General Assembly.
42. Mr. NAGENDRA SINGH said he entirely agreed with Mr. Ago on the need to give priority to item 1 (a), even if it had to be at the expense of other items, since the latter had not progressed to the stage of finalization. Apart from the reasons already given, it should be remembered that the Sixth Committee was liable to become impatient because of the inevitably protracted character of the painstaking work of the Commission. Since considerable progress had already been made on item 1 (a), the Commission would be wise to concentrate on that item and present something by way of an accomplishment.
43. He also agreed on the desirability of giving priority to the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, a topic which promised speedy results.
44. Mr. ROSSIDES said he agreed on the desirability of concentrating on the topic of succession of States in respect of treaties, but it was even more desirable to give priority to the question of the protection and inviolability of diplomatic agents, which was very urgent for many reasons.
45. Mr. CASTAÑEDA said he could agree that priority should be given to items 1 (a) and 5, but the Commission should not lose sight of the fact that item 2, State responsibility, ought also to be dealt with as soon as possible. It was now about ten years since the Commission had adopted a new approach to State responsibility and it had only been prevented from considering that topic by the urgency of other topics, in particular of relations between States and international organizations. It would also be undesirable to postpone for as much as two years the topic of succession of States in respect of matters other than treaties, on which the Special Rapporteur has already submitted his fifth report (A/CN.4/259).
46. The CHAIRMAN suggested that the Commission should give priority, at its current session, to items 1 (a) and 5 of the agenda.

It was so agreed.
47. Sir Humphrey WALDOCK said that it would help the Commission to reach a conclusion on the procedure to be followed with regard to item 5 if the Chairman, who had submitted a working paper with draft articles on the subject (A/CN.4/L.182), would indicate how the topic might best be dealt with, bearing in mind that the Commission had not yet appointed a Special Rapporteur.
48. The CHAIRMAN said that experience at the previous session with the topic of relations between States and international organizations had shown the effectiveness of the method of setting up a small working group
to take over a variety of functions normally performed by a Special Rapporteur. Perhaps the same method could be followed at the present session in dealing with item 5. The Secretariat had been collecting materials which would be of great assistance in preparing commentaries to future articles on the protection and inviolability of diplomatic agents. He would therefore suggest that a small working group be set up fairly quickly; it might take his draft articles as a basis for its work.

49. Sir Humphrey WALDOCK said he thought it would be desirable for the Commission itself to have some discussion on those draft articles before they were referred to a small working group.

50. Mr. SETTE CÂMARA said that the Working Group which had dealt with relations between States and international organizations at the previous session had had before it six extensive reports by the Special Rapporteur on that topic. In the present instance, he would not object to the appointment of a small working group, but the thought it should proceed more or less on the lines of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations. The work of the small working group should logically lead to the appointment of a Special Rapporteur. The subject was a very important one and, to be discussed thoroughly, it needed the help of a Special Rapporteur; it could not be disposed of merely on the basis of draft articles.

51. Mr. BARTOS said that although in principle he approved of the draft prepared by the Chairman, he was opposed to its being examined by a working group before the Commission had discussed it. The proposed articles contained certain clauses which amounted to a virtual reform of modern international law and would in some cases involve a return to practices of the past. It was essential that the Commission, whose composition, under its Statute, had to reflect the principal legal systems of the world, should first decide on the main lines of the draft.

52. Mr. USHAKOV acknowledged that a preliminary discussion in the Commission would be useful, but urged that it should be very brief.

53. Mr. ACO said he agreed with Mr. Ushakov. Item 5 of the agenda differed from the subjects the Commission usually dealt with, which were matters of classical international law suitable for codification. In the present case, the General Assembly had referred to the Commission a problem which called for a quick solution, and that could only be provided by setting up a working group. If its work was to be fruitful, however, it was essential that the Commission should first have a general exchange of views.

54. Mr. NAGENDRA SINGH said he agreed that the Commission should have a short discussion on the draft articles before the working group was set up, so that the group could be apprised of any objections to the proposals embodied in those articles.

55. The CHAIRMAN said that there would be a meeting of the officers of the Commission, the special rapporteurs and the former chairmen of the Commission to discuss the programme of work, before the Commission's next meeting.

The provisional agenda was adopted.

Communication from the Secretary-General

56. The CHAIRMAN said that the Commission had received the following communication from the Secretary-General:

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

"As far as 1972 is concerned, he has made it clear that the budget appropriations need to be administered in such a manner as to achieve a final unexpended balance in the amount of $4 million, the approximate equivalent of the anticipated shortfall in the payment of assessed contributions. As for 1973, on the assumption that no real progress will be made in the immediate future towards a basic solution of the deficit situation, the Secretary-General has stated that it is essential that the level of the estimates should demonstrate maximum self-restraint and fiscal care on the part of the Secretariat. He has indicated, in particular, that even in those circumstances where a legitimate case could be made for the strengthening in 1973 of particular offices and departments, he would not seek the necessary provisions for such purposes until present difficulties have been resolved.

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

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

The meeting rose at 5.15 p.m.

1150th MEETING

Wednesday, 3 May 1972, at 11.20 a.m.

Chairman: Mr. Richard D. Kearney

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Work

1. The CHAIRMAN said that at the previous meeting it had been decided that the officers of the Commission, together with the special rapporteurs and former chairmen, should meet to discuss the organization of work, in particular the method of dealing with item 5 of the agenda, the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. As a result of their discussion, it was suggested that a working group consisting of Mr. Ago, Mr. Hambro, Mr. Sette Câmara, Mr. Thiam and Mr. Ushakov, with Mr. Tsuruoka as Chairman, should be set up to review the problems involved and prepare proposals for submission to the Commission. He himself would attend meetings of the working group as required and give any explanations that might be requested regarding the draft articles he had prepared (A/CN.4/L.182). If there were no objections, he would take it that the Commission accepted that suggestion.

It was so agreed.

2. The CHAIRMAN said that with regard to the immediate work of the Commission it was proposed that a general discussion be started at once on item 5. That discussion might take up another two meetings, following which the Commission could begin to consider item 1 (a), succession of States in respect of treaties. It would continue consideration of that item until it had reviewed all the draft articles prepared by the Special Rapporteur. That would take approximately five weeks, so that the Commission could defer, for the time being, any further discussion of the organization of its work on the other items on the agenda.

3. There was a strong feeling that those other items, which were important topics of international law, should not be neglected, but that ways and means should be found of giving them some attention. If the Commission was going to achieve the results expected of it, however, serious thought would have to be given both to the idea of simplifying its methods of work to some extent and to the possibility of holding longer sessions or extraordinary sessions.

4. Mr. CASTAÑEDA said that the Commission should so organize its work as to be able to allocate at least two weeks to the discussion of item 2, the important topic of State responsibility, and at least one week to item 1 (b), succession of States in respect of matters other than treaties. Some attention should also be given to item 6 (a), review of the Commission’s long-term programme of work. That would mean speeding up the work on item 1 (a), perhaps by holding two meetings a day.

5. The CHAIRMAN said that all possible methods of speeding up the work of the Commission would be explored. Members could help by exercising the utmost restraint and keeping their statements as brief as possible.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/L.182)
[Item 5 of the agenda]

6. The CHAIRMAN invited the Commission to begin a general discussion of item 5 of its agenda, the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, which it was called upon to consider under section III, paragraph 2, of General Assembly resolution 2780 (XXVI).

7. He had prepared a working paper on the subject (A/CN.4/L.182) containing a set of draft articles concerning crimes against persons entitled to special protection under international law. For the purposes of the general discussion, members might find it convenient to consider the various problems raised by item 5 in the order in which they were treated in those draft articles.

8. Mr. SETTE CÂMARA said that the topic had been defined in General Assembly resolution 2780 (XXVI) and the Commission would, of course, have to abide by the terms of that resolution. Nevertheless, he felt obliged to place on record his views on the limitation of the topic to diplomatic agents and other persons entitled to protection under international law. Such persons were already the subject of a series of provisions assuring them of special protection, such as the provisions on personal inviolability in the 1961 Vienna Convention on Diplomatic Relations, whereas the acts of terrorism which had unfortunately become so frequent in recent years were directed against other persons as well. Many innocent persons had been the victims of kidnapping, and even in some cases of cold-blooded murder, without the international community being able to take any action.

9. It was worth noting that under the Hague Convention of 16 December 1970, the unlawful seizure of

aircraft had been made an international crime. Any such seizure constituted a crime against the peace of mankind and endangered the lives of innocent persons. The same applied to other acts of terrorism, all victims of which were entitled to consideration.

10. He could speak with some authority on the question because his country had had very sad experience in the matter. The concern of the Brazilian authorities for the life and freedom of diplomatic agents had been so great that they had been prepared to do anything to protect them. Although there had been four major cases of kidnapping of diplomatic agents in Brazil, not one of the victims had suffered any harm, because the Brazilian authorities had gone to the extreme length of negotiating with the kidnappers in order to save them.

11. He was not making any reservation on the discussion of the topic, but wished to place on record his regret that the whole problem was not going to be discussed on a wider basis.

12. Mr. TSURUOKA said he wished to express his appreciation to the Chairman for the valuable working paper he had submitted, which, although not an actual basis for discussion, would be of great assistance to the Commission in dealing with the present topic.

13. He felt some sympathy for the ideas expressed by the previous speaker, but considered that the Commission would be performing a valuable service to the international community by starting work immediately on the question of the protection of diplomatic agents and certain other persons, as requested by the General Assembly.

14. Concern had been rightly expressed by many States regarding recent incidents involving offences against such persons, who included those entitled to special protection both under general international law and under international conventions. Such offences affected not only friendly relations between States, but also the interests of the international community as a whole. Effective international measures should be taken to prevent them, and the action taken by the General Assembly would therefore be welcomed.

15. He supported the principle of preparing a set of draft articles dealing with offences against diplomatic agents and other persons entitled to special protection, but would like, first, to comment on a few important points regarding the contents of the draft.

16. It was essential first to decide who should be entitled to special protection. Should the list include persons other than diplomatic and consular agents and, if so, what other persons? His own view was that the list should be restrictive. Recent events showed that offences against diplomatic and consular agents were in the main politically inspired or committed for purposes of extortion. Any future convention should therefore deal only with persons who were especially valuable for purposes of political extortion or publicity, namely, Heads of State or government, members of imperial or royal families, members of the cabinet and other high-ranking government officials of ministerial rank, and diplomatic and consular agents.

17. The offences to be made punishable under the convention should include such acts as the murder or kidnapping of such persons if committed with the intention of extorting anything of value, of forcing the release of offenders or alleged offenders, or of changing important government actions or policies. Any attempt to commit such acts or any participation in them as an accomplice should also be made punishable.

18. Any future international instrument on the subject should require contracting States to make the offence punishable if committed within their territory or by one of their nationals. Contracting States should also give serious consideration to making the offence punishable whenever one of their own nationals was the victim.

19. A provision should be included in the draft to the effect that severe penalties should be imposed for all such offences.

20. The question of the advisability of qualifying such offences as “international crimes” should be given very careful thought in view of the variety of meanings attached to that term; his own feeling was that it was preferable not to introduce that concept into the draft.

21. On the question of jurisdiction, a contracting State should be required to take the necessary measures to establish its jurisdiction over the offence in three cases: first, when the offence was committed in its territory; secondly, when one of its nationals had committed the offence; and, thirdly, when one of its nationals was the object of the offence. A contracting State should also be permitted to establish its jurisdiction when the alleged offender was in its territory and the State did not extradite him to another State with jurisdiction over the offence.

22. He had some doubts about the desirability of including a provision to the effect that the offence should not be considered as a political offence. On the other hand, it was essential to include a provision requiring a contracting State in whose territory an alleged offender was found to extradite him or, if it did not extradite him and if it had established its jurisdiction, to submit the case to the competent authorities for prosecution.

23. Mr. ROSSIDES said he agreed with the view that all victims of terrorism should be afforded protection. The fact was, however, that the General Assembly had restricted the topic to diplomatic agents and other persons entitled to special protection under international law, and it had done so not merely out of a desire to underline the privileges those persons enjoyed; there were sound reasons for concentrating on the problem of offences against them.

24. The first reason was that the free use of diplomats, and of such persons as emissaries of the United Nations, was essential to the progress of international understanding. Those persons played a very important part in the furthering of international relations.

25. The second was the practical reason that such persons had unfortunately become a special target of terrorist attacks. A diplomatic agent representing a country which had nothing to do with the real or imaginary injustices complained of by the terrorists might be kidnapped or even murdered by them. He was an easy prey
because he was often less well guarded than local dignitaries. Again, terrorists believed that the local authorities would attach importance to securing the release of a diplomatic agent and he was therefore regarded as a useful bargaining counter.

26. Mr. BILGE said that the set of draft articles prepared by the Chairman met a pressing need of the international community, which for some years had been the victim of a new form of piracy, at first committed against aircraft in flight, but more recently on the ground as well. Since the international community had already tried to protect itself against piracy in the air by its recent adoption of the Convention for the Suppression of Unlawful Seizure of Aircraft, on which the Chairman had drawn in preparing his draft, a similar instrument for the suppression of piracy on the ground would be timely. The special feature of that new form of piracy was that it was always carried out by a clandestine organization, so the draft articles should take that into account.

27. The Chairman has restricted the application of his draft articles to diplomatic and consular agents and persons with a similar status, but it should perhaps be extended at least to privileged foreigners, in other words, to foreigners enjoying a special status under a treaty.

28. It would also be desirable to add to the motives for the international crimes listed in article 1 attempts to influence public opinion, since the purpose of the acts committed against the persons whom the draft was designed to protect was generally to arouse public opinion against the government in power.

29. The reference in article 1 to the notion of complicity should be supplemented by adding that of membership of a clandestine organization.

30. In article 6, while it was right to invite States to cooperate in preventing international crimes, the draft should go further and invite them to refrain from giving any assistance to clandestine organizations.

31. He would also be in favour of providing, in article 10, for an accelerated procedure for prosecuting international crimes, not merely the procedure applicable in the case of an offence of a serious nature under the law of the State concerned, and of referring, in article 13, to the appropriate convenant on human rights.

32. Lastly, it would be useful for the Commission to know whether any action on the matter had been taken by other international bodies, in particular the Council of Europe, and, if so, what progress they had made.

33. The CHAIRMAN said that the subject had been discussed at some length at a recent meeting of the European Committee on Legal Co-operation; perhaps the Secretariat could provide a summary of that discussion.

34. A Latin American conference had also been convened under the auspices of the Organization of American States to prepare a draft convention on the subject. At that conference, there had been considerable differences of opinion as to the scope of the proposed convention, which, in the view of some Latin America States, should not be limited to the protection of diplomats, but should cover all victims of terrorism.

35. Mr. HAMBRO said that, to begin with, he wondered whether it was usual or proper for the Commission to discuss the question whether a convention of that kind was necessary. If it was proper for the Commission to discuss that question, he could say that he himself doubted whether the proposed convention would serve any useful purpose.

36. Mr. Sette Câmara had raised the interesting question whether protection against terrorism should be provided only for diplomats. Mr. Rossides had rightly pointed out, first, that the General Assembly had requested the Commission to prepare a set of draft articles on the question of the protection and inviolability of diplomatic agents and, secondly, that diplomatic agents came within a special category of persons.

37. On 16 November 1937 the League of Nations had adopted in due form a Convention for the Prevention and Punishment of Terrorism, but that Convention had not been ratified by a single State and had never entered into force. He wondered, therefore, whether it would not be correct and useful for the Rapporteur to state in his report that some members had doubted whether it was proper to ask the Commission to prepare an entirely new treaty on that subject. He feared that if the Commission were to undertake that task at the present session, it would be unable to work with the care and sound scientific method which had made it so useful an organ of the United Nations.

38. Lastly, he suggested that the Chairman should include, in the long list of definitions contained in his working paper, a definition of the term "international crime".

39. Sir Humphrey WALDOCK, speaking on a point of order, said that to expand the scope of the proposed convention to include acts of terrorism in general would be going beyond the Commission's terms of reference, which, as laid down by the General Assembly, referred essentially to the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law.

40. On the question of the utility of a convention on that subject, he would point out that the Commission had been canvassed at its last session and that its decision to draft a convention was not a sudden inspiration. The question of the utility of such a convention was one which could not be discussed until a text was available.

41. Mr. CASTAÑEDA asked whether the text prepared by the Organization of American States was available.

42. The CHAIRMAN said he agreed with Sir Humphrey Waldock that the Commission was working under a mandate from the General Assembly and that it was therefore no longer proper to discuss the question of the utility of the proposed convention.

43. In reply to Mr. Castaños's question, he said that the Secretariat had already circulated, at the previous session, the draft convention prepared by the Organiza-

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tion of American States and the document should still be available.

44. Mr. ALCÍVAR said that the mandate given to the Commission by the General Assembly was absolutely definite; the General Assembly had requested it to study the question “as soon as possible”, with a view to preparing a set of draft articles.

45. Mr. SETTE CÂMARA said that he had been impressed by the doubts expressed by Mr. Hambro concerning the utility of the proposed convention. Owing to lack of time, the question had not been discussed by the Commission at its previous session. It had not been on the Commission’s agenda, but had merely been mentioned in its report, it had been on that basis that the General Assembly had issued its mandate.

46. Since the General Assembly had not set any deadline for the production of the draft articles, but had only asked the Commission to study the question “as soon as possible”, the Commission should not proceed too hastily. Before beginning to draft a text, it should consider the observations of Member States; it should also discuss, in the working group, the points raised by Mr. Hambro.

47. Mr. USTOR said he must point out that paragraph 134 of the Commission’s report on the work of its twenty-third session stated that: “In considering its programme of work for 1972, however, the Commission reached the decision that, if the General Assembly requested it to do so, it would prepare at its 1972 session a set of draft articles on this important subject with a view to submitting such articles to the twenty-seventh session of the General Assembly”. That was a decision by the Commission and it would be very awkward if a contrary decision were taken at the present session.

48. Mr. SETTE CÂMARA said that the Commission’s decision to prepare a set of draft articles had been contingent on its being requested to do so by the General Assembly. What the General Assembly had requested it to do, however, was “to study as soon as possible”, in the light of the comments of Member States, the question with a view to preparing a set of draft articles for submission to the General Assembly at the earliest date which the Commission considers appropriate. The General Assembly had not set any deadline and it was not necessary for the Commission to complete the work at the present session.

49. Mr. AGO said that the Commission was not a political, but a technical body and it was for the General Assembly to decide on the utility of a convention. What the Commission had to do was to prepare, as quickly as it could, a technical draft—the best draft possible—so that the political bodies could take a decision with all the material before them.

50. Mr. USHAKOV said that the utility of preparing a set of draft articles was no longer open to discussion since the Commission had already decided to place the item on its agenda.

51. Mr. REUTER said he endorsed Mr. Ago’s remarks. Since the matter gave rise to wide differences of political opinion, it would be well to produce alternatives, without spending time on discussing the merits of each one of them.

52. Mr. SETTE CÂMARA said that the only question to be decided by the Commission was the degree of priority to be accorded to item 5.

53. Mr. BARTOS said that the question of the utility of a draft convention should not be discussed, since the item was already on the agenda. Nor was there any need to discuss its urgency, which had been recognized both by the majority of the Commission and by the General Assembly. Of course, the Commission was not called upon to give an opinion on the advisability of concluding a convention, but when presenting its technical legal opinion to the General Assembly as requested, it could not in good faith refrain from informing that political body of its views on the matter.

54. He himself was convinced that a convention would be useful. Since the Commission, at its twenty-third session, had recognized the importance and the urgency of the matter, it only remained to prepare the best possible text without delay. In doing so, it should draw on all other existing texts, such as the 1937 Convention for the Prevention and Punishment of Terrorism, in other words, on any precedent based on the notion of international responsibility and the need for international collaboration in that field, which were well brought out by the draft prepared by the Chairman.

55. Mr. NAGENDRA SINGH suggested that the Commission discuss the question first in plenary, then in the Working Group, and then once again in plenary. Since the General Assembly obviously regarded the matter as urgent, the Commission should produce something for its consideration; the General Assembly could then take whatever further steps it thought fit. In point of procedure, they would be following all the necessary stages traditional with the Commission, except that there would be no Special Rapporteur for the subject and two or three years would not be spent in submitting preliminary reports.

56. The CHAIRMAN, referring to the doubts expressed by Mr. Hambro about the utility of the proposed convention, said he would not like to think that there were no legal means which the Commission could devise for providing the necessary protection for diplomatic agents. He was convinced that there would be real value in such an attempt and that the Commission ought to do what it could to strengthen international law in that respect.

57. Sir Humphrey WALDOCK said that the work on item 5 at the present session would not, of course, be definitive. The Commission would merely produce a set of draft articles for the General Assembly, which the latter would comment on and return to the Commission for completion at its next session.

The meeting rose at 12.50 p.m.
1151st MEETING

Thursday, 4 May 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1; A/CN.4/L.182)

[Item 5 of the agenda]

(continued)

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

2. Mr. TAMMES said he shared the doubts expressed by other speakers as to whether it would be possible to prepare draft articles on crimes against protected persons at the present session with due reflection, despite the valuable preparatory work done by the Chairman. There were far too many issues of general international law involved in the topic for the Commission to have all the relevant material before it at the present stage and to carry out its work of progressive development of international law in the manner required by the provisions of article 16 of its Statute.

3. The first, and perhaps the most important issue, was that of the concept of a "political offence", which had survived all past attempts to narrow its scope. It had appeared in a number of conventions hastily formulated in the nineteenth and early twentieth centuries but now almost totally forgotten. It had reappeared in modern international instruments since the Second World War, in particular in the Universal Declaration of Human Rights. The Commission should therefore exercise the greatest caution before making even tentative suggestions to States as to what should be considered a political offence, or what offences should be excluded from the scope of that concept.

4. In the covering letter he had sent to members with his working paper (A/CN.4/L.182), the Chairman had recognized that very serious problems arose, in particular the need to reconcile the right of asylum with protection of the proper functioning of the international machinery, but had arrived at the conclusion that the latter consideration should prevail over the former.

5. Exactly the opposite conclusion, however, was embodied in the Convention to prevent and punish acts of terrorism signed at Washington on 2 February 1971 by the member States of the Organization of American States. Article 6 of that Convention read: "None of the provisions of this Convention shall be interpreted so as to impair the right of asylum".

6. He also noted that in the Chairman's draft articles it was in effect proposed to depart from the principle of the unilateral qualification of the State in whose territory the alleged offender was found. That principle, however, had been accepted unanimously in a resolution of the General Assembly and was embodied in many national laws, such as the Extradition Act of the Netherlands.

7. He had made those brief references to certain delicate questions not in a spirit of criticism, but only to stress that the subject-matter was much too complex for the Commission to undertake the preparation of merely tentative draft articles. It was true that the Commission had adopted that course for the topic of relations between States and international organizations, but the precedent was not a valid one because those relations were a relatively minor problem compared with the protection of diplomats and assimilated persons. Not only was the former topic of less importance in itself, but it did not involve the same volume of legal material.

8. He sympathized with the view that the draft was rather too narrow in its definition of the protected persons. In another sense, however, it was much too wide, in that article 3, paragraph 1 included Heads of State and other high-ranking persons within the scope of the phrase "person entitled to special protection under international law". In fact, those persons were in a different position from diplomatic agents and the other persons entitled to personal inviolability mentioned in paragraph 2 of the same article. A Head of State or other high-ranking persons would often be the end of a political offence, whereas the whole purpose of the draft was to prevent diplomatic agents and assimilated persons from being made the means of a political offence. He was not in favour of treating the two categories in the same way and thought that, on the contrary, an "attentat clause" would have helpful.

9. At the previous session, during the discussion on the Survey of International Law in connexion with the review of the Commission's long-term programme of work, he had recommended that the Commission consider resuming the study of a code of offences against mankind and extending the scope of its work to offences of international concern other than those against the peace and security of mankind as conceived in 1949. The present position was that various kinds of offence of international concern were being dealt with piecemeal, with all the undesirable consequences that followed. For example, such piecemeal treatment tended to deprive governments of their necessary freedom of action and ultimately had an effect which was the opposite of that intended.

2 A/CN.4/245.
10. Mr. CASTAÑEDA said he had the most serious misgivings about the proposed procedure. He could find no justification for departing from the Commission’s normal practice. There was no particular urgency in the matter; the General Assembly had simply requested the Commission to prepare draft articles “as soon as possible”. The Commission itself had stated in its 1971 report that it would prepare a set of draft articles at its 1972 session “if the General Assembly requested it to do so”. The fact was, however, that the General Assembly had not requested the Commission to prepare draft articles at the present session. By using the rather vague formula “as soon as possible” it had, if anything, indicated that the Commission was free to undertake that work at the present or at a later session.

11. In 1954 the General Assembly had specified that the draft articles on the law of the sea should be prepared for a particular session of the Assembly. In the case of the codification of the law on diplomatic relations, however, following a complaint by a particular State regarding the ill-treatment of certain of its diplomats, the General Assembly had requested the Commission to undertake the codification of the topic of diplomatic intercourse and immunities “as soon as it considers it possible”, and the articles had taken many years to complete.

12. While there was thus no valid argument for adopting emergency measures, there were many good reasons for adhering to the Commission’s normal methods of work, which had always produced good results. Those methods ensured that drafts were prepared after careful reflection and had good prospects of general acceptance by governments. In the very few cases, such as that of reservations to multilateral treaties, in which the Commission had prepared a draft at a single session, the result had been a failure. The reason was that those drafts had not been prepared with the necessary deliberation and consultation of governments.

13. There was another important reason for following the normal practice of appointing a special rapporteur responsible for submitting a report to the Commission to facilitate careful consideration of the topic: that was the highly political character of the topic, illustrated by the marked division of opinion in the General Assembly when it had been discussed. Further evidence of that political character was provided by the discussions in the Organization of American States, when certain countries, like Chile, had disputed the need for a treaty of the type proposed, on the grounds that national laws were sufficient for the prevention and punishment of the crimes in question.

14. The Commission had been careful hitherto to remain aloof from political controversies, a fact which partly explained the success of its work. He would urge the greatest caution before any departure was made from that wise practice.

15. The Chairman’s draft articles (A/CN.4/L.182) centred round the concept of an “international crime”, for which no satisfactory definition had yet been found. It would be difficult to build a set of draft articles on such uncertain ground.

16. Another intractable problem was that of the definition of a “political offence”, not to speak of the problem of the acts connected with a political offence. The difficulty of those problems had been demonstrated by the discussions in the Organization of American States on the Convention on the right of territorial asylum. It should be remembered, moreover, that the traditional view was that attacks against Heads of States were considered as political offences and hence as non-extraditable.

17. In the Chairman’s draft articles, it was proposed to make certain political offences expressly extraditable. A provision to that effect in an international instrument would constitute a departure from what was virtually a general principle of law; indeed, the law of a great many countries recognized the non-extraditable character of political offences. Certainly, the Commission could not recommend such a departure without first making a very thorough study of the question and canvassing the views of governments.

18. The provision of the 1971 OAS Convention to prevent and punish acts of terrorism, cited by Mr. Tammes, had been introduced on the proposal of the Mexican delegation, precisely in order to safeguard the right of territorial asylum. Respect for the right of territorial asylum was traditional in Latin America, but it concerned every State in the world. The problem was different from that of diplomatic asylum, in respect of which Latin American practice had its special features.

19. He wished to draw attention to another provision of the same OAS Convention, namely, article 3 which laid down that persons charged with or convicted of any of the crimes referred to in article 2 of the Convention should be subject to extradition under the provisions of the extradition treaties in force between the Parties. Since virtually all bilateral extradition treaties recognized that political offences were not extraditable, that provision had the effect of safeguarding the existing position.

20. In that connexion also, article 3 of the Chairman’s draft proposed a totally different rule. The same was true of article 11. In both cases, the Commission should be careful not to depart from the existing rules of international law without very careful study on the basis both of a report by a Special Rapporteur and of government comments on the preliminary articles emerging from the first stage of its work.

21. The Chairman had prepared a very useful working paper, but the Commission should adhere to its normal methods of work.

22. Mr. AGO said he was sorry that members were calling in question conclusions on which agreement seemed to have been reached, namely, that the matter was urgent and that, as it lay rather outside the usual scope of the Commission’s work, it called for a rather unusual procedure. At its previous session the Commission had itself decided that if the General Assembly
requested it to do so, it would prepare a set of draft articles on the subject at its 1972 session. The Assembly had responded positively, and its recommendation could not be interpreted otherwise than as an invitation to do precisely what the Commission had suggested doing. In any case, as Sir Humphrey Waldock had observed, the draft to be prepared would be merely a basis for discussion by the General Assembly, which would be entirely free to reject it, to transmit it to governments, or to ask the Commission to amend it on particular points.

23. Turning to the substance of the matter, he said that the very real problems involved were perhaps less complicated than had been made out. It was, moreover, typical that, with regard to the scope of the draft, those who were opposed to preparing a convention on the subject should adopt two conflicting positions: some held that even within the limits proposed such a convention would go too far, while others found that it would be too limited and wished to extend it to all cases of terrorism. He certainly appreciated the concern of the latter group, but he believed that there were special reasons for urgent action to protect diplomats, that term being understood in a broad sense.

24. Diplomats already enjoyed special protection in the State in which they resided; that was the whole tenor of the Conventions on diplomatic and consular relations. Thus, so far as the receiving State’s obligations were concerned, the existing instruments were perfectly adequate; but could it be said at the present time that the safety of diplomats concerned only the receiving State and the sending State? He did not think so. It must be remembered that the diplomatic function had assumed greater importance with the increase in the number of States and the intensification of international co-operation, which was needed above all by the new States. The world community thus had a common interest in the harmonious development of diplomatic relations, and it was only to be expected that, faced with the increasing number of acts of terrorism against diplomats, it should wish to take steps to provide them with more general protection than they had enjoyed hitherto.

25. Of course, there was no question of passing a political judgment on the movements which were working against the established régime in some countries; one could even sympathize with all those who were fighting for freedom. But that did not mean accepting the use, for internal political struggles, of methods which injured persons who had nothing to do with those struggles and which were detrimental to diplomatic relations all over the world.

26. Since it was in the interests of the international community to prevent the kidnapping of diplomats, inter-State solidarity must come into play; and that was why there were certain similarities—which were brought out in the draft articles submitted by the Chairman—between the measures for protecting diplomats and those for preventing certain activities such as piracy and the slave trade. In that connexion, while it was true that in the nineteenth century piracy, for example, had been called crimen juris gentium, he thought that that term should be avoided in the draft under consideration. The term “infraction internationale” (“international crime”), used in the French text, suggested at the present time the notion of an internationally wrongful act by a State, in other words a violation of international law at the inter-State level. But there was no wrongful act by a State if a diplomat was kidnapped on its territory without that State having failed to fulfil any of its obligations. Hence the acts dealt with in the draft belonged solely to internal criminal law, and there was nothing international about them except the concern they caused. It seemed that that idea would be well rendered in English by the expression “crime of international concern”.

27. The protection of diplomats took place at two levels, that of prevention and that of punishment; it was at those two levels that the receiving State’s obligations normally came into play. Hence international solidarity, too, should come into play at those two levels. As to prevention, the rule should be that a State must ensure that its territory was not used by movements to prepare operations which they could not prepare in the territory of the State where they would ultimately be carried out. As to punishment, it was necessary to prevent the guilty person from escaping punishment by taking refuge abroad. In that matter third States should be left free to choose between two solutions: either to define the acts in question as punishable offences in their internal criminal law and to punish them themselves, or to resort to extradition.

28. That was a thorny problem, for there could be no doubt that the acts in question were political offences. But that was precisely where the value of the proposed convention lay; it must affirm that the fact that the acts in question were political offences was no obstacle to extradition, and that that principle prevailed not only over the provisions of internal criminal law, but also over those of existing bilateral extradition treaties between States.

29. It was, of course, important not to overlook another aspect of the problem: that of safeguarding human rights and ensuring that the guarantees of impartial judicial proceedings were universally and fully observed. There could be no question of exceptional proceedings or of prolonged detention pending a trial which never took place. It was only necessary to guard against measures for remission of the penalty, pardon or amnesty, which would amount to circumventing the convention and making it meaningless.

30. He stressed the need for a text which could be widely accepted by the members of the international community; for if potential offenders knew that there were countries in which they would be assured of impunity or even welcomed as heroes, all the Commission’s work would have been useless, if not harmful.

31. He also thought it essential to provide in the convention for a procedure for the settlement of disputes; the idea of compulsory conciliation adopted in the Vienna Convention on the Law of Treaties might usefully be adopted again.

32. Mr. USTOR said that under present conditions States were compelled to broaden their co-operation and extend it to new fields, and to replace the traditional bilateral forms of co-operation by multilateral arrangements. That process appeared to be taking shape also in the field of criminal law, which States in the past had jealously regarded, and indeed still regarded, as falling within their sovereign and exclusive domain. The conclusion of an international convention concerning crimes against persons entitled to special protection under international law would meet a clearly felt need.

33. The inviolability of diplomatic agents and persons assimilated to them was one of the pillars of international law and an absolute necessity for the maintenance of peaceful relations between States. If that inviolability was placed in jeopardy, it was an absolute right of the international community and even an act of self-defence to devise ways and means of preserving such a basic institution.

34. The usefulness of a convention for that purpose would depend on many factors, the first being whether the Commission would be able to formulate rules which made good law. It would also depend on the political will of States to adopt a convention on that basis, on their willingness to ratify it in sufficient numbers, and on the implementation of its provisions by the parties in good faith. It was to be hoped that all those elements would be present.

35. The draft submitted by the Chairman (A/CN.4/L.182) was a very helpful document. It was largely based on the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, but there was a striking difference in the terminology used in the two texts. What was simply called an "offence" in the Hague Convention became an "international crime" in the Chairman's draft. It was open to question whether the adjective "international" was appropriate.

36. Article 7 of the draft, which corresponded to article 2 of the Hague Convention, called upon the contracting Parties to make the crimes described in article 1 punishable by severe penalties. Article 4 recognized the jurisdiction of the State in whose territory the crime was committed. The underlying idea of the draft was therefore that the Parties to the convention would bring the crime described in article 1 under their criminal law. The actual penalty to be applied and the criminal procedure to be followed would be governed by the internal law of the country concerned. It could therefore be argued that it would be advisable to follow the example of the 1970 Hague Convention and omit the adjective "international" before the word "crime".

37. There was another matter in which it was desirable to follow the precedent of the 1970 Hague Convention: the use of such controversial expressions as "political offence" should be avoided. Similarly, the problems of territorial and diplomatic asylum should be avoided, in the interest of achieving the necessary consensus and producing a convention that might prove generally acceptable.

38. Mr. YASSEEN said that the question referred to the Commission by the General Assembly appeared to be urgent because certain political groups seemed to have chosen attacks on diplomatic agents as a means of drawing international attention to the cause they advocated.

39. The preliminary draft articles submitted by the Chairman showed how thorny and controversial the topic the Commission was called upon to consider. The draft introduced two main concepts: that of an international crime and that of a political offence. An international crime seemed to mean, not a crime committed by a State, in other words a breach of international law, but a crime which, although committed by a private person or persons, constituted a grave danger for the international community, such as piracy or the slave trade.

40. Crimes of that kind came within "universal jurisdiction", which meant that persons committing them were tried in the country in which they were arrested. It was open to question whether there were good grounds for extending universal jurisdiction to crimes committed against diplomatic agents, but the Commission could not take any decision on that point until it knew what the international community thought about it. It would therefore have to wait until it had learned the views of States on the matter.

41. As to the political nature of such crimes, which was often undeniable, the question arose whether it did or did not place them in the class regarded as exceptions to the principle of extradition. There, again, the Commission could not decide without knowing the views of States.

42. In the contemporary world, ideological differences produced different attitudes regarding the reprehensible nature of certain acts; moreover, the problem which the Commission had to study touched on certain fundamental principles of the legal order of several States, such as the right of asylum. The Commission must therefore exercise the greatest discretion if its draft was to be generally acceptable.

43. The Commission was not bound to follow its usual method of work in all circumstances, and in the case in point it would be better to adopt a more flexible attitude in view of the urgency of the work requested of it. He was therefore in favour of making an exception, for once, to the practice of appointing a special rapporteur, and setting up a working group instead. There was every reason to believe that, with the help of the basic documents already before it, the Commission would be able to prepare some provisional general rules on the protection of diplomatic agents at its present session. Since the subject was so controversial it would be advisable, as Mr. Reuter had suggested at the previous meeting, to produce alternatives for submission to governments for comment; but in any event the Commission would have to review the draft at its next session in the light of the comments of governments and of the discussions on

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* See *International Legal Materials*, vol. X, number 1, January 1971, p. 133.
the subject in the Sixth Committee of the General Assembly.

44. Mr. REUTER said he thought that in referring the question under consideration to the Commission, the General Assembly had approached it as a body of experts, and it was in that capacity that the Commission should respond. But there could be no doubt that the General Assembly had been induced to act in that way because it was faced with a very serious political problem. The difficulty was that, although there were imperative reasons for action, certain States had extensive reservations, for various highly respectable reasons, some believing that a convention would be ineffective, others fearing that it would conflict with certain rules of their criminal law, and yet others, which had perhaps so far escaped the current affliction, being anxious to retain the greatest possible freedom of action. Nevertheless, the General Assembly had entrusted a task to the Commission in terms that brooked no discussion, so the Commission must complete that task without prejudging the results and seek a compromise solution acceptable to the greatest possible number of States.

45. Without going into detail, he would like to stress a few important points. First, the fundamental element of the draft articles, on which there could hardly be any compromise—what might be called the "hard core"—was an old principle of the law of international responsibility: "either punish or surrender". If that principle were infringed, the draft would lose its character of a legal instrument and become merely a pious declaration. It would be for States to decide, but the Commission, as a legal body, was bound to stress that point.

46. Once that principle was accepted, its application must be restricted to the categories of persons listed in the Chairman's draft. It should be clearly understood that the basis was not the international protection of human rights; for if it were, fighters in modern civil wars, whose methods it was desired to outlaw, would claim protection under the conventions on the laws of war on the same footing as regular combatants, and there was every reason to believe that governments would not agree to recognize as regular combatants the fighters of revolutionary movements, whatever their nature.

47. If it became involved in such dialectics, the Commission would only increase the political tensions underlying the draft, which would be doomed to failure. On the other hand, the bold, neutral concept going beyond international law, which should dominate the whole draft was that the category of persons to be protected was that which constituted the only human machinery capable of preserving peace; for war had become so terrible that it was no longer possible to allow such persons to be involved.

48. As few additions as possible should be made to the list of crimes in article 1 and it should be strictly limited to political crimes. There were some crimes which the article seemed to refer to, but which should probably not be covered by the draft, for instance, the abduction of a diplomat's child by gangsters or the murder, by a jealous husband, of a diplomat who had committed adultery. States should be asked to make a sacrifice for the sake of a great idea, and the Commission should not hesitate to say so.

49. Incidentally, he wondered whether it was really necessary to lay down that there should be no negative prescription. It could happen that the authors of crimes covered by the draft articles succeeded in their enterprise and came into power, so that what had been a crime became a great deed. In such cases, how would a third State be able to punish, by virtue of a rule of international law, an act which had become glorious?

50. Lastly, with regard to the safeguards to be granted to persons to be tried, the author of the draft, being unable to accept the notion of an international court, had opted for an impartial tribunal. He himself doubted whether there was such a thing as a truly impartial political tribunal. It would therefore be better to lay down specific rules on the rights of the defence and leave it at that. In any event, the only real obligation on which States would have to take a decision lay in the alternative "either punish or surrender".

51. Mr. TABIBI, after thanking the Chairman for his valuable working paper, said that members appeared to be in general agreement that the Commission should take some positive steps in pursuance of General Assembly resolution 2780 (XXVI). That resolution, however, as Mr. Sette Câmara had observed, was couched in flexible terms, particularly its request that the Commission study the question "as soon as possible, in the light of the comments of Member States", so that there was obviously no intention that item 5 should take priority over the other items on the Commission's agenda.

52. He himself agreed with Mr. Tammes and Mr. Carvalheda that the concept of an "international crime" was not entirely clear and seemed to overlap at many points with other traditional concepts of international law, such as extradition and the right of asylum. Hence the Commission should not take any hasty decision in the matter; any draft it might produce at the present session should be submitted to governments for their comments, thoroughly discussed in the Sixth Committee, and then returned to the Commission for final revision.

53. More preparatory work by the Secretariat would also seem to be indicated; in particular, a compilation of the decisions of national courts in cases involving offences against diplomats would be very useful.

54. The concept and definition of an "international crime" seemed to vary widely between jurists and between governments. What might be regarded as an international crime in some States might in others be considered an act of political necessity. In fact, the term so often had political connotations that the Commission should proceed very cautiously in regard to its use.

55. Among other things, the Commission might have to consider whether it was desirable or necessary to revive the idea of establishing an international criminal court to try offences against the peace and security of mankind. It should also be remembered that some of the provisions of the Vienna conventions on diplomatic and consular relations were being violated, even by States which had ratified those conventions.
56. The CHAIRMAN drew the attention of the Commission to a memorandum from the Executive Secretary of the Publications Board concerning the printing costs for volume I of the 1972 Yearbook of the International Law Commission and of volume II of the 1971 Yearbook. He suggested that the matter be referred to a group consisting of the officers of the Commission, the Special Rapporteurs and the former Chairmen of the Commission, and that the Secretariat prepare a paper showing printing costs for the documents to be published in volume II of the 1971 Yearbook.

It was so agreed.¹⁰

The meeting rose at 1.5 p.m.

¹⁰ See also 1157th meeting, paras. 43 et seq.

1152nd MEETING

Friday, 5 May 1972, at 10.25 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Tribute to the memory of the late Sir Kenneth Bailey

1. The CHAIRMAN said he regretted to have to announce the death of Sir Kenneth Bailey, the distinguished Australian jurist. He suggested that the Commission ask the Secretariat to send a telegram of condolence to Sir Kenneth’s family.

It was so agreed.

On the proposal of Mr. Tsuruoka, the members of the Commission observed a minute’s silence in tribute to the memory of Sir Kenneth Bailey.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 and 2 ; A/CN.4/L.182)

[Item 5 of the agenda]

(resumed from the previous meeting)

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

3. Mr. USHAKOV said that at its twenty-third session the Commission had unanimously decided to place item 5 on the agenda for its present session and had later decided, exceptionally, to break with its usual practice and set up a working group to prepare a set of draft articles. There was no deed, therefore, to revert to those two points.

4. The substance of the question was, strictly speaking, the indirect protection of diplomatic agents, since the rule of direct protection had existed in international law for centuries, and after having long been applied in customary law had now been formally laid down in the provisions of various instruments, such as article 29 of the 1961 Vienna Convention on Diplomatic Relations¹ and article 28, and paragraph (3) of the commentary thereto, of the draft articles on the representation of States in their relations with international organizations,² which the Commission had adopted at its twenty-third session. Those instruments laid down the principle of the host State’s obligation to take all appropriate steps to prevent any attack on the person of diplomatic agents or persons of similar status; so what the Commission was now called upon to provide was additional measures designed to help States perform that duty.

5. The draft articles should be based on the principle that there was an obligation to prosecute and punish the perpetrators of crimes committed against diplomatic agents. They should accordingly provide, first, for the obligation of the State on whose territory the crime was committed to prosecute its authors and punish the crime with the penalties applicable under ordinary law; secondly, for exterritorial jurisdiction or, in its default, extradition; thirdly, for mutual assistance between States in preventing such crimes; and fourthly, for the exchange of information on plots, conspiracies and the like. Such steps might perhaps, as some feared, give rise to political difficulties, but, in the case in point, it was the common interest that should prevail.

6. With regard to the method of work, the Commission had undertaken at its last session to prepare a set of draft articles at its 1972 session if the General Assembly requested it to do so, and it must honour that undertaking. It had been right in deciding to depart from its usual practice by entrusting the drafting of the articles to a working group, for that would enable it to proceed with its other work at the same time. To enquire what would become of a draft which did not yet exist was premature. It would be time to consider the best procedure to follow when the draft had been completed. In any case, that was a matter for the General Assembly to decide.

7. The text submitted by the Chairman (A/CN.4/L.182) offered a sound basis for the Working Group to start on.

8. Mr. BARTOŠ said that from time to time the course of international relations was disturbed by outbreaks of terrorism, which claimed as its victims—sometimes with the connivance of governments, as had been alleged, for example, in the case of the disturbances in China caused by the Boxer Rebellion—the agents responsible for conducting international relations and protecting the interests of the international community. The State
was then held to be responsible for the maintenance of order.

9. A distinction should be made between the state of insecurity created by terrorism and that resulting from civil war; in the latter case, the State was under an obligation to protect embassies and their staff, who might be exposed to attacks by the party opposed to the politics of the country they represented, as had been the case in Spain. The existing conventions made no provision for protection against acts of terrorism, for the simple reason that the phenomenon had been unknown when they were drawn up. That gap must be filled, not only to ensure good relations between States, but also for humanitarian reasons. The Chairman was therefore to be commended for his initiative in the matter.

10. While it was right to lay down as a principle that it was the duty of all States to take appropriate steps to ensure the safety of diplomatic agents and persons assimilated to them, it should also be provided that persons enjoying such protection had, on their side, a duty to adopt an attitude of complete neutrality and do nothing that might give the impression that they were taking one side or the other, as had sometimes happened, particularly in Latin American countries.

11. With regard to the Chairman's draft, he would not dwell on article 1 or article 3, which were non-controversial and only needed detailed examination by the Working Group, perhaps with the help of written comments by members of the Commission.

12. Article 2, on the other hand, which provided that an international crime described in article 1 should not be considered as a political offence, called for some thought. It would not be the first time that certain crimes, described as political or military, had been turned into international crimes called crimes against humanity or crimes against the international community. But it was open to question whether that should be done in the present case. The draft would make it a crime even to propagate political ideas or support political movements. It would be better to follow the 1937 Convention for the prevention and punishment of terrorism. The offences in question should be classed as crimes against humanity, but defined with the utmost caution.

13. With regard to collaboration between States in the form of the exchange of information for the purpose of combating movements regarded as subversive—an idea which was not new, as the example of the Holy Alliance showed—it would be dangerous to impose too strict an obligation on States, since that might be incompatible with national sovereignty, especially in the case of national liberation movements. The Working Group should also consider very carefully the questions of territorial and diplomatic asylum.

14. In order not to depart from the practice of asking for the observations of governments on the draft articles prepared by the Commission before they were submitted to the General Assembly, he proposed that a draft be completed as quickly as possible and sent to governments even before the end of the session.

15. Mr. THIAM said he would not speak on the substance of the question, since he was a member of the Working Group and would be able to do so there.

16. With regard to procedure to be followed, although measures to protect diplomatic agents, or rather the international community, were urgently needed, it was just as important that governments should not be deprived of their right to make comments, especially on the most controversial points, such as the definition of an international crime, the classes of persons to be protected and jurisdiction. The Commission's goodwill would not suffice to guarantee the success of the undertaking; the observations of governments were essential. He therefore agreed with Mr. Bartoš that the necessary steps should be taken to ascertain the opinion of governments even before the end of the session. Alternatively, the work produced by the Commission should be treated as a preliminary draft for submission to governments and the General Assembly should be informed that, in the absence of their observations, the Commission had not been able to prepare a final draft.

17. Mr. ALCÍVAR said that the General Assembly had had before it a problem that was wholly political in character, namely, that of a world in ferment trying to bring about changes in the social structure. The means used to achieve that end were many and varied. Since they had included a number of cases of kidnapping of diplomats, the General Assembly had referred the problem of the protection of diplomats and assimilated persons to the Commission as a body of legal experts.

18. One of the difficulties which arose was that of deciding whether such acts should be called "international crimes". On that point, he fully agreed with Mr. Ago that international crimes could only be imputed to States and organs of States; aggression was a typical example. The kidnapping of diplomats was an offence under municipal law and the application of the term "international crime" to it was inappropriate. A more suitable expression, "crimes of international significance", had been used in the OAS Convention of 2 February 1971.\(^4\)

19. Another major technical difficulty was how to distinguish between political crimes and ordinary crimes; that was of the unsolved problems of criminal law. In the General Assembly, the discussions had centred partly on an effort to promote international co-operation for the punishment of certain offences of international concern, and he had felt some misgivings that a sort of Holy Alliance approach might be emerging. The question was now in the hands of technical experts, however, and for the time being he was reassured.

20. The problem which had to be faced was that of the existence of terrorism, which as the name implied, was the commission of acts calculated to induce terror. Such acts were committed not only by members of revolutionary movements, but also by governments. The same was true of violations of human rights, with the aggravating circumstance, in the case of governments, that it was mainly their responsibility to ensure the protection of those rights.

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21. That being said, he wished to express his concern that persons committing acts of terrorism should be given a trial which would guarantee them the legal protection due to any person accused of a criminal offence.

22. It had been rightly maintained that, at the time when the Vienna Conventions of 1961 and 1963 on diplomatic and consular relations had been concluded, the present problem had not yet arisen. Nevertheless, those Conventions and similar instruments made it perfectly clear that every State had an unqualified obligation to protect the life and property of diplomatic agents on its territory. Under no circumstances could a State shirk that obligation and in fact States did do everything in their power to fulfil it.

23. Cases did occur, of course, in which, despite all the efforts of the State, a diplomatic agent was kidnapped; it was then the duty of the State to protect his life at any price. Unfortunately, there had been recent examples of governments refusing to negotiate with the kidnapping terrorists and in some cases the outcome had been tragic. He believed that a case of that sort gave rise to responsibility of the State if its government had failed to take every possible step to protect the diplomatic agent.

24. In his own country, the Minister for Foreign Affairs had made it clear that he considered it an inescapable obligation of the Government to protect all diplomatic agents accredited to it, and that the Government would be prepared to pay any price, and take any steps, to save the life of any one of them. In fact, that policy applied even to the diplomatic agents of a country which had specifically notified Ecuador that it did not wish its diplomatic agents to be given abnormal protection.

25. As to the draft articles, he thought a provision should be included to the effect that the State of asylum had the right of unilateral qualification with regard to the alleged offence. That safeguard was absolutely essential if the right of asylum, so important to Latin American countries, was to be maintained.

26. Similarly, with regard to extradition, it was necessary to specify that it would be for the requested State to determine whether the offence was extraditable or not.

27. As to the procedure to be followed in dealing with item 5, he had accepted the idea of setting up the Working Group with some reluctance, since he would have preferred the draft to be prepared by a Special Rapporteur. He still thought that certain traditional procedures of the Commission ought to be observed. The most important was that the draft articles resulting from the present work should have only a preliminary character. They should be submitted to governments, and only after government comments had been received, either in writing or in oral statements in the Sixth Committee of the General Assembly, would the Committee be in a position to prepare the final text.

28. Mr. ROSSIDES said that the question of urgency or priority had already been decided by the very fact the Commission had agreed to set up the Working Group to prepare a draft in the light of the general discussion in the Commission.

29. Nevertheless, since the question had again been raised, he wished to draw attention to the terms of Section III, paragraph 2 of General Assembly resolution 2780 (XXVI). The General Assembly had therein requested the Commission “to study as soon as possible, in the light of the comments of Member States, the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, with a view to preparing a set of draft articles…”6. That request had to be read in the context of the Commission’s own decision at the previous session, expressing its willingness to “prepare at its 1972 session a set of draft articles on this important subject with a view to submitting such articles to the twenty-seventh session of the General Assembly”. Moreover, the sixth paragraph of the preamble to General Assembly resolution 2780 (XXVI) stressed the urgency of the problem of the protection of diplomatic agents and the importance of dealing with the subject. It was significant that that subject was the only one regarding which any reference to urgency was made in the resolution.

30. That being so, the item should be given due priority, though the Commission could, of course, subsequently decide, in the light of its discussion, that it needed more time to deal with the topic.

31. Before making a few brief comments on the substance, he wished to mention that, prior to the Commission being seized of the question of the protection of diplomats, he had been personally concerned with that question. On 2 April 1971, he had written to the editor of the New York Times a letter which had appeared in the 19 April 1971 issue of that newspaper. In that letter, he had called for international action against political kidnapping, pointing out that the victims had mainly been diplomats in capitals where they were accredited. He had pointed to the sad irony of diplomats becoming the main victims of that new form of political crime, since the development of organized international society over the ages had clearly demonstrated that diplomats must be assured of the privileges of safety from arrest and security of life if they were to perform their duties, which were of vital importance to the progress of international relations. The rapidly expanding body of technical assistance experts, who were emissaries of goodwill and humanity, had also become easy targets for those crimes. He had concluded his letter by stating that, at the twenty-sixth session of the General Assembly, steps must be taken to deal with kidnapping on an international level, and had urged that such acts should be branded as international crimes and a totally inappropriate means of seeking the redress of grievances, real or imagined.

32. As Chairman of the Sixth Committee of the General Assembly at its twenty-sixth session, he had taken an active part in securing the almost unanimous adoption of the draft which had become General Assembly resolu-

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involved. The Commission, in his opinion, was bound to if the Commission should fail to deal with that item merely because political as well as legal considerations were meal approach might disrupt its long-range programme. to be careful about departing from its normal method before they were considered by the General Assembly. agreeable to their being submitted to governments even to be regarded as exceptions which were justified by the legal point of view, the offences under discussion should totally unwarranted methods used by the offenders, could sometimes be idealists and sometimes common criminals. In that complex situation, the efforts of the international community should be directed towards ensuring that peaceful methods were employed to bring about political changes.

34. Another grave problem was that of the right of asylum for political offenders. The world was experiencing rapid changes which called for a new approach to problems and even to values. It was no longer possible to solve problems in the same way as before the nuclear and space age. Technological progress was having its effect in all fields. In the matter of political change, it was true to say that ordinary revolutions in the traditional sense were no longer possible, because of the powerful weapons in the hands of those in authority. Consequently, persons wishing to bring about political changes had in many instances fallen back on terrorism. But terrorists could sometimes be idealists and sometimes common criminals. In that complex situation, the efforts of the international community should be directed towards ensuring that peaceful methods were employed to bring about political changes.

35. The Commission was under instructions from the General Assembly to draw up a set of draft articles on the protection of diplomatic agents and persons assimilated to them, and the existence of the right of asylum was not a valid reason for not undertaking that task. From the legal point of view, the offences under discussion should be regarded as exceptions which were justified by the totally unwarranted methods used by the offenders, whose targets were diplomats having no connexion whatsoever with their real or imagined grievances. The admission of such exceptions would not detract from the general right of asylum in any way.

36. He would urge that the Working Group proceed with great caution, because of the political aspects of the problem; every care should be taken to ensure that the draft articles it produced were generally acceptable.

37. He hoped that the Commission would be able to complete its work on a set of preliminary draft articles at the present session. Personally, he would be quite agreeable to their being submitted to governments even before they were considered by the General Assembly.

38. Mr. QUENTIN-BAXTER said he could understand that the Commission, in dealing with item 5, would have to be careful about departing from its normal method of work, since there was always the risk that a piece-meal approach might disrupt its long-range programme. In his opinion, however, it would be most unfortunate if the Commission should fail to deal with that item merely because political as well as legal considerations were involved. The Commission, in his opinion, was bound to place the most favourable construction on the mandate given to it by the General Assembly.

39. Some members had expressed misgivings over the use of the term "international crime"; and admittedly the concept of delicta juris gentium had had a twilight existence in international law for a century. There were, however, clear precedents, going back to the conventions for the suppression of the slave trade, for States to agree upon the establishment of a universal jurisdiction to deal with offences which threatened international order. This was the essence of the matter now put to the Commission. Moreover, it might be timely to give some thought to the implications of extending the present areas of universal jurisdiction; for, with increasing international interest in such topics as the human environment, there were likely to be other demands for such extensions.

40. As other speakers had emphasized, it was the practice of States not to allow their laws to be used to uphold their internal order of other States. He agreed with Mr. Castañeda that the principle of asylum for political crimes committed abroad was of fundamental importance and must not be weakened. Nevertheless, diplomats, by the very nature of their calling, had no role to play in the internal politics of the countries in which they served; and there could therefore be no excuse for criminally misusing diplomats in pursuit of local political aims.

41. From the earliest times, States had recognized a common interest in upholding the sacred character of the herald of diplomatic agent. A convention limited to the protection of that common interest could not infringe the principle of asylum, and would, in its aims, be strictly comparable with other treaties—such as the Convention on unlawful seizure of aircraft—which established a universal jurisdiction to protect a common international interest. On the other hand, it had to be acknowledged that most of those other treaties dealt with offences of an essentially trans-national character; that was to say, the offenders, were seldom to be found within the jurisdiction of the country with which the offence was most closely associated. In the case of offences committed against diplomats, the offender would ordinarily be found and brought to trial within the country in which the offence had taken place.

42. This last consideration pointed to the real difficulty in elaborating a text which States would be ready to accept. The extent of any obligation to make changes in jurisdictional principles, or in rules governing extradition, would have to be justified by the prospects of practical usefulness. He would therefore urge the Commission to draft the convention in terms which, while strengthening international co-operation to repress such crimes, also took account of the sensitivities of States in matters affecting criminal jurisdiction and extradition laws.

43. As to the procedural aspects of the matter, he noted that article 17 of the Commission's Statute seemed to contemplate such a case as the present one. It might meet the requirements of that article, and the terms of the General Assembly's request if the Commission should decide that its report to the General Assembly on the subject under consideration should also be referred to governments for comment.

The meeting rose at 1.10 p.m.
1153rd MEETING
Monday, 8 May 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 and 2; A/CN.4/L.182)

[Item 5 of the agenda]

(continued)

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

2. Sir Humphrey WALDOCK said he largely agreed with Mr. Ago that there was a practical justification for dealing with the protection of diplomats as opposed to other persons who might be the victims of terrorism, because diplomats were acting in the general interests of international relations and were in a special position in which they were unable to defend themselves.

3. The question, therefore, was not merely one of the protection of human rights in general, but rather of diplomatic law; what the Commission had to decide was whether it was really possible to do anything practical and useful by way of a convention for the protection of diplomatic agents. It was clear that such a convention would be useless unless it was accepted by a large number of States and could pass the scrutiny of their Ministers of Justice and other civil authorities who dealt with criminal matters.

4. With regard to the persons to be covered by the convention, the Chairman’s draft (A/CN.4/L.182) contemplated a wide range, including Heads of State and public officials of cabinet rank. The inclusion of such persons had been criticized, but he himself considered it logical, since today Heads of State and foreign ministers frequently travelled about the world and did much of the work which had formerly been done by diplomats. The Working Group would, however, have to consider whether and to what extent the convention should include members of special missions and representatives to international organizations.

5. With regard to the criminal acts which the convention should cover and their definition, Mr. Reuter had drawn attention to certain hypothetical cases which the Commission might not wish to cover, but which seemed to fall within the provisions of the Chairman’s draft, such as the kidnapping of a diplomat’s child from motives of pure financial gain, or the murder of a diplomat by a jealous husband. The Chairman’s draft was, indeed, sufficiently broad to cover almost any criminal offence which might be committed against the person of a diplomat, even including manslaughter as a result of gross negligence when driving a car. The Working Group would also have to consider the question of mens rea and whether it would be necessary to prove that the offender was aware that his victim possessed diplomatic status.

6. He agreed that it would be undesirable to use the term “international crime”, since States might well hesitate to accept such a general idea, the full implications of which it was impossible to foresee. He would prefer, therefore, some such expression as “crime of international concern”, or even the word “crime by itself, followed by a list of the acts to which it referred.

7. On the general question of jurisdiction, the text produced by the Chairman seemed largely appropriate, although in connexion with one or two particular points he would prefer the Working Group to draw inspiration from the Hague Convention for the suppression of unlawful seizure of aircraft, especially with respect to the discretion to be left to prosecuting authorities as to whether they should grant extradition or prosecute the offenders themselves. Some flexibility of action in that regard was necessary, since the problems of protection were more of a practical than of a legal nature. The convention should be strict, but on the other hand it should not be cast in such absolute terms as to make it too difficult to provide the protection aimed at.

8. Mr. NAGENDRA SINGH said the Chairman was to be congratulated on having produced a draft single-handed on such a controversial and complex subject. The draft was by no means perfect, but it furnished a basis for discussion. He was prepared to go further and say that it could furnish the foundation for a codification exercise. However, it needed several amendments. In regard to the guide lines for the Working Group, he had several observations to make.

9. First, the Working Group should do its utmost to satisfy the fears and apprehensions of the Latin American members of the Commission. In no circumstances should the time-honoured institution of political asylum be interfered with. He agreed with Mr. Castañeda that it was a key institution in the political life of the Latin American States and the Working Group must find an appropriate formula which would maintain it.

10. As far as he could see, article 2 of the Chairman’s draft did not come in conflict with the institution of asylum. In that connexion he drew attention to the provisions of article 6 of the draft submitted by Uruguay to the Sixth Committee of the General Assembly in 1971. It should be possible for the Working Group to adopt the Uruguayan principle embodied in that article which read as follows: “Nothing in this Convention shall be deemed to impair the right of asylum in so far as it relates to those States which recognize it as an institution under international law”. Article 2 of the Chairman’s draft, which spoke of a political offence, was not inconsistent

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with that principle either. Asylum was granted under the ancient laws of India to a person who had not committed any offence except that he had earned the "wrath of the sovereign". Thus when India had granted asylum to the Dalai Lama of Tibet, Mr. Nehru, the Prime Minister, had taken great pains to ascertain whether the Dalai Lama had committed any offence under Indian law, such as murder or theft. After satisfying himself that the Dalai Lama had not committed any legal offence, Mr. Nehru had granted him asylum in accordance with the ancient laws of Manu.

11. He agreed with Mr. Castañeda that the subject under consideration was not suitable for treatment by an experimental method, namely, the short-cut method of dispensing with a special rapporteur. That novel, radical method might be tried for making rapid progress in codification, but the subject of the protection of diplomats, because of its controversial character, should be treated in the traditional fashion. However, the Commission had taken the plunge by adopting the short-cut method and it must therefore face the difficulties and carry on, rather than give up the project.

12. The second observation he had to make related to the presentation of as many alternatives as possible. The intention behind the formulation of any convention was to make it widely acceptable, for therein lay its utility. For the particular subject under study, it was necessary to adopt as broad an approach as possible and to present as many alternatives as possible, both to the Commission and later to the General Assembly when the draft was ultimately put into final form.

13. His third observation was that the closest possible study should be made of all relevant and connected conventions, in particular, the Hague Convention for the suppression of unlawful seizure of aircraft. There were other conventions too which the Working Group should examine closely, such as the Convention of the Organization of African Unity, and it should study the efforts made by the Inter-American Juridical Committee in that field. However, the closest parallel was with the Convention for the suppression of unlawful seizure of aircraft, of 16 December 1970. In that regard he believed that the principle of stare decisis, or precedent law, had a great role to play, not only in the adjudicatory processes where the common law principle was effectively enshrined, but also in the field of legislative measures involving codification. For example, although article 2 of the 1970 Hague Convention was very vague in prescribing "severe penalties" for offences punishable under the Convention, he was prepared to consider that formulation because of the precedent it had established. In the circumstances, article 7 of the Chairman's draft, which closely followed the wording of the article 2 of the Hague Convention was acceptable to him despite its vagueness "severe penalties" could be interpreted as 10 years' rigorous imprisonment or a death sentence or even 5 years' rigorous imprisonment—and he thought the Working Group should accept it.

14. It was certainly necessary to obtain comments from governments, but it took time and he thought a time-limit might be considered. In any case, there was a certain element of repetition involved: first the Commission consulted governments during the formulation of the draft articles; then the Sixth Committee invited governments to comment on the Commission's draft; then there was a third opportunity for governments to advance their views during the plenipotentiary conference. The Commission would therefore be wise to consider a time-limit of six months or less, and if comments were not received from all governments, not to wait for them indefinitely.

15. He agreed that the term "international crime" should be replaced by the word "crime" or possibly "heinous crime".

16. Lastly, the Working Group should consider the case of a Head of State who was assassinated in his own territory by a foreign national who subsequently escaped from that territory.

17. Mr. Bilge said that at a previous meeting he had suggested providing for an accelerated procedure in article 10 of the draft. He had made that suggestion because the Turkish courts had hitherto applied the normal procedure to the crimes covered by the draft articles. In the meantime, he had noticed that the International Covenant on civil and political rights used two forms of wording which expressed the same idea, namely, the right to trial "within a reasonable time", in article 9, paragraph 3 and "without undue delay", in article 14, paragraph 3 (c). The Working Group might take them as a basis and amend article 13 of the draft accordingly, rather than article 10. It might also introduce the notion of an independent tribunal, which was to be found in article 14 of the Covenant.

18. Mr. Hambro said that, after listening to the numerous speakers, he had decided to abstain from making any statement in the general debate. He would reserve his comments for the Working Group and, at a later stage, for the Commission itself.

19. Mr. Castañeda said he wished to state once more that he had the most serious reservations concerning the procedure which the Commission had adopted for dealing with item 5. Although the matter was urgent and important, he saw no reason why the Commission should depart from the traditional procedure which it had followed for the past twenty-two years and which offered the best possible guarantee for serious and constructive work. The topic had political and even ideological connotations; it simply did not lend itself to such brief and summary treatment, and he did not think that a draft convention produced under such circumstances would be supported by many States in the General Assembly.

20. While fully respecting the Chairman's motives, he considered his draft a dangerous one, since, by providing for automatic extradition for acts which had always been considered to be of a political nature, it would destroy the traditional institution of political asylum. As Mr. Reuter had observed, the question of asylum constituted the "hard core" of the draft, and if that element was removed from it, nothing would be left.

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3 See 1150th meeting, para. 31.
4 General Assembly resolution 2200 (XXI) section A, annex.
21. Mr. Usto had said that the essential rule was that laid down in article 7, whereby each Party would undertake to make the international crimes described in article 1 punishable by severe penalties; surely, however, such an undertaking related to a national measure and all that was needed was an international recommendation to the same effect. The draft convention was even more restrictive of national sovereignty than the OAS Convention, which had gone as far in that direction as most Latin American States could accept.

22. Lastly, he thought the Commission’s appointment of the Working Group had been premature and precipitate, since a much longer procedure of study and consultation was obviously called for. However, if the Working Group was to function at all, it should not attempt to draft articles immediately, but should draw up a questionnaire for submission to governments concerning the points of international law involved. When the replies of governments had been received, the Commission could proceed on a much more solid foundation and produce a more viable draft.

23. Mr. SETTE CÂMARA said he fully shared the reservations expressed by Mr. Castañeda about the Commission’s method of work and agreed with him that the Working Group should not begin by drawing up articles on the basis of the Chairman’s draft, but should discuss the topic in broad terms and attempt to isolate and define the most important problems. It had been with that procedure in mind that he had agreed to participate in the Working Group and if it adopted any other approach he feared that he could be of little help to it and would have to ask to be relieved of his responsibilities.

24. Mr. AGO said that draft articles such as it was intended to prepare did not deserve to be called reactionary, since no one was thinking of impairing the right of political asylum in general or reducing the chances of those who might benefit by it. Nor was anyone thinking of any general impairment of the principle of non-extradition of persons who had committed political offences. He was in favour of political asylum, but the purpose of the future convention was to prevent certain political movements from resorting to means unworthy of their aims and thus seriously endangering relations between States. In the last resort, it was the interest of the international community that should prevail.

25. Mr. USHAKOV emphasized the slowness of the Commission’s usual procedure of appointing a special rapporteur. That procedure was to be recommended only in normal circumstances. In the present case, the Commission had decided to give the General Assembly an undertaking that it would prepare a set of articles at its current session. That decision had been unanimous and the Commission was bound to give effect to it.

26. In making their comments on the draft articles submitted by the Chairman, some members seemed to have lost sight of its purely personal character. It was merely a basis for discussion, which the Working Group might or might not take as a model.

27. He hoped the Secretariat would prepare unofficial summaries of the Commission’s discussions, which, together with the observations of governments and the documentation circulated by the Secretariat, would enable the Working Group to start work at once.

28. Mr. SETTE CÂMARA said that there had been no discussion on the problem of the protection of diplomatic agents at the Commission’s previous session. It was precisely for that reason that paragraph 134 of the Commission’s 1971 report to the General Assembly had been carefully drafted in very general terms. Nor should it be forgotten that the Commission, as now constituted, was newly elected. Hence no obligation to prepare a set of draft articles at the current session could be said to exist. Moreover, the General Assembly had not requested the Commission to draft such articles forthwith, but merely “as soon as possible”.

29. Mr. TABIBI said he agreed that there was probably no obligation to complete a draft convention at the current session, but that did not mean that eight years should be allowed to elapse. It was true that the views of Member States would first have to be ascertained. Perhaps the Working Group should prepare a series of questions, as proposed by Mr. Castañeda, which could be sent to the Secretary-General for transmission to Member States.

30. Sir Humphrey WALDOCK said he thought that to circulate a questionnaire to governments was not a good idea. Some governments would not reply, because on a question such as the protection of diplomats they would want to see a text on which they could comment. The best course would be for the Working Group to produce a text, perhaps with a number of alternatives, as suggested by Mr. Reuter. Such a document could be very usefully discussed in the Working Group and in the Commission. If the Commission failed to produce a set of draft articles, it would disappoint governments.

31. The CHAIRMAN said he had felt it desirable to prepare a draft, if only to direct attention to the difficulties, and he certainly appeared to have succeeded in that object. He had by no means expected the Commission to approve his document as it stood.

32. Mr. NAGENDRA SINGH said he thought it was imperative that the Commission’s procedure should be approved throughout by its Latin American members, and the views expressed by Mr. Castañeda and Mr. Sette Câmara should certainly be respected. The Working Group should consider all the aspects of the matter and report to the Commission on what was possible. It should be left to the Working Group to use the Chairman’s draft as it saw fit. The Group would of course take note of all the points that had been raised in the discussion and then make its recommendations; it need not be given any directions.

33. Mr. ROSSIDES said that, on the question of procedure, it should be remembered that the General

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...Assembly had had before it the report of the Sixth Committee, which was very explicit and referred to the Commission's report. The General Assembly had admittedly left the Commission some latitude, but it had described the item as a matter of urgency and events were also making the protection of diplomatic agents a pressing matter.

34. He could not agree that the Commission was relieved of all responsibility to act on its own proposal merely because its membership had changed; the Commission was a continuing body. The articles need not necessarily be completed at the current session, but their preparation must not be allowed to take eight years.

35. Sir Humphrey Waldock's suggestion that a draft be circulated among Member States should, if adopted, meet Mr. Castañeda's wishes, since it would enable governments to express their views.

36. As to the substance, Mr. Castañeda's fears that the right of asylum might be endangered were real, but perhaps exaggerated. It was not only the right of asylum that should be protected, but also diplomatic agents who were entirely unconnected with the political struggle that had engendered the violence against them. Perhaps the Working Group could draft a text which would afford extra protection—going beyond the protection given to diplomatic agents under the existing conventions—only to such "innocent" diplomatic agents.

37. Mr. Tsuruoka said that at its previous session the Commission had taken its decision on the topic under consideration only after he himself, as Chairman at the time, had asked each member for his opinion, and the General Assembly had reached its decision only after long discussion. If the Assembly had not addressed the Commission in direct terms, that was because it had considered that it should not give the Commission orders, but its intention was plain enough: it wished the Commission to study the question as quickly as possible and take concrete steps, if possible at the present session.

38. Speaking as Chairman designate of the Working Group and after consulting its members, he could assure the Commission that the Working Group regarded itself as the instrument of the Commission, that it would bear in mind the discussions at plenary meetings, that it would try faithfully to interpret all the views expressed in the International Law Commission and in the Sixth Committee and that it would take into account the observations of Member States and endeavour, in accordance with the Commission's sound tradition, to reconcile differing opinions on controversial points. On that basis it would prepare preliminary draft articles, which would be submitted to the Commission and to governments for their observations and put into more final form at the Commission's next session. The Group would base its work on a summary of the essential points in the discussions which had taken place in the Commission and on the working papers before the Commission, namely, the draft articles submitted by the Chairman, the draft submitted by Uruguay in the Sixth Committee and the drafts which Denmark and Italy had announced that they intended to submit.

39. The CHAIRMAN said he might add to Mr. Tsuruoka's statement that the delay in discussing the question of the protection of diplomats had not been due to any reluctance on the part of the Commission to tackle it at the previous session, but to the fact that the Commission had understood that the Italian Government was considering convening an international conference on the subject.

40. Mr. Alcivár said he had not objected to the adoption of a method of work which departed from the Commission's usual procedure; the reason for that departure was the time factor. Diplomatic agents were constantly exposed to serious danger, which was now all the greater because many governments were unable or unwilling to negotiate with revolutionary groups.

41. He was not opposed to the establishment of the Working Group, but would request that, having noted the views expressed in the Commission, it should submit a list of points to the Commission as a basis for further action, so that the Commission could lay down specific term of reference for the Group before it began to draft articles. That procedure might reconcile the different views expressed in the Commission. Any over-hasty procedure would not produce quick results, and might only lead to embarrassment.

42. Mr. Castañeda said that when the Commission had drafted paragraph 134 of its 1971 report to the General Assembly, it had not been aware of all the complex aspects of the question. Moreover, when the General Assembly had asked for the preparation of draft articles "as soon as possible", it had had in mind precisely the opposite of what several members ascribed to it. On similar occasions in the past, when the Assembly had wished certain texts to be prepared for a particular session it had said so expressly; the use of the words "as soon as possible" meant that greater latitude was allowed.

43. At the previous meeting Mr. Ushakov had described the Chairman's draft as a document which the Working Group could take as a basis, but now he was calling it a purely personal product. That was a contradiction.

44. Sir Humphrey Waldock was right in saying that governments preferred a specific text to a questionnaire as a vehicle for expressing their views. It was precisely for that reason that the Commission was in the habit of asking a Special Rapporteur to submit a report. No such report existed as yet. If the Commission followed its usual procedure, a text would emerge in due course.

45. As he had emphasized earlier, the Working Group should not draft any articles at the current session. On the other hand, it could draw up a few specific questions for consideration by the Commission, which might include: the question whether the concept of an international crime should be used or not; the definition of a political crime; the obligation to extradite persons committing such crimes and the consequences of that obligation for the right of asylum. It was desirable that the most appropriate procedure should be devised for...
consultation between the Working Group, the Commission and Member Governments.

46. Mr. USHAKOV said he regarded all the working papers as of equal value and it was only by an oversight that he had omitted to mention the draft submitted by Uruguay.

47. The CHAIRMAN said he thought that the Working Group would inevitably report back to the Commission for guidance, though in view of the Commission's timetable, he was not certain whether it would be possible for it to report its general conclusions to the Commission and receive further instructions if draft articles were to be reproduced during the current session.

48. Without pronouncing on the different procedural ideas which had been advanced, he thought that the General Assembly had certainly desired the Commission to go ahead with all speed. Perhaps the Secretariat could prepare a working paper reproducing articles of the 1971 OAS Convention to prevent and punish acts of terrorism, the 1970 ICAO Convention for the suppression of unlawful seizure of aircraft, and his own draft, side by side.

49. Mr. TSURUOKA said he thought that the proposals put forward by Uruguay, Denmark and Italy for the protection of diplomats should also be considered.

50. Mr. TAMMES suggested that the Working Group might also study the Convention governing the specific aspects of refugee problems in Africa, adopted by the Organization of African Unity in September 1969. The approach of that Convention to the problem of political refugees differed completely from the approach adopted in the Chairman's draft.

51. Mr. USHAKOV said that the Working Group was free to make use of any document it considered useful.

52. Mr. AGO said that the Commission should not consider itself bound by any draft. The documents before it might help the Working Group, but to give it formal terms of reference would impair its efficiency. Its first task would be to determine what should be included in the draft articles, in what order and for what reasons.

53. Mr. BARTOS said that the Working Group should consider not only the problems dealt with in the working papers before the Commission, but also the ideas connected with them, and was free to take up any point it thought useful for the accomplishment of its task.

54. Mr. CASTAÑEZA asked whether any formal decision had been taken on the Working Group's terms of reference.

55. The CHAIRMAN replied that it was his understanding that the Working Group had been instructed to produce a set of draft articles in accordance with the terms of General Assembly resolution 2780 (XXVI).

56. Mr. CASTAÑEZA said he wished his opposition to that decision to be noted in the record.\(^8\)

The meeting rose at 6 p.m.

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\(^9\) For resumption of the discussion on item 5 of the agenda see 1182nd meeting.
important treaties and as such came within the scope of the first topic.

5. He was now introducing, in effect, a series of five reports, of which the fifth was not yet completed. The first report (A/CN.4/202) was of a preliminary character; its purpose had been to explain the manner in which he had then proposed to approach the topic. It contained four draft articles, but after a brief discussion in the Commission, those articles had been left aside for the time being. Some of the ideas contained in the first report, however, particularly in its introduction, still remained valid; many of them were reflected in the accounts of the Commission's debates.

6. It would be convenient for members to refer to the summary of his own proposals and of the Commission’s debate on them contained in the Commission’s 1970 report. That summary covered the contents of his first three reports and constituted a convenient introduction to the topic.

7. In the introduction to his first report, he had raised a number of important issues. After its discussion the Commission had approved his own general approach to the topic and he had therefore continued his work on the same lines. In particular, he had not approached the topic of State succession in respect of treaties from the standpoint of any general theory of succession. Many writers in the nineteenth century had dealt with the subject on the lines of universal succession on the pattern of municipal law. He had found, however, that their approach was not suited to international law, the diversity of State practice with regard to both bilateral and multilateral treaties made it impossible to erect a general conception of succession and then apply it to each particular case. State practice in the matter was in reality quite pragmatic.

8. His own conclusion had been that the best manner of dealing with the topic of succession of States in respect of treaties was to consider it as a special aspect of the law of treaties; it was treaties that were the subject-matter of the topic, and treaties were governed by the law of treaties. It was within the framework of the law of treaties that the solutions to the various problems would have to be sought, while giving due consideration to the impact of State succession; the principles and rules governing State succession and the law of treaties respectively would thus have to be interlinked.

9. The first question which arose for the purposes of the present discussion was that of terminology. It would be seen from paragraph 1(a) of his draft article 1, on the use of terms (A/CN.4/214) that the term “succession” would be used throughout the draft as meaning “the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory”. As was shown by paragraphs 1(b) and 1(c) of the same draft article, the use made of the terms “successor State” and “predecessor State” conformed to the meaning thus attached to the term “succession”.

10. That terminology focused attention on the mere fact of replacement of one State by another; it did not commit the Commission in any way with regard to the legal consequences of any particular kind of succession. It was important to bear that point in mind because, in the past, too many assumptions had been made which were certainly not compatible with the present State practice, in particular with regard to multilateral treaties.

11. He would suggest that the Commission take a tentative decision on the use of the terms “succession”, “successor State” and “predecessor State” in that way, as terms of art. Such a decision would be of great help for drafting purposes, since it would provide the Commission with a firm terminology. Some ambiguity was involved because in municipal law the term “succession” meant a great deal more and implied the transfer of rights and obligations. Under his proposals, there would, of course, be no such implication in international law.

12. When the Commission had reached its conclusions on the whole range of problems involved in the topic of succession of States in respect of treaties, it would no doubt wish to scrutinize its terminology once more. His own feeling, however, was that the use of the term “succession” which he had suggested would prove the most convenient.

13. In view of what he had said about his approach to the topic, it was natural that the draft articles he now proposed should be drafted against the background of the provisions of the 1969 Vienna Convention on the Law of Treaties, although, of course, they constituted an autonomous body of articles which could stand on their own. The terminology of the Vienna Convention had been used throughout the draft articles and their provisions had been drafted so as to be consistent with those of the Vienna Convention. It would have been extremely inelegant to have adopted any other approach.

14. He had, for example, assumed that certain reservations included in the Vienna Convention on the Law of Treaties would also apply in the present instance. The scope of that Convention was confined to written instruments and to treaties between States; moreover, treaties that were the constituent instruments of international organizations and treaties concluded within such organizations had also been made subject to the particular rules of the organization. Working on the assumption that those reservations applied to the present topic, he had formulated his draft articles without making any reference to the important practice of the International Labour Organisation with regard to succession in respect of treaties.

15. In the five reports he had so far submitted, he had presented eighteen draft articles to the Commission. The first four were contained in his second report (A/CN.4/214) and dealt with a number of general questions. Article 1 (Use of terms) would have to be expanded as

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the Commission advanced in its work, so as to include provisions to cover such additional terms as became necessary. Article 2 (Area of territory passing from one State to another) dealt with the application of the “moving treaty frontiers” rule. Article 3 dealt with devolution agreements and article 4 with the question of unilateral declarations by successor States.

16. His third report (A/CN.4/224) contained eight draft articles, numbered 5 to 12, on the position of new States with regard to multilateral treaties. The position of those States in regard to bilateral treaties was dealt with in articles 13 to 17, which appeared in his fourth report (A/CN.4/249).

17. He had considered it necessary to isolate the basic rules applicable to newly independent States. The Commission would thus deal first with the problems of succession in respect of treaties as they arose for new States. Once the Commission had examined those rules, it would be in a better position to deal with the question of any modifications or additions to the general rules that might be necessary for particular categories of succession, such as succession in the case of former dependent territories, succession in the case of a union of States, and succession in the case of dismemberment of a State.

18. His fifth report (A/CN.4/256) dealt with a special category of succession: that of former protected States, trusteeships and other dependencies. The subject was dealt with in only one article—article 18—but an extensive commentary was attached.

19. He was engaged in the preparation of articles and commentaries on succession in the case of unions of States and in the case of the dissolution of a union or the dismemberment of a State. He expected that material to be circulated to members in the various languages in the very near future.

20. He was also preparing draft provisions on “dispositive”, “localized” or “territorial” treaties. That work had been rendered more delicate by the Commission’s discussion on “objective” treaties in the course of its work on the law of treaties. Another great difficulty was the tremendous number of details to be gone through.

21. Lastly, he wished to draw attention to the valuable Secretariat studies reproduced in the 1962, 1963 and 1968 Yearbooks of the Commission and in the volume entitled “Materials on succession of States”, on which he had drawn largely for evidence of State practice. He had also consulted the legal literature, which was extensive, but wished to mention particularly the remarkable study by the International Law Association, which included the interim report of its Committee on the Succession of new States prepared for its 1968 Conference, the report of the same Committee for the 1970 Conference, and a small book on the effect of independence on treaties.

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7 United Nations, Legislative Series, ST/LEG/SER.B/14 (United Nations publication, Sales No. E/F.68.V.5).

22. Mr. RYBAKOV (Secretary to the Commission) said that the Secretariat would prepare the two papers requested by Sir Humphrey Waldock as quickly as possible.

23. The CHAIRMAN said it was normal practice for the Commission not to take up the question of definitions until the substance of draft articles had been discussed. He asked whether Sir Humphrey Waldock was proposing a departure from that practice.

24. Sir Humphrey WALDOCK said that the question of terminology was essential in his approach to the topic; he considered it important, therefore, to obtain as much agreement as possible about the definitions used, since they were bound to dominate the subsequent discussion.

25. In reply to a question by Mr. Reuter, he said he would try to provide the Commission with texts for the later articles, so that they might be dealt with at the present session. Those articles would refer mainly to unions and federations of States, the dissolution and dismemberment of States, and localized and dispositive treaties.

26. The CHAIRMAN said that, on an earlier occasion, doubts had been expressed in the Commission as to whether article 6 (A/CN.4/224) would be acceptable if the rule on dispositive treaties proved to be unacceptable; the discussion of article 6 would therefore be difficult if the latter text was not yet available.

27. Sir Humphrey WALDOCK said that article 6 included reservations which would cover any conclusions reached with respect to territorial treaties.

28. Mr. USHAKOV said that it was unfortunate that the Commission did not have before it all the reports on succession of States in respect of treaties and that the fifth report had not been circulated some weeks before the beginning of the session. He had made a similar observation the previous year with regard to the draft articles on relations between States and international organizations.

29. The Commission needed a general view of the whole of Sir Humphrey Waldock’s draft, the more so because the topic with which it dealt was entirely new, whereas the draft considered the previous year had drawn on familiar concepts of diplomatic law, so that members of the Commission could more easily foresee the content of the articles still to come.

30. The Commission should have been able to have some idea of the results of the method followed by the Special Rapporteur before it began to consider the draft article by article. Part II of the draft contained general rules on the succession of new States, while Part III was devoted to special rules applicable to certain particular types of new State. Personally he thought that each particular situation, such as decolonization, fusion of States and the division of a State into two or more States, required quite different rules. As the Commission had only an incomplete draft before it, there was no alternative but to examine it article by article.

30 Circulated as conference room documents only.
31. The CHAIRMAN said that, while he fully appreciated Mr. Ushakov’s concern that draft articles should be available in advance of the session, he feared that that would rarely be the case, because the time of special rapporteurs was generally in such demand from other quarters.

32. Sir Humphrey WALDOCK said that he too appreciated Mr. Ushakov’s concern, but the enormous mass of material behind each of the reports made it very difficult to produce them on time.

33. He hoped that the Commission would be able to concentrate on the more general aspects of the topic and then go on to consider special cases. The main problem, of course, was what to do with special categories of dependent States, though when one looked at the bulk of the material available for each of those categories, they all seemed to be dealt with in the same way.

34. He had been somewhat troubled by some of the modern views taken of the decolonization process, in particular, that of O’Connell, according to which that process was a gradual development towards independence, accompanied by a growing economy and an increase in personality, so that the case might be viewed rather as a change of government than a change of State. He himself did not hold that view, but a number of perplexing problems did arise; for example, when a colonial territory became an associated member of an international organization before attaining independence, and in the case of federations of new States.

35. Mr. Ago, referring to Mr. Ushakov’s comments, said that it would certainly be desirable for the Commission to have only complete drafts put before it, but experience had shown that the wider and more complex a topic, the harder it was for special rapporteurs to submit the whole of their work at once. Hence it was not surprising that the Commission had once again to consider a draft piecemeal.

36. Mr. USTOR said that sub-paragraph (e) of article 1 in the Special Rapporteur’s third report (A/CN.4/224) defined a “new State” very briefly as “a succession where a territory which previously formed part of an existing State has become an independent State”. In his opinion, that definition needed completion along the lines of paragraph 9 of the introduction to the report, which read: “The term ‘new State’ as used in the present articles means a succession where a territory which previously formed part of an existing State has become an independent State. It thus covers a State formed either through the secession of part of the metropolitan territory of an existing State or through the secession or emergence to independence of a colony...”.

37. A “new State” might be territory which had previously been part of another State, as in the case of Bangladesh, which had formerly been part of Pakistan. It should be made clear in the definition, therefore, that there need not have been any dissolution or dismemberment of the original State.

38. Sir Humphrey WALDOCK said he would prefer to discuss that point when the Commission came to the question of the dissolution and dismemberment of States. The question was mainly one of terminology; the term “new State” might perhaps be replaced by “newly independent State”, for example, although that was a rather heavy phrase from a drafting point of view.

39. Mr. Bartos pointed out that when the independence of India and the creation of Pakistan had been proclaimed,11 it had been stipulated that India should be regarded as the old State and Pakistan as the new State.

40. That distinction had also been made by the Sixth Committee, which had decided that India retained its membership in the United Nations, whereas Pakistan would have to submit an application for admission. It had also been established that Pakistan was not bound by treaties previously concluded by India. Thus the organs of the United Nations had considered that that delicate question should be dealt with separately in the case of Pakistan, whereas for India it was settled ipso facto by the treaty between the United Kingdom and India.

The meeting rose at 12.25 p.m.

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11 See British and Foreign State Papers, vol. 147, p. 158.

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1155th MEETING

Wednesday, 10 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quintin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

[Item 1 (a) of the agenda]

(continued)

GENERAL DEBATE

1. The CHAIRMAN invited the Commission to begin its general debate on the draft articles prepared by the Special Rapporteur.

2. Mr. TABIBI, after thanking the Special Rapporteur for his lucid and scientific presentation of the topic, said that he could agree with his approach except in the case of one or two articles.

3. He himself had been engaged in the study of State succession since India’s accession to independence in 1947, which had affected his own country’s treaty relations with the countries of the sub-continent and with the United Kingdom. As a member of the former Sub-Committee on the Succession of States and Governments,
as well as of the Commission itself, he had come to question, to an increasing extent, whether it was either necessary or useful to survey the whole field of State succession in respect of treaties and to establish rules on the model of the Vienna Convention on the Law of Treaties. In his opinion, that would involve the risk of establishing régimes analogous to internal laws, which might only create difficulties instead of solving the problems arising out of succession.

4. He believed that the Commission would be better advised to stay on safer ground and to concentrate its attention on the problems arising out of succession. That would mean attempting to establish rules on succession in respect of treaties based on the practice of the newly independent States. After all, it was only during the United Nations era that any more or less uniform pattern was to be found in the practice, particularly that relating to multilateral treaties.

5. It would be preferable to concentrate on the Special Rapporteur’s third, fourth and fifth reports rather than to deal with certain rules contained in his second report (A/CN.4/214),1 such as article 2 (Area of territory passing from one State to another) and article 3 (Agreements for the devolution of treaty obligations or rights upon a succession) and even, to a certain extent, article 4 (Unilateral declaration by a successor State). He based that view mainly on the fact that in 1963 the Sub-Committee on the Succession of States and Governments, in paragraph 6 of its report, had stressed the “need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II” and recommended that “problems concerning new States should therefore be given special attention” and that “the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter”.2 That had also been the view taken by the General Assembly.

6. The subject of State succession in respect of treaties was difficult and complex; different régimes covered different types of treaty and the practice of States had varied, thereby leading to the establishment of conflicting rules. In particular, the Commission should avoid trying to establish régimes founded on colonial practice, where the basic elements of succession, namely treaties, had in most cases been unequal and illegal, owing to the domination of colonial interests.

7. In his introductory statement, the Special Rapporteur had expressed the view that the solution to the problems of succession in respect of treaties should be sought within the framework of the law of treaties, of which he considered it to be a particular aspect. But the recommendations of the Sub-Committee, adopted by the Commission in 1963, had expressly stated that “succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties”.3

8. In adopting the draft of the historic Vienna Convention on the Law of Treaties,4 the Commission had adopted a set of useful rules; but it should be borne in mind that in Part V of that Convention there was a whole series of safeguards and exceptions to those rules such as articles 48 (Error), 49 (Fraud), 50 (Corruption of a representative of a State), 51 (Coercion of a representative of a State), 52 (Coercion of a State by the threat or use of force), 53 (Treaties conflicting with a peremptory norm of general international law (jus cogens)), 61 (Super-vening impossibility of performance), 62 (Fundamental change of circumstances) and many others. So if the Commission was to look for solutions to the problems of succession within the framework of the Vienna Convention, the question arose whether it should apply the same safeguards and rules of invalidity as were included in that Convention. It would seem that if the rules on Succession were to be based on the Vienna Convention, the Commission would have to adopt what would in effect be another chapter of that Convention and ignore any independent rules on State succession which might exist.

9. With regard to article 1 (Use of terms) in the Special Rapporteur’s second report, he thought it could be used provisionally during the discussion, but he would prefer to reserve his comments until the Commission had reviewed the draft articles as a whole.

10. As to article 2 (Area of territory passing from one State to another), the question of boundaries was a highly explosive one in all parts of the world and could not be settled by proposing rules on State succession.

11. When the Special Rapporteur’s first and second reports had been before the Sixth Committee in 1968; the Committee had included the following passage in its report to the General Assembly: “On the other hand, it was argued that boundary treaties imposed by colonial Powers against the wishes of the people of subject territories should be regarded as contrary to the rule pacta sunt servanda, to the fundamental principle of self-determination, which was a principle of jus cogens, and to General Assembly resolutions 1514 (XV) and 1654 (XVI). ... It was believed that since boundary questions were highly political issues, the Commission should refrain from making legal pronouncements when the particular situations involved fell within the competence of other organs of the United Nations.”5 It had been the view of many delegates during the twenty-third and twenty-fourth sessions of the General Assembly that the Commission should either omit article 2 altogether, because of its close connexions with localized and territorial treaties or leave it to be considered with that subject.

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3 Ibid., para. 10.
12. He also had reservations on article 3 (Agreements for the devolution of treaty obligations or rights upon a succession) which dealt with an institution favoured mainly by the United Kingdom. Devolution agreements were, in fact, often resorted to by colonial Powers upon the accession to independence of a former colony, in order to obtain concessions contrary to the principle of self-determination and in violation of the interests of third States. Moreover, while multilateral devolution treaties showed a certain uniformity, bilateral devolution treaties were far from uniform, and the practice with respect to them varied considerably.

13. Mr. AGO said that he approved of the approach chosen by the Special Rapporteur for dealing with the topic, namely, as he had stated in his first report (A/ CN.4/202), that the solution to the problems of so-called “succession” in respect of treaties was to be sought within the framework of the law of treaties rather than of any general law of “succession”. He could not but endorse the argument that that choice was justified not only by the practice of States, but also by the doubts which might be felt as to whether “succession” of States even existed as an institution.

14. The Commission might eventually amend the title of the draft because strictly speaking it did not deal with succession of States, but rather with a question of the law of treaties, namely, what became of a treaty when there was a change in sovereignty over a territory, or when one subject of international law, which had concluded a treaty, or participated in its conclusion, or subsequently acceded to it, was replaced by another subject of international law. The difficulty arose from the fact that that change in the material situation might be due to all sorts of very different events: association, as in the formation of the German Empire and the Italian State; dissociation, of which the Habsburg Empire and the British Empire were examples; separation, as in the formation of a State from a former province or colony; or simply the transfer of a territory of one existing State to another existing State. In that multiplicity of situations it was necessary to take account of the uniform elements — those which were always the same — and the non-uniform elements — those which were not the same in every situation. Different parts of the draft could be devoted to them.

15. In its study of the topic dealt with by Sir Humphrey Waldock and of that entrusted to Mr. Bedjaoui, the Commission should be careful to avoid transferring to international law theories, viewpoints or criteria of internal law. In internal law the question of succession of succession was regulated by legislation which provided, under certain conditions, for the automatic transfer of certain rights and certain obligations from one subject to another. Did the same situation exist between two States in international law? An affirmative answer must probably be given in the case of treaties regulating the situation of certain specific areas, such as the treaties governing the status of the Free Zones around Geneva originally concluded between the Republic of Geneva and the Kingdom of Sardinia, the effects of which had subsequently been transferred to France.

16. It was doubtful whether there were any other comparable examples in international law. In any case one could not speak of a general rule of customary law providing for the transfer of international treaty obligations from one State to another. And that held even more strongly for succession in respect of matters other than treaties. Even in that case, what was sometimes described as a problem of succession was really only a problem of the automatic application of the general rules of customary law to every new State. In fact, on closer inspection, what the Commission was called upon to examine, in certain cases, was the content of certain customary rules, in particular those relating to the treatment of aliens, and their application in various de facto conditions. But that was not, strictly speaking, a problem of succession, in other words, of the transmission of rights and obligations from one subject of international law to another.

17. One of the basic difficulties of the topic being dealt with by the Special Rapporteur was to decide what a new State was. The first question that arose was whether there was any great difference in situation as between a new State and any other State. The second question was when a new State existed. For example, it was still being argued whether the Italian State had replaced the Kingdom of Sardinia or merely continued it, and, if so, what was the situation in regard to treaties.

18. He approved of the Special Rapporteur’s reservation concerning the law of international organizations. There might be a provision in the constituent instrument of an organization dealing with the case of succession of States which went beyond a mere customary rule. The practices and rules established by each international organization ought to be respected.

19. He also approved of the Special Rapporteur’s attitude to devolution agreements. Rights and obligations might result from such agreements for the two parties concerned, but not for third States. The new State might be required to adopt a certain attitude to the former metropolitan State in regard to treaties concluded by it, but third States could not require it to do so. The relationship which came into being between the former metropolitan State and the new State was a bilateral relationship.

20. With regard to unilateral declaration, it was true that there was a basic difference between bilateral and multilateral treaties, as the Special Rapporteur had stated in his second report. In the case of a bilateral treaty, and probably in that of some restricted multilateral treaties, a unilateral declaration was equivalent only to an offer, whereas in the case of general multilateral treaties a sort of offer on the part of former States was presumed to exist in the treaty itself, and the unilateral declaration then constituted a consent, the effect of which was to establish agreement.

21. He approved of the lines on which the Special Rapporteur had decided to deal with the topic and was ready to consider his draft article by article. As he had said before, he considered that it dealt not so much

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with succession in respect of treaties as with certain particular aspects of the law of treaties relating to changes in sovereignty over a particular territory.

22. Mr. REUTER said that he fully approved of the method chosen by the Special Rapporteur. In point of fact, enough arguments could be found in international practice to justify any approach, and the Special Rapporteur had been right to take the law of treaties as the starting point. He had also been right to start from the hypothesis of the new State, which was the simplest and best known.

23. With regard to the substance, there were two principles to be considered: the personality of the State and the absence of effect of treaties with respect to third parties. It was not surprising to find in the articles precisely what had been adopted as a hypothesis, namely, the "clean slate" solution. As Mr. Ago had so rightly said, there was no succession of States with respect to treaties. It was a solution which, for the great majority of new States, satisfied political aspirations, and it took into account the fact that, in matters of succession, everyone still had decolonization in mind. The articles drafted by the Special Rapporteur satisfied the aspirations to decolonization, since they amounted to saying that every new State was born free, without obligations. He approved of the Special Rapporteur's approach in that respect too.

24. There were, however, other difficulties, especially that of the effects of treaties with respect to third parties. When the Commission had considered the draft articles on the law of treaties, it had, so to speak, swept the difficulty aside by proclaiming, without much discussion, the principle of no effects with respect to third parties—no doubt quite rightly since the Vienna Conference has subsequently confirmed that principle. But although new States wished to be born free, they nonetheless found themselves in a de facto situation governed by treaties—that of the frontiers within which they were born—and the question arose how that situation should be made mandatory and what exceptions should be provided for.

The problem of colonial frontiers was a vast political problem, a real problem which it was no use trying to avoid, even if its study were to lead to the conclusion that it went beyond the framework of the topic with which the Commission was dealing, that it should be dealt with in another context and that, consequently, all possible solutions should be left open.

25. The same applied to certain serious difficulties mentioned by other speakers. Although the Special Rapporteur's article 2, on the "moving treaty frontiers" rule was, quite rightly, based on the personality of the State, it raised a problem which went beyond the law of treaties and even beyond the bounds of legal abstraction—that of the social, sociological, economic and financial realities to be taken into consideration in all changes of States. Of course, those realities were relegated to the background in the problem before the Commission, but there was no ignoring the fact that when Austria had refused, in 1919, to regard itself as the successor to the Habsburg Empire, it had done so for essentially economic and financial reasons.

26. Incidentally, he noted that the Commission was deciding, for the second time, to reserve the "relevant rules" of international organizations. He would have occasion later to ask the Commission to remember that constant position it had taken, which set a kind of boundary to its work of codification before the specific phenomenon, not of international organizations in general, but of each international organization in particular.

27. Mr. QUENTIN-BAXTER, after expressing his appreciation of the Special Rapporteur's excellent reports, said that he too had had certain difficulties when considering the elusive subject of State succession in respect of treaties. As a lawyer accustomed to tracing the thread of his own country's treaty inheritance, he had been struck by the bleakness of the rule propounded in article 13 of the Special Rapporteur's fourth report (A/CN.4/249). In the area of multilateral treaties, the tabula rasa principle was not a deprivation for a new State, which could at will establish its right of succession. In the area of bilateral treaties, however, the tabula rasa principle, when coupled with the principle of equality between the parties, could denude a new State of all the useful treaty relationships already reflected in its law and practice. Under article 13, the rule of consent negated any inheritance by a transmission to a new State of rights or obligations under a bilateral treaty concluded by its predecessor.

28. That idea was so much at variance with the thinking of administrators that it was necessary to consider the question of the relationship between rules of law and canons of administrative practice. As a practical matter, of course, there could be no doubt that no bilateral treaty could exist without the will of the parties; and, since most bilateral treaties could be denounced at short notice, it would be idle for either party to attempt to enforce a succession to a bilateral treaty. There was, however, a real question whether those practical limitations justified a negative rule of law, or whether the volume of practice favouring continuity should be supported by a legal presumption in favour of continuity.

29. There was no other area of relations between states in which practice was more tolerant, or in which there was a greater need for what the Special Rapporteur had described as a "margin of appreciation". After all behind the question of the revival of bilateral treaties there always stood the shadow of the doctrine of rebus sic stantibus. Some years ago, his own Government had invoked an extradition agreement which had been concluded between the United Kingdom and the United States in 1842, or only two years after the founding of the colony of New Zealand. The United States would have been entirely justified in suggesting that, when that treaty had been concluded, it had not been contemplated by the parties that there would ever be a request for extradition by the Government of New Zealand; or, on a more, technical level, the United States could have pointed out that such a request would have to be signed and sealed by a Minister of State in the United Kingdom. In actual practice, however, the fact of State succession was not questioned in such cases and no obstacles were placed in the way of an accommodation between the parties.
30. The legal question, however, was whether that practice, which seemed to be in accordance with the behaviour of States, was based on the belief that there was no presumption of transmission or inheritance in the case of a new State. He did not think that that was the case. In his opinion the new State, as a successor, did inherit something. His own Government, for example, continued to apply a number of bilateral treaties which had been concluded over a century ago, without taking the initiative to consult the other parties as to whether they considered them still in force.

31. Of course, the survival of a bilateral treaty relationship could often be inferred from the conduct of the parties in maintaining a means of implementation under their domestic laws; but even that kind of test might be imperilled by an excessive stress on the concept of novation. For example, in the case of extradition treaties, States had usually acted with special caution. In both the United Kingdom and New Zealand, any such treaty had to be embodied in domestic law as a condition of its enforcement, and it must appear that the treaty had been in force at the moment when its provisions were invoked. It would not be enough to show that, following a succession of States, the treaty might still be in force, or that it was being applied as if it were in force.

32. The general dilemma was well illustrated by the two aspects of devolution agreements. They had been developed—primarily by the United Kingdom—to systematise the practice of the older British dominions on their attainment of separate statehood—to help newly independent States to claim their just inheritance. Understandably, devolution agreements had fallen into disfavour, because they could not bind third parties and because they appeared to fetter the freedom of action of the newly independent State. The still more recent practice of provisional application could be viewed as a makeshift expedient, forced upon new States by the need to reconcile the assertion of their sovereign independence with their desire to claim succession to certain treaty rights and obligations. The object of codification should be to provide a rule which would eliminate this false conflict, and would give new States a sense of unhurried security in reviewing their party inheritance.

33. In any event, it should be stressed that the rule of tabula rasa contained in article 6 (A/CN.4/224) might be judged against the background of the commentary to article 13, as well as that to article 6 itself. Once the rule in article 6 was fixed, the rule in article 13 and some other provisions of the draft articles would follow with logical inevitability. Similarly, one might predict that the commentators to articles still to come would also have bearing on article 6. He agreed, therefore, with those speakers who thought that it was necessary to see the end of the draft before fully appreciating its beginning.

34. Mr. CASTAÑEDA, referring to article 7, said he did not think that the right of a new State to notify its succession in respect of multilateral treaties could be said to have its legal source in the law of treaties, since such a right might be said to prejudice res inter alias actae. In practice, that right had been developed on the basis of legal custom, and its origins must be sought in the law of succession as derived from the practice of States, not in the law of treaties.

35. The CHAIRMAN pointed out that the Special Rapporteur’s commentary on article 18 (Former protected States, trusteeships and other dependencies) (A/CN.4/256) opened with the following passage: “A preliminary question may arise as to whether a codification of the law of succession of States in the 1970s should include any provisions regarding dependent territories. A treaty setting out the rules of succession in respect of treaties would not ‘bind a party in relation to any fact or act which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party’ . In regard to any previous act, fact or situation the parties would be bound only by rules to which they would be subject under international law independently of the Convention. Having regard, therefore, to the progressive disappearance of dependent territories, and to the modern law regarding self-determination enshrined in the Charter, the omission of provisions concerning dependent territories may be argued to be at once legally justifiable and politically preferable.”

36. In his opinion, the restriction of the last sentence to dependent territories placed too great a limitation on the scope of the commentary; it could equally well be phrased: “Having regard to the progressive disappearance of colonies and to the modern law regarding self-determination, the omission of provisions concerning new States could be justified”.

37. If the proposed articles came into force as a convention, what would be their effect on the relations between States which were parties to the convention and a new State? He was inclined to think that the Commission would be laying down rules which, in treaty form, would be of a rather peculiar nature, since they referred to problems to which they could not be applied unless they became a part of customary law. That raised the question whether a convention should be adopted merely to promote customary law. The North Sea Continental Shelf cases,7 in particular, provided no support for the idea of “instant” customary law.

38. Sir Humphrey WALDOCK (Special Rapporteur) summing up the general debate, said that the point raised by the Chairman had been raised with regard to the 1969 Vienna Convention on the Law of Treaties and could in fact be raised with regard to almost any codification. Even in the case of the most successful codification conventions, ratifications took a long time, so that the value of the instrument of codification was necessarily limited. The difficulty was inherent in the method of using as an instrument of codification a multilateral treaty of the ordinary kind.

39. That fact, however, did not seriously diminish the value of the work of codification. It was true that, in the North Sea Continental Shelf cases, the International Court of Justice had not found that the principle embodied in article 6 of the 1958 Geneva Convention on the

7 I.C.J. Reports 1969, p. 3.
Continental Shelf\textsuperscript{8} constituted an expression of a rule of customary international law. There were, however, special factors involved in that particular case which did not apply generally to codification conventions.

40. The International Court of Justice had relied in a recent case on the provisions of one of the articles of the 1969 Vienna Convention on the Law of Treaties, and had considered it an expression of a rule of international law already in force. In State practice, there were even instances of reliance on codification work still in progress in the International Law Commission.

41. Since codification work thus constituted a slightly mysterious process of consolidation of legal opinion with regard to the rules of international law, the Commission would be acting rightly in seeking bases for codification, even if some of the rules it codified would only enter into force as treaty provisions in a rather distant future.

42. To turn to Mr. Ta\textsuperscript{b}bi's remarks, he must first dispel a possible misunderstanding. The "moving treaty frontiers" rule reflected in draft article 2 in his second report (A/CN.4/214) had no connection with the problem of boundary treaties; it was a well-established principle of international law which governed the consequences, with respect to treaties in general, of the passing of an area of territory that was not itself a State under the sovereignty of an already existing State.

43. The point raised by Mr. Tabibi was in fact connected rather with the contents of article 4 (Boundaries resulting from treaties) in his first report (A/CN.4/202). That article made a general reservation with regard to the effect of the draft articles on boundaries established by treaty prior to the occurrence of a succession. The article had, of course, been set aside for the time being, together with a whole group of four articles in his first report, but in due course he would have to make a proposal to deal with its subject-matter.

44. Mr. Tabibi had also raised the question of unequal treaties in connexion with devolution agreements. He himself had endeavoured to steer clear of that problem, which was covered by the Vienna Convention on the Law of Treaties in the provisions on the use of force or coercion in the conclusion of a treaty. He had dealt with devolution agreements only insofar as they affected succession.

45. He had very much appreciated Mr. Ago's exposition. He fully agreed that the Commission must not take as its starting-point the idea that there was an inheritance of treaties; at the same time, he would not go so far as to say that in no case would there be any transmission of rights and obligations. He simply wished to avoid the confusion that would result from municipal law analogies.

46. The important point was the existence of a legal nexus between a treaty and a territory, arising from the fact that the treaty had previously applied to the territory. In the case of a general multilateral treaty that legal nexus gave the new State the right to opt for the continued application of the treaty. During the discussions at a previous session, Mr. Rosenne, then a member of the Commission, had put forward the view that the case was one of novation, that the new State had no actual right in the matter and that the other parties to the multilateral treaty would have to assent to its joining the treaty. State practice, however, was so absolutely uniform that he thought the Commission would agree that there did exist an actual right for the new State. There was thus an element of transmission, because the new State had an option to join the treaty without it being open to the other parties to make any objection. The new State's right was somewhat outside the scope of the rule, governing the law of treaties.

47. In the case of bilateral treaties, the legal nexus arising from the fact that the treaty had previously applied to the territory in question gave rise to a process of novation and not to transmission ipso jure. He understood the position taken by Mr. Quentin-Baxter, but thought that modern State practice clearly showed that the case was one of novation. In the case of Australia, Canada and New Zealand, there was also a special factor present in that the British Crown had been the Crown of Australia, Canada and New Zealand before independence and had continued to be the Crown of those countries after independence. That factor introduced a special element into the treaty-making processes—an element which was not present in cases relating to other countries.

48. A number of other points which had been made during the general debate could be dealt with more conveniently in connexion with the discussion of certain specific articles.

49. He realized the importance attached by several members to the problem of objective regimes and localized treaties. He hoped shortly to be able to submit a draft article on that question for the consideration of the Commission.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 1

For the purposes of the present articles:

1. (a) "Succession" means the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory;
(b) "Successor State" means the State which has replaced another State on the occurrence of a "succession";
(c) "Predecessor State" means the State which has been replaced on the occurrence of a "succession";
(d) "Vienna Convention" means the Convention on the Law of Treaties adopted at Vienna on 22 May 1969;
(e) "New State" means a succession where a territory which previously formed part of an existing State has become an independent State;
(f) "Notify succession" and "notification of succession" mean in relation to a treaty any notification or communication made by a successor State whereby on the basis of its predecessor's status as a party, contracting State or signatory to a multilateral treaty, it expresses its consent to be bound by the treaty;
(g) "Other State party" means in relation to a successor State another party to a treaty concluded by its predecessor and in force with respect to its territory at the date of the succession.

51. The CHAIRMAN invited the Special Rapporteur to introduce article 1, the provisions of which involved fundamental considerations that would affect the course of the Commission's work on all the draft articles.

52. Sir Humphrey WALDOCK (Special Rapporteur) said he would confine his introductory remarks to sub-paragraphs (a), (b) and (c) of article 1, which appeared in his second report (A/CN.4/214), and more particularly to sub-paragraph (a). He would introduce the other paragraphs which were contained in subsequent reports at a later stage of the discussion, as necessary.

53. The essential provision was that contained in sub-paragraph (a), to the effect that, for the purposes of the draft articles, "succession" meant "the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory". That wording differed from the text he had originally proposed in paragraph 2 (a) of article 1 in his first report (A/CN.4/202), which simply referred to the replacement of one State by another in "the competence to conclude treaties with respect to a given territory". He had now introduced the concept of replacement of one State by another "in the sovereignty of territory", in deference to the comments made by some members during the discussion at the Commission's 1968 session. At the same time, he had retained the idea of replacement in the competence to conclude treaties with respect to territory because there were cases in which such replacement might take place regardless of any change of sovereignty.

54. As he has already pointed out, the term "succession" was used in his draft articles as a convenient short term to describe the fact of replacement of one State by another. There was no suggestion of any actual inheritance or transmission of rights and obligations, concerning which there were many conflicting theories in international law. It was in fact a convenient drafting device which would enable the Commission to avoid the confusion that might result from entering into the various theories on transmission or inheritance.

55. A number of speakers during the general debate had commented on the position taken by States in particular cases, such as that of the emergence of the Kingdom of Italy from the Kingdom of Sardinia, and the enlargement of Serbia—or the establishment of Yugoslavia. He himself had preferred not to enter into a discussion of those particular cases, but to concentrate on the rule that could be derived from general State practice. For their own reasons, governments sometimes preferred to speak of the enlargement of a pre-existing country rather than of the creation of a new one, but the Commission should concentrate on endeavouring to discern the right solution and the correct principles to be derived from the general body of State practice, given a particular case of succession.

56. Mr. BARTOŠ said he hoped the Special Rapporteur would take into consideration a theory that had been put forward several times regarding the formation of States, according to which, from the standpoint of internal law a new State was considered to have been created, but as far as participation in international life was concerned, it could be a successor State.

57. That theory could be applied, for example, to Italy as the successor State to the Kingdom of Sardinia or to Yugoslavia as the successor State to Serbia. Three years ago, the United States Supreme Court had ruled that Yugoslavia had succeeded Serbia in respect of the treaties concluded by Serbia, including the treaty concerning the application of the most-favoured-nation clause, which the United States had concluded with Serbia. The Supreme Court had added that the treaties concluded by Serbia remained in effect not only for States Parties to the Treaty of Versailles, but also for those States which, like the United States, had not signed that treaty. It should be noted that, from the standpoint of internal law, the theory of succession had not been invoked.

58. In view of its importance in practice, the theory of succession limited to international relations should at least be mentioned in the Special Rapporteur's commentary.

59. Mr. USHAKOV said that, since article 1 affected the whole of the draft, it would be preferable to consider it as a whole, in the light of all the definitions proposed by the Special Rapporteur in his various reports.

60. Some comments were called for concerning the arrangement of the draft. A number of titles were missing, such as those of Part I and Part II, section 1. Part III, entitled "Particular Categories of Succession", seemed to conflict with Part II, entitled "New States". In fact, as was apparent from the Special Rapporteur's introduction (A/CN.4/256, para. 3), Part III also concerned new States, but set out special rules, whereas Part II contained general rules. The special situations dealt with in Part III really covered all foreseeable cases of new States.

61. Certain questions, such as the problem of "territorial" treaties and the transfer of an area of territory from the sovereignty of one State to that of another, should be dealt with in separate chapters. The latter aspect of the succession of States, which conflicted with the establishment of new States, had so far been dealt with only in article 2. As was clear from the commentary to that article (A/CN.4/214), other provisions would have to be added, setting out the exceptions to the "moving treaty frontiers" rule.

The meeting rose at 1 p.m.
ruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

[Item 1 (a) of the agenda]

(continued)

ARTICLE 1 (Use of terms) (continued) 1

1. The CHAIRMAN invited the Commission to continue consideration of article 1 in the Special Rapporteur’s second and third reports (A/CN.4/214 and A/CN.4/224). 2

2. Sir Humphrey WALDOCK (Special Rapporteur) said he wished to give an immediate reply to the question raised by Mr. Ushakov at the end of the previous meeting on the arrangement or structure of the draft articles. The structure was at present in a very rough form, partly because the draft had developed in sections, and partly because, as a result of the discussions in the Commission on his first report, he had decided to set aside his original proposal for some general provisions (A/CN.4/202) 3 linking the present draft with the provisions of the 1969 Vienna Convention on the Law of Treaties.

3. His own feeling was that the draft would inevitably have to include a few general provisions at the beginning. In the case of the 1969 Vienna Convention, it had been found necessary to include some general provisions both at the beginning and at the end of the text.

4. The general provisions would, for example, specify that certain terms of the law of treaties were used in the present draft with the meanings attached to them by article 2 (Use of Terms) of the Vienna Convention and reserve the question of international organizations on the lines of article 5 of that Convention. 4 Such provisions were essential in order to avoid ambiguities in many parts of the draft.

5. For the time being, however, the general provisions in his first report had been set aside and the Commission now had before it the four articles in his second report, which were admittedly a rather disparate assemblage of provisions. His purpose in drafting that group of articles which were admittedly a rather disparate assemblage of parts of the draft.

6. With regard to article 2 (Area of territory passing from one State to another), he wished to allay the misgivings expressed by Mr. Ushakov about the character of the “moving treaty frontiers” rule embodied in that article. The rule in question was a well-recognized principle of international law, but it was not so much a dominant principle as a principle which applied in cases not covered by a special rule. The main problem was that of the appreciation of specific cases.

7. His own impression was that the formulation of his proposed article 2 would probably prove sufficient, subject to drafting improvements. Clearly, however, the question was separate from those dealt with in the later articles. It was distinct from the subject of “new States” dealt with in the articles in Part II (A/CN.4/224) and independent of the subject-matter of article 3, on devolution agreements and article 4, on unilateral declarations.

8. The whole of the present Part I, appearing in his second report, would undoubtedly need further thought before a decision was reached on the final arrangement of the articles. He wished to assure Mr. Ushakov that the texts of those articles were purely provisional; they did not prejudice the position of the Commission or of any of its members. His method had always been not to inject his own personal views into draft articles he introduced at the opening stage of the Commission’s work; at that stage he aimed to produce a draft that would enable the Commission to discuss all the necessary points. His own ideas invariably evolved as the Commission’s work proceeded. It was only at the end of the discussions that a text suitable for submission to governments could be arrived at.

9. With regard to terminology, he had tried to use phrases were not too clumsy for drafting purposes and would prove convenient for the continuation of the Commission’s work.

10. On the question of the “new State”, he emphasized that the formula he had put forward was provisional, and had been adopted purely for purposes of study. He had concentrated on the concept of the “new State” set out in sub-paragraph (e) of article 1, so as to leave aside the question of any special rules that might apply to particular categories, such as former mandates, former trust territories and former protected States. Since those categories were differentiated in the legal literature, it was necessary from a practical point of view to examine whether any special rules existed for them. Of course, the Commission might well find, on examination, that one or other of those categories did not require any special rules and could be covered by the general concept of a “new State”. Until its examination was completed, however, it would be necessary for the Commission to deal with the “new State” as defined in sub-paragraph (e).

11. He had adopted that approach in order to avoid certain complications which might otherwise arise in the case of unions or federations. For example, on the emergence of the United Republic of Tanzania, and also of the United Arab Republic, a “new State” had certainly come into being as a result of the adoption of a constitution creating a common central organization competent to conduct relations with other States. Nevertheless, for purposes of membership in the United Nations, those cases had been treated as mergers and the question of admission had not arisen. It was in order to avoid such complications at the present stage of the work that he had preferred to isolate the pure case of the “new State”.

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1 For text see previous meeting, para. 50.
12. Mr. USHAKOV said that his remarks at the previous meeting concerning the arrangement of the draft articles had been based on his personal ideas as to how the various categories of new States should be treated, both in Sir Humphrey Waldock’s and in Mr. Bedjaoui’s draft articles. Each of those categories was governed by different rules and should be treated separately, particularly where the situation of the new States in relation to bilateral treaties was concerned. In the case of multilateral treaties, on the other hand, it should be possible to establish rules which, if not identical, were at least similar and could be applied to all categories of succession. He agreed with Mr. Ago’s remarks at the previous meeting concerning the scope of multilateral treaties, which might be binding on only three parties or be of a general or even a universal character. That differentiation would have to be borne in mind in drafting the provisions on multilateral treaties, for it was inconceivable that they should disregard the scope of those treaties.

13. He had often expressed his opposition to the method of drafting texts by reference to previous texts and he hoped that the Special Rapporteur would, in particular, avoid general references to groups of articles.

14. With regard to sub-paragraph (a) of article 1, which defined the term “succession”, it might be asked whether it would not be better to prepare a single definition, valid for both Mr. Bedjaoui’s and Sir Humphrey Waldock’s draft. The second part of the proposed definition, “in the competence to conclude treaties with respect to territory”, could not be included in a definition applicable to Mr. Bedjaoui’s articles.

15. In themselves, the words “replacement ... in the competence to conclude treaties with respect to territory” were not sufficiently explicit, since they required elucidation in the commentary; a good definition should be easily comprehensible.

16. The first part of the proposed definition, “replacement of one State by another in the sovereignty of territory”, did not cover certain cases of the formation of States, in particular, formation by fusion or by separation. Moreover, with regard to decolonization, it should be remembered that the sovereignty of metropolitan States did not extend to colonial territories. The General Assembly had endorsed that view in its Declaration on principles of international law concerning friendly relations and co-operation among States.\footnote{General Assembly resolution 2625 (XXV), Annex.}

17. He intended to speak again on sub-paragraph (a) and other sub-paragraphs of article 1.

18. Mr. AGO said that he intended to comment on sub-paragraphs (a) and (e) and, in particular, on the relationship between those two provisions.

19. Sir Humphrey WALDOCK (Special Rapporteur) said he had no objection to the provisions of sub-paragraph (e) on the “new State” being discussed together with those of sub-paragraph (a) on “succession”. It had become clear, however, that the language of sub-paragraph (e) would have to be adjusted. It was not satisfactory to say that the term “new State” meant “a succession where a territory...”. The opening words should be amended on the following lines: “‘New State’ means a State arising from a succession where a territory...”. He would submit a rewording of the paragraph in due course, but he urged members first to discuss the concept itself in order to facilitate the drafting.

20. Mr. BARTOŠ thought it necessary for the Commission to adopt one and the same conception of decolonization for both sets of draft articles—those submitted by Sir Humphrey Waldock and those submitted by Mr. Bedjaoui. It could not adopt the so-called traditional conception of colonization, but should take into account the view expressed on several occasions by the United Nations that the possession of colonies was illegal, so that no legal sovereignty was exercised over colonial territories.

21. Sir Humphrey WALDOCK (Special Rapporteur) said that in his original draft provision on “succession” in his first report there had been no reference to sovereignty. He had included that reference in the present sub-paragraph (a) of article 1 in deference to the strong wishes expressed by many members of the Commission during the discussion of his first report.\footnote{See Yearbook of the International Law Commission, 1968, vol. 1, pp. 130-146.}

22. Mr. USHAKOV, reverting to sub-paragraph (a) of article 1, observed that in paragraphs (2) and (3) of his commentary the Special Rapporteur indicated that the concept of succession comprised two elements, first the replacement of one State by another in the sovereignty of territory and secondly the legal consequence of that substitution, which was the transfer of rights and obligations. Perhaps it would be useful to introduce that second element in the definition of the term “succession”, though the text proposed by the Special Rapporteur for sub-paragraph (a) might be adequate at the present stage of the discussion.

23. According to sub-paragraph (b), “successor State” meant “the State which has replaced another State on the occurrence of a succession”; it might be better to consider that a State succeeded another State on the occurrence of a replacement and he therefore suggested that the words “on the occurrence of a succession” be deleted.

24. Referring to the definition of the term “new State” he drew attention to paragraph (2) of the commentary, which stated that the term signified “a State which has arisen from a succession where a territory which previously formed part of an existing State has become an independent State”. That definition was very restrictive and excluded a number of situations; it did not apply, for example, to the former United Arab Republic. Part II of the draft dealt with a number of cases not covered by the definition. There appeared to be no reason to limit the definition of a “new State” to a certain number of cases only.

25. Sir Humphrey WALDOCK (Special Rapporteur) stressed that the provisions of sub-paragraph (e), on the
meaning of the term “new State”, had been put forward purely for working purposes. It would be extremely difficult for the Commission to examine the various rules in the later articles if it had to take into account the many subtle questions which arose in connexion with such special categories as unions, dissolutions or dismemberments. He had endeavoured to isolate the pure case of the “new State” in order to provide a convenient framework for the Commission’s future discussions. He fully recognized that the language used would have to be adjusted. For example, the words “a territory which previously formed part of an existing State” would probably have to be replaced by some such wording as “a territory for whose international relations a State was formerly responsible”.

26. When the Commission had completed its discussion on the rules relating to “new States” as thus defined and on the various special categories, it might find that the particular rules which were specific to those categories amounted to only a few minor points. It would, however, first have to go through the process of considering the “new State” and the various categories in question.

27. It was, of course, possible to adopt another approach and to frame general rules on the “successor State”, thus renouncing the whole concept of the “new State”. There was a feeling in some newly independent States themselves that the term “new State” was not felicitous and such an approach would take that feeling into account. For his part, he had thought it legitimate, at the present stage, to use the term “new State” as a term of art to facilitate the work of the Commission.

28. Mr. USHAKOV noted that the Special Rapporteur was in favour of limiting the scope of the rules to certain particular categories of new State. For that purpose, either a restrictive definition of the term “new State” could be adopted, or the draft could be subdivided and special rules laid down for each case. He himself would prefer the latter solution.

29. Mr. HAMBRO said that, in view of the great difficulty of framing definitions, he would not at that point press his own views on the suitability or otherwise of some of the language used in the important provisions under discussion.

30. He thanked the Special Rapporteur for his explanations, which showed that the Commission was not at present engaged in the formulation on any definitive conception of the terms under discussion. It was only trying to fashion useful working tools for its deliberations on the topic of succession of States in respect of treaties.

31. On a preliminary basis, he could accept the provisions of sub-paragraphs (a), (b) and (c) of article 1 as a working proposition, on the understanding that they would be reviewed when the Commission had advanced further in its work. He was also prepared to accept the provisions of sub-paragraph (d), but tended to agree with Mr. Ushakov that drafting by reference could be dangerous and that the provisions of the draft articles should, as far as possible, be self-contained.

32. With regard to sub-paragraph (e), it was necessary to remember that very often a newly independent State was really old in history and civilization, so that it was natural for it to object to the use of the term “new State”. Another problem was the difficulty of drafting a provision which allowed for the fact that a “new State” was sometimes formed by the merging of portions of territory taken from two or three pre-existing States.

33. He was not altogether satisfied with the Special Rapporteur’s suggested rewording of sub-paragraph (e); it was not quite correct to say that a “new State” arose from a succession. The real position was rather that the problems of succession arose from the birth of a “new State”.

34. That being said, he wished to express his admiration for the scholarly reports submitted by the Special Rapporteur and for his extremely open mind, which would be of great assistance in leading the Commission through its debates.

35. Mr. USTOR said that article 1 (Use of terms) in the Special Rapporteur’s first report had contained a paragraph 1 which stated that the meanings specified for particular terms in article 2 of the draft articles on the Law of Treaties were also to be given to those terms for the purposes of the present articles. No such provision appeared in article 1 in the second report now under discussion, and in view of the objection which had been voiced to drafting by reference it would seem necessary to include in article 1 a series of additional paragraphs reproducing such provisions as those defining the meaning of “treaty”, in article 2, paragraph 1 (a) of the Vienna Convention on the Law of Treaties.

36. He noted the explanations given by the Special Rapporteur in paragraph (6) of the commentary to article 1 in his second report, and also the more detailed explanations in paragraph 4 of the introduction to his third report (A/CN.4/224) regarding the setting aside of the four articles proposed in the first report. Nevertheless, he thought the Commission would soon have to come to a decision on whether to include in the present draft not only a provision on the use of terms as defined in the Vienna Convention on the Law of Treaties, but also provisions on the scope of the articles and the relevant rules of international organizations. Those decisions would have to be taken before the Drafting Committee could usefully undertake its work.

37. Sir Humphrey WALDOCK (Special Rapporteur) said he intended to submit draft provisions on the points mentioned by Mr. Ustor. The Commission could then discuss those texts and refer them to the Drafting Committee at the appropriate time.

38. Another point which would have to be covered was that of reserving the continued application of the rules of general international law which were set out in the draft articles and which would apply under international law independently of those articles.

39. The CHAIRMAN said that, for the purposes of the present discussion, the Commission could assume, for example, that the term “treaty” was used with the meaning given to it in article 2, paragraph 1 (a) of the Vienna Convention on the Law of Treaties.

40. Mr. THIAM said he would not dwell on the subject of definitions, as the Special Rapporteur had indicated that it would be taken up again later.
41. As to substance, the draft was based on a concept which gave deep satisfaction to the new States, and of which he himself fully approved—that of self-determination: no new State was bound by previous treaties, but it could agree to be bound. The draft articles might be expected to be widely approved if the Commission stood by that basic principle throughout.

42. With regard to the definition of “succession”, he saw no practical value in a discussion on the use of the term “sovereignty”. That a metropolitan State had exercised de facto and de jure sovereignty over a territory and had assumed responsibility for it in international affairs was simply a fact to be noted. There was all the less point in discussing it because the draft articles recognized the right of new States to self-determination. Nevertheless if some people found the term unacceptable, it should be possible to find another.

43. It had been questioned whether it was appropriate to include a definition of the term “new State”, which might soon fall into disuse, in a codification intended for the future, especially since a great many problems had been settled during the last ten years, in which many States had acceded to independence. In his opinion, it would be well to speak of new States and to devote part of the draft especially to the problems relating to them, if only to emphasize the basic fact of decolonization. Furthermore, on the matter of principle, classical international law had long been based on the study of relations between sovereign States and it was not easy to make out when self-determination, which had become the concern of the United Nations, might have begun to influence writers on international law.

44. As to the definition of a “new State”, unlike Mr. Ushakov he thought it was too wide, since according to the commentary it covered cases of secession, that was to say the case of States that claimed to have become independent by secession and whose independence was not recognized. However, the Special Rapporteur had pointed out that some special cases would have to be treated separately.

45. To meet the objections of those who were opposed to the use of the term “new State”, arguing, with some justification, that new States were often former States whose sovereignty had been interrupted by colonization, perhaps a distinction could be made between “State” and “nation”, and the new States spoken of as former nations. The fact that such countries were today independent put them in a position similar to that of the West African States, which had accepted the status of new States while at the same time claiming the rights attached to the principle of self-determination.

46. He agreed with the Special Rapporteur and other members of the Commission that it would be necessary to return to the subject of definitions later, when the rest of the draft was reviewed.

47. Mr. TSURUOKA, referring to sub-paragraph (a), said that, unlike Mr. Ushakov, he did not think the capacity to conclude treaties was not, in itself, a precise concept. He doubted, however, whether the two expressions, “sovereignty of territory” and “competence to conclude treaties with respect to territory”, could be juxtaposed. Competence to conclude treaties was an integral part of sovereignty. Perhaps it would be possible to replace the word “or” by something more appropriate, or even to drop the reference to sovereignty of territory altogether and only retain the notion of competence to conclude treaties.

48. It was vital to have precise wording for definitions, but the rules governing the problems to be dealt with should be fairly flexible.

49. The Chairman thought that codification, in the form of a convention, of matters directly affecting new States was a sound method. He himself would go further. Such a convention would be open to new States and, pending their becoming parties to it, would give some idea of the existing rules on the subject and serve them as a guide. It would therefore be of practical value in international life.

50. As Mr. Quentin-Baxter had rightly said, the concept of succession contained an idea of transmission of rights and obligations. That also followed from article 9 (A/CN.4/224), for instance, which rightly provided that a new State was considered as maintaining reservations unless it expressed a contrary intention. It was on that basis that Japan had come to request many new States to refrain from invoking article 35 of the General Agreement on Tariffs and Trade against it. No doubt that was a special case, but it was not an isolated one and it should be taken into account in the commentary.

51. He was prepared to proceed with the consideration of the draft articles on the understanding that the Commission would revert to the definitions later.

52. Mr. SETTE CÂMARA, after praising the reports submitted by the Special Rapporteur, said that his approach was a realistic one which met the needs of modern international life. At the present time, when decolonization had brought independence to some sixty nations, it would be very dangerous to look on the problems of succession in respect of treaties with an old municipal law bias and to adhere to the concept of the automatic inheritance of rights and obligations. No country could agree to assume obligations contracted by another country without the direct intervention of its own will, since that would mean entering independent life with its hands tied by foreign commitments.

53. The Special Rapporteur’s conclusions were drawn from an impressive mass of experience in which antagonistic positions between predecessor States and successor States were very common. That had led to the formulation of the “clean slate” doctrine. Although in agreement with the Special Rapporteur’s line of thinking, he believed that in the future it would be necessary to bring into harmony with the needs of international life the successor State’s complete lack of obligations and its almost absolute possession of rights with respect to treaty succession.

54. Article 1 embodied a series of definitions, or terms of art, which were necessary for dealing with such a complex and intricate subject. As compared with the original formulation proposed by the Special Rapporteur in his first report, a considerable improvement had been achieved: the concept of government succession, which
covering the different circumstances in which succession
in such an approach. Another advantage of the empirical
definition of succession was that it referred exclusively
to the material fact of the replacement of one State by
another. That would make it unnecessary to deal with
the classical conception of succession as the actual transfer
of rights and obligations from predecessor to successor,
with all the elements of doubt and controversy inherent
in such an approach.

56. Article 1 went far beyond a simple explanation of the
meaning of the terms used in the draft. The wording of
the text and the spirit of the commentary made it clear
that the Commission's task was understood to fall within
the bounds of the general law of treaties and thus excluded
any obsolete analogies with problems of succession in
municipal law. Succession in municipal law dealt solely
with the devolution from one person to another of rights
and obligations by the force of law alone, independently
of the will of the persons concerned. Once it was admitted
that succession of States in respect of treaties was part
of the law of treaties, rights and obligations could not
be derived from any other source than the will of the
contracting parties as expressly stated.

57. After the first definitions in article 1, as presented
in the Special Rapporteur's first and second reports,
other terms of art had been added in following reports.
The third report (A/CN.4/224) included a definition of
the "Vienna Convention" (sub-paragraph (d))—which
was indispensable in view of the frequent references to
such a basic document of the law of treaties—of a "new
State" (sub-paragraph (a)) and of "notification of suc-
cession" (sub-paragraph (f)). All those expressions would
necessarily appear very often in the course of the Com-
mision's work of codification. In particular, the defini-
tion of the term "new State" was very important, since it
departed from the general, broad sense of the term so far
as to make it mean "a State which has arisen from a
succession where a territory which previously formed part
of an existing State has become an independent State".
That definition obviously excluded the cases of a union
of States, a federation with an existing State, and accession
to independence of a trusteeship territory, a mandated
territory or a protected State. The clear characterization
of the term "new State" was the cornerstone of the present
draft.

58. The definition of "notify succession" and "notifi-
cation of succession" in sub-paragraph (f) was also very
important, because it reflected the decisive moment in
the treaty-making procedure of a new State—the moment
when the element of consent, the will to be bound, was
duly expressed.

59. The last addition to article 1 proposed by the Special
Rapporteur in his fourth report (A/CN.4/249), namely,
sub-paragraph (g) defining the expression "other State
party", was necessary, since the common idea expressed
by the term "third party" did not satisfy the need to
cover cases in which reference had to be made to parties
to a treaty concluded by the predecessor State and in
force with respect to the territory involved. The Special
Rapporteur's wording was most ingenious and fully met
the needs of the Commission's future drafting.

60. Mr. TAMMES said he was fully satisfied with the
definition of "succession" in sub-paragraph (a); it was
an ingenious formulation and covered all the relevant
cases. He thought the term "succession" might be retained,
as the one most current in that context in international
law, even if it was subsequently concluded that no
succession took place in the municipal law sense of the
transfer of rights and obligations.

61. Less satisfactory, however, was the use of the word
"replacement" in sub-paragraph (a), since it was not clear
whether one State was replaced by another or whether
there was a continuity of the same State despite the drastic
changes which might have taken place in its territory.
That was a question which was often decided pragmatically
or unilaterally; in the case of partition, referred to by Mr. Ushakov, it was not clear for which part of
the territory there was a replacement of sovereignty and
for which part there was continuity of sovereignty. There
were, in fact, no legal criteria for such marginal cases,
nor had any been developed by international organiza-
tions when adopting their policy for the admission of
new members. The present debate would serve a useful
purpose by making everybody aware of those problems,
even if no solutions for them were known.

62. Mr. AGO said that article 1 went beyond mere
definitions and raised very important matters of sub-
stance, especially in sub-paragraphs (a) and (e).

63. The definition of "succession" given in sub-
paragraph (a) seemed entirely satisfactory. It was under-
stood that the concept of succession differed in inter-
national law and internal law, and that the Commission
could give the term "succession" a particular meaning,
which had been made clear in the general debate.
Mr. Ushakov had expressed doubts about the possibility
of covering all cases by recourse to the idea of replace-
ment of one State by another in the sovereignty of territ-
ory. Those doubts would be justified if sub-paragraph (a)
had the same wording as sub-paragraph (e), which
referred to "a territory which previously formed part of
an existing State". For it could not be said that a former
colonial power had formed a part of the metropolitan State;
on the other hand, it could be acknowledged that the sove-
reignty of a metropolitan power had extended to its
colonial territories. That had always been the position
in international law, so much so that the acquisition of
independence was a synonym for liberation from the
sovereignty of a particular State. Hence there was nothing
against the use of the term "sovereignty".

64. It would not be appropriate to mention only the
competence to conclude treaties, as Mr. Tsuruoka had
suggested, for two reasons. First, the Special Rapporteur
had referred to that competence intentionally, in order
to cover the case of States not subject to the sovereignty
of another State, that was to say, States which had
existed, but had not been sufficiently independent to have the capacity to conclude international treaties themselves. That was the position of States under a protectorate. Secondly, it would be inappropriate to describe the accession to independence of a territory previously under the sovereignty of another State—no matter whether it was a case of decolonization or something different—simply in terms of replacement in the competence to conclude treaties. The basic phenomenon to be borne in mind was detachment from sovereignty, and it was therefore essential to keep both formulas, even if the necessary explanations had to be given in the commentary.

65. The Special Rapporteur had tried to give definitions which covered all possible cases of succession, except in sub-paragraph (e), where his intention had been to refer only to succession due to the birth of a new State. Apart from the question of improving the drafting of the English version, the definition given in that sub-paragraph needed to be supplemented. For as he had just said, the formula “territory which previously formed part” was not applicable in all cases; there, too, it would be better to use some such expression as “previously under the sovereignty”. The words “an existing State” should also be reconsidered. In the first place, some States, like Poland, had been formed from parts detached from several different States. Secondly, the State from which the new State had been detached might have ceased to exist, like the Hapsburg Empire from which Czechoslovakia had emerged. It would be better to use a more neutral formula such as “one or more other States”.

66. Then there remained the fundamental question whether to use the term “new State” and to retain the definition given in sub-paragraph (e), the scope of which was restricted and which was, as the Special Rapporteur had himself admitted, only of practical utility. The use of terms was always a matter of convention, but conventions had their own limits. Although there was a difference between the case of a State created in the territory of a former colony and that of a State which had freed itself from a protectorate, it could hardly be said that one was a new State and the other was not. It was doubtful whether the expression “newly-independent State” could be used. The most important point was that the definition given in sub-paragraph (e) excluded, although they were certainly new, States resulting from a fusion, such as the United States of America, Tanzania and many others. He would add that some States which had emerged from a separation, such as Sweden and Norway, did not regard themselves as new States, and many newly-formed States would not agree to be so designated either.

67. In fact, the expression “new State”, as used in everyday language, was not a legal expression and it was not necessary for the Commission, whose work was exclusively legal, to use it. Besides, the idea it expressed was very relative, for what was new today would no longer be new in a little while. It would therefore be better to use the expression “successor State” to cover all the cases considered—he asked the Special Rapporteur to study that possibility—and to include a chapter containing the rules applicable to all cases of succession, followed by sets of rules dealing specifically with the different cases one after the other.

68. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself had not been enamoured of the term “new State”, but that at the start of his work on the topic he has been pressed to give prominence to new States. He had since come to accept Mr. Ago’s view that in a juridical exposition it would be preferable to use a less ambiguous phrase with fewer political overtones. Perhaps the answer could be found in the term “successor State”, though some drafting technique might be called for in applying it to the “moving treaty frontiers” principle. He suggested, therefore, that the Commission should use the term “new State” for working purposes when drawing up the general rules and then go on to deal with particular cases.

69. A union was not a “new State”; the United Arab Republic, in fact, had been a fusion of two sovereignties, which had subsequently been dissolved and treated as two separate States.

70. The CHAIRMAN said that in view of those comments he assumed that the term “new State” would not appear as defined at present.

71. Sir Humphrey WALDOCK (Special Rapporteur) said that some speakers had been in favour of the term, but that from a legal point of view it now seemed better to replace it by something else.

The meeting rose at 1.5 p.m.

1157th MEETING

Friday, 12 May 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castanea, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Camara, Mr. Tabibi, Mr. Tamnes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/286)

[Item 1(a) of the agenda]

ARTICLE 1 (Use of terms) (continued) 1

1. The CHAIRMAN invited the Commission to continue consideration of draft article 1 submitted by the Special Rapporteur.

2. Mr. Bartos said he agreed with the Special Rapporteur’s chosen method of work, but not entirely with the doctrine on which he relied. The classical doctrine was that succession, in other words, continuity, occurred

1 For text see 1155th meeting, para. 50.
even in cases of the emancipation of colonies. But since the establishment of the United Nations and the appearance of the phenomenon of decolonization, a new doctrine had come into being, according to which States born of decolonization did not automatically assume the rights and obligations of the former colonial Power.

3. Excepting the case of the former British colonies and possessions, such as India, whose independence had been recognized by an act of internal law providing for devolution of sovereignty, the States which had issued from decolonization considered that they had obtained their independence by their own will and that the consent of the former "holder" of the territory, which they regarded as a usurper, had no part in the creation of the new State. In the eyes of those States there could be no continuity of sovereignty or, consequently, of rights and obligations, unless they agreed to it.

4. The Commission was thus faced with a choice: either it must fully support the Special Rapporteur's proposals and adhere to the old "classical" doctrine dear to certain States, or it must adopt the new revolutionary doctrine, which many States did not accept. The difference was more political than technical. He himself was inclined to favour the new doctrine, and thought it would be well to mention, either at the end of article 1 or at least in the commentary, that the phenomenon of decolonization, as the origin of the creation of new States, called for some other conception of continuity of sovereignty than the classical doctrine.

5. That comment should not be taken to imply any criticism of the Special Rapporteur's work, which was perfectly logical from the standpoint he had adopted.

6. Attention should, however, be drawn to the existence of a new doctrine, even though it was still ill-defined, for the new States themselves, while refusing to regard themselves as the successors of the colonial régime, sometimes invoked measures taken by the colonial Power if they were to their advantage. For example, when Pakistan had become a Member of the United Nations, it had cited a map made by the British authorities fixing the frontiers when the country had become independent and thereby drawn a protest from Afghanistan, which had considered itself injured by that arbitrary act of the United Kingdom. In any case, it would be a mistake for the Commission to affirm that the classical doctrine was the only one that need be taken into account.

7. Mr. REUTER said he recognized that the definitions drafted by the Special Rapporteur were in no way final and were intended solely for the use of the Commission. It was also understood that the draft articles submitted related to a special case and that there would be other special cases to be considered. Obviously, the Commission would not know until it reached the end of its work to what extent it would need to recast the whole draft and work out simpler and more general rules to cover all the special cases. It was the Commission's method of work that was responsible for that situation, not the Special Rapporteur.

8. It was also understood that the Commission's work was only at a provisional stage. It was obliged to use a certain terminology in order to make progress without misunderstandings, though it was sometimes hard to dissociate substance from form. He hoped it would be possible to avoid unduly complicated formulations and terms that wounded legitimate susceptibilities.

9. Incidentally, a substantive problem was raised by sub-paragraph (f) of article 1, in regard to the possibility of States continuing their participation in multilateral treaties. He approved of the intention, but if the idea was to be retained it would be necessary to adopt a more radical solution and say that in order to preserve continuity, multilateral treaties continued to apply provisionally until the successor State took a decision.

10. Another point he wished to make was that the Commission must choose a reasonable solution and reach a compromise between the desire to adopt general solutions and the necessity of accepting particular solutions. If it was not to sink into chaos, the Commission could not do otherwise than take a general position on certain principles, but the facts were there and once it had taken a position on principle, the Commission would have to consider what would be the consequences in each specific case. It was not certain that the same principles could be adopted in every case. The most important question was how many special régimes were to be provided for.

11. It would therefore be best to follow the course proposed by the Special Rapporteur, who had started with a simple and clearly defined case, on the understanding that the solutions adopted for that case might not be applicable to others, such as cases of merger, like European unification.

12. He agreed with Mr. Bartos on the subject of decolonization. It was no accident that the Special Rapporteur's approach in the draft articles coincided with the wish of the States issuing from decolonization to be born free from all prior commitments. But it was necessary to consider what other problems might arise from decolonization.

13. For example, several members of the Commission had alluded to the serious problem of colonial frontiers. The principle of the claim to former frontiers could be accepted so far as frontiers in general were concerned, but more caution was called for in the case of frontiers deriving from a colonial situation. There were many problems of decolonization which had not yet been settled, especially in Asia. Could the Commission lightly accept the idea of laying down special rules on decolonization applicable to the problems of Asia? He was not opposed to that idea, but he hoped such matters would not be considered until the end of the Commission's work; it would be better to start with the text submitted by the Special Rapporteur.

14. The Commission would have to deal, at least in the commentary, with the question of a succession involving an international organization, namely, the question of Namibia; it could not ignore problems of that kind.

15. If the Commission was going to refer to the Vienna Convention on the Law of Treaties, it should think twice before limiting the effects of its draft to treaties for which that Convention had laid down substantive rules. The Convention had done so only for treaties in written
form, but it contained other provisions from which it followed that the *pacta sunt servanda* rule also applied to oral agreements.

16. Mr. BILGE said that he too approved of the method proposed by the Special Rapporteur, who had prudently given warning against analogies with internal law. The difference was not only between internal law and international law, but also between national legal systems. It would be well, however, not to reject out of hand the idea that there could be analogies between internal law and international law, for example, in regard to the disposal of property or, even more, the transfer of contractual rights and obligations. The difference between the notion of the automatic transfer of rights and obligations in internal law and in international law should be brought out more clearly and explained in the commentary. Nevertheless, he accepted the definitions submitted by the Special Rapporteur, the sole purpose of which was to provide a working foundation for the Commission.

17. The reference to sovereignty in the definition in sub-paragraph (a) should be deleted, and it should be specified, either in a general reservation or in the commentary, that cases of military occupation were excluded.

18. With regard to the notion of a new State, the Special Rapporteur had naturally wished to take a typical case as his starting point. The Commission would not be able to decide whether the term was appropriate or not until it reached the end of its work. Similarly, it was only then that it would be able to decide on the structure for the draft. The Commission should therefore accept the proposals made by the Special Rapporteur in his third report (A/CN.4/224).  

19. He believed that the solution to the problems of succession in respect of treaties was not to be sought solely in the law of treaties, but in the whole of the international legal order.

20. Mr. TABIBI said he agreed with Mr. Reuter that the question of boundaries was a burning issue, particularly in Asia, where the lives and destinies of millions of people were involved. In his opinion, therefore, article 2 should not be dealt with after article 1, but should be considered in Part IV of the Special Rapporteur's draft, on dispositive, localized or territorial treaties.

21. With regard to article 1, while he accepted the Special Rapporteur's explanation that the article was not intended to be definitive, it was certainly highly important, since it was the key to the whole discussion. In particular, he thought that sub-paragraph (g), which defined "other State party", should be given greater prominence, since in practice the position of the other party to a treaty was often of equal importance to that of the predecessor State. It was unfortunately true that a number of treaties concluded during the nineteenth century era of colonialism had ignored the position of third parties. The treaties between his own country and the United Kingdom, for example, had been concluded on that basis.

22. The Anglo-Afghan Treaty of 1921 had acknowledged the independence of Afghanistan, and article XI of that treaty had laid down certain provisions regarding the tribes in two frontier areas: the North-West Frontier area and the free tribal area. The latter was an area with 4 million inhabitants who were allowed to move freely, without passports, between Afghanistan and India, and the British Government had undertaken to consult the Afghan Government in all matters concerning the area; but by the Indian Independence Act of 1947, the British Government had unilaterally transferred both areas to Pakistan, completely ignoring the millions of Afghans dwelling in the region, in violation of the principle of self-determination. That example was sufficient to show the need to give prominence to the position of the "other party" in bilateral treaties concluded by a predecessor State.

23. He agreed that sub-paragraph (d) should be retained, since there were many cases in which reference could be made to the chapter on invalidity in the Vienna Convention on the Law of Treaties.

24. As Mr. Ago had shown by historical examples, the term "new State", defined in sub-paragraph (e), was not a legal term. It was, nevertheless, a useful term, since it corresponded to earlier decisions by both the Sub-Committee on Succession of States and Governments and the General Assembly. "New States" need not have acquired their status by decolonization; it was sufficient that they had all gone through the same process of attaining independence. Perhaps the term "newly independent States" could be adopted.

25. Mr. YASSEEN observed that article I was not confined to stating definitions, but in fact established the method of work to be followed in preparing the draft.

26. In wording sub-paragraph (a) as he had, the Special Rapporteur had wished to make it clear at the outset that the use of the term "succession" did not permit of analogies with internal law. It should be noted, moreover, that systems of internal law varied considerably in that respect; for instance the notion of transfer of obligations was unknown to the Moslem law of succession. The Special Rapporteur intended the term "succession" to designate a *de facto* situation, namely, the replacement of one sovereignty by another. The Commission's task was to try to find solutions to the problems raised by that situation. He supported the neutral method adopted by the Special Rapporteur, which was the only one that could lead to positive results.

27. Sub-paragraph (a) had, however, met with objections from members of the Commission, mainly in regard to the reference to sovereignty. Some members had expressed doubts about the birth or continuity of sovereignty over certain territories. He himself thought it inadvisable to say anything about the source of sovereignty, which might have been usurped or exercised in a manner incompatible with the principles at present in

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force. The Special Rapporteur and the Drafting Committee should therefore ensure that sub-paragraph (a) was drafted in such a way as not to prejudice those questions.

28. Mr. ALCIVAR said that when the Commission had discussed succession of States in 1970, he had stressed the unity of the subject, though he fully realized that there were sound technical reasons for dividing it into two topics.

29. He supported the Special Rapporteur's method of dealing with the topic of succession of States in respect of treaties within the framework of the 1969 Vienna Convention on the Law of Treaties. He also shared the Special Rapporteur's view that the municipal law concept of "succession" should not be injected into international law.

30. During the discussion in 1970, he had drawn attention to the problem of succession, of which a number of examples were to be found in Latin-American history. One was the formation and subsequent break-up of the union of the five States of Central America; another was the splitting-up of the original "Greater" Colombia into the three separate States of Colombia, Ecuador and Venezuela. A fourth State, Panama, had subsequently been formed, in 1903, by secession from Colombia.

31. He regretted that sub-paragraph (a) contained a reference to "sovereignty", and would have preferred the formula originally proposed by the Special Rapporteur in his first report (A/CN.4/202), which avoided that term and referred simply to the replacement of one State by another in "the possession of the competence to conclude treaties with respect to a given territory".

32. In 1963, in its interpretation of the effect of the provisions of Article 73 of the United Nations Charter, the delegation of Ecuador had put forward the view that the adoption of the Charter had brought into being a new international legal order by virtue of which the colonial status was automatically abolished. Consequently, the former colonies had ceased to be subject to the sovereignty of the metropolitan Powers concerned. Those Powers were, in the language of Article 73, "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government". As such, and by virtue of the same Article, they undertook "to develop self-government" and to assist the peoples of those territories "in the progressive development of their free political institutions".

33. In such cases the metropolitan State ceased to be sovereign over the non-self-governing territory and became an administering authority answerable to the United Nations. As for the non-self-governing territory, it had two of the distinctive characteristics of a State, namely, a territory and a population; but it lacked a government of its own to represent it in international relations. The metropolitan State represented the non-self-governing territory in its international relations, not by virtue of its sovereignty, but in its capacity as an administering authority under the Charter. Moreover, it remained under a duty to assist the people concerned to attain self-government.

34. That interpretation of the Charter provisions on non-self-governing territories had been accepted by the Assembly and, for that reason, he would have preferred a formula for sub-paragraph (a) which avoided the use of the term "sovereignty". Nevertheless, he was prepared to accept the compromise formula put forward by the Special Rapporteur, which combined the concept of replacement in sovereignty with that of replacement in the competence to conclude treaties.

35. With regard to sub-paragraph (e), he had some doubts about the Special Rapporteur's idea of leaving the cases of mandates and trust territories outside the scope of the term "new State". He believed, however, that the Commission would be able to arrive at a formula that would cover those categories as well.

36. The CHAIRMAN speaking as a member of the Commission, said he agreed with the neutral wording put forward by the Special Rapporteur for sub-paragraph (a). He also agreed that the municipal law concept of succession should not be introduced. It was equally desirable, however, to avoid introducing into international law the municipal law concept of novation, to which he had noted a few references in the commentaries to the Special Rapporteur's draft articles. That concept did not carry over easily into international law and could cause constitutional difficulties in many States.

37. There was, perhaps, some conceptual confusion in the wording of sub-paragraph (a). The use of the conjunction "or" to link the two phrases "in the sovereignty of territory" and "in the competence to conclude treaties with respect to territory" appeared to suggest that the two phrases covered different ground, whereas in fact the concept of sovereignty necessarily included the power to conclude treaties with respect to the territory over which sovereignty was exercised.

38. He was not at all certain that it was necessary to include a reference to sovereignty in sub-paragraph (a) or to refer specifically to the competence to conclude treaties. He would therefore propose the following short definition: "Succession" means the replacement of one State by another in the capacity to conclude treaties, the term "capacity" might be used, as in article 6 of the Vienna Convention on the Law of Treaties. The reference would then be to the "replacement of one State by another in the capacity to conclude treaties with respect to a given territory". If it was also desired to retain the reference to sovereignty, it might be done by saying that: "Succession" means the replacement of one State by another in the capacity to conclude, as sovereign, treaties with respect to a given territory.

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39. Mr. ROSSIDES said he could accept the Special Rapporteur’s formulation for sub-paragraph (a) as a convenient temporary solution to a problem of terminology to facilitate the Commission’s discussions, but on the understanding that the Commission would later amend the wording if that proved necessary in the light of its discussions. The crucial fact was the passing of sovereignty over a territory from one State to another, regardless of whether it resulted from an agreement between two States or from the attainment of independence by a formerly dependent area.

40. With regard to the provisions of sub-paragraph (e), there was a great difference between the emergence of a new State as a result of the splitting up of an existing State, and the attainment of independence by a former colony. In the first case, of which the attainment of independence by Czechoslovakia in 1919 was an example, the inhabitants of the territory had been full citizens of the State from which they had separated. The inhabitants of a colony, on the other hand, had never been considered full citizens of the metropolitan Power. The Charter of the United Nations took note of that distinction when it placed upon metropolitan States the duty to emancipate their colonies, but those Charter provisions did not apply to such situations as the dismemberment of States and the formation of unions of States.

41. One method of overcoming those difficulties might be to retain the term “new State” with the meaning attached to it in sub-paragraph (e), and to introduce another term, such as “newly emancipated State”, to cover the case of former colonies which had attained independence.

42. Of great importance for new States were the opening words, “Every treaty in force is binding . . .”, of article 26 (Pacta sunt servanda) of the Vienna Convention on the Law of Treaties. A treaty would be binding upon a new State only if it was “in force”, which meant if it was validly in force. That point was vital for the newly emancipated States, because in some cases treaties had been imposed upon them, and since those treaties had not been freely entered into or were in conflict with a peremptory norm of general international law, they were not valid and so could not be held to be “in force”.

Yearbook of the International Law Commission
(resumed from the 1151st meeting)

43. The CHAIRMAN said he would read out the letter concerning the printing of the Yearbooks of the International Law Commission drafted by the group to which that matter had been referred. If the letter was approved by the Commission, he would send it to the United Nations Legal Counsel. The letter read:

I am writing in connexion with the memorandum from the Executive Secretary of the Publications Board relating to the printing of volume II of the 1971 Yearbook of the International Law Com-

mission and volume I of the 1972 Yearbook (see document ILC (XXIV)/Misc.1 attached).

At its 1151st meeting, on 4 May 1972, the Commission referred that memorandum to the enlarged Bureau, composed of the officers of the Commission, the Special Rapporteurs and former Chairmen present in Geneva. The enlarged Bureau met on 9 May 1972 to consider the matter. In addition to the memorandum from the Executive Secretary of the Publications Board, it had before it a paper prepared by the Secretariat setting out the printing costs of the documents to be included in volume II of the 1971 Yearbook (see document ILC(XXIV)/Misc.2 attached).

The members of the enlarged Bureau stressed the importance of the documents published in the Commission’s Yearbook. The Yearbook contains the travaux préparatoires which are indispensable for a proper understanding of the Commission’s drafts. These documents are, in the first place, indispensable to States in their preparations for and participation in diplomatic conferences called to consider draft articles prepared by the Commission. They also have a continuing value of substantive importance as is established from the frequent references to them in State practice, in pleadings before and opinions of the International Court of Justice and Arbitral Tribunals, as well as the innumerable references in various scholarly works. It was pointed out in this connexion that paragraph (g) of article 16 of the Commission’s Statute provides that:

“When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in sub-paragraph (c) above;”

A similar provision appears in article 21.

However, taking into account the present exceptional financial difficulties of the United Nations, the enlarged Bureau considered the possibility of making the following recommendations to the Commission:

1. Volume II of the 1971 Yearbook would be divided into two parts.

2. Part I would contain the Commission’s Report on the work of its twenty-third session, and the Reports of the Special Rapporteurs. These documents are listed under A and B.1 to B.5 in the Secretariat paper (ILC (XXIV)/Misc.2) and their printing costs are estimated at $37,640, a sum which exceeds by $9,640 the amount available for the printing of volume II of the 1971 Yearbook see para. 5 of the memorandum from the Executive Secretary of the Publications Board, ILC(XXIV)/Misc.1). Since Part I must be printed this year and circulated before the beginning of the next session of the Commission, the enlarged Bureau expressed the hope that, after reconsidering the matter, the Publications Board would find the additional funds required.

3. Part II of volume II of the 1971 Yearbook would contain all the other 1971 documents of the Commission with the exception of:

(i) The letters and memoranda listed under B.6 to B.9 of the Secretariat paper (ILC (XXIV)/Misc.2);

(ii) The historical survey listed under E.4;

(iii) The report by the Secretary General listed under F.1 to F.3.

Part II should be issued in 1973 at the same time as volume II of the 1972 Yearbook and the necessary funds should be included in the budget estimates which the Secretary-General will submit to the General Assembly. I may point out, in this connexion, that if the study of the practice of the Secretary-General as depositary of treaties is not published in volume II of the 1972 Yearbook, that volume will be shorter than usual (approximately 230 pages).

4. The Report of the Secretary-General listed under F.1 to F.3 in the Secretariat paper would be published in the Yearbook at a
later date, when the Commission takes up the topic of the non-navigational uses of international watercourses.

The enlarged Bureau would greatly appreciate receiving your views on the above tentative recommendations before it takes a final decision thereon. The matter is somewhat urgent since the Editing Section of the Geneva Office cannot prepare the manuscript of volume II of the 1971 Yearbook before it receives the instructions of the Commission. You may therefore wish to give me your views by cable.

44. If there were no comments, he would take it that the Commission agreed that he should send that letter to the Legal Counsel.

It was so agreed.

The meeting rose at 12.50 p.m.

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1158th MEETING

Monday, 15 May 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Akefvar, Mr. Bartoš, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiim, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(resumed from the previous meeting)

ARTICLE 1 (Use of terms) (continued)¹

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

2. Sir Humphrey WALDOCK (Special Rapporteur) said it had been clearly understood by all the participants in the discussion that the provisions of sub-paragraphs (a), (b) and (c) were wholly provisional at the present stage and would have to be reviewed when the Commission arrived at some conclusion on the substantive rules.

3. Some of the points which had been raised during the discussion could be more conveniently dealt with in connexion with the substantive rules to which they related; for the present he would concentrate on the comments on sub-paragraph (a).

4. There had been general agreement that a formula on the lines of that which he had put forward should be retained for the time being for working purposes. It was true that the term “succession” was ambiguous, but it would create great difficulties if the concept of transmission of rights were to be adopted in sub-paragraph (d) at the present stage. The meaning of the term “succession” should be restricted for the time being to the mere fact of the replacement of one State by another. That being so, the French term “substitution” was not altogether appropriate in that it contained, to some extent, the notion of transmission; another term should perhaps be sought and it had been suggested to him that “remplacement” might be preferable.

5. Consideration would be given in the Drafting Committee to the drafting suggestions made by the Chairman, when speaking as a member of the Commission, at the end of the previous meeting, in particular to his suggestion that the expression “capacity to conclude treaties” should be used.

6. He had been very conscious of the dangers of the ambiguity of the term “succession” when drafting sub-paragraph (f), in which he had had to define the terms “notify succession” and “notification of succession”. There, of course, “succession” meant succession in respect of a treaty and contained a certain element of transmission of rights. He had included that definition because the phrases defined were frequently used, especially in United Nations practice, where a new State had notified a succession in respect of a treaty.

7. With regard to the provisions of sub-paragraph (e), he realized that the term “new State” could be used in different senses, leading to different interpretations. He had used it because of the need for a framework in which to formulate the general rules on succession to multilateral and bilateral treaties. On further consideration, it might perhaps be decided to refer only to the “successor State” and to eliminate the concept of a “new State” altogether.

8. As to the method he had adopted of dealing with the present topic within the framework of the law of treaties, he wished to make it clear that he had no intention of separating the topic entirely from succession. What was needed was to determine the impact of cases of succession on the rules of the law of treaties.

9. On the question of drafting by reference, it would be for the Drafting Committee to decide whether that method was necessary in the present instance. Personally, he thought that cross-reference to the 1969 Vienna Convention on the Law of Treaties would be convenient as it would avoid having to frame a set of provisions on such difficult questions as reservations.

10. Considerable stress had been laid during the discussion on the principle of self-determination. It went without saying that the present topic should be considered in the light of all the principles of international law, of which the principle of self-determination was particularly relevant. Nevertheless, it should be remembered that it was an autonomous principle, just as the law of treaties and the law of succession were autonomous. It was also necessary to be cautious about the principle of self-determination, because if it were carried too far it would make it impossible to adopt what he understood to be the Commission’s view on the question of localized or territorial treaties.

11. Mention had also been made of the distinction between general multilateral treaties and restricted multilateral treaties. He had introduced into draft article 7

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¹ For the text see 1155th meeting, para. 50.
inspiration from the relevant provisions of the Vienna Convention on the Law of Treaties and the effect of which would be to leave restricted multilateral treaties outside the scope of the main provisions of article 7. When the Commission came to discuss that article, it might appear desirable to formulate some further rules on the matter.

12. With regard to bilateral treaties, he fully agreed that the municipal law concept of novation should be avoided. In fact, he had not used the term “novation” at all in his draft articles. He had used it in one or two places in the comments for the sake of convenience, but the Commission could eliminate those references without difficulty for the purposes of its own commentaries when it came to adopt them.

13. There had been some misunderstanding of his general position when it had been suggested, during the discussion, that his draft articles were an expression of the traditional doctrine. In fact, the text of the draft articles was very much affected by the principles of the Charter, particularly the principle of self-determination. For that reason members from new States had approved the general philosophy of the draft articles. They contained an element of progressive development, but were largely based on modern State practice.

14. With regard to the question of boundary treaties, which he had reserved in his first draft, he wished to assure members that he intended to submit an article dealing with the matter.

15. The interesting problems of the European Economic Community and Namibia had been raised during the discussion. The Community, he thought, was as yet outside the scope of the draft articles; as to Namibia, the situation with regard to succession was still too undeveloped to be treated as a practical issue in the present discussion.

16. He suggested that article 1 be referred to the Drafting Committee for consideration in the light of the discussion.

17. Mr. USTOR said he understood that the Drafting Committee would be able to deal with any further suggestions from the Special Rapporteur on provisions dealing with the meaning of terms other than those included in the present draft. In particular, consideration could be given to the inclusion of provisions on the meaning of the terms defined in article 2, paragraph 1, of the Vienna Convention on the Law of Treaties.

18. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 1 to the Drafting Committee as proposed by the Special Rapporteur and on the understanding expressed by Mr. Ustor.

It was so agreed.


* For commentary see Yearbook of the International Law Commission, 1969, vol. II, pp. 52 et seq.
example was that of Newfoundland when it had become a part of Canada in 1949. The concept of unilateral annexation should be rejected, but there were other less objectionable ways in which one State could be merged with another. The problem was one of practical importance and should be dealt with in article 2.

24. He welcomed the restriction on the application of the main rule, contained in the concluding proviso of sub-paragraph (a), "unless it appears from a particular treaty or is otherwise established that such application would be incompatible with the object and purpose of that treaty". That wording was based on the language of two articles of the Vienna Convention on the Law of Treaties: article 18 on frustration and article 19 on the formulation of reservations. Personally, he thought that, in addition to the object and purpose of the treaty, explicit reference should be made to the question of fundamental change of circumstances, in the terms used in article 62, paragraph 2(b) of the Vienna Convention. The extension of the treaty régime could bring about a fundamental change, detrimental not only to the successor State, but also to the other State concerned. The other State might, for example, have difficulty in extending the territorial scope of application of a commercial treaty.

25. Mr. SETTE CÂMARA said he supported the text of article 2, which combined the "moving treaty frontiers" principle with the "clean slate" principle. The rule it embodied was really a corollary to that contained in article 29 of the Vienna Convention on the Law of Treaties. Since that article stated that a treaty was binding upon each party "in respect of its entire territory", it followed that, if the territory of a party to a treaty was extended, the treaty would apply to the extended territory. The rule also had a negative aspect, in that the treaties of the predecessor State would cease to apply to the area of territory transferred, since that area was no longer part of the territory of the predecessor State.

26. The formulation proposed by the Special Rapporteur offered the necessary flexibility and was quite acceptable, but he had doubts about the position of the article in the draft.

27. Mr. NAGENDRA SINGH said that, before discussing article 2, he wished to refer once again to article 1. He considered that the draft on succession in respect of treaties should be kept distinct from the codification undertaken by Mr. Bedjaoui. If any action were taken to integrate the two aspects of succession, namely, treaties and matters other than treaties, such as credits, debits and contracts, it would cause complete confusion. Consequently, he did not favour the inclusion in article 1, subparagraph (a) of the reference to "sovereignty of territory"; questions of transfer of sovereignty belonged to the topic of succession in respect of matters other than treaties, and any attempt to bring those questions into the present topic would create serious difficulties. Since, in the present draft, the Commission was exclusively concerned with succession of States in respect of treaties, the reference to sovereignty should be dropped and subparagraph (a) should refer only to the replacement of one State by another in the competence to conclude treaties with respect to territory. A formulation of that kind would be enough to cover all the problems arising from such situations as decolonization, unions of States and dissolution of unions.

28. On the question of categories of treaties, it was necessary to bear in mind the important category of constituent instruments of international organizations. Succession in respect of such treaties was particularly important.

29. He was not in favour of codification by cross-reference; the draft articles should be self-contained.

30. With regard to article 2, he thought it could possibly be retained, although the International Law Association had not included a provision on the "moving treaty frontiers" rule in its draft. The contents of article 2 would be useful, in particular, for purposes of the application of the provisions of constituent instruments of international organizations. For example, if a territory in which there were shipowners was added to that of a pre-existing State, the tonnage held by those shipowners would have to be added to that State's total for purposes of the application of certain important provisions of the constituent instrument of the organization concerned. However the territory must be acquired by legal means, not by war and conquest. As the United Nations Charter prohibited force in inter-State relations, that point should be covered by existing international law.

31. Mr. TABIBI said that the principle of self-determination was the paramount principle of the United Nations, as was clear from the language of Article 1 (2) and Article 55 of the Charter. That principle had to be borne in mind in any codification, but was particularly relevant to the present topic.

32. The principle of self-determination had affected all the rules of traditional international law. As a result of the adoption of the United Nations Charter, new principles of international law had emerged which had to be taken into account when framing any rule of international law.

33. On the question of frontiers, to which he had referred at a previous meeting, he wished to make it clear that, as a citizen of a small country, he was in favour of stability. At the same time, it was essential not to do anything which could have the effect of legalizing situations created by unequal treaties. Throughout Asia, serious problems arose in connexion with frontiers and gave rise to many political difficulties.

34. He agreed with Mr. Sette Câmara that some other place would have to be found for article 2; its contents were not appropriate for an opening article. Consideration might be given to placing it in Part IV, on dispositive, localized or territorial treaties.

35. Mr. USHAKOV said that article 2 was not a general article but an article dealing with a particular case, namely, the transfer of an area of territory from

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7 See 1155th meeting, paras. 10 et seq.
one State to another. As the Special Rapporteur had indicated in his commentary, there were exceptions to the “moving treaty frontiers” principle stated in article 2 and the application of that principle might need to be qualified by other rules. A separate section should be devoted to all those rules so that they could be considered at the same time as article 2.

36. The text of article 2 called for some comments. First, with regard to the introductory phrase, it might be asked whether there were any States which did not possess treaty-making competence; if not, the phrase “possessing treaty-making competence” was superfluous. Secondly, it would be better to say “another State” instead of “an already existing State”. Thirdly, the expression “passes under the sovereignty” was not clear. It meant, of course, the lawful transfer of an area of territory, but it would be better to be precise and to replace the phrase “passes under the sovereignty of an already existing State” by “is transferred by mutual agreement from one State to another State”.

37. With regard to sub-paragraph (a), a definition of “the date of the succession” should first be given in article 1. The second part of the sentence stated the rule laid down in article 29 of the Vienna Convention on the Law of Treaties, but in a slightly different form; he wondered whether it was possible to transfer that rule, since article 29 of the Vienna Convention referred to the entire territory existing at the time of the conclusion of a treaty, whereas draft article 2 dealt with the entire territory after a treaty was concluded. Further, the draft articles made provision for the future, and the phrase “or is otherwise established…” referred to territory existing at the time of the conclusion of an earlier treaty; the Drafting Committee should pay careful attention to that question of time.

38. Finally, in sub-paragraphs (a) and (b) the expressions “that treaty” and “that area” should be made more precise.

39. Mr. YASSEEN said that article 2 raised no problem; it simply concerned the application of the “moving treaty frontiers” principle, which could be deduced from article 29 of the Vienna Convention on the Law of Treaties. A treaty applied in principle to the entire territory, but the intention of the parties could provide a basis for establishing that it applied to the territory not only as it was at the time when the treaty was concluded, but also as it would be at any other time.

40. The introductory phrase of article 2 certainly referred only to lawful transfers of territory. It would be inconceivable for the Commission to propose a provision sanctioning an unlawful situation. It was necessary to respect the principle of self-determination, within the limits recognized by international law.

41. In general, the provisions of article 2 were logical and were confirmed by practice. Subject to a few improvements in drafting, he thought the article acceptable.

42. Mr. CASTAÑEDEA said he had no difficulty in accepting the Special Rapporteur’s text for article 2; in particular, he could agree to his reasons for excluding other cases of transfer of sovereignty. Questions concerning the transfer of territory in connexion with the creation of a new State, or of a federation or union of States, could be dealt with in article 18 (A/CN.4/256).

43. However, there was one question which seemed deserving of consideration. While article 2 obviously dealt with the lawful transfer of sovereignty, he was inclined to wonder, like Mr. Ushakov, whether consideration should not be given, particularly when finalizing the draft, to the problem of reconciling the lawful transfer of sovereignty with the very obvious need not to recognize any transfer of territory achieved by unlawful conquest. In the time of the League of Nations, it had generally been acknowledged by legal authorities that any unlawful transfers of territory were contrary to the League Covenant; the Commission should consider to what extent even partial transfers of territory, in so far as they were possibly unlawful, could be reconciled with that principle and with the principles of the United Nations.

44. Mr. HAMBRO said he agreed with Mr. Yasseen that the Special Rapporteur had produced a satisfactory text for article 2, though he could also agree with Mr. Castañeda that it might be necessary to give further consideration to the article when considering article 18. In connexion with article 18, he did not think it necessary to invoke all the general principles of international law, since that would tend to prolong the discussion unnecessarily. It should be assumed as implicit in the draft that the Commission would not wish to adopt anything that would conflict with the purposes and principles of the United Nations.

45. Mr. USTOR said he was basically in agreement with article 2 and fully accepted the reasons given by the Special Rapporteur in support of the reservation contained in sub-paragraph (a).

46. With regard to sub-paragraph (b), he was not entirely clear as to what would happen to treaties, such as those concerning international servitudes, which might apply to the part of the territory transferred.

47. Sir Humphrey WALDOCK said that question had already been raised by Mr. Reuter and other speakers, and he had agreed that there was a need for some reservation with respect to localized treaties.

48. Mr. USTOR said he had only mentioned the point because, while the reservation had been made with respect to sub-paragraph (a), it had not been made with respect to sub-paragraph (b).

49. Mr. AGO said he agreed with Mr. Yasseen that the situation covered by article 2 was a simple one and should not be complicated unnecessarily. The article dealt with the transfer of territory from one existing State to another and its consequences for treaties. It was self-evident that the transfer must be valid; the Commission could not contemplate the legal consequences of an invalid transfer and, in any case, it did not need to concern itself with the validity of a cession or other agreement; it simply assumed, for its own purposes, the existence of a valid agreement.

50. The article showed once again that the Special Rapporteur was right in considering that the topic for which
he was responsible dealt with the fate of treaties in the event of a succession of States, rather than with, strictly speaking, the succession of States in respect of treaties. He fully agreed with the Special Rapporteur's views on that point, which were admirably set out in paragraph (2) of his commentary to article 2.

51. The text of article 2 only raised questions of drafting. It might be asked whether the phrase "an area of territory which is not itself organized as a State possessing treaty-making competence" was well chosen, since it had been affirmed in the Vienna Convention on the Law of Treaties that every State possessed capacity to conclude treaties. The wording used by the Special Rapporteur gave the impression that States were divided into two categories, according to whether they did or did not possess treaty-making competence. It might perhaps be true that that was sometimes so in reality, but as the Vienna Convention had sought expressly to exclude such a distinction, the Drafting Committee should try to find a way of removing that apparent contradiction.

52. Sub-paragraph (a) gave the impression that a main category and an exceptional category of treaties were contemplated, the former containing treaties which applied automatically to any territory newly acquired by a State, and the latter containing treaties which could not apply to a new territory—for instance, because they had been drawn up and concluded solely for a specific area. But there was another category of treaties which might perhaps have to be taken into account in drafting the article, namely, treaties which by their very nature were not susceptible of territorial application and consequently were not affected by any enlargement or diminution of territory. Examples were treaties providing for the supply of certain goods and treaties of defensive military assistance.

53. With regard to Mr. Ustor's comment and the Special Rapporteur's reply about sub-paragraph (b), he wondered whether localized treaties really came within the sphere of succession in respect of treaties or whether they did not rather come under succession in respect of other matters. One example was an international right of passage established by treaty. If the territory was transferred, would the servitude be imposed on the transferee State by succession to a treaty obligation or by succession to a real obligation? Rather than from succession to a treaty, would not the obligation derive from the principle res transit cum onere suo. That was also the standpoint from which the questions raised by treaties relating to frontiers should be considered, for it was open to question whether they really came within the sphere of succession in respect of treaties.

54. Article 2 was acceptable, on the understanding that the Commission would subsequently have to regulate certain special situations.

55. Mr. ROSSIDES said that, although article 2 appeared in general to be fairly clear, it should be made more explicit that any transfer of territory must be in accordance with the principles of the Charter and of the self-determination of nations. Some reference to the purposes and principles of the Charter should be included, possibly at the beginning of the draft, in order to make it clear to the international community as a whole that the Commission, in its work on the codification and progressive development of international law, was fully aware of their importance.

56. A reference to the principle of self-determination would seem to be particularly necessary: perhaps the words "passes under the sovereignty of an already existing State" could be amended to read: "passes with the consent of its people under the sovereignty of an already existing State".

57. Mr. QUENTIN-BAXTER said that in principle he could support the Special Rapporteur's text for article 2, though its exact place in the draft would have to be decided later. He did agree, however, that it was necessary to reconcile the phrase "not itself organized as a State possessing treaty-making competence" with the exception stated in sub-paragraph (a).

58. With regard to sub-paragraph (b), he noticed that at no other place in the draft was reference made to the position of the predecessor State, in particular with respect to its release from its rights and obligations under treaties. He would be grateful if the Special Rapporteur would consider that question in connexion with article 3 (A/CN.4/214/Add.1).^6

59. The CHAIRMAN, speaking as a member of the Commission, said that he too could agree in general to the Special Rapporteur's text for article 2.

60. He did not consider it necessary to include a reference either to the principle of self-determination or to the unlawful seizure of territory, since such references would normally be made by the diplomatic conference in the preamble to the future convention, or wherever it judged best.

61. Sub-paragraph (a) was a restricted version of article 29 of the Vienna Convention on the Law of Treaties; the Commission would be able to determine later, when it had considered the final interrelationship of all the articles, whether the provision was sufficiently broad.

Appointment of a Drafting Committee

62. The CHAIRMAN suggested that the Commission appoint a drafting committee of twelve members, including both new and old members, on a basis of equitable geographical distribution. The members could be Mr. Ago, Mr. Alcivar, Mr. Castañeda, Mr. Elias, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen.

It was so agreed.

The meeting rose at 5.55 p.m.

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Succession of States in respect of treaties


[Item 1 (a) of the agenda]
(resumed from the previous meeting)

ARTICLE 2 (Area of territory passing from one State to another) (continued) 1

1. The CHAIRMAN invited the Commission to resume consideration of draft article 2 (A/CN.4/214).

2. Mr. BEDJAOUI said that article 2, which concerned the incorporation of a territory in an existing State, called for a number of comments. With regard to subparagraph (a), it was not certain that the fundamental principle of the law of treaties which it stated—the “moving treaty frontiers” principle—was entirely established in State succession. For in cases of incorporation the successor State often had recourse, where the incorporated territory was concerned, to the principle of separate treatment by internal law or treaty; in other words it preferred, for political or other reasons, to retain the particularity of the territory incorporated and not to extend to it automatically its own laws and regulations and the treaties by which it was bound. That applied not only to colonial situations, but also to incorporation by plebiscite or reincorporation, as in the case of Alsace-Lorraine. He wondered whether the Special Rapporteur had considered that aspect of the question.

3. With regard to the opening phrase, “When an area of territory, which is not itself organized as a State possessing treaty-making competence”, he would remind the Commission that the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, whose work had been endorsed by the General Assembly on its completion in 1970, had declared that the territory of a colony or other non-self-governing territory had a status separate and distinct from the territory of the State administering it and retained such separate and distinct status until the people of the colony or non-self-governing territory had exercised their right of self-determination. 2 So at least the drafting should be reconsidered in order to avoid any conflict with principles which had been adopted by the Special Committee after long discussion and enjoyed universal support.

4. The expression “an area of territory” was not appropriate; as the commentary confirmed, it was not an area of territory that was referred to but an entire territory, or even a former State, such as Madagascar. A more general wording should therefore be found.

5. Lastly, the meaning of the expression “date of the succession” should be more precisely defined. It was a very complex problem, to which he himself had devoted an article in the draft on the topic for which he was Special Rapporteur.

6. Mr. ALCÍVAR said that article 2 caused him a good deal of difficulty, part of which was due to the unsatisfactory Spanish rendering of the English term, the “moving treaty frontiers” rule.

7. As the Special Rapporteur had already said, the origin of the article was to be found in article 29 of the Vienna Convention on the Law of Treaties. 3 Mr. Tabibi had pointed out that the interpretation of the territorial scope of treaties was different in Asia from what it was in Africa, and he himself felt compelled to add that it was even more different in Latin America, where the concept of territorial sovereignty had been determined by the principle of uti possidetis juris introduced in Spanish America to fix the boundaries of the new Spanish American States born after the achievement of independence.

8. Consequently, it was essential to make it clear that article 2 referred to the lawful transfer between States of sovereignty exercised over a particular territory, especially as the Drafting Committee at the United Nations Conference on the Law of Treaties had interpreted the pacta sunt servanda rule a little vaguely.

9. He would find it difficult to accept an article relating to the “moving treaty frontiers” rule unless it clearly brought out that the transfer of territory in question must be lawful and valid.

10. Sir Humphrey WALLOCK (Special Rapporteur), summing up the discussion, said that although article 2 was an expression of the same principle as was stated in article 29 of the Vienna Convention, it should be realized that it was also a principle which had been accepted generally and for a long time in connexion with matters of State succession. In setting out the principle, he had perhaps resorted to somewhat formalistic drafting in order not to prejudge other cases of State succession. For example, in using the words “When an area of territory, which is not itself organized as a State possessing treaty-making competence”, he had intended to be as neutral as possible, in order to cover such cases as those of former colonies or trusteeships, or of a combination of both, such as that between Northern Cameroon and Nigeria.

1 For text see previous meeting, para. 19.
11. It had not been his intention to imply that the rule, as such, was subject to many exceptions. What he had meant to say was that the principle that treaties should apply to the territory of a State as a whole was a general rule which would prevail, but that particular cases of succession gave rise to a number of situations in which the rule might have to give way to the particular requirements of the situation.

12. He could understand those who might wish to place article 2 in some other part of the draft, but he could not agree with those who proposed to link it up with the problems of the fusion or federation of States, which was an entirely different matter. He would prefer, therefore, that the Commission should leave it as an independent principle and decide later how it might be more precisely formulated in the draft as a whole.

13. He could not agree with Mr. Tammes that it was necessary to introduce into article 2 the question of the extinction of a State. Article 2 had been designed to cover the case in which an area of territory was added to a State in accordance with the "moving treaty frontiers" rule. The question, which had been referred to by a number of speakers, of the process by which that territorial addition was effected was politically important, but he had started from the assumption that when the Commission spoke of territory passing from one State to another, it would be referring only to lawful transactions and not to any possible cases of forcible annexation.

14. Mr. Kearney had said that the question of the lawfulness of the transfer which might be left to the future diplomatic conference. He himself believed that, once the concept of legality was introduced into the draft, it would be necessary to include it in other articles as well. For that reason he had referred to territory as "passing" under the sovereignty of an already existing State, since that was a neutral expression which could cover a number of different methods of transfer.

15. Mr. Ushakov had suggested the wording "passes by mutual agreement", but then the question arose by whom the agreement should be made. The territory in question might, indeed, have its own local authorities and its inhabitants might be consulted, but that was a situation which would be difficult to cover in the draft.

16. Reverting to Mr. Tammes' hypothesis of the extinction of a State, he thought that article 62, paragraph 1 (b), of the Vienna Convention, on fundamental change of circumstances, should not be considered as embracing and sufficiently covering cases of State succession. As Mr. Tammes had pointed out, that provision was formulated in extremely strict terms. He himself would be among the first to argue that the law of State succession in respect of treaties should be formulated within the general framework of the Vienna Convention, but at the same time he would insist that account had to be taken of the impact of the different categories of succession on the rules of the law of treaties. In other words, it was necessary first to approach the problem from the angle of the different cases of State succession, and then from that of their impact on the law of treaties.

17. Mr. Ago had raised some questions about the exception in sub-paragraph (a). He himself considered that exception necessary, because there were cases in which the "moving treaty frontiers" rule could not apply.

18. Mr. Ago had also suggested that account should be taken of treaties involving no territorial obligations, such as those relating to military alliances and the like; but he himself had always believed that any treaty, including broad political treaties with no special territorial connotations, involved obligations comprehending the whole of the State's territory. That problem, however, could perhaps best be dealt with in the Drafting Committee.

19. Mr. Quentin-Baxter, referring to sub-paragraph (b), had suggested that it might be necessary in that context, and possibly elsewhere, to include some article which would release predecessor States from their treaty obligations. He himself would be inclined to take such a release for granted, but consideration might be given to the possible need for some such general article.

20. Mr. Bedjaoui had raised the question of the relationship between State succession in respect of treaties and internal law. Undoubtedly, there were many cases in which treaties not only existed on the international plane, but were also a part of internal law; but he feared that the Commission would inevitably involve itself in difficulties if it did not regard the question of external relations as one which was largely autonomous. In his view, internal law was a factor of very minor importance for the validity of treaties.

21. He agreed with Mr. Bedjaoui, however, that the Commission should be careful not to draft anything which would be in conflict with the General Assembly's attitude to the status of colonies before they had gained independence.

22. Mr. AGO said he understood that the Special Rapporteur had drafted article 2 with cases of the cession or partial transfer of territory from one State to another in view, excluding cases of total absorption, which would be dealt with separately; so he would not go into that question for the moment.

23. The Commission might be doing a disservice to the cause which Mr. Alcivar wished to uphold if it introduced into the draft articles the notion of the lawfulness or validity of transfers of territory. It was obvious that the Commission must necessarily postulate the lawfulness of the transfers it referred to. If it was considered necessary to specify that only "lawful" transfers were meant, logic would require the Commission to go further and also specify that it was speaking of States "whose existence was lawful under international law", though that was also implied. There was no reason why all that should not be explained in the commentary, but to state it in the text of the draft articles would open the way to many dangers of interpretation.

24. He agreed with the Special Rapporteur that it would be inadvisable to speak of transfers of territory made by mutual agreement. In some cases transfers were not based on an agreement; for instance, after the Second World War some transfers of territory, the validity of which was not now contested, had taken place without any mutual agreement. It would therefore be better not to reopen questions which should not be reopened and to
accept as self-evident that the rules the Commission was drafting applied only to lawful transfers.

25. With regard to the application of treaties of the successor State to a territory which had passed under its sovereignty, it seemed to him to be obvious that there would be no sense in saying that such treaties “become applicable in respect of that area” if the treaties had no territorial application. What the article meant was that in case of cession, the treaties of the transferee State were binding on it with respect to the whole territory, including the area ceded. The drafting of sub-paragraph (a) therefore needed some revision.

26. It was true, as Mr. Bedjaoui had said, that the principle of separate treatment by internal law or treaty could be invoked in certain cases. For example, in the case of an establishment treaty authorizing the nationals of one State to carry on certain activities in the territory of another State, the latter State might not be willing to apply the treaty to a newly-acquired province, and it should be considered whether the extension of the treaty régime ought really to be made mandatory in such cases.

27. It was also true, as Mr. Bedjaoui had said, that a State which had acquired a new area of territory might deem it advisable to leave in force not only its internal laws, but also the agreements concluded with a third State; but then the consent of the third State was also essential. In that case, even if the impression given was that the former agreement continued to apply, there was really a new agreement reproducing the provisions of the old one and specifying that they still produced their effects in the newly annexed territory. That was a matter which should be explained in the commentary, but it did not change the rule stated in article 2.

28. Mr. USHAKOV said he could not agree with the Special Rapporteur that there were hardly any exceptions to the principle stated in article 2. The possibility that exceptions existed was mentioned in the commentary and Mr. Ago had cited some. The question therefore remained open, and it would be advisable to include, after a general article, a few articles dealing with possible exceptions.

29. Mr. CASTANEDA said that in his opinion it was not enough to assume that any transfers of territory referred to by the Commission in its draft articles would be lawful transfers; that should be stated expressly in the text itself, possibly in the form of a general reservation.

30. In recent years international law had changed markedly in its attitude towards territorial acquisitions; no less an authority than the General Assembly had come out strongly in support of the duty of States not to recognize acquisitions by conquest. The title of article 2 might perhaps be amended to read: “Area of territory passing lawfully from one State to another”.

31. Mr. YASSEEN said that the substance of the question under discussion was not controversial; all the members of the Commission agreed that only lawful transfers could be covered by the article. The question was whether that should or should not be stated expressly. Personally he thought it should not be, because if it were, the Commission would continually have to be considering whether or not the point should be stressed, and any cases it passed over in silence might give rise to problems of interpretation.

32. The CHAIRMAN said that the problem seemed to be basically a matter of drafting.

33. Mr. ALCIVAR said he fully supported the position taken by Mr. Castaneda, which he hoped the Drafting Committee would take into consideration.

34. Mr. ROSSIDES said he agreed with Mr. Yasseen that, in theory, it could fairly be assumed that the Commission, as a United Nations body working in the spirit of the Charter, would never sanction any but lawful transfers of territory. In the world today, however, not only theory, but harsh reality had to be taken into account; the concept of “lawful” acquisition was unfortunately not always respected and there were cases of proposed or attempted territorial annexation which almost took the form of legality. He agreed with Mr. Castaneda, therefore, on the need to include some general reservation on the lawfulness of transfers of territory.

35. Mr. BEDJAOUI said that his position with regard to the lawfulness of territorial transfers was well known, and as he had to tackle the problem himself in the draft articles for which he was Special Rapporteur, he had proposed a preliminary article intended to solve it.

36. The question was therefore one for the Drafting Committee, and the way it approached article 2 would determine the further progress of the Special Rapporteur’s work and his own, and indeed that of the other Special Rapporteurs. He would suggest, therefore, that in order to solve all such problems at a stroke a general formula be devised, which might serve as a kind of preface to all the draft articles on the succession of States, specifying that the whole approach to the topic of State succession was based on the assumption of respect for the principles of the Charter and of the lawfulness of the situations it covered.

37. Sir Humphrey WALDOCK (Special Rapporteur) said that, while he fully appreciated the concern of members about the lawfulness of territorial transfers, he agreed with Mr. Yasseen and Mr. Ago that it would be incorrect, both from a drafting and from a psychological point of view, to insert the word “lawful” in an article such as article 2. The point raised was undoubtedly a valid one; if it should be thought necessary to cover it, it would be possible to do so, as in the Vienna Convention on the Law of Treaties, by means of a general reservation.

38. Mr. BARTOS said he agreed with Mr. Rossides that, in order to take account of reality, it would be advisable to state once, but at the appropriate place in the draft, that the Commission was referring solely to lawful situations in conformity with the Charter. That might perhaps be done in an introductory article, as the Special Rapporteur had suggested.

39. The CHAIRMAN suggested that the Special Rapporteur be asked to draft an appropriate reservation and that, on that understanding, article 2 be referred to the Drafting Committee.

It was so agreed.8

ARTICLE 3

Article 3

Agreements for the devolution of treaty obligations or rights upon a succession

1. A predecessor State's obligations and rights under treaties in force in respect of a territory which is the subject of a succession do not become applicable as between the successor State and third States, parties to those treaties, in consequence of the fact that the predecessor and the successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. When a predecessor and a successor State conclude such a devolution agreement, the obligations and rights of the successor States in relation to third States under any treaty in force in respect of its territory prior to the succession are governed by the provisions of the present articles.9

41. Sir Humphrey WALDOCK (Special Rapporteur) introducing article 3, said he had prepared a long commentary which covered most of the points that arose in connexion with the article.

42. The purpose of his draft articles 3 and 4 was to clear the ground to some extent for the Commission's work on the substantive provisions that followed, especially those on multilateral and bilateral treaties in the context of new States.

43. The exact placing of article 3 would have to be decided later. Its contents reflected a practice which had developed after the end of the Second World War and for which the United Kingdom Government was largely responsible. In view of the existence of that practice, it was necessary to include in the draft a provision stating the effect of devolution agreements as between predecessor and successor States. The rule in the matter, as he saw it, was that devolution agreements did not of themselves produce any results in relation to third parties.

44. In 1963, during the deliberations of the Commission's Sub-Committee on Succession of States and Governments, the question of the validity of devolution agreements had been discussed in a working paper submitted by Mr. Bartok.7 In his own view, as explained in paragraph (8) of the commentary, the validity of such agreements was a matter to be determined under the provisions of the 1969 Vienna Convention on the Law of Treaties, in particular those of articles 42 to 53, which contained the basic rules on the validity of treaties. The fact of the matter was that devolution agreements had generally been treated as valid by the States concerned. Any difficulties that had arisen had not been connected so much with the question of validity as with the problem of determining the actual meaning of devolution agreements in terms of succession.

45. Paragraph 1 stated the general rule that devolution agreements concerned essentially the predecessor and successor States and did not, as such, affect rights and obligations vis-à-vis third States.

46. Paragraph 2 stated that, where a devolution agreement was concluded, the obligations and rights of the successor State in relation to other States parties were governed by the provisions of the draft articles, in other words, by the rules of succession.

47. Apart from that, a devolution agreement might in practice influence the policy of the successor State, but effects of that kind were not expressible in terms of law.

48. Bearing in mind that the United Kingdom Government had been to a large extent the originator of the modern practice of devolution agreements, he had pointed out that the United Kingdom, when in the position of a State called upon by a successor State to apply its predecessor's treaty, had insisted that a devolution agreement could not make the treaty binding upon the United Kingdom.

49. Mr. USHAKOV said that article 3 raised a number of general questions. The term “devolution agreement”, which was used in paragraph 2, was not defined in article 1. According to the commentary to article 3, that term designated an agreement by which a metropolitan State transmitted some of its treaty rights and obligations to one of its formerly dependent territories when it had become a new State as a result of decolonization.

50. Article 3, however, and in particular its paragraph 1, did not contain the term “new State”, but spoke of “a territory which is the subject of a succession”—an expression which did not seem to cover the case of a newly independent State. Yet there could be no doubt that article 3 applied to new States. As he had said before, he was in favour of devoting a separate part of the draft to the articles dealing with decolonization, but in any case, the term “new State” should be substituted for the form of words used by the Special Rapporteur.

51. Apart from cases of decolonization, it might be asked whether the division of a State into two or more States could give rise to devolution agreements, and if so, whether the rules stated in article 3 were applicable.

52. The question of the validity of devolution agreements, although not directly related to succession of States, had already been raised by several members of the Commission, in particular during the discussion of article 1. Although the Commission did not have to settle the question, certain passages in paragraphs (12), (13) and (16) of the commentary to article 3 suggested that in a certain sense devolution agreements were binding on the predecessor and successor States.

53. The same paragraphs of the commentary stated that certain rights and obligations of the predecessor State passed to the successor State, independently of the devolution agreement, by operation of the general rules of international law. Since the Commission's task was to codify the existing rules on succession of States it could not confine itself to mentioning the existence of general rules of international law which applied independently of devolution agreements and even independently of the rules set out in the draft articles, without expressly stating

8 For resumption of the discussion see 1176th meeting, para. 74.
those rules. As he saw it, however, there were no rules of treaty or customary law which could bind newly independent States with respect to treaties concluded by the predecessor State.

54. The wording of article 3 could be improved. The phrase "A predecessor State's obligations and rights under treaties" might be replaced by the words "The treaties", since that was what was meant. The present wording suggested non-existent differences.

55. There was a discrepancy between the French and English versions of paragraph 1, where the expression "du seul fait" was more restrictive than the words "in consequence of the fact".

56. The term "third States" was not used in the same sense in article 3 as it was in the Vienna Convention on the Law of Treaties, and that might cause confusion.

57. In paragraph 2, it was not clear that the words "its territory" related to the successor State.

58. Lastly, the reference to the "provisions of the present articles" at the end of paragraph 2 was not quite adequate. According to the Special Rapporteur, that formula covered the whole draft, but it was obvious that the provisions relating to a union of States and to the division of one State into two or more States were not applicable in the circumstances.

59. The CHAIRMAN said it was important to determine whether it was the French version—"du seul fait"—or the English version—"in consequence of the fact"—which expressed the Special Rapporteur’s true intention. Paragraph (27) of the commentary would seem to indicate that it was the French version which was correct, since that paragraph explained that paragraph 1 of the article stated the negative rule that the obligations and rights of a predecessor State under treaties did not become applicable as between the successor State and third States "in consequence only of the fact" that the predecessor and successor States had concluded a devolution agreement. It was significant that the Special Rapporteur had himself stressed the word "only".

60. He would be grateful if the Special Rapporteur would comment on the relationship between the present draft article 3 and the provisions of article 34 and the following articles of the Vienna Convention on the Law of Treaties. For example, the question of the effects of a notification under article 35 of that Convention might arise.

61. Sir Humphrey WALDOCK (Special Rapporteur) said that a notification could be a move in the direction of agreement to continue the predecessor’s treaty. But he did not think that the terms of devolution agreements admitted of their being considered as treaties intended to be the means of creating obligations or rights for third States within the meaning of articles 35 and 36 of the Vienna Convention. Nor could such an intention be deduced from the mere fact of registration of the agreement.

62. He had used the word "only" in paragraph (27) of the commentary in order to make the meaning clear, but had thought that, in the statement of the rule in paragraph 1 of article 3 itself, the word was not necessary.

63. Mr. AGO said that before deciding whether the word "only" was necessary, the Commission should consider whether rights and obligations might sometimes become applicable without any provision to that effect in the devolution agreement. The term "devolution agreement" was vague and it would be better to speak of an "agreement for the devolution of rights and obligations".

64. Leaving aside questions of drafting for the time being, he wondered what was the exact scope of article 3. Like Mr. Ushakov, he would like to know whether it related solely to the case of a new State, and if so, whether it applied only to a State which had formerly been a dependent territory. In his commentary, the Special Rapporteur referred only to cases of decolonization. But article 3 should also apply when part of the metropolitan territory formed a new State and became the subject of an agreement for the devolution of rights and obligations. To deal with that case, the Commission might lay down rules identical with those proposed by the Special Rapporteur, or different rules.

65. In the case dealt with in article 2, namely, the transfer of an area of territory from the sovereignty of one State to that of another, an agreement for the devolution of rights and obligations might be concluded not only between an old State and the new State which had split off from it, but also between a State which ceded territory and the State which annexed it. He wondered whether the same rules would be applicable in both cases. It was essential to define the cases coming under article 3 more clearly.

66. The CHAIRMAN, speaking as a member of the Commission, said he shared some of the concern expressed by Mr. Ushakov and Mr. Ago regarding the precise scope of article 3, bearing in mind particularly the difference between the English and French versions of paragraph 1.

67. A key question was the relationship between the provisions of paragraph 1 and those of the articles on third States in the Vienna Convention on the Law of Treaties. Article 3, paragraph 1, could appear to be a limitation on those provisions of the Vienna Convention.

68. He saw no objection to the application of the rules on treaties and third States contained in the Vienna Convention to certain agreements such as those that might be entered into regarding external public debts owed under treaty arrangements by the States forming a union or federation. Another example was that of an agreement for the division of the existing external public debt between two or more States formed from the splitting up of a pre-existing State.

69. In general, he agreed on the need to define more closely the scope of article 3. The devolution agreements so far concluded appeared to incline towards the rule laid down in paragraph 1. The question arose, however, whether the same rule would apply to a devolution agreement that contained specific provisions stating clearly how particular treaty obligations were to be taken over and the manner in which they were to be carried out. He saw no reason why an agreement of that type should be precluded.
70. Mr. USHAKOV, explaining his views on the validity of devolution agreements, said that such an agreement concluded between a metropolitan State and a former dependent territory was not binding on the predecessor State and the successor State. But the situation was less clear with regard to devolution agreements concluded when an area of territory was transferred from one State to another or in the case of a union of States or the division of a State. It was important to determine the consequences following from such situations, both for the contracting parties and for third States. For that purpose, articles 34 and 35 of the Vienna Convention on the Law of Treaties might be taken as a basis.

71. Mr. AGO said that the Commission did not have to consider whether an agreement concluded between a metropolitan State and a newly independent State was binding on the two parties; the only question which arose was that of the effects of such an agreement on third parties. The purpose of article 3 was, precisely, to establish that third States were not bound by such an agreement.

72. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ago had stated the position very correctly. Article 3 dealt solely with the effect of devolution agreements in regard to third States. Under the provisions of the Vienna Convention, in no case could an agreement between two States bind a third State; the consent of the third State was necessary. Paragraph 1 of article 3 applied the same rule to devolution agreements.

73. The purpose of paragraph 2 was to state that cases of devolution agreements would be governed by the provisions of the draft articles. Thus, if the case related to a new State, the provisions of Part II would apply.

74. The remarks made by the Chairman when speaking as a member of the Commission had now convinced him that it would be better to introduce the word “only” into the phrase “in consequence of the fact” in the last part of paragraph 1.

75. As to the question of a metropolitan State compelling a successor State to accept certain treaty obligations, no case of that kind had in fact occurred in practice. What had occurred, on the other hand, was that not infrequently a successor State had invoked a devolution agreement when desirous of having a particular treaty continued in force.

The meeting rose at 1 p.m.

1160th MEETING

Wednesday, 17 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tanmes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(continued)

ARTICLE 3 (Agreements for the devolution of treaty obligations or rights upon a succession) (continued) 1

1. The CHAIRMAN invited the Commission to continue consideration of draft article 3 (A/CN.4/214/Add.1).

2. Mr. USTOR said that the question had been raised during the discussion whether the rule embodied in article 3 was applicable only to devolution agreements such as those concluded by the United Kingdom, France and certain other metropolitan countries with some of their dependent territories on the occasion of their emergence to independence, or whether it was a rule of general validity and as such applied whenever a predecessor State and a successor State concluded an agreement of that kind. One example, that could be given was that of cases to which the “moving treaty frontiers” rule applied. Article 3 was couched in general terms, but the commentary 2 referred only to cases involving new States. He wished to reserve his position on that question until he had heard further explanations from the Special Rapporteur, particularly on State practice in the matter. For the time being, he would examine the rule embodied in article 3 as it applied only to a devolution agreement concluded between a new State and the former colonial Power.

3. The Special Rapporteur’s view was summarized at the end of paragraph (25) of the commentary, where it was stated that “devolution agreements, however important as general manifestations of the attitude of successor States to the treaties of their predecessors, should be considered as res inter alios acta for the purposes of their relations with third States”.

4. That statement, as well as the whole of article 3, referred of course to valid—or rather validated—devolution agreements. That should be stressed because, as mentioned in paragraph (7) of the commentary, the question had been raised of the validity of agreements of that kind, which were usually negotiated and concluded before the dependent territory had gained full independence.

5. Article 3, however, was based on the assumption that a devolution agreement, even if concluded under special and unequal circumstances, could be subsequently approved by the new State, which might regard it as valid because it had a special interest in so doing.

6. The Special Rapporteur’s thesis that a devolution agreement did not bind the other parties to the predecessor State’s treaties and did not create obligations for the new State towards those other parties, was well supported by State practice. It was also in conformity with the provisions of articles 34 to 36 of the Vienna

1 For text see previous meeting, para. 40.

Convention on the Law of Treaties. As a progressive thesis, it deserved the support of the whole Commission.

7. The proposition in paragraph 1 of article 3, meant that the new State was born generally free from treaty obligations, whether or not it had concluded a devolution agreement, subject only to the rules already contained in Part II of the draft and to any further rules that might subsequently be added thereto.

8. His first reaction to paragraph 2 was that it was redundant. If, however, ex abundanti cautela, it was desired to retain it, he suggested that the opening word “When” be replaced by some such expression as “Independently of whether...”, which would reflect more accurately the real intention of the paragraph.

9. Mr. YASSEEN said that, despite its importance, the practice of making devolution agreements had not become general. He proposed to consider first the validity of such agreements and then their possible effects.

10. In the working paper he had submitted in 1963 to the Sub-Committee on Succession of States and Governments Mr. Bartos had expressed some doubts, which he himself shared, about the validity of devolution agreements. In paragraph (8) of his commentary to article 3, the Special Rapporteur stated that the question of the validity of devolution agreements would seem to be one which now had to be determined by reference to articles 42 to 53 of the Vienna Convention on the Law of Treaties, which had since been adopted. In his opinion those provisions would not always be sufficient, since they dealt with cases of coercion by the use of force, whereas devolution agreements might be vitiating by coercion of a political or economic nature.

11. With regard to the effects of devolution agreements, on the basis of the general theory of treaties, it might be considered that acceptance by third States could make the treaties covered by the devolution agreement enforceable against the successor State. The main danger was that the devolution agreement might be considered to contain not an offer depending on the will of the offering State, but a final offer. It would not be a unilateral declaration, but an irrevocable offer deriving from a treaty.

12. The reference to devolution agreements in the draft articles would therefore make it necessary to specify that such agreements could not establish a final offer to the detriment of a successor State. That reservation was all the more necessary because it reflected the general practice of States, which had always waited for a fresh expression of the will of the successor State before considering that it was bound by a former bilateral, or even multilateral, treaty.

13. He recognized that a devolution agreement has a negative aspect for the predecessor State; indeed, it could be established by other rules of international law that a predecessor State ceased to be responsible for former treaties in so far as they concerned a territory which had become independent.

14. Mr. BEDJAOUI said he would consider first the real scope of article 3 and then its significance.

15. As the Special Rapporteur had explained, article 3 was based on a practice found mainly in relations between the United Kingdom and its former possessions, though the wording of the article did not indicate its scope precisely. That approach was also shown by the terminology used, since the term “devolution agreement” had generally been used by writers for cases of decolonization.

16. There was, however, nothing to prevent the scope of article 3 from being extended, and the Special Rapporteur seemed to be inviting the Commission to extend it when he stated in his commentary that devolution agreements might be concluded, in principle, whenever a new State was created by agreement. The inference was that they might be concluded where there was a partial transfer of territory, for example.

17. If the term “devolution agreement” appeared to be too closely connected with decolonization, it might be replaced by the expression “a formal arrangement between the predecessor State and the successor State”. Another question of terminology had been raised at the previous meeting: that of the use in the French version of the expression “du seul fait” in paragraph 1; he would suggest using the words “par le fait même”, meaning ipso facto.

18. With regard to the significance of the article, he observed that it did not provide for the automatic application of former treaties to third States, but made such application dependent on rules stated in later articles. It should therefore be decided, when the time came, precisely which of the articles of the draft were applicable.

19. Unlike Mr. Yasseen, he thought the practice of making devolution agreements was very widespread, and hence, if the term was taken to include all treaty rules established by a predecessor State and a successor State to govern relations between the successor State and the rest of the international community. Whether decolonization took place peacefully or not, it always gave rise to treaty rules concerning public property, public debts, nationality, the protection of minorities and acquired rights.

20. In paragraphs (7) and (8) of his commentary to article 3, the Special Rapporteur suggested that the validity of devolution agreements should be determined by reference to articles 42 to 53 of the Vienna Convention on the Law of Treaties. In his own first report on succession of States in respect of matters other than treaties, he had examined that question in connexion with what he had called the “période suspecte” preceding independence. It was a question that had various aspects.

21. First, it must be remembered that devolution agreements were very much of a developing character; it had sometimes been contended that they were real international treaties when concluded between an existing State and an emergent State. Their validity should also be considered in the context of self-determination and in

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23. The term “third State”, as used in article 3, denoted the draft of a rule on the validity of devolution provisions, the commentary, he would not press for the inclusion in
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partners.
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The United Nations had also sometimes intervened during the preparation of a devolution agreement when certain elements of coercion had been too apparent. In face of the refusal of the French and British forces, in 1946, to evacuate Syria and Lebanon until there was a devolution agreement, the majority of the Security Council had considered that the evacuation of those forces should not depend on the continuation or success of the negotiations in progress between the partners. 7
22. If that problem was later dealt with more fully in the commentary, he would not press for the inclusion in the draft of a rule on the validity of devolution provisions, for that question belonged to a stage prior to the succession of States and came under the law of treaties.
23. The term “third State”, as used in article 3, denoted a State party of the treaties concluded by the predecessor State and not a third State with respect to those treaties. Such a State party to the treaties in question was considered, in the article, as a third State with respect to the devolution agreement.
24. In order to examine the rights and obligations deriving from treaties concluded by the predecessor State, it was necessary to see what were the respective positions of the third State, the predecessor State and the successor State. The third State could believe that a change of debtor might injure it and that there could be no stipulations pour autrui. Thus, to take an example which, it was true, concerned an international organization, the International Bank for Reconstruction and Development would not agree to a change of debtor unless it had itself taken the necessary formal steps. For a loan it had granted to a dependent territory, the Bank had insisted on an express guarantee from the metropolitan country. It was obvious that a third State would often feel even less bound by the rights than by the obligations deriving, for the successor State, from former treaties. Frequently, despite a devolution agreement, the predecessor State substituted itself for the defaulting successor State to fulfill the latter’s obligations. That sometimes happened when a former metropolitan State paid compensation for its own nationals in place of the newly independent State. As to the successor State, it was sometimes unwilling to be bound automatically vis-à-vis third States by virtue of a devolution agreement.
25. Devolution agreements were therefore of limited value, and as the Special Rapporteur said in paragraph (16) of his commentary, their significance was primarily as an indication of the intentions of the newly emerged State in regard to the predecessor’s treaties.
26. Relations between the predecessor State and the successor State would depend on a multitude of former treaties generating rights and obligations. To examine in detail what happened to those rights and obligations, as Mr. Hambo had suggested, would mean going beyond the bounds of the Special Rapporteur’s subject, which was succession in respect of treaties, in other words, instruments in the formal sense, whereas the topic for which he himself was responsible concerned succession to an instrument taken in the material sense. It was in the context of his own draft articles that the Commission should examine in detail what happened to rights and obligations and the question of their transfer independently of a devolution agreement.
27. Mr. QUENTIN-BAXTER said it was important to remember that devolution agreements had flourished for a brief span during a period of decolonization that was now ending. They could be regarded as reflecting distortions of practice which were attributable to uncertainties of the law. One would not expect devolution agreements to occupy a large place in an instrument which was intended for application in the future.
28. The fact remained, however, that devolution agreements were an important indicator of the assumptions on which the actions of the States concerned were based, and of the doubts felt at the time by those States. It was significant that two terms—“devolution agreement” and “inheritance agreement”—were used in practice. As devolution agreements, the instruments in question appeared to have the effect of binding the hands of the successor States and perhaps even of fettering their sovereignty: hence the reaction by Tanganyika in 1961.
29. There was, however, the other aspect of the question, namely, the desire of the predecessor State that the new State should not come into being without any inheritance. The practice of the United Kingdom, in particular, showed a clear desire that the new State should not be left in a vacuum, and a corresponding belief that the new State was entitled to lay claim to a treaty inheritance.
30. Indeed, the United Kingdom had long continued to inform the international community that its own treaty rights and obligations in respect of a particular territory had ceased “as a result” of applying the relevant treaty instruments to the successor State. There might therefore be advantage in stating a clear rule that the treaty rights and obligations of a predecessor State, in respect of a territory which was the subject of a succession of States, came to an end on the date of that succession.
31. There was perhaps the more reason to state such a rule because, when a dependent territory was moving gradually towards full self-government, the international responsibility of an administering Power often greatly exceeded its remaining constitutional powers in respect of that territory.
32. With regard to paragraph 2, he agreed with Mr. Ustor that the opening word “When” meant in reality “whether or not”.
33. Personally, he would prefer a general rule that would combine the contents of paragraph 2 of article 3 with

those of paragraph 1 of article 4, so as to cover both
devolution agreements and unilateral declarations. The
combined provision would state that "whether or not
a successor State makes any agreement with a predecessor
State or makes or communicates any unilateral decla-
ration of its policy in regard to the maintenance in force
of treaties which were applicable in respect of its territory
at the date of succession", the rules contained in
the subsequent draft articles would apply. The way would
then be clear for a separate article dealing with provisional
application.

34. Mr. AGO said that the situation created by an
agreement between a predecessor State and a new State
providing for the devolution of rights and obligations was
not quite the same as that created by a unilateral decla-
ration. The declaration was addressed to third States,
whereas the devolution agreement only concerned relations
between the predecessor State and the successor State.
Furthermore, in the latter case the question of the validity
of the devolution agreement might arise; the successor
State might, in some cases, claim not to be bound by
the agreement, whereas it could not go back on a multi-
lateral declaration, which constituted an offer, so that
when the third State had expressed its consent, the agree-
ment was concluded.

35. With regard to the question raised by Mr. Bedjaoui,
he was inclined to think that all agreements for the devo-
lution of rights and obligations were international
agreements, even though one of the parties might be an
insurgent movement or an emergent State represented by
a provisional government, that was to say, by a subject
of international law, nevertheless. In his opinion, the
international character of such an agreement would be
unaffected even if the metropolitan power had described
it as an instrument of internal public law.

36. It was conceivable, too, that the insurgent movement
or provisional government might make an agreement with
the third State undertaking to accept a treaty concluded
between the metropolitan State and that third State. A
situation of that kind did not partake of succession from
the predecessor State to the successor State, but possibly
of succession from the "provisional" subject of inter-
national law to the definitive subject. That situation
had arisen in Algeria, for example, but the case was obviously
outside the scope of the Special Rapporteur’s topic.

37. Mr. SETTE CÂMARA said that he agreed with
Mr. Ago’s remark at the previous meeting that it would
be better to speak of devolution of rights and obligations
rather than simply of devolution agreements. Some such
clarification was necessary when referring to cases outside
the United Kingdom practice, in which that meaning
had been attached to the expression "devolution agreement".

38. After having examined an impressive mass of
material on the practice of States and of depositaries, the
Special Rapporteur had expressed the view, in para-
graph (25) of his commentary, that the practice of States
was “too diverse to admit the conclusion that a devolution
agreement should be considered as by itself creating a
legal nexus between the successor State and third States,
in relation to treaties applicable to the successor State's
territory prior to its independence”.

39. That passage discarded old ideas of tacit novation
and reflected the modern view that a devolution agree-
ment was little more than a solemn statement of intention
concerning the future maintenance in force of pre-existing
treaties concluded by the predecessor State. No legal
presumption of continuity could be said to exist, and it
had accordingly become the practice of the United
Nations Secretariat, in the case of a devolution agreement,
simply to invite the new State concerned to become a
party to the treaties signed by its predecessor State.

40. The negative rule embodied in paragraph 1 of
article 3 was consistent with the philosophy of the draft,
which situated the problem of succession in respect of
treaties within the scope of the general law of treaties.
Since treaty obligations and rights could not exist without
the consent of the parties, an expression of the will of the
third parties concerned was essential to establish the legal
nexus indispensable to create treaty relations.

41. Devolution agreements, despite their limited cha-
acter as statements of intention, were useful because they
helped to avoid the gap that would otherwise occur if,
at the moment of independence, all treaty links were to
be automatically and unconditionally severed. The com-
plexity of modern international life would make it
extremely difficult to reconstitute at once the network of
treaties within which every nation normally lived. Devo-
lution agreements opened the way for new States to
conclude the treaties necessary for international co-
existence.

42. It had been suggested during the discussion that
article 3 should be placed in Part II of the draft, which
related to new States. It was true that most of the former
United Kingdom dependent territories, and some of the
French ones, had signed devolution agreements with the
metropolitan Power. Nevertheless, since the rule in
article 3 was a negative rule relating to the effects of
devolution agreements with respect to third parties, it
would not be advisable to confine its scope explicitly
to new States in the strict sense of the term. Such a for-
mulation might lead to the interpretation that devolution
agreements were valid in relation to third parties in cases
other than those involving countries that had achieved
independence through the process of decolonization.

43. The question of the position of article 3 in the draft
should be considered by the Drafting Committee when it
came to examine Part II and the definition of the concept
of a "new State".

44. Mr. TABIBI said he agreed that it was necessary
to state the rule in paragraph 1 of article 3 with respect
to multilateral treaties.

45. With regard to devolution agreements, four elements
should be considered: the first was the treaty itself; the
second was the action taken by the predecessor State;
the third was the position of the third State concerned;
and the fourth was the position of the successor State.

46. The position of the third State concerned was vital,
particularly in the case of bilateral treaties. The third
State was equal in status with the predecessor State and
its rights could not possibly be affected by the conclusion
of a devolution agreement between the predecessor State
and the successor State.
47. Devolution agreements were often the price paid for independence and could not therefore be regarded as final. They were not final for the successor State, but they were also not final for the third State concerned, since that State might not wish to be bound by the treaty in relation to the successor State. It was essential to take into account the intention of the third State, and the interests of that State in connexion with the treaty.

48. The text of the treaty itself was particularly important. The provisions of some treaties were personal to the parties to the treaty; in the event of a succession, a treaty of that kind would simply terminate and no devolution was possible.

49. With regard to the scope of the rule in article 3, that should be dealt with in the context of decolonization. It was necessary to study carefully the question whether, in the case of separation of part of the territory of a State, the territory in question constituted a new State.

50. Relations between the predecessor State and the third State were governed by the provisions of the treaty itself and did not come within the scope of the present draft articles.

51. Paragraph 2 of article 3 should be left in abeyance until the Commission had considered the whole of the draft. It would then be possible to determine whether a provision of that kind was really necessary.

52. Mr. BARTOS said that, in his 1963 working paper, he had only described the theoretical concepts relating to States by decolonization. At that time the special rapporteurs for the topic of succession of States and Governments had not even been appointed. Although his working paper contained indications of the need to deal with the question, it proposed no practical solution and was of no direct interest for the present discussion.

53. With regard to treaties concluded with an emergent State, a good example was afforded by the case of Yugoslavia during and after the Second World War, when treaties had been concluded by the Allied Powers with both the Royal Government and the revolutionary Government. Again, before the end of the First World War—even during that war—the Czechoslovak nation had been proclaimed a subject of international law and authorized to participate as such in certain conferences. Furthermore, the great Powers had sometimes concluded treaties between themselves regulating the status of emergent or changing States, which were invocable against those States. Those were instances of stipulations pour autrui.

54. It was interesting to note that after the Second World War Yugoslavia had announced the discontinuation of its internal legal order, but had recognized the continuation of its internal legal order, particularly with respect to treaties.

55. Although in principle he supported the Special Rapporteur's main ideas, he thought, like Mr. Bedjaoui and Mr. Ago, that they should be expanded in the light of the different suggestions made during the debate.

56. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that some members wished to relate article 3 to the decolonization situation, while others thought that such an application was too limited. After all, the devolution of treaty obligations or rights could occur in other contexts and it was necessary to state the general rule. An obvious example of such a devolution agreement was that concluded on the separation of Singapore from Malaysia. The question was one which would have to be considered by the Drafting Committee, but he personally believed that article 3 should not be limited to cases of devolution connected with former dependent territories.

57. The question was in some degree linked with the problem of the birth of new States—a problem he had steered clear of, since he was aware of the mass of legal speculation concerning the process by which new States came into existence. Moreover, although the original title of item 1 had been "Succession of States and Governments", he had subsequently received strict instructions from the Commission to deal only with the succession of States. There was, of course, always the possibility that a devolution agreement might have been concluded by an insurgent government shortly before the new State attained independence, but he considered it better not to get involved in such complications.

58. Mr. Ushakov had rightly questioned the use of the phrase "third States" in article 3. He himself had, at a later stage, reached the conclusion that that phrase was unsuitable, because it had been used in the Vienna Convention on the Law of Treaties as denoting "a State not a party to the treaty". In this fourth report (A/CN.4/249), therefore, he had proposed the term "other State party".

59. Mr. Ushakov had also questioned the use of the words "present articles" in paragraph 2, but that was merely a provisional term which could be changed at a later stage.

60. Mr. Bedjaoui had taken exception to the reference to a predecessor State's "obligations and rights" in paragraph 1. He had used that expression merely for drafting reasons and it could be reviewed by the Drafting Committee.

61. Mr. Ustor had suggested that paragraph 2 be amended to state that the obligations and rights of the successor State might be determined independently of the existence of a devolution agreement. No doubt the paragraph might be improved, but Mr. Ustor's suggestion seemed to go too far. It was impossible to ignore the significance of a devolution agreement as an instrument for bringing about the novation of a treaty.

62. Lastly, Mr. Quentin-Baxter had repeated his suggestion that there should be some more general rule about the release of the predecessor State from its obligations under a treaty which had been taken over by a successor State. He agreed that that situation deserved consideration, but there were cases in which a predecessor State was not relieved of all its obligations, as, for example, when it was acting as a guarantor for technical assistance activities.

63. The CHAIRMAN suggested that article 3 be referred to the Drafting Committee.

It was so agreed.8

8 For resumption of the discussion see 1177th meeting, para. 52.
ARTICLE 4

1. When a successor State communicates to a third State, a party to treaties in force in respect of the successor State’s territory prior to independence, a declaration of its will with regard to the maintenance in force of such treaties, the respective obligations and rights of the successor State and the third State are governed by the subsequent articles of the present draft.

2. When a successor State communicates to the third State a declaration expressing its consent to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination, the treaties shall continue to apply provisionally as between the successor State and the third State unless in the case of a particular treaty:

(a) The treaty comes into force automatically as between the States concerned under general international law independently of the declaration;

(b) It appears from the treaty or is otherwise established that the application of the treaty in relation to the successor State would be incompatible with its object and purpose;

(c) Within three months of receiving the notification the third State in question has informed the successor State of its objection to such provisional application of the treaty.

3. The provisional application of a treaty as between a successor State and a third State under the present article is terminated if:

(a) Subject to any requirement of notice that may have been agreed between them either State communicates to the other its decision to terminate the provisional application of the treaty; or

(b) The declaration specified a period for the duration of the provisional application of the treaty and this period has expired; or

(c) At any time they mutually agree that the treaty shall henceforth be considered as terminated or, as the case may be, brought into force between them, whether in full or in modified form; or

(d) It appears from the conduct of the States concerned that they must be considered as having agreed to terminate the treaty, or as the case may be, to bring it into force; or

(e) The termination of the treaty itself shall have taken place in conformity with its own provisions.9

65. The CHAIRMAN invited the Special Rapporteur to introduce article 4 (A/CN.4/214/Add.2).

66. Sir Humphrey WALDOCK (Special Rapporteur), said that article 4 was perhaps not altogether satisfactory, in that it dealt mainly with cases of the provisional application of a treaty; in view of the general title of the article, members might think that it should more clearly cover unilateral declarations which did not envisage the provisional application of a treaty, but were rather aimed at its definitive continuance in force.

67. Unilateral declarations by successor States were a significant phenomenon in modern practice. Some of the declarations stated a policy and amounted to an offer which, when communicated, might constitute one side of an agreement for the continuance of a treaty. It was reasonable to conclude, therefore, that they should not be limited to cases of provisional application of a treaty, but should have a more general scope.

68. There was now a considerable volume of practice in regard to unilateral declarations flowing from the declaration made by the Government of Tanganyika in 1961 and communicated to the Secretary-General of the United Nations. Mr. Quentin-Baxter had suggested that unilateral declarations might be dealt with together with devolution agreements; he himself, however, thought that they were quite different things. A devolution agreement was drawn up as between a predecessor State and a successor State, whereas a unilateral declaration, as Mr. Ago had pointed out, was an act done vis-à-vis other States parties, which might constitute an offer to them to continue treaties in force on a reciprocal basis.

69. He himself had already pointed out that a different technique was employed in the two cases. A devolution agreement was registered with the Secretary-General, as registrar of treaties, who subsequently published it in the Treaty Series in due course, which might often be a more or less considerable interval of time. A unilateral declaration, on the other hand, was sent to the Secretary-General with a specific request that it be circulated to Member States, which meant, in practice, that it was almost immediately submitted to a very large number of States.

70. Mr. USHAKOV said that the words “prior to independence”, in paragraph 1, showed that the article was not general in scope, but related to cases of States which had formerly been dependent territories, in other words to cases of decolonization. It would be better to amend the wording so as to say so clearly.

71. Since the Special Rapporteur had said that he had used the expression “obligations and rights of the successor State” only provisionally for the purposes of the draft articles he would not comment on it. In paragraph 1, the words “the subsequent articles” should read “the subsequent paragraphs”.

72. Article 4, the drafting of which could be improved, belonged to the chapter on cases of succession arising out of decolonization. Paragraph 2 provided that, by virtue of a unilateral declaration, treaties should be regarded as being provisionally in force between the parties, subject to three exceptions listed in sub-paragraphs (a), (b) and (c). The Special Rapporteur should make it clear which rules of general or contemporary international law were referred to in sub-paragraph (a) and to what kind of situation sub-paragraph (b) applied. It was, in fact, difficult to see how it could appear from a treaty deemed valid for a previously dependent territory, that its application would be incompatible with its object and purpose once the territory had become independent.

73. In paragraph 3, sub-paragraph (d) was not clear. It was open to question whether the conduct of the States concerned could really be regarded as indicating their intention concerning the application of the treaty. There also seemed to be a lack of concordance between sub-paragraphs (a) and (c). If one of the States could terminate the application of the treaty unilaterally, in accordance with sub-paragraph (a) there was no need to provide for the possibility of mutual agreement in sub-paragraph (c).

74. Sir Humphrey WALDOCK (Special Rapporteur), said he agreed that it might be desirable to replace the phrase “prior to independence” in paragraph 1 by some less restrictive wording.

75. In paragraph 2 (a), he had used the words “the treaty comes into force automatically” on the assumption that the treaty would be governed by the rules of general international law. Mr. Ushakov might think the “clean-slate” principle should apply in all cases of decolonization, but many new States, such as Tanganyika, had considered some treaties as binding on them under general international law. He had therefore felt bound to include such a provision until the Commission might decide otherwise.

76. With regard to paragraph 2 (b), in some cases the application of a treaty in relation to the successor State might indeed be incompatible with its object and purpose. For example, the United Kingdom had extended the European Convention on Human Rights to many of its dependent territories prior to their independence. Some of those territories had expressed their wish to continue to be bound by that Convention after attaining independence, but that had not been possible because the Convention was limited to members of the Council of Europe.

77. Lastly, with regard to paragraph 3, it had seemed to him necessary to list all the different situations in which the provisional application of a treaty would be terminated. It was possible, however, that the list might be reduced at a later stage.

78. Mr. THIAM said he agreed with the Special Rapporteur on the substance of the article. It was quite certain that a new State could only be committed by its own will and that if it wished to be bound by a treaty it had to express that will. The principle of article 4 was therefore acceptable.

79. It was well to state the rule of provisional application in paragraph 2. In most cases new States needed time for reflection before deciding whether to regard themselves as bound by a treaty or to withdraw from it.

80. With regard to the exception provided for in paragraph 2 (a), it should be stated clearly which rules of general international law could prevent the provisional application of a treaty; if those rules were valid, it was difficult to see how a treaty could stand against them.

81. The presumption on which paragraph 3 (d) was based was too broad, and difficult to apply in practice. It would be better either to amend that provision or to delete it.

82. Lastly, even if the scope of the draft was to be extended to cover new States other than newly independent States, the fact remained that the interests of States springing from decolonization should predominate, in accordance with the Special Rapporteur’s first intention.

83. Mr. REUTER said he could accept article 4 provisionally, but noted that it raised serious problems. The first was that of its scope. The article was included among the general provisions, but even if the words “prior to independence” were deleted it was open to question whether, as it stood, it could be applied to a merger of States. He was not expressing an opinion, but a doubt.

84. The article would be clearer and more correct if the title were “Provisional application of the rules of a treaty”. For although it certainly dealt with a problem of provisional application, it was not the original treaty, but its rules that were provisionally applied. From the viewpoint adopted by the Commission there was no application of the original treaty: what was applied was an entirely new agreement, a collateral agreement, resulting from an offer and its acceptance.

85. That being so, some substantial drafting changes were inevitable. It was impossible to speak of maintaining the treaty in the proper sense of the term; it was its substantive rules, and perhaps some others, that it was decided to continue to apply provisionally. The successor State did not become provisionally a party to the treaty, but to a new agreement, and that raised all sorts of problems, such as whether to retain or to delete paragraph 3 (e). Indeed, in that instance, it was not stated that the rule on the termination of the original treaty would be among those which were provisionally maintained.

86. It was often forgotten that the Vienna Convention on the Law of Treaties opened up the prospect of collateral agreements, as the Special Rapporteur had very clearly explained at the time, in connexion with the effects of treaties for third parties. The Commission would perhaps see later that, in the case of multilateral treaties between States, international organizations could, without becoming parties to the treaty, decide by a collateral agreement concluded between themselves and the parties, to apply certain substantive rules contained in the treaty.

87. He reserved his opinion on the drafting of the article, which would have to be reconsidered when the Commission took up article 7, on the right of a new State to notify its succession in respect of multilateral treaties.

88. The question of rights and obligations, which Mr. Bedjaoui and Mr. Ago had raised in connexion with article 3, was extremely complex. There was on the one hand the treaty, that was to say the complete mechanism, to which there was never any succession, and on the other hand the substantive rules, which might be the subject of other agreements. Was not that the same idea as the rights and obligations referred to by Mr. Bedjaoui and Mr. Ago? In their view, there was the treaty, which gave rise to rights and obligations, which in turn gave rise to situations. That was a very serious fundamental problem, which was bound to lead to much controversy.

The meeting rose at 1.5 p.m.

1161st MEETING

Thursday, 18 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 4 (A/CN.4/214/Add.2).

2. Mr. NAGENDRA SINGH said that, in view of the doubts expressed by Mr. Ushakov and Mr. Reuter about the advisability of including a clause on provisional unilateral declaration on treaties, he doubted whether article 4 was really necessary. The Commission would have to deal with non-provisional declaration as well, and, if it did so, provisional declaration could be referred to in the substantive formulation and a separate article on the provisional aspect could be avoided. It was true that there was State practice of provisional declaration, but that was not a permanent feature requiring a separate article in the Commission’s codification. The Special Rapporteur might like to examine that matter.

3. Mr. BEDJAOUİ said that article 4 fitted in logically with the preceding articles, especially article 3, first, from the point of view of finding rules applicable to cases of decolonization and, secondly, because its purpose was to regulate the effects of a succession for third States.

4. As to the question raised by Mr. Ushakov at the previous meeting, he thought it was indeed the subsequent articles of the draft, not the subsequent paragraphs of the article, which were referred to at the end of paragraph 1. It would be incomprehensible for paragraph 1, which dealt with the maintenance in force of treaties, to refer to the subsequent paragraphs, which dealt with their provisional application or termination.

5. The Special Rapporteur had in fact approached the whole question from the standpoint of the problems of succession raised by decolonization. But there were grounds for hoping that, after the necessary drafting amendments, article 4 could cover, as it should, other succession situations, such as mergers. The Commission should consider that question.

6. With regard to effects for third parties, the Commission should go further and ask what happened to treaty relations between the successor State and the predecessor State, for that was not self-evident, but would be seen in other articles of the draft. Article 4 dealt with two cases: that of a unilateral declaration by the successor State, added to a devolution agreement, and that of a declaration independent of any devolution agreement, the question about which was whether it could affect the predecessor State and finally settle the situation between the predecessor State and the successor State. In the former case, there might be sub-groups, such as a declaration concerning a treaty not covered by the devolution agreement.

7. The next question was what was a third State. A state could be a third State in relation to a treaty, but then it would be article 3, on devolution, that would be concerned. Where there was no devolution agreement, but only a unilateral declaration, it was hard to see what “third State” meant. It would be better to drop the word “third”, so that the use of the word “State” alone would include the predecessor State.

8. To judge from the drafting, at least, article 4 appeared to exclude two things: first, all multilateral treaties, since it provided that the successor State communicated its declaration to a third State and not to a State or an international organization which was the depositary of a multilateral treaty; and secondly, unilateral declarations not communicated to a third State because of their general character, such as those made on accession to independence.

9. Like Mr. Ushakov, he had been struck by the apparent contradiction in paragraph 2 (b), but his doubts had been partly dispelled by the Special Rapporteur’s explanations.

10. It should be remembered that treaties were not always applied automatically to all dependent territories. Some of them contained colonial clauses which did not solve all the problems; some underwent subsequent amendment by means of protocols which might or might not take the colonial clauses into account. Hence it was often difficult to know whether a treaty was in fact applied to a particular territory, so that lists of treaties for which a unilateral declaration would be appropriate had been drawn up. A declaration made unilaterally by a successor State expressed its consent to be bound by the instrument in questions, but was also the prelude to the novation of the agreement, which, legally speaking, was slightly different from the previous one.

11. He was in favour of keeping to the general line chosen by the Special Rapporteur and approved of article 4 provisionally.

12. The CHAIRMAN said it might help if the Special Rapporteur would clarify the point just raised by Mr. Bedjaoui about the application of article 4 to multilateral treaties.

13. Sir Humphrey WALDOCK (Special Rapporteur) said that the application of article 4 to multilateral treaties raised the question whether the article should cover more thoroughly unilateral declarations which were not of a provisional nature. The cases which the article primarily covered at present were those in which a successor State offered to continue to apply certain treaties as a temporary expedient.

14. Newly independent States seemed, indeed, to have recognized that it would not be possible for them to participate in a multilateral treaty, as such, on a provisional basis. Multilateral treaties did not normally contemplate participation otherwise than on a definitive basis, and provisional participation would therefore require the consent of every party to the treaty. At any

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1 For text see previous meeting, para. 64.
rate, the multilateral declarations of new States found in practice did not claim or offer provisional participation in multilateral treaties as such. They offered merely to apply multilateral treaties provisionally on a basis of reciprocity vis-à-vis any individual party willing to do so. Even if a multilateral declaration were couched in terms expressing the will of the State to be considered as a party to its predecessor’s multilateral treaties, it was doubtful whether the declaration should be regarded as a notification of succession to all those treaties. As in the case of a devolution agreement, a depositary would be likely to require a specific indication of the State’s will with respect to the particular treaty in question.

15. Mr. YASSEEN said he approved of the philosophy underlying article 4, which was intended to bring out the preponderant part played by the will of the successor State in determining its future with respect to treaties.

16. Devolution agreements were not always essential, since a successor State could itself express its intentions without the assistance of the predecessor State. Such agreements were useful in matters other than treaties, where there was a bilateral relationship, but for treaties, where other States were involved, the method of unilateral declaration was more appropriate. A devolution agreement might make the future of the successor State depend on the will of the predecessor State, whereas a unilateral declaration was an act of the successor State alone.

17. Its provisional nature also added to the importance of a unilateral declaration. The first concern must be to ensure the continuity of international life, but that ought to be *sub beneficio inventarii* for the successor State. The time allowed for reflection enabled the successor State, first, to become truly independent and, secondly, to consider which treaties it wished to maintain or to reject. The new State thus remained master of the situation.

18. He would not go into the very thorny question whether the renewed instrument was the former treaty or a new and slightly different instrument. That distinction depended on the will of the parties.

19. Multilateral treaties differed considerably from bilateral treaties, in that they concerned the international community and were intended to serve the general international interest. He was in favour of making participation in multilateral treaties easier and therefore thought that questions of succession to such treaties should be dealt with in another article.

20. Subject to drafting changes, he supported article 4.

21. Mr. QUENTIN-BAXTER said that article 4 seemed to contain two different ideas: that of ensuring that a unilateral declaration should not disturb the normal operation of the rules in the draft articles and that of dealing with the provisional application of treaties. He himself was inclined to agree with those who considered that the article should be confined to the provisional application of treaties.

22. He agreed with Mr. Yasseen that the purpose and value of article 4 was to emphasize the role of the intention of the successor State. At the same time, however, the thought the unilateral declaration, like the devolution agreement, had its less attractive side, since it had begun as a rather hasty expedient resorted to by a new State which did not wish either to lose any possible benefit to which it might be entitled under old treaties, or to diminish its sovereignty in any way. The provisional application of treaties was essentially a crutch designed to help new States faced with that dilemma. The Commission would have to decide whether that device should be improved or whether it could be done away with altogether.

23. One problem was that of reconciling the concepts of novation and transmissibility. That problem—not easily explained to the laymen governing new States, who would probably be confronted with many more practical problems—could be avoided by the simple rule that the treaties of the predecessor State were voidable at the option of the successor State.

24. Another problem in depending upon a provisional application procedure was its sheer unreliability. It could be assumed that in general the predecessor State would do its best to inform the successor State about what treaties were in force at the time, but there was no guarantee that the list would be complete, and the new State would have to decide, with a false sense of urgency, which treaties it would adopt and which it would reject.

25. When Western Samoa had gained its independence from New Zealand, there had been a devolution agreement, because that had been the fashion of the time. The purpose, however, had been not so much to bind the parties as to put Western Samoa on notice of the treaties to which it could claim succession. The Government of Western Samoa had slowly made a selection of those treaties which it wished to remain in force, and there had been no instance in which another State had questioned its wishes.

26. He agreed with the Special Rapporteur that the Secretary General received unilateral declarations not in his capacity as a depositary, but simply as an intermediary for disseminating information. He saw no reason why that practice should not continue, since, as Mr. Yasseen had pointed out, there were many cases in which a new State would wish to inform the world that it regarded an old treaty as still provisionally in force, though it had not yet decided whether to accept it permanently. He did not, however, think that the third State should be compelled to respond to the notification within a specific time-limit.

27. To sum up, while agreeing that new States should be able to declare their intentions if they so desired, he believed that article 4, if strictly applied in its present form, could give rise to grave difficulties of both a doctrinal and a practical kind.

28. Mr. TAMMES said that while article 3 was mainly designed to protect the interests of third States, article 4 placed greater emphasis on those of new States, and on the general concern of the international community about the continuity of treaty law. The two articles were therefore complementary and helped to restore the balance of the general provisions of the draft.

29. He fully approved of the progressive and open spirit in which article 4 was drafted and hoped that it would
retain the general nature which justified its place in Part I. It should be remembered that there had been cases of the emergence of new States in other ways than by the process of decolonization, as was evidenced by the merger of two new States in the United Republic of Tanzania.

30. He also agreed with the approach adopted by the Special Rapporteur in paragraph 2, which was an adaptation of article 25 of the Vienna Convention on the Law of Treaties.²

31. As Mr. Quentin-Baxter had pointed out, recent practice showed that new States needed a reasonable period for reflection before definitely undertaking to acknowledge an existing treaty. The time-limit provided for in paragraph 2(c) was justified by the reasons given by the Special Rapporteur in paragraph (23) of his commentary.³

32. The Special Rapporteur had invited the Commission to express its views on the contents of paragraph 2(a): "The treaty comes into force automatically as between the States concerned under general international law independently of the declaration". He (Mr. Tammes) thought that the more work the Commission did in codifying international law in treaty form, the less there would remain for it to do under general international law independently of treaties. The following passage from the judgment of the International Court of Justice in the North Sea Continental Shelf cases illustrated his point:

"In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way".⁴

33. What would finally become automatically binding in an ideal world would be certain general rules of logic and certain moral rules, but it was impossible to separate such rules from the practical, administrative and organizational rules contained in conventions, which were not of a kind that could come into force automatically. The Special Rapporteur had himself given, with reference to paragraph 2(b), the example of the European Convention on Human Rights.

34. Mr. HAMBRO said he agreed with Mr. Yasseen about the general philosophy behind article 4. Those ideas had been clearly and constructively brought out by the Special Rapporteur, and if the Commission proposed to codify the rules on succession of States in respect of treaties, it would undoubtedly be wrong to ignore the widespread practice of unilateral declarations.

35. On the question whether article 4 related only to cases of decolonization or covered all kinds of succession, it was clear to him that the latter interpretation was the correct one and that it would be a mistake to concentrate too narrowly on decolonization. Decolonization, in fact, had now become almost a part of history and in the future there would undoubtedly be many other ways in which new States might be formed.

36. Mr. Quentin-Baxter had commented on the difficulty of explaining the underlying conception of succession in article 4; he himself thought it was not the Commission's task to explain all the subtleties which might arise, but to produce a draft that would be sufficiently simple to be understood by those who would have to apply it. There was always a danger that international law might become too esoteric, but it was a danger, he was pleased to note, that the Special Rapporteur had been highly successful in avoiding.

37. Mr. USHAKOV, referring to the question of multilateral treaties, said he thought that article 4 related only to cases of succession to bilateral treaties. Succession to universal or general multilateral treaties was decided by notification, which was the subject of another article.

38. Moreover, article 4 was applicable only to formerly dependent States, for it was based on the "clean slate" principle, which did not apply either to mergers or to cases of separation.

39. Mr. AGO said that the present wording of article 4 would suggest that it did not cover all cases of State succession; the drafting would have to be amended if its scope was to be made general.

40. The problems of substance raised by the article were more difficult. The rule it proposed applied perfectly to the situation of new States, whether they were former dependent territories or former parts of the territory of a particular State, but it was doubtful whether it covered cases of merger. In the case of a new State born of decolonization, separation of dismemberment, the only question was whether an existing treaty applied to the new State or not. But in a case of merger, did the problem arise only for the State with respect to which the treaty had been in force and which had merged with others, or for the entire territory of the State created by the merger? That was a complex question, on which the Commission would have to reflect. The problem also arose in a different form where a cession or transfer of territory occurred, and special provisions would probably have to be included for each of those cases.

41. With regard to restricted multilateral treaties—special provisions would have to be included for general multilateral treaties—the problem differed very little from that raised by bilateral treaties. It was, indeed, mainly in their case that a declaration expressing consent to provisional application could be envisaged.

42. He would not go into the drafting problems raised by paragraph 1. It might be questioned whether the introductory clause of paragraph 2 reflected existing international practice; in other words, whether it was a rule de lege lata or de lege ferenda. In any case, the clause was very appropriate. Its purpose was to make it possible to maintain provisionally in force, in accordance with the

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will of the successor State, a treaty whose suspension might be harmful, the consent of the third State being temporarily assumed. The successor State would not normally take such a step if it had any reason not to expect the third State’s consent. The spirit of the clause was in conformity with the principle of the stability of international treaty relations affirmed by the Vienna Convention on the Law of Treaties. And the Vienna Convention contained a provision specifying that a treaty might be applied provisionally before ratification, if that was desirable.  

43. Sub-paragraph (a) of paragraph 2 should be retained provisionally; it could be deleted later if necessary, depending on what the Commission decided about localized treaties.

44. Sub-paragraphs (a) and (e) of paragraph 3 caused him more serious doubts. Since paragraph 3 dealt with the provisional application of a treaty, and there was not a really existing treaty but a kind of expectation of a new treaty, it was doubtful whether one could speak of a requirement of notice, since that requirement derived from rules concerning treaties in force. Similarly, with regard to sub-paragraph (e), a treaty might terminate in conformity with its own provisions between the States between which it was effectively in force; but when it was applied only provisionally and there was a possibility of prolongation, perhaps it would be better not to bring the provision in sub-paragraph (e) into play.

45. Mr. TABIBI said that, while he shared many of the doubts expressed by Mr. Reuter and Mr. Ushakov regarding the structure of article 4, he favoured the inclusion of an article of that kind in the draft. The provisions of article 4 were not open to the same objections as those of the previous article. A devolution agreement could represent the price of independence, whereas the practice of unilateral declarations left every new State free to take its own decision on the continued application of treaties to its territory. Moreover, it was a practice that played a useful role in ensuring the stability and continuity treaties.

46. The practice of unilateral declarations had developed satisfactorily in connexion with multilateral treaties. With regard to bilateral treaties, however, care should be taken not to give a sort of blank cheque and suggest that a unilateral declaration was always useful and necessary. A unilateral declaration could give the successor State an opportunity to put forward its own unilateral interpretation of a treaty in which other States were concerned and to which it did not intend to become a party. There was the case of a new State which had declared, on attaining independence, that within a specified period it would inform the Secretary-General of the United Nations of the treaties of its predecessor State which it considered to be valid, thus suggesting that it treated as invalid those treaties which it did not wish to continue to apply to its territory.

47. The safeguards provided in article 4 seemed inadequate, whereas those of article 25 of the Vienna Convention on the Law of Treaties were clear and precise.

The Drafting Committee should improve the language of article 4 in that respect.

48. Mr. REUTER said he agreed that the “clean slate” rule was perfectly applicable to cases of decolonization and to all forms of separation of a territory to constitute a new State. He doubted, however, whether it was applicable to a case not covered by article 4, namely, the case of a merger of States. For the legal personality of a State could not be invoked as a ground for allowing two or three States to default on their treaty obligations on the pretext that they had merged to form a single State. Or course, it was always open to third States not to recognize a merger and to consider that the States in question retained their separate existence, but that was rather a simplistic idea. When the Commission came to examine the problem of mergers, which would arise more and more frequently in the future, it would have to review its position on the “clean slate” rule.

49. Paragraphs 1 and 2 of article 4 concerned the provisional application of treaties, whereas paragraph 3 seemed already to envisage the institution of a definitive régime. Those two stages should be kept separate, in accordance with the practice which appeared to be followed in the United Nations. For open multilateral treaties, members of the Commission would certainly be prepared to make substantial concessions to the “clean slate” rule; it might perhaps be simpler to provide that all open multilateral treaties could be automatically applied provisionally until their maintenance in force was terminated by a declaration. That solution, which was in conformity with ILO practice, would solve the discontinuity problem resulting from article 4. It would therefore be advisable to redraft the article and, if necessary, the provisions relating to bilateral and multilateral treaties.

50. Mr. BILGE said he approved of the solution proposed by the Special Rapporteur in article 4, which, although not concerned with succession in the strict sense of the term, met a definitive need.

51. In paragraph 1, the expression “maintenance in force” suggested an idea of continuation which was not appropriate in the circumstances, since the parties concerned had changed. A more suitable expression would have to be found, taking into account the terminology used in the subsequent articles.

52. Although it was wise to provide in paragraph 2(c) that a third State could oppose the provisional application of the treaty, it might be asked whether three months was not too short a period. In his commentary, the Special Rapporteur had explained that a longer period might diminish the value of provisional application. But from his own experience he knew that many internal decisions often had to be taken, particularly in the case of treaties relating to technical or financial matters. If too short a period were allowed, it might cause States to give a negative reply merely through lack of time. He wondered, too, whether sub-paragraph (c) was not perhaps a true condition, which should be placed in the introductory part of paragraph 2.

53. Mr. TSURUOKA said he could accept article 4 on the understanding that it related solely to bilateral treaties,
not to multilateral or restricted multilateral treaties, whose maintenance in force could be dealt with in separate articles.

54. The procedure proposed in article 4 provided for the maintenance in force of the existing treaty régime in the interests of the new State and the international community. It was with that consideration in mind that the Special Rapporteur had set the consent of the third State against the unilateral declaration of the successor State, thus attenuating the unilateral character of that declaration. It should also be noted that the article could never have more than a limited practical scope, since it dealt with provisional application.

55. In order to ensure a parallelism between the successor State and the third State, the period during which the new State could make a unilateral declaration might be limited, since a time-limit for objection by the third State was laid down in paragraph 2 (c).

56. Lastly, the Special Rapporteur and the Drafting Committee should make it clear whether or not they were adopting the “clean slate” principle. If they were, the reservations accompanying a treaty would not be maintained in force.

57. Mr. BARTOS said that theoretically he supported the “clean slate” rule. In cases of decolonization it was clear that there was no continuity as between the colonial Power and the newly independent State and that the latter was not automatically bound by the treaties previously concluded by the colonial Power. And that was the approach chosen by the Special Rapporteur.

58. Nevertheless, that conception raised certain difficulties. In the first place, it involved some inequality of treatment between the new State and the third State, the former being free to accept the rights and obligations deriving from the treaties of the predecessor State, while the third State had to await the unilateral declaration of the successor State before it could take a position.

59. Furthermore, the maintenance in force of treaties often depended not only on the will of the States concerned, but on political and economic circumstances. Every new State was necessarily bound by pre-existing contractual relations with respect to its territory. Theoretically, it could refuse to accept those relations, but to do so could often mean condemning itself to isolation. That would be the case, for example, in the field of telecommunications, if a State refused membership in the International Telecommunication Union.

60. Similarly, on achieving independence certain African colonies of the British Crown would have lost their traditional cocoa markets if they had not opted for the maintenance in force of the arrangements concluded by the United Kingdom with other British colonies or consumer States. Those arrangements, which had been of a quasi-international character, had become true international treaties when the former colonies had acceded to them. The situation of the French colonies has been similar.

61. The period of three months prescribed in paragraph 2 (c) should be increased to six or eight months, or there should be no time-limit at all. In his experience, a period of three months would be definitely insufficient in some circumstances. On the other hand, too long a period would certainly be detrimental to the security of international relations.

62. Paragraph 2 (b) referred to the case in which the application of the treaty in relation to the successor State would be incompatible with its object and purpose. Since that notion of incompatibility had given rise to many international disputes, the meaning of the provision should be clarified.

63. Mr. USTOR said that the provisions of article 4 had been intended by the Special Rapporteur to be of general application. The concluding words of paragraph 1, “are governed by the subsequent articles of the present draft”, clearly referred to all the draft articles that would follow and not merely to those in Part II, which dealt specifically with new States.

64. It was useful to have in the draft an article on the effects of a unilateral declaration in all cases of successor States, including cases of merger. A provision such as that in paragraph 2 (a) would apply, for example, to the case of the merger of two pre-existing States. It laid down an exception to provisional application and, in the case in question, it would be that, if the two pre-existing States were parties to the same general multilateral treaty, that treaty would become automatically applicable to the combined State.

65. There were a few drafting points he would like to raise. The title of article 4 used the word “declaration”, but the text of the article used the word “communicates”, while article 7 (A/CN.4/224) spoke of the “notifying” succession. The Drafting Committee should endeavour to unify those expressions.

66. If, as proposed, article 4 was retained in the form of a general rule, it would be appropriate to include in it some of the provisions at present in Part II, which were general in character. Two examples of such provisions were those of article 11, on the procedure for notifying succession in respect of a multilateral treaty, and those of sub-paragraph (b) of article 7, which made an exception for the constituent instruments of international organizations; they applied not only to the case of a new State, but to other cases of succession as well. If those provisions of a general character were moved to draft article 4, Part II would contain only provisions relating exclusively to new States.

67. Mr. USHAKOV, referring to Mr. Ago’s remarks concerning multilateral treaties, said that article 4 related solely to bilateral treaties: it required the consent of only one third State. If it were applicable to a tripartite treaty, it would require the consent of two third States. In the case of a tripartite treaty, however, only one of the two third States might give its consent, and that would lead to the provisional application of a multilateral treaty, but binding on only two parties.

68. The Special Rapporteur should also consider the difficulties involved in drawing a distinction between cases of separation and cases of partition of one State into two new States.
69. Mr. ROSSIDES said that, taken as a whole, the provisions of article 4 were satisfactory; they were based on the experience gained with newly independent States in the recent past.

70. The provisions of the article were obviously intended to apply exclusively to new States. The subject of merger in the recent past.

71. It was not desirable to place undue emphasis on the question of separation, since that would seem to endorse the idea of partition of States. That idea had been worth stressing during the period when the application of the principle of self-determination had required the breaking up of large empires; at the present time, however, separations were an exceptional phenomenon and should not receive undue attention in the draft. The emphasis should rather be placed on mergers and unions of States, which were bound to have great importance in the future.

72. With regard to the text of the article, he agreed that the period of three months laid down in paragraph 2 (c) might well prove too short. Consideration should be given to the idea of proposing no time-limit at all; when a successor State made the declaration mentioned in paragraph 2, provisional application of the treaty would begin, and it would continue either until such time as the third State informed the successor State of its objection to provisional application, or until the treaty came fully into force between those two States.

73. The CHAIRMAN, speaking as a member of the Commission, said that he supported the philosophy of article 4 with respect to multilateral treaties. The article was not intended to put a multilateral treaty into effect as such between all the parties concerned.

74. One point which had to be borne in mind was that many multilateral treaties contained provisions for machinery; a treaty of that kind could not very well be applied provisionally without at the same time bringing the machinery into operation. A similar problem could also arise in connexion with bilateral treaties, many of which contained provisions for the functioning of an arbitration body or a river or boundary commission. Such treaties clearly could not be provisionally applied without setting up the machinery they provided for. Those considerations suggested that the real problem was not so much succession to treaties as succession to rights and obligations resulting from treaties.

75. On the question of terminology, he found the term "communicates" unduly broad, since it might be taken to cover, for example, a broadcast announcement. Narrower wording should be sought.

76. The Drafting Committee should also endeavour to clarify the relationship between the provisions of paragraph 2 (b) and those of paragraph 2 (c). It should be made clear that, if the third State did not notify its objection to the sending State within three months in accordance with paragraph 2 (c), it was not thereby precluded from objecting under paragraph 2 (b) to the application of the treaty in relation to the successor State as being incompatible with the object and purpose of the treaty.

77. The CHAIRMAN said he had received the following cable, dated 17 May 1972, from the Legal Counsel of the United Nations in reply to the letter of 12 May 1972 sent in pursuance of the Commission's decision:

"Communications contained in your letter of 12 May 1972 and objections thereof to the draft recommendations of the ILC enlarged Bureau for having thus overcome existing financial difficulties regarding publication of Volume II of 1971 ILC Yearbook.

If there were no comments, he would take it that the Commission approved the recommendations of the enlarged Bureau.

It was so agreed.

The meeting rose at 1.5 p.m.

* See 1157th meeting, paras. 43 and 44.

1162nd MEETING

Friday, 19 May 1972, at 9.35 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Tabibi, Mr. Tamnes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(resumed from the previous meeting)

ARTICLE 4 (Unilateral declaration by a successor State) (continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 4 (A/CN.4/214/Add.2).
2. Sir Humphrey WALDOCK (Special Rapporteur) said that several members had raised the question of the scope of article 4. They had done so from two points of view: the first related to the question whether the article should cover every case of succession or only that of the new State; the second related to the question whether the article should cover both multilateral and bilateral treaties.
3. On the first question, a distinction should be made between the provisions of paragraph 1 and those of

1 For text see 1160th meeting, para. 64.
paragraph 2. The former dealt with declarations in general and covered more than the mere question of temporary application of the treaty; the latter dealt exclusively with temporary application.

4. As far as paragraph 1 was concerned, the practice was clearly not confined to cases of new States. At least two examples could be given, namely, the formation of the United Republic of Tanzania and the formation of the United Arab Republic. In the case of the United Arab Republic, a declaration had been made to the Secretary-General of the United Nations and to others, informing them of the constitutional provisions of the newly-formed union, and of the continuity in force of the treaties formerly binding upon the separate States of Egypt and Syria which had formed the union.

5. When that declaration had been made, some reservations had been expressed by certain States which regarded the declaration as not binding upon third States. It was possible, of course, to take the view that the constitutional provisions in question merely gave expression to an existing rule of general international law providing for the ipso jure continuity of treaties. The position was not at all certain in that respect. It also seemed prudent to include in article 4 the reservation contained in paragraph 2 (a) to safeguard the position under general international law. The Commission need not at the present stage take a definite position on that question, to which it would have to revert when it dealt with the problems of fusion of States and of localized treaties.

6. In any case, he wished to make it clear that the use of the words “prior to independence” in paragraph 1 was not intended to restrict the provisions of that paragraph to the case of formerly dependent territories. He had used that language simply because the practice in the matter had revolved largely, but not exclusively, around the emergence of the newly-independent States.

7. As to the question whether the provisions of article 4 should cover both multilateral and bilateral treaties, although some unilateral declarations drew a distinction for other purposes between those two categories of treaty, provisional application applied to both categories. For instance, draft article 16, in his fourth report (A/CN.4/249), dealt with the possibility of continuing the application of a multilateral treaty on a purely reciprocal basis; in that case, bilateral relations were established under a multilateral treaty.

8. Another question, relating to the arrangement of the subject-matter of article 4, had been raised by Mr. Ushakov, who had suggested that it should be combined with the provisions on notification. He could not accept that suggestion, because any attempt to combine the two sets of provisions would lead to considerable difficulties of substance. The declarations covered by article 4 were declarations of policy and did not constitute an acceptance of all the treaties mentioned in the declaration. The position was altogether different with regard to notifications; a notification of succession had an effect comparable to ratification and served to express the consent of the successor State to be bound by the treaty.

9. With regard to the use of the terms “communication”, “declaration” and “notification”, he thought it was too early to take a decision on the final terminology. While he would bear in mind the Chairman’s comments on that point, he should point out that article 78 of the Vienna Convention on the Law of Treaties was entitled “Notifications and communications”, and that both those terms were used in the text of that article.²

10. There had been some discussion on the provisions of paragraph 2 (b), on incompatibility with the object and purpose of the treaty. Those provisions were necessary because the treaty might well have no relevance in the new situation. It was true that the wording was somewhat general in character but it had been accepted at the United Nations Conference on the Law of Treaties for inclusion in the Vienna Convention and it constituted an objective notion; he did not believe it would be possible to find a more precise formula to express the intended purpose.

11. The reservation in paragraph 3 (d) was also necessary, because the actual termination of the treaty, or alternatively the agreement of the parties concerned to bring it into force, would necessarily bring to an end the temporary application of the treaty.

12. Mr. Reuter had pointed out that it was not the treaty itself which was maintained temporarily in force, but the rights and obligations embodied in the treaty. That proposition was no doubt correct from a strictly logical point of view, but the language of States differed from the language of lawyers. States usually referred to the continuance in force of a treaty, and it would be better not to enter into legal subtleties on that point since the result might well be to make it necessary to go through the process of parliamentary approval all over again.

13. As for the three months’ time-limit laid down in paragraph 2 (c), he agreed that it might be unduly short. It should be remembered, however, that the States which were called upon to reply were not generally the new States, but the other parties to the treaties, which were often old States with well staffed legal departments in their foreign offices. Besides, the States concerned were not called upon to look into every treaty mentioned in the declaration; it was only a matter of deciding in a general way whether they were prepared to maintain those treaties temporarily in force.

14. It was, of course, possible to specify no time-limit whatsoever, but then the situation would remain undefined for a long period.

15. In conclusion, he agreed that the provisions of article 4 would need some rearrangement. Consideration would have to be given to the possibility of separating the provisions dealing with provisional application from those relating to unilateral declarations independently of provisional application. It would also be necessary to consider whether to separate the temporary application of multilateral treaties from that of bilateral treaties.

16. Mr. AGO said that, if article 4 referred to new States, the Special Rapporteur might consider placing it in Part II.

17. Sir Humphrey WALDOCK (Special Rapporteur) said that if it was desired to leave such cases as that of fusion outside the scope of article 4, the provision could be conveniently placed in Part II. Together with articles 5 and 6, which were general articles on new States and which applied to both multilateral and bilateral treaties, it could form an introductory section to Part II.

18. He did not think, however, that the question of fusion could be left altogether outside article 4 in its present form, because there were, in fact, declarations which dealt with much more than the temporary application of treaties.

19. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 4 to the Drafting Committee for consideration in the light of discussion.

It was so agreed.3

ARTICLE 5

19. Article 5

Treaties providing for the participation of new States

1. A new State becomes a party to a treaty in its own name if:

(a) The treaty provides expressly for its right to do so upon the occurrence of a succession; and

(b) It establishes its consent to be bound in conformity with the provisions of the treaty and of the Vienna Convention.

2. When a treaty provides that, on the occurrence of a succession, the successor State shall be or shall be deemed to be a party, a new State become a party to the treaty in its own name only if it expressly assents in writing to be so considered.4

21. The CHAIRMAN invited the Special Rapporteur to introduce article 5 (A/CN.4/224). He suggested that the time had perhaps come for the Commission to discuss, in connexion with article 5, and the following articles sub-paragraphs (d), (e) and (f) of article 1 (Use of terms).5

22. Sir Humphrey WALDOCK (Special Rapporteur) said that there had been considerable discussion already on the term “new State”. For the purposes of article 5, it would be preferable not to enter into a discussion on the use of terms, but to leave the final formulation until the relevant substantive questions had been settled.

23. The purpose of the various articles in Part II was to state the rules applicable in cases of independence. Clearly, the Commission could not discuss every possible question in connexion with each of the articles; it would have to confine its discussion to the subject-matter of each article.

24. Mr. AGO said that the provisions of article 5 obviously applied to all new States, whether they derived from the attainment of independence by a former dependent territory or by part of the metropolitan territory of an existing State, from a merger of States, or from a dismemberment. The only case to which those provisions would not apply was that of succession arising from the transfer of a piece of territory from one State to another.

25. Sir Humphrey WALDOCK (Special Rapporteur) introducing article 5, said that the article was a general provision and dealt with the case in which a special clause was included in a treaty in contemplation of the emergence of a new State.

26. The practice showed that the form of those clauses varied considerably from one treaty to another. For example, the General Agreement on Tariffs and Trade made provision for a territory to become a party to it on attaining independence, but on the basis of sponsorship by a Contracting Party to the General Agreement.6 Other treaties gave an actual right to the new State upon its becoming independent.

27. A somewhat different case was that of the Geneva Agreement of 1966 between the United Kingdom and Venezuela, mentioned in paragraph (10) of the commentary to article 5. That agreement expressly provided for the participation of a new State which was in the process of becoming independent. It specified clearly that it was for the new State to take action under the treaty.

28. He had thought that, where a treaty specifically stated that the new State would become a party to the treaty, it would still be necessary for the new State to assent expressly to the treaty after attaining independence. In order to become a party in its own name, the new State would have to give some indication of its consent to be bound by the treaty.

29. Mr. REUTER said he found article 5 acceptable, but would like the Special Rapporteur to specify how far he accepted the principle of continuity in the application of treaties. That question was prompted not only by article 5, paragraph 2, but also by article 4, paragraph 2 (c) and the whole of article 7.

30. Under article 5, paragraph 2, a new State became a party to a treaty only when it expressed its assent. It therefore appeared that it was not bound previously, though it would be possible to specify that its assent took effect retroactively to the date on which it had become independent.

31. Under article 4, paragraph 2 (c), did the treaty apply provisionally so long as the third State had not expressed its objection, or did it not?

32. Article 7 was also based on the notion of the continuity of treaties and it would be important to know precisely what its effects were in that respect.

33. Mr. AGO said that article 5 would not be applied very often since a State seldom foresaw, when negotiating a treaty, that some part of its territory might become an independent State or that it might itself merge with another State. Such an eventuality was usually provided for in a treaty only when the process of separation or fusion had already begun at the time of the negotiations. The case of Guyana, mentioned by the Special Rapporteur, was an example of that situation.

34. Without the help of the commentary to article 5, it was hard to see the difference between the cases referred

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3 For resumption of the discussion see 1181st meeting, para. 49.
5 Ibid., p. 28.
to in the two paragraphs. Paragraph 1 applied where the treaty gave the new State merely the right to become a party, while paragraph 2 concerned treaties which stipulated that the new State should automatically be deemed to be a party to the treaty unless it signed a contrary intention. In the latter case, the new State might even be deemed to be an original party, thereby acquiring considerable privileges.

35. Although the case dealt with in paragraph 1 was the commoner, the case referred to in paragraph 2 entailed a certain obligation for the new State, and it might perhaps be wise to transpose the two paragraphs. With those reservations, he found article 5 acceptable and he agreed with the Special Rapporteur that it should be placed, together with other articles, in a general section devoted to all new States, however formed.

36. Mr. USHAKOV said that in spite of its apparent simplicity article 5 raised a basic problem with regard to its scope. The article obviously concerned multilateral treaties more than bilateral treaties, since a bilateral treaty very seldom provided for the accession of a new State.

37. There was some contradiction between article 5, which was primarily applicable to multilateral treaties, and article 7. Under article 5 a new State could not become a party to a multilateral treaty unless the treaty provided expressly for its right to do so on the occurrence of a succession. Article 7, on the other hand, provided that a new State was entitled to accede to a multilateral treaty even if that possibility had not been reserved for it. Since article 7 was more general, he doubted the utility of article 5.

38. Mr. BARTOS said that article 5 was reasonable and did not establish a new practice. In the nineteenth century the Treaty of Berlin, for example, had laid down the conditions for the independence of certain States and, for the Treaty to apply to them, the new States had only had to ratify the article concerning the creation of new States, not the whole Treaty. A similar practice had been followed in some of the treaties concluded after the First World War.

39. It might be asked whether that practice was in conformity with the system of decolonization, which recognized that new States were created by the right of their nations under the United Nations Charter and not, as in traditional international law, by the effect of the will of the States occupying the territory. Thus, the Latin American States had never recognized the United Kingdom's right to dispose of British Guiana. The article drafted by the Special Rapporteur put an end to an international disagreement in a manner favourable to new States, the creation of which would no longer depend on the acceptance or non-acceptance of a treaty. The Special Rapporteur was to be commended for having devised such a felicitous solution.

40. Mr. ROSSIDES said that article 5 was unobjectionable in every respect. It was for the new State to decide whether it wished to become a party to the treaty or not. Today, when multilateral treaties of general application were becoming increasingly important for the development of international law and the world legal order, States should undoubtedly be encouraged to accede to such treaties.

41. He agreed with Mr. Reuter, however, that it would be desirable to know what happened during the period before a new State assented in writing to be considered a party to a treaty. As the Special Rapporteur had pointed out in his commentary, the Contracting Parties to the General Agreement on Tariffs and Trade had, in 1957, provided for "a reasonable period" for the de facto application of the Agreement, which had subsequently been extended to a period of two years. Even that period had then been found unsatisfactory and finally a recommendation of 11 November 1967 had provided for de facto application on a reciprocal basis without any specific time-limit.

42. He suggested that article 5 should contain a clause providing for the provisional application of a treaty until the successor State had expressly dissented in writing.

43. Mr. YASSEEN said that article 5 was useful, but not essential. Paragraph 1, in particular sub-paragraph (a), did not provide for anything other than strict application of the general rules of the law of treaties.

44. Paragraph 2 was useful in that it might obviate misunderstandings by stressing that a new State, since it became a party to the treaty in its own name only if it expressly assented in writing, retained full freedom with respect to the treaty which declared it a party. The treaty provision stipulating that the successor State "shall be or shall be deemed to be" a party to the treaty might therefore be regarded as an offer, not an obligation to become a party.

45. If the Commission decided to retain the whole of article 5, he would raise no objection, but he thought it would be preferable only to retain paragraph 2.

46. Mr. USHAKOV drew attention to the possible consequences, in cases of merger or separation, of the principle embodied in article 5, according to which a new State was born free of all treaty obligations. If two States which were parties to a tripartite agreement merged, was the new State thus formed released from its obligations to the other State? Or could it be said that the two States formed by the separation of a State which had been a party to a bilateral agreement were no longer bound by that agreement? The Special Rapporteur and the Drafting Committee should consider those questions.

47. Mr. AGO said that the general criterion to be applied in every case was the newness of the State, regardless of how it had been formed. The essential point was that it must be a subject of international law different from the one which had preceded it. In cases or partition, where there were really two or more new States, the rule applied, but if only one State was really new and the other was a continuation of the previous State, the rule did not apply to the continuing State.

48. The same applied to cases of merger. If, as in the case of the United States of America, the Federal State was an entirely new State in relation to the States which had been merged and if the latter had ceased to exist in their own name, there was a new State which was not
bound by obligations contracted by one of the merged States. But if there was a dominant State which had combined other States in its own international personality, as Sardinia had done in bringing Italy into existence, the basic principle was that the international legal obligations of that State subsisted after the merger. Thus the criterion was certainly whether the State in question was a new State or not.

49. Mr. USTOR said that the main problem concerning article 5 was whether it was to be construed as relating only to new States resulting from the process of decolonization or whether it was to be taken as relating to all other possible cases of the emergence of new States.

50. He himself would prefer the first alternative, since that would simplify matters, for the time being at least, and the Special Rapporteur could always make alterations at a later stage.

51. In his opinion, article 5 was not of a general character and should be included among the exceptional cases dealt with in a later part of Part I. In particular, he thought that the two situations provided for in paragraphs 1 and 2 did not differ too greatly and that the article might be simplified by combining the two paragraphs in a new draft.

52. The CHAIRMAN, speaking as a member of the Commission, said he could agree with the Special Rapporteur that article 5 was a relatively innocent article of general application. It was designed to meet a special type of case: that of a specific treaty clause to take care of a future change in conditions. To take a hypothetical case, if his own country and the States forming the European Economic Community should conclude a treaty on scientific collaboration, that treaty might conceivably apply only to the territory of the United States of America. That would be a case of fusion, but there should be no difficulty in applying the clause.

53. There could be no possible confusion between articles 5 and 7, since article 5 applied only to the special case of a specific treaty clause and the limitations in article 7, particularly that expressed in sub-paragraph (g), could not possibly apply to a situation in which the treaty in question clearly contemplated continuity.

The meeting rose at 11.10 a.m.
to be bound "in conformity with the provisions of the treaty and of the Vienna Convention". There could thus be a break in the continuity of application of the treaty. For example, some multilateral treaties specified that the new State became a party as from the date of notification of its intention to be bound; in such a case, there would be a period of non-application of the treaty to the territory in question prior to the notification. In all such cases, the provisions of the treaty itself prevailed. Hence, if any rule were to be laid down regarding continuity, it would necessarily have to be qualified by some such proviso as "Unless the provisions of the treaty itself otherwise provide . . ."

6. Mr. AGO said that on the whole he was satisfied by the Special Rapporteur's explanations. He had, however, been surprised to hear that article 5 was intended to refer only to new States, excluding cases of fusion. For a new State might emerge from a fusion of States; there were many historical examples of that, notably the formation of the United States of America.

7. The Commission should be careful about the terminology it used, in order to avoid serious difficulties of interpretation. It could not, even as an expedient, adopt any notion of a new State which excluded the birth of a State as a result of fusion.

8. Sir Humphrey WALDOCK (Special Rapporteur) said he was preparing draft provisions on the problem of fusion for submission to the Commission. The problem was a difficult one; in some cases, such as that of the formation of a federation, a new State could undoubtedly be said to emerge with the constitution of a central authority to concentrate all the external relations of the component members of the federal union. It would, however, be a very different type of "new State" from the one envisaged in sub-paragraph (e) of article 1.

9. The practice in regard to fusions of States gave little indication of any clear rules in the matter, while the writers generally spoke of a rule of continuity, but did not make it clear whether, in their opinion, continuity operated in respect of the territory ipso jure or by agreement of the States concerned. As for the International Law Association's proposals on the subject, they were complex and not free from difficulty.

10. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 5 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.8

ARTICLE 6

11. Article 6

General rule regarding a new State's obligations in respect of its predecessor's treaties

Subject to the provisions of the present articles, a new State is not bound by any treaty by reason only of the fact that the treaty was concluded by its predecessor and was in force in respect of its territory at the date of the succession. Nor is it under obligation to become a party to such treaty.4

8 For resumption of the discussion see 1181st meeting, para. 35.
not been very fully explored from the point of view of codification. It had therefore seemed to him that the best approach was to frame the general rules by reference to new States as defined in sub-paragraph (e) of article 1.

22. That concept, as Mr. Ushakov understood it, included former mandates and trust territories. "New States", as envisaged in sub-paragraph (e) of article 1, in fact covered nine-tenths of the cases of succession that had occurred in the past twenty years or so. It might well be that, with the completion of the process of decolonization, other types of succession would become more frequent. Nevertheless, the Commission would no doubt find it convenient to begin the draft with a set of general rules on new States, to which the bulk of the existing practice referred, and then deal with other cases of succession afterwards. At the conclusion of its work, the Commission could consider whether or not to alter that general arrangement.

23. Mr. YASSEEN said that article 6 sanctioned the theory of the "clean slate"—that a successor State was not considered a party to treaties concluded by the predecessor State and was not under any obligation to become a party to those treaties. In his opinion, the Commission should broadly endorse both elements of that rule.

24. Article 6 was based directly on State practice. It was true that some eminent writers had argued for a rather different rule for law-making treaties. Jenks, for instance, believed that new States succeeded, or should succeed, to law-making treaties concluded by their predecessors. Such a position, however, could only be interpreted as a generous appeal by the writer to new States to respect the continuity of international work for the codification and progressive development of international law; there could be no question of any legal obligation. If those States had to respect certain rules of law-making treaties it was for a different reason; in particular, because they were rules of customary law. As drafted, article 6 faithfully reflected the general practice, and it would not even be possible to provide for an exception in the case of law-making treaties.

25. He would reserve his comments on localized or dispositive treaties until the relevant draft articles came up for consideration.

26. Mr. BARTOŠ said he did not think the positions of the Special Rapporteur and Mr. Ushakov were in conflict. Under article 6, a new State was, in normal cases, able to make use of the treaties concluded by the predecessor State. That rule was consistent with the "clean slate" doctrine, but did not preclude the possibility of special cases requiring special provisions, as was clear from the use of the expression "Subject to the provisions of the present articles" at the beginning of article 6. Thus the Special Rapporteur had in no way excluded the special cases mentioned by Mr. Ushakov.

27. The proposed rule had, however, the defect of not stating the position of third States. The draft articles were based, on the one hand, on the "clean slate" principle, and on the other hand, on the rule that there must be some reciprocity between the parties in the acceptance of obligations. A third State which had been bound to the predecessor State should not, by reason of that fact, also be bound to the new State. Thus, in the case of partition of a State, the position of a third State in relation to the new States would not necessarily be what it had been in relation to the predecessor State. A treaty had not only legal force, but also a practical value, for instance, in economic matters. If one of the territories which had become a new State did not offer sufficient economic value for the third State, the third State should be obliged to maintain gratuitous contractual relations with it. But the proposed article did not offer any solution for the third State; it stipulated that a new State was not under any obligation to become a party to the treaty, but was silent on the question of any right to remain a party to the treaty.

28. As Mr. Yasseen had observed, third States might be obliged to accept certain general international obligations because they were part of international custom. Similarly, Jenks considered that the ILO conventions were a part of the international public order and were binding, not ipso jure, but because they entailed a duty of States to comply with humanitarian international obligations.

29. He approved the general rule stated in article 6, on the understanding that the Special Rapporteur would deal separately with the cases mentioned by Mr. Ushakov.

30. Mr. ROSSIDES said that there was a similarity between the provisions of article 5 and those of article 6. Article 5 provided that, even where a treaty itself made provision for the participation of a new State, it was necessary for that State to express its consent to be bound by the treaty. Article 6 laid down the rule that, in a case of succession, no obligation existed for the new State without its consent. For his part, he fully agreed with the "clean slate" principle as expressed in article 6.

31. Like Mr. Yasseen, he could not accept the idea that, in the case of a multilateral treaty of a so-called legislative character, a new State should be regarded as being automatically bound because the predecessor State had been a party. He understood the anxiety to promote the development of international law, but it was not possible to depart from the basic principle that a new State had the right to decide whether or not to become a party to a treaty.

32. His own suggestion would be to adopt a very practical formula such as had been put forward by the International Law Association's Committee on the Succession of new States at its Buenos Aires Conference in 1968. That formula would state the law in terms of a presumption of continuity: the treaty would be considered as being internationally in force for the new State unless a declaration to the contrary was made by that
33. A rule of that kind would give the new State a reasonable period in which to contract out of the treaty. If applied to multilateral treaties of a so-called legislative character, such as the 1899 and 1907 Hague Conventions, it would further the interests of the development of international law without detracting from the prerogatives of the new State. It would amount to a “clean slate” rule, but without creating a vacuum; and it would be consistent with modern trends towards internationalism and away from the concept of absolute sovereignty.

Mr. Ustor took the Chair.

34. Mr. Ushakov said it could not be laid down as a principle that cases of decolonization and secession of part of the territory of an existing State were general cases of succession, whereas cases of separation and fusion were special cases. All cases should be treated on the same footing. Every case was a particular case which required particular rules; there could be no so-called “basic” rules applicable to general cases, since there were no general cases. Different groups or sets or rules should be drawn up to cover the different cases of succession.

35. Mr. Reuter said that he agreed with Mr. Ushakov. The term “new State” was ambiguous because it covered two different cases: new States formed by secession and new States formed by fusion. The rule stated in article 6 was certainly applicable to cases of secession, but it was open to question whether it also applied to cases of fusion. If the intention had been to cover cases other than cases of secession, the article should have spoken not of a treaty “in force in respect of its territory at the date of the succession”, but of a treaty “in force, in whole or in part, in respect of its territory at the date of the succession”. The rule would then have been truly general, even though wrong.

36. He could accept article 6 for cases of secession, but its structure was open to criticism, and he could not accept that what was in fact a special rule should be called a general rule. That was tantamount to saying that other principles would be formulated subsequently for cases of fusion, considered in some sort as an exception. But it was not on that head that a different rule for cases of fusion was justified. One good reason was that nowadays fusion could not be brought about by conquest, but only by treaty. That brought in the whole dialectic of the law of treaties, in particular, that treaties produced no effects for third parties. Consequently, if two States merged by treaty, it was not the fact of the creation of the new State that nullified a treaty which had previously united one of the States to a third State, it was the relative effect of the treaties that mattered. The Commission would have to bear that point in mind when it came to rearrange the draft articles.

37. Mr. Ago said he endorsed Mr. Reuter’s view. It was quite clear that the rule stated in article 6 applied to cases of secession in general, not just to decolonization. It applied in all cases where a new State was formed by the secession of part of an existing State or of a dependent territory of an existing State. Whether what seceded was a former colony or a metropolitan province of the State itself made no difference.

38. On the other hand, in relation to the purpose of the article, fusion was a different case and should be considered separately, even if the Commission came to an identical conclusion. The formation of a new State by fusion was not a special case; in a few years time, it might be the most frequent one. In any event, it could not be ignored in the context of the draft articles.

39. He agreed with Mr. Yasseen that, in substance, the rule in article 6 held good for all rules, including those deriving from universal treaties, general treaties or codification treaties. He appreciated, however, that other members of the Commission were concerned to ensure the continuity of such treaties and he would be prepared to consider the possibility of adopting modifications, for example, in the form of certain presumptions, provided that the principle that a new State was born free of all contractual obligations was strictly observed.

40. In the case to which it related, the rule stated in article 6 was beyond dispute and he could support it.

41. Mr. Sette Câmaras said he accepted the rule stated in article 6, which followed logically from the Special Rapporteur’s approach to the problem. Once it had been agreed to take the general law of treaties as a basis, it was clear that treaty obligations could be binding only on a State which had expressed its will to be so bound.

42. He also, however, gladly accepted the Special Rapporteur’s reservations concerning the meaning of the “clean slate” principle. The term should be considered constructively and not construed as an encouragement to new States to reject the observance of all international conventions. Mr. Yasseen had suggested that the international community could do no more than appeal to new States to consider themselves bound by what Jenks had described as “legislative” instruments. Surely Mr. Ago and Mr. Rossides were right to recommend that the articles should contain a warning to new States not to discard treaties which were in the general interest of the international community.

43. With regard to the arrangement of the draft, he agreed with Mr. Ushakov and Mr. Reuter that different cases would have to be treated in different ways. He was sure the Special Rapporteur would not fail to do so when he came to re-arrange the articles.

44. Mr. Hambro said he supported the view of those speakers who had advocated that the draft articles should contain some sort of warning to new States not to deny all obligations deriving from treaties concluded by predecessor States. The Special Rapporteur had rightly stressed the danger of attaching too much importance to the “clean slate”. A way must be found of encouraging new States to continue the observance of certain treaties. There was a danger that the Commission might over-emphasize the freedom of new States in regard to treaty obligations.

45. Mr. Bedjaoui said that he unreservedly accepted the rule formulated by the Special Rapporteur in article 6, which he regarded as a basic article of the draft.
46. No type of succession took precedence over any other type. The Commission should derive, from a number of existing cases, a composite formula which would enable it to draft a general rule. Article 6 was fundamental, because in international law there was no obligation for any State, old or new, to consider itself bound without its express consent.

47. Mr. Rossides had expressed the view that there should be some sort of presumption that a new State was bound until it denounced the obligation binding it. He did not share that view. To begin with, there was no case in which such a rule had been followed. Further, the expression of the will of a new State in rejecting an obligation after a number of years could only be assimilated to the denunciation of a treaty by which it had been presumed to be bound, so that was no solution.

48. The formula once adopted by the International Law Association, that a State was presumed to be bound unless it declared the contrary within a reasonable time, would have been preferable. But that formula had not attracted the unanimous support of the members of the Association. It would therefore be better to keep to the rule proposed by the Special Rapporteur, which restated a principle that was one of the cornerstones of international law—that no State could be bound without its express consent.

49. He fully endorsed the Special Rapporteur's analysis of custom. It was one thing to feel governed by a customary rule, but quite another thing to consider oneself bound by a treaty, even if the treaty expressed a customary rule.

50. On the question of determining the utility of a treaty from the dual standpoint of international co-operation and the interests of the new State, practice varied, whether the depositary was the Secretary-General of the United Nations, the International Labour Office or a government; but all depositaries were always anxious to remove any possible uncertainty as to whether a new State was or was not bound by a treaty. The express consent of the new State was always required; there was no automatic continuity. Thus, as the depositary of the 1949 Geneva Conventions, the Swiss Federal Council had seen fit to sound the Algerian Government, after independence, as to its intentions with regard to those Conventions, although they had been ratified in their time by France and by the Provisional Government of the Algerian Republic.

51. The question was whether the expression of the new State's will was entirely optional or whether the new State was obliged sooner or later to declare its intentions. In his view, the idea could safely be accepted that the new State was bound by the expression of its will, in particular with regard to legislative or law-making treaties, on which new States had been very quick to take a decision. There was no need for a rider referring to the right of a new State to be bound by a treaty. Article 6 should be read in conjunction with article 7, which referred to that right.

52. Article 6 might be considered as applicable in the majority of cases. When the Commission came to consider cases of fusion, it might perhaps find that they were governed by a rule analogous to that which the Special Rapporteur had adopted in article 6. Without establishing a hierarchy of types of succession, that rule could be taken as the starting point, in other words, as the basic rule. The Special Rapporteur had, moreover, made a reservation to cover other cases right at the start of article 6. The Commission might invite him to propose one or more further articles applicable to certain types of treaty that were really special cases, such as localized treaties.

53. Mr. Quentin-Baxter said that article 6 had the great advantage of establishing a connexion between the old law and United Nations doctrine, and he accepted the provision on the terms on which it was offered, in other words, without prejudice to the way in which the Commission might later decide to treat cases of fusion or territorial obligations, or to the distinction which it might later draw between universal and limited treaties.

54. He was, however, concerned about the problem of language: the rule should be stated in such a way as not to diminish the dynamism of United Nations practice, or the impetus to continuity which was so evident in that practice. He was encouraged by the tenor of the discussion on that point.

55. As a matter of law, he had some difficulty with the concept of a new agreement as the means of continuing an old one. That difficulty was, however, less formidable when article 4 and article 6 were considered together. Article 4 agreed with State practice in the matter of the temporary continuance of treaties; it stressed the factor of continuity and therefore reduced whatever anxieties he might still have concerning article 6.

56. Mr. Rossides, replying to Mr. Bebjaoui, said that when he had advocated a provision which would presume continuance of a treaty unless a successor State declared within a reasonable time that it did not wish to be bound by that treaty, he had been under the impression that he was quoting a recommendation made by the International Law Association at the Buenos Aires Conference in 1968. The declaration would have to be made "within a reasonable time" so that no State could be bound indefinitely. Such as provision would be a great encouragement to new States. It should be remembered that many new countries had not signified their intentions with regard to the Hague Conventions, and one country had declared that it did not consider itself bound by them.

57. Mr. Bartos said that, although he was a former President of the International Law Association and a life Vice-President, he did not consider himself bound by the resolution of the Association's General Conference, to which Mr. Bebjaoui had referred, because he did not approve of it. He supported the view stated by the Special Rapporteur that a new State was born free of all treaty obligations, unless it accepted such obligations.

58. It was unfortunate that, in the name of the continuity of treaties, it should have to be asked whether it was more important to safeguard the security of a third State or the freedom of a new State. He would choose the latter, particularly in the case of economic treaties. Contemporary international law laid down the principle
that no treaty obligation existed without the express consent of the State concerned, which would not be freed from the vestiges of colonialism if it had to consider itself bound, even provisionally, by a treaty it had had no part in concluding.

59. Mr. AGO said he had changed his previous position on the subject of measures to ensure the continuity of treaties of a general character. On second thoughts, he found it impossible to adopt a rule such as that envisaged by the International Law Association. In reality accession to a treaty, even a general treaty, was regulated in the constitutional law of all countries by strict provisions which left no room for presumed or tacit accession. Accession to a general international treaty required a formal act.

60. Mr. BEDJAOUI said that, when applied to the case under consideration, the solution contemplated by the International Law Association gave a different meaning to the silence of new States. In a first phase, that silence constituted a sort of "pause of reflection", but without any presumption of the immediate application of the treaty. It was after a reasonable period of time that the silence of the State, if it continued, was interpreted as meaning that the new State accepted the treaty in question.

61. Mr. ROSSIDES said he fully agreed with Mr. Bartos and Mr. Bedjaoui as to what decolonization ought to mean with respect to freedom from treaty obligations. It was not his idea that new States should take over irksome financial or economic obligations, but they could surely be expected to continue observance of humanitarian instruments, such as the Hague and Geneva Conventions. A new State was, of course, quite free to repudiate all treaties of the predecessor State the day after independence; but in a spirit of internationalism, continuity of agreements of that kind should be encouraged.

The meeting rose at 6 p.m.

1164th MEETING

Wednesday, 24 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. Keanney

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bedjaoui, Mr. Bilge, Mr. Castaneda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

Item 1 (a) of the agenda
(continued)

ARTICLE 6 (General rule regarding a new State's obligations in respect of its predecessor's treaties) (continued) ¹

¹ For text see previous meeting, para. 11.
caution in placing obligations on third States; article 6 was entirely consistent with the rule in the Vienna Convention and was therefore fully acceptable to him.

8. Mr. ALCÍVAR said that when the Commission had considered article 6 in 1970, he had been in agreement with the Special Rapporteur’s proposals; on re-considering the article, however, he found that it could not be regarded as a “general rule”. In his opinion article 6 was applicable to new States which had formerly been colonies and which, on the entry into force of the United Nations Charter, had become non-self-governing territories, or, in any of the three cases mentioned in Chapter XII of the Charter, had become trust territories. At the same time, he thought the article could only apply to new States which had been formed as a result of a dismemberment, so long as “real”, “territorial” and “dispositive” treaties were safeguarded in a separate article.

9. What should be made clear was that a new State began its independent life without any obligation—the “clean slate” rule—to become a party to general multilateral treaties concluded by the predecessor State, but retained its right to become a party by simple notification to the depositary, without requiring the assent of the other parties.

10. As to the question whether a new State was automatically bound by multilateral treaties of a legislative character, he confessed to being much attracted by the affirmative opinion of Jenks, which had been cited by the Special Rapporteur. There could be no doubt that treaties were replacing custom as the principal source of international law, so much so that it was now rules of treaty law which were being converted by custom into rules of customary law; and he certainly could not forget the beautiful theory of Georges Scelle on the expansive force of the law-making treaty. He need hardly say that Jenks’s opinion was very close to his own personal views as an active participant in the building of a new international legal order taking precedence over national legal orders, which was the model for a new law to confront the realities of the new world. Nevertheless, he preferred to speak of “rules of general international law” rather than “rules of customary law” and considered that some caution should still be exercised in regard to Professeur Jenks’s interpretation.

11. He fully supported article 6 as drafted by the Special Rapporteur, subject to certain minor amendments.

12. Mr. CASTAÑEDA said he entirely agreed with the rule proposed by the Special Rapporteur for article 6, which was based not only on custom and precedent, but also on the principles of equity and justice. In particular, he agreed with the reasons given by the Special Rapporteur for not including within the scope of that article new States which had emerged as a result of fusions, federations and the like.

13. There might seem to be a certain contradiction between articles 6 and 7 since, while the former exempted the new State from obligations in respect of its predecessor’s treaties, the latter established the right of the new State to notify its succession in respect of such treaties. However, that lack of full reciprocity was also to be found in municipal law where in some legal systems, an heir could accept a succession under beneficium inventarii, or, in other words, could accept the estate without personal liability beyond the value of the estate.

14. With regard to the suggestion by Jenks, referred by the Special Rapporteur in his commentary, that there might have been a tendency to over-emphasize the contractual at the expense of the legislative element in multilateral instruments of a legislative character, he fully agreed with the views stated by the Special Rapporteur, and with those expressed by Mr. Alcivar.

15. Lastly, with regard to the practice of the Swiss Federal Council as depository of humanitarian Conventions referred to by the Special Rapporteur in paragraph (12) of his commentary, he agreed that there should be no presumption that a new State would accept the obligations of its predecessor, since a new State would have no difficulty in expressing its agreement to be bound by the conventions in question if it so desired.

16. Mr. TAMMES said he agreed with those who believed that article 6 was a necessity in the context of Part II of the present draft. It was clear that the rule it expressed was only complementary to the general rule of consent or self-determination on which the draft was based and that it would be undesirable to replace it by any presumption of consent. He would therefore prefer that the principle underlying article 6 be left as it stood.

17. Mr. USTOR said that members seemed to be virtually unanimous in endorsing article 6, which, as the Special Rapporteur had made convincingly clear, referred to those new States which had emerged through the process of decolonization.

18. The rule stated by the Special Rapporteur had a strong moral foundation and, as Mr. Castañeda had said, corresponded to the principles of equity and justice. New States had complete freedom to continue, or not to continue, to be bound by the obligations assumed by their predecessors.

19. Yet while it was clear that the rule would apply in the case of former colonies, it was not clear how far it would apply in other cases of State succession, such as that of fusion, which had been referred to by Mr. Reuter. In paragraph (18) of his commentary, the Special Rapporteur had referred to the case of “real”, “dispositive” or “localized” treaties, which would be the subject of separate examination.

20. There had also been some discussion on whether article 6 would apply to new States which were the result of secession, partition or dismemberment. In those cases, the new States could not say that treaties previously concluded were not their treaties, since their parliaments might contain members who had actually participated in the ratification of those treaties. Such States would obviously not enjoy the same status as a former colony which entered the international forum as a completely new State.

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4 See commentary, para. (8).

5 Ibid., para. (9).
21. In paragraph (9) of his commentary, the Special Rapporteur had dealt very ably with the problem of assimilating law-making treaties to custom. His solution appeared to be the best one, but he (Mr. Ustor) wondered what would happen in the case of treaties affecting international peace and security, such as disarmament treaties, and treaties for the non-proliferation of nuclear weapons. Should not new States which had become independent as a result of secession or dismemberment be bound by such treaties, regardless of their consent? That was a question which would require closer examination.

22. The CHAIRMAN, speaking as a member of the Commission, said he agreed that article 6 should be retained, although, like Mr. Ushakov, he thought that in the interests of preserving continuity it should be made easier for new States to assume obligations arising from the treaties of their predecessors.

23. He suggested, therefore, that the Drafting Committee be asked to consider replacing the words "a new State is not bound by any treaty" by some slightly less emphatic wording such as "a new State is not bound to maintain in force any treaty ...". He also suggested, in the interests of simplicity, that the second sentence of the article might be combined with the first.

24. Mr. AGO said that the Commission would have to take Mr. Ustor's observations into consideration, though personally he remained convinced that the rule stated in article 6 was applicable even in cases of secession, separation or dismemberment so long as a new State was born. For instance, there had been Czech, Slovak and Galician deputies in the Parliament of the Hapsburg Empire; but the new States which had emerged from the Empire, such as Czechoslovakia and Poland, had not had to consider themselves bound by the treaties in the adoption of which some of their deputies had taken part.

25. The real problem raised by Mr. Ustor was that of the existence or non-existence of a new State in each specific case. When the rule in article 6 did not apply, it was really because in international law, the State concerned was merely the continuation of an already existing State. Hence it was important to stress the notion of a new State rather than seek to apply a principle other than that embodied in article 6.

26. Mr. USTOR, replying to Mr. Ago, said that the question was, indeed, what really constituted a new State. A mere declaration would obviously not be enough; to take an extreme example, if the British Parliament should decide to dismember the United Kingdom into England, Scotland and Wales, would the latter be old States or new ones? If new States, could they say that they were not bound by the treaties concluded by the United Kingdom? The international community had such an abhorrence of a vacuum that it would be extremely difficult for it to accept such a proposition. The problem was admittedly a very complicated one and he hoped that some solution for it could be found.

27. Mr. BARTOS said he agreed with Mr. Ago. Some cases of secession had been prompted by the wish to obtain release from international treaties unfavourable to the seceding territories. In some countries, too, it was not parliament which ratified treaties, but the executive power alone; for example, the Head of State. Secessions had sometimes taken place as a reaction against the executive power. Examples were the cases of some of the States which had emerged from the Austro-Hungarian Empire and that of the Norwegian Parliament, which had voted for the dissolution of the real union between Sweden and Norway in protest against the foreign policy of the Stockholm Government. It could not be claimed that States born in such circumstances were bound by the treaties of the predecessor State.

28. Consequently, he was not in favour of Mr. Ustor's idea. If certain treaties offered an advantage for seceding States which had attained their independence, the new States would take steps to become parties to those treaties. Their position would depend, however, on the attitude of the third States which must acknowledge their right to become parties to the former treaties. That applied, in particular, to general multilateral treaties, and even to law-making treaties, which usually made the accession of a new State subject to certain conditions. True open multilateral treaties were very rare in modern times.

29. Mr. USHAKOV said that, to take another extreme case, supposing Tanganyika and Zanzibar, which had merged to form Tanzania, recovered their separate existence, in the opinion of the majority of the Commission the treaties concluded by Tanzania would not be binding on the two new States. Such a consequence would be difficult to accept, especially in the case of general multilateral treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons.

30. Once again he urged the Special Rapporteur to deal separately with the different cases of succession of States, formulating different rules for them if necessary.

31. Sir Humphrey WALDOCK (Special Rapporteur) said he had already recalled his intention of drafting certain articles on the dismemberment and dissolution of unions, but at the present stage he was not in a position to say precisely how they would be framed.

32. Mr. BEDJAOUI, referring to Mr. Ushakov's remarks, said that the situation was not the same when two separate States emerged from a federal State or a confederation by violence as it was when they were born peacefully. It would be unwise not to specify that such States were free to become parties to previous treaties.

33. In the example of Tanzania given by Mr. Ushakov, the new State would be Zanzibar, if it left the union; Tanzania would remain an "old" State. Useful information on the position adopted by Tanzania shortly after it had been formed was to be found in paragraph 168 of the studies prepared by the Secretariat on succession of States in respect of bilateral treaties. Tanzania had declared that treaties in force between Tanganyika or Zanzibar and other States continued in effect "to the extent that their implementation is consistent with the constitutional position established by the articles of Union ... and in accordance with the principles of International Law". If that declaration were applied, mutatis

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mutandis, to a possible separation, it could be argued that the circumstances in which a separation occurred might jeopardize the continuity of a treaty. Hence, such a situation should certainly be governed by article 6.

34. Mr. REUTER observed that the members of the Commission agreed that article 6 applied to cases of dismemberment resulting from decolonization, but several of them had serious reservations concerning other cases of succession.

35. By planning to deal with the special case of the dissolution of a union of States, the Special Rapporteur was calling in question the actual concept of that form of State. If it were considered that a union of States was not a special type of State from the standpoint of international law, endowed with a constitutional structure of its own, but an entity possessing some international personality, although composed of true States, the question of international organizations would also have to be dealt with. Suppose there was an international economic union which had made treaties recognized by all its member States and that it broke up: the question would arise whether the States were bound by those treaties or not. That was another situation which would have to be considered among the special cases Mr. Ushakov wished to be dealt with separately.

36. Sir Humphrey WALDOCK (Special Rapporteur) summing up the discussion, said that Mr. Reuter had clarified the area of agreement very well. The question of the exact scope of article 6 was still subject to some reservations, but in principle it covered new States arising from dependent territories.

37. A number of members thought it should also include new States created by secession, though that was a very difficult area of international law. As to cases of fusion, his commentary on those was already very long. One point was to distinguish the case of States belonging to political unions from that of States belonging to associations of States like the European Economic Community. The EEC had a central organ which possessed a certain power, but its characteristics were those of an intergovernmental organization rather than a union of States. He was of the view that such cases properly came under a different topic, and any discussion of them now might take the Commission too far afield. In any event, when considering the fusion of States and the dissolution of unions, he would have regard to the practice rather than to theory.

38. On the question of presumption in the case of normative treaties, there seemed to be a general feeling that new States should be free to decide whether they would succeed to multilateral treaties, whether normative or not, and that there should be no presumption that they accepted them. He had some sympathy with the general idea that a new State should take over a normative treaty; nevertheless, to oblige it to do so would be somewhat arbitrary, quite apart from the difficulty of formulating a precise definition of such a treaty. Moreover, even if a new State notified the Secretary-General that it considered a certain treaty concluded by its predecessor to have been in force as from the date of its succession, there could still be no presumption of the continuity of the treaty during the interval.

39. At the previous meeting, Mr. Ushakov had interpreted his proposals as based on some form of "hierarchy" of cases of succession; but he could assure Mr. Ushakov that he had had no conception of any such hierarchy in mind when drafting the articles in Part II. Those articles applied to such a large proportion of the modern cases of succession that they were necessarily of a general kind. Cases of fusion, on the other hand, were in practice comparatively few at the present time.

40. On the whole, there seemed to be such a wide measure of agreement about article 6, that it could safely be referred to the Drafting Committee, subject to the necessary reservations.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 6 to the Drafting Committee.

"It was so agreed."  

ARTICLE 7

Article 7

Right of a new State to notify its succession in respect of multilateral treaties

A new State, in relation to any multilateral treaty in force in respect of its territory at the date of its succession, is entitled to notify the parties that it considers itself a party to the treaty in its own right unless:

(a) the new State's becoming a party would be incompatible with the object and purpose of the particular treaty;

(b) the treaty is a constituent instrument of an international organization to which a State may become a party only by the procedure prescribed for the acquisition of membership of the organization;

(c) by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any additional State in the treaty must be considered as requiring the consent of all the parties.*

42. Sir Humphrey WALDOCK (Special Rapporteur) said that the provisions of article 7 were a complement to the rule in article 6; to some extent they served to mitigate that rule in that they recognized the right of a new State to notify the existing parties to a multilateral treaty, other than a restricted one, that it considered itself a party to the treaty.

43. The CHAIRMAN invited the Special Rapporteur to introduce article 7 of his draft (A/CN.4/224).

44. Sir Humphrey WALDOCK (Special Rapporteur) said that the provisions of article 7 were a complement to the rule in article 6; to some extent they served to mitigate that rule in that they recognized the right of a new State to notify the existing parties to a multilateral treaty, other than a restricted one, that it considered itself a party to the treaty.

45. Whatever the position might have been in the past, the existence of such a right of notification for the new State was borne out by a custom that was already of long standing and by a voluminous practice. The depositary of the multilateral treaty—in particular, the Secretary-General of the United Nations as depositary—normally circulated such a notification to all the parties to the treaty. No case had come to his attention where any objection to a notification of that kind had been expressed on the ground of its being communicated by the depositary to the existing parties.

46. It was, of course, possible to regard the case as one of tacit consent resulting from the fact that the existing parties to the treaty had not objected to the notification. That approach would be similar to the solution adopted in the draft articles on bilateral treaties. He awaited the views of members on that point, but personally, as he had explained in his fairly long commentary, he found that modern practice supported the recognition of an actual right for the benefit of the new State.

47. The new State, it was to be assumed, was a State recognized as such. The Commission would be well-advised not to enter into questions of recognition and non-recognition in the present discussion, since to do so would further complicate an already complex subject.

48. Article 7 made provision for three exceptions to the general rule embodied in its opening sentence. The first, contained in sub-paragraph (a), related to incompatibility with the object and purpose of the treaty. A typical example was that of a new State which, at the time when it was a dependent territory, had been in principle subject to the régime of a regional treaty to which the metropolitan Power belonged; on attaining independence the new State, which was in a different region of the world, clearly could not consider itself a party to the treaty simply by reason of the treaty's former extension to its territory.

49. The second exception, set out in sub-paragraph (b), related to the constituent instruments of international organizations where a procedure for admission to membership existed, however simple that procedure might be. The procedure in question would apply in such cases. In the case of an organization of a "loose" character, the question sometimes arose whether it was a true "organization"; the test, as far as article 7 was concerned, was the element of membership. Where that element was present, the exception in sub-paragraph (b) applied.

50. The third exception, set out in sub-paragraph (c), related to restricted multilateral treaties. It might perhaps prove necessary to draft further provisions relating to those treaties; the rules applicable to them were closer to those on bilateral treaties.

51. Mr. REUTER said that he had no objection to draft article 7, but doubted the need for it, perhaps because he did not quite understand its bearing. An article of that kind would be necessary only if it introduced some element of novelty: he could see three which might justify its existence.

52. The first was that it would give new States a right which they did not possess. It might be held to contain a substantive rule to the effect that new States could become parties to a treaty which was not open to every State; in other words, it was because they were new that some States would have a right which they would not otherwise enjoy.

53. Of course, such a rule could apply only to States which were really entitled to special attention, and that meant decolonized States; for it was not conceivable that a State which had resulted from a fusion, for example, could have that right if the two States of which it was composed had not previously each enjoyed the right individually. That raised a difficult question in the general law of treaties. Hitherto, even in the Vienna Convention on the Law of Treaties, it had always been accepted that participation in a treaty was determined by the treaty itself, not by some other provision. He willingly acknowledged that that view was too narrow and that the principle of a right of access to a treaty might be laid down. That was the problem of the "all States clause". But that problem, which appeared as a complement to the Vienna Convention, should not be examined in the context of succession.

54. He did not believe, however, that the intention of the article was to give new States a right they would not otherwise possess. For seeing that the article as it stood did not apply to decolonized States only, that right would have very far-reaching consequences for the past: for example, in regard to the right to participate in certain nineteenth-century multilateral conventions, such as those concerning international waterways. He would therefore discard that interpretation.

55. The second element of novelty which the article might introduce lay in procedure, since it provided that a new State could become a party to a treaty merely by notification. It might therefore be assumed that that was one of the other agreed means permitted under article 11 of the Vienna Convention on the Law of Treaties. If that was the case, the novelty was very slight, since any depositary would now interpret a notification, even from a State which was not new, as an accession coming under article 11 of the Vienna Convention.

56. The third element of novelty would relate to the effects of notification, again with the idea of safeguarding the continuity of the treaty. Did notification of the parties produce different effects from ordinary accession, and if so, what were they? One might be retroactive effect to the date of the succession, but the Special Rapporteur had indicated that States should be left entirely free on that point. Moreover, the rights of the other parties to the treaty were involved. If it was a humanitarian convention, or an international labor convention, retroactivity did not impair the interests of third States, but if it was a treaty involving reciprocal obligations, the idea of retroactivity seemed arbitrary. He doubted whether it was necessary or possible to introduce it.

57. Other possible effects of notification were conceivable, for example, if the original treaty specified that certain States had special rights. The Special Rapporteur should give some further explanations of that point, which would make it easier to judge the usefulness of article 7.

58. Lastly, under article 7 the notification was addressed to the parties, whereas under article 78 of the Vienna Convention it was normally transmitted to the depositary. Was that due to some idea differing from that of the Vienna Convention or was it merely a matter of drafting?

59. Mr. RAMANGASOAVINA said that article 7 was the logical sequel to the principles stated in articles 5 and 6, according to which no new State could be bound by a treaty without its express consent. Article 7 thus supplemented the preceding articles by making express notification compulsory if a new State was to be bound.
by a multilateral treaty which had been in force in respect of its territory at the date of the succession.

60. The new State was perfectly free to notify or not to notify its succession to a treaty. But then the question arose what was the position of that State with respect to a treaty in the absence of notification, where the treaty had been in force in respect of the territory. Either the meaning of the term "notify" should be made clearer or it should be replaced by some term covering all the different means of communicating a State's will to accede to a treaty.

61. The exceptions provided for in sub-paragraphs (a), (b) and (c) were correct, since treaties were subject to certain procedures and the consent of the other parties was necessary. Article 7 was therefore wholly appropriate to the position of any newly independent State, whether it had emerged from a dismemberment, a fusion or a regrouping.

62. Mr. YASSEEN said that article 7 reflected international practice and in some of its aspects even contained an element of progressive development of international law. The abundance of multilateral treaties was a feature of modern times, so it was right to devote a special article to the attitude of new States toward such treaties.

63. Article 7 was not concerned with what a treaty might or might not provide about accession or acceptance, but with a right deriving from the succession and from the link between the treaty and the territory which had become independent. It was the play of those elements which contributed to the creation of a right in favour of new States—of a new rule which enabled them, if they so desired, to consider themselves parties to treaties concluded by their predecessors which had a link with their territory. That was how article 7 could be regarded as contributing to the progressive development of international law. The difference between the new procedure and accession to a treaty lay, perhaps, in its retroactivity, which would provide the continuity essential for an orderly international life.

64. The principle stated in article 7 was indisputable. It was based on a customary rule which recognized, not the actual application of the treaty to new States, but the possibility of future applicability.

65. The exceptions provided for were logical. The first—incompatibility with the object and purpose of the treaty—derived from observance of the treaty itself. The reason for the second was not only that the treaty was the constituent instrument of an international organization, but that the status of a member was necessary and that the constituent instrument laid down a particular procedure for the acquisition of membership. The third exception, which was modelled on a provision concerning reservations in the Vienna Convention on the Law of Treaties, was obviously indispensable, because certain restricted multilateral treaties had only a small field of application, which explained the small number of States that had participated in their negotiation and justified the requirement that the States which had concluded the original treaty must give their consent.

66. Mr. USHAKOV said he thought it would be preferable to make a general reservation concerning international organizations, so as to avoid having to include a reservation in every case where it was required.

67. As it stood, article 7 had little meaning. Any State could at any time notify any other State of whatever it saw fit. The article said nothing about the effects of the notification for third States; it could only be assumed that they would be automatically bound in relation to the notifying State. There was no question, as in article 4, of the consent of the other parties.

68. Another question was whether the article was also applicable to restricted multilateral treaties, for example tripartite treaties? The question did not arise in the case of open treaties, which provided for the participation of the largest possible number of States, but a restricted multilateral treaty was not always open to a new State.

69. Lastly, the exception provided for in sub-paragraph (c) was only an exception to the right to notify. But the main problem raised by article 7 was how the parties to the treaty would be bound in relation to the notifying State.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that the statement in article 7 that the new State was entitled to notify the parties to a multilateral treaty "that it considers itself a party to the treaty" was intended to set forth the right of the new State to continue as a party to the treaty. The process was analogous to that of accession, though the procedure was less formal than that of accession. The drafting of the article should perhaps be tightened up to make it clear that the new State established, by means of a notification, its consent to be bound by the treaty.

71. He had given some attention to the temporal question raised by Mr. Reuter and, appended to his commentary to article 12, members would find a special note on the question whether a time-limit should not be set for a new State to make its notification. A new State might remain silent for years; the question would then arise whether it could still consider itself a party to the treaty from the date of succession by making a long-delayed notification.

72. Mr. BILGE asked whether the Special Rapporteur intended to leave open the question whether the new State would become a party from the date of the notification or from the date of the succession.

73. Sir Humphrey WALDOCK (Special Rapporteur) said that the draft articles which followed, particularly article 12 (A/CN.4/224/Add.1) dealing with the legal effects of the notification, gave the answer to that question.

74. The practice of the Secretary-General as depositary was that, unless it appeared otherwise from the declaration of the State concerned, the notification made it a party to the treaty as from the moment of succession.

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9 Article 20, para. 2.

Examples could be given of a new State expressing the intention to become a party either before or after that date. In one case, a new State had even stated its intention to consider itself a party to a treaty as from the date on which the treaty had been ratified by the predecessor State. In a number of cases, on the other hand, new States had declared that they considered themselves parties only from the date of notification.

**Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law**

(A/CN.4/253 and Add.1 to 3; A/CN.4/L.182)

[Item 5 of the agenda]

(resumed from the 1153rd meeting)

75. The CHAIRMAN said that it was necessary to revert briefly to item 5 of the agenda in order to enable the Secretariat to begin its preparatory work on the Commission's report.

76. Members had received the observations of governments which had been circulated as documents A/CN.4/253 and Add.1 to 3. If there were no objections he would assume that, in conformity with past practice, the Commission agreed that those observations should be annexed to its report on the work of the present session.

*It was so agreed.*

The meeting rose at 1:50 p.m.

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**1165th MEETING**

_Thursday, 25 May 1972, at 10.5 a.m._

*Chairman:* Mr. Richard D. KEARNEY

*Present:* Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tamnes, Mr. Tsuuko, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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**Succession of States in respect of treaties**


[Item 1 (a) of the agenda]

(resumed from the previous meeting)

**ARTICLE 7 (Right of a new State to notify its succession in respect of multilateral treaties) (continued)**

1. The CHAIRMAN invited the Commission to continue consideration of article 7 of the Special Rapporteur's draft (A/CN.4/224).

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2. Mr. TSUROKU said he could accept article 7 as interpreted by the Special Rapporteur when introducing it, and in view of the fact that the term "new State" was provisional. He wished, however, to raise two questions.

3. The first was whether the right of a new State to become a party to a multilateral treaty was accompanied by an obligation of the other parties to that treaty to recognize the effect of the notification. In other words, had the other parties no right to object or to make reservations?

4. The second question was whether it would not be advisable to set a reasonably long time-limit within which the new State must notify its intentions.

5. He approved of the three exceptions specified in the article. With regard to sub-paragraph (a), however, the question arose what would happen if the parties to a treaty were not unanimous in considering that its object and purpose were incompatible with the new State's participation. Similarly, with regard to sub-paragraph (c), the parties to a treaty might differ as to whether it did or did not fall within the category of treaties covered by the exception. Those questions would no doubt be settled later, but the Commission should bear them in mind and it would be helpful if the Special Rapporteur would give his opinion on them.

6. Mr. BEDJAOUI said he did not agree with those who believed that article 7 was of little use. An article of that kind was not merely useful, it was necessary as a complement to article 6 and should therefore be retained. There were four questions he would like to examine: the nature and origin of the right accorded to the successor State; the field of application of that right; the nature of the instruments to which it was applicable; and the effects of recognition of that right.

7. The right provided for in article 7 was derived from the law of State succession, not from the law of treaties. It was not available to any and every new State. To take the example given by Mr. Reuter at the previous meeting, a State which had emerged from a fusion could not be permitted to notify its accession to a multilateral treaty unless the two previous States, or one of them, had been a party to it.

8. The previous application of a treaty to the territory of a new State was thus a prerequisite for the creation of that State's right to notify its succession to the treaty. Moreover, article 7 used the expressions "notify its succession" and "any multilateral treaty in force in respect of its territory". The previous application of a treaty to a particular territory conferred on the sovereign which took it over as the result of a succession an open right to maintain that treaty.

9. That right was justifiable, since the new State was not entirely alien to the sphere of territorial application of the treaty, which might have left its mark on the territory in question. The right was also welcome because it made possible, with due respect for and in harmony with the sovereignty of the new State, the continuity of application of multilateral treaties which all members desired, as had become clear while article 6 was being considered. Article 7 should therefore be read in close conjunction with article 6, to which it was the comple-
ment. That was, indeed, the only way to combine respect for sovereignty, as formulated in article 6, which entailed the denial of any obligation, with concern for international co-operation and the continuity of useful treaties, which entailed the right to notify succession, as provided for in article 7. It was clear, therefore, that article 7 came within the province of State succession and contributed in some degree to the progressive development of international law.

10. With regard to the field of application of the right provided for in article 7, it could not be doubted, as in the case of the preceding articles, that it applied to every possible type of succession of States, whether resulting from decolonization, partition, dismemberment, fusion or absorption.

11. In the last-named situation, two possible cases had to be considered: that of two or more merged States, all of which had previously been parties to the treaty—there would then be an obligation rather than a right—and that in which one or more, but not all, of the merged States had been parties to the treaty—in which case it was only natural that the right to notify should be accorded to the successor State. In that connexion, he suggested that, in order to cover all possible cases of succession, the phrase "in respect of its territory" in the introductory sentence should be replaced by the phrase "in respect of all or part of its territory".

12. The nature of the instruments to which the right stated in article 7 was applicable was determined by the title of the article. Those instruments were multilateral treaties. But it would be well for the Special Rapporteur to give his opinion concerning bilateral treaties in cases of secession or dismemberment, where the actual nature of the treaty was changed and it became multilateral, since in addition to the predecessor State and the other original party, there might be one or more successor States. The question which arose was whether that problem should be taken up in connexion with article 7 or whether as had been the case, the problem should be considered in the application of the treaty to the territory of the new States as such that the problem arose, but for any States which happened to ratify only one of the Conventions. So far as article 7 was concerned, that case should be disregarded.

13. The question of the effects of recognition of the right stated in article 7 arose, first, with regard to States parties other than the predecessor State, and, secondly, with regard to the date of application—in other words, the problem of retroactivity. Article 7, even in its present form, safeguarded the rights of States other than the predecessor State.

14. In the case of general multilateral treaties—technical, humanitarian and law-making treaties—the successor State had such an incontrovertible right to notify its succession almost to amount to a duty, quite apart from the fact that the machinery of multilateral treaties allowed other States to make any reservations they saw fit. Consequently, for general multilateral treaties notification satisfactorily fulfilled its function, which was to ensure the participation of the new State. It was true that there were special cases: for example, instruments which made acceptance of the notification conditional on the prior agreement of all the other States parties; that was the case of the Hague Convention of 1899 establishing the Permanent Court of Arbitration. But such very special cases need not be considered in article 7.

15. There remained the case of restricted multilateral treaties. The exception provided for in sub-paragraph (c) of article 7, which went so far as to require the consent of all the parties, amply sufficed to safeguard the rights of the other States. The problem did arise, however, of the effects of the notification for States, other than the predecessor State, which were parties to other multilateral conventions dealing with the same subject.

16. That applied, for example, to humanitarian conventions such as the Geneva Conventions of 1906, 1929 and 1949. Most of the new States had acceded only to the 1949 Convention, passing over or neglecting the others, and the question had arisen whether older States which had become parties only to the 1906 and 1929 Conventions should consider themselves bound in relation to the new States on the basis of the 1949 Convention. From the strictly legal standpoint, of course, the conventions to which they were not parties had no binding force for either group of States, even if they were considered to be bound because the conventions were humanitarian conventions. It was not, however, for the new States as such that the problem arose, but for any State which happened to ratify only one of the Conventions. So far as article 7 was concerned, that case should be disregarded.

17. The date of application, which some members would make retroactive in order to avoid any break in continuity in the application of the treaty to the territory of the new State, raised the problem of the rights of the other parties. He was not in favour of retroactivity. In order to safeguard the rights of the parties other than the predecessor State and the essential principle of article 6, and in order to eliminate the idea of retroactivity of a treaty, which was technically difficult to put into practice, it would be better to consider that the new State was bound only from the date of notification. Retroactivity could also give rise to difficulties because notification was often made only after a very long time. The principle of retroactivity had been applied in the case of humanitarian conventions, but the practice varied widely and was very uncertain. It would therefore be better to keep to the date of notification as the date of the treaty's effective entry into force.

18. Mr. TAMMES said that article 7 could make a significant contribution to the widest possible participation in multilateral treaties. Combined with the more general provisions of article 4, on the right to make a unilateral declaration, the new rule embodied in article 7 would serve both the interests of individual successor States and those of the international community as a whole.

19. The proposed new rule was sufficiently well established by depository practice for its acceptance not to be as revolutionary as it would have seemed twenty-five years ago. It had the important effect of conferring a right on the successor State independently of the consent of the other parties to a multilateral treaty. It was on that assumption that depositaries had consistently acted, as was shown by the abundant material in the commentary to the article.
20. He had no difficulties with matters of detail. The legal effects of the rule were set out adequately by the provisions of article 12 (A/CN.4/224/Add.1); the exceptions were satisfactorily dealt with in sub-paragraphs (a), (b) and (c). In particular, the provisions of sub-paragraph (b) were ingeniously formulated so as to avoid any confusion between a loose association of States and an international organization established by a constituent instrument and having rules for the admission of members.

21. The question of a possible time-limit for the exercise of the right to notify succession had been dealt with by the Special Rapporteur in a note at the end of his third report. In the concluding paragraph of that note, the Special Rapporteur had suggested that for the time being no provision concerning a time-limit should be included in the draft and that the question should be reviewed at a later stage “as part of a general consideration of the problem of the loss of the right to invoke the status of a successor State as a means of becoming a party to a treaty”.

22. At first sight, the provisions of article 7, combined with those of article 8 (multilateral treaties not yet in force), might seem surprising in one respect. They would have the effect of enabling a new State, immediately after attaining independence, to notify its succession to a multilateral treaty on the basis of an act of the predecessor State, even if that act was only a signature subject to ratification, acceptance or approval. As a result, the new State would be entitled to become a party to the treaty by means of its notification of succession, regardless of the contents of the final clauses of the treaty. Those final clauses could, and often did, contain certain limitations or conditions with regard to accession, so that not all existing States had the right to accede. The new State would thus have a right to become a party by notification of succession while some older States were precluded from becoming parties by accession.

23. On reflection, however, it should be agreed that there was nothing illogical in that solution, because the legal nexus on which the right of participation was based did not derive from the final clauses of the treaty. It seemed rather excessive, in that case, to allow the new State an indefinite period in which to exercise a virtual right of accession. For the new State would thus be permitted to disclaim all obligations under the treaty after the attaining of independence. Under the formula adopted at its Buenos Aires Conference by the International Law Association, continuity would be assumed unless and until the newly independent State had declared “within a reasonable time after the attaining of independence” that the treaty was not in force with respect to it. The formula proposed in article 7, however, gave no such assurance of continuity, unless the new State declared that its notification was intended to have retroactive effect.

24. Article 7 was to be welcomed as a contribution to the cause of expanded participation in multilateral treaties of general interest.

25. Mr. ROSSIDES said that the provisions of article 7 were closely connected with those of articles 5 and 6; the article related to new States and was well placed in Part II of the draft.

26. The Special Rapporteur had acted wisely in leaving questions of fusion and separation for later consideration. Nevertheless, when those questions came to be considered, it would be essential to deal quite separately with the two types of situation. In the case of separation, a distinction should be drawn between a separation by agreement, such as that of Syria and Egypt in 1961 and secession resulting from internal or external pressures.

27. The provisions of article 7 did not in themselves provide any right of participation; that was really based on the provisions of article 5, which set out the requirement of the consent of the new State for it to be bound by a treaty. The importance of the provisions of article 7 lay in the fact that they accorded a procedural right having implications of substance. Notification of succession was a distinct procedure based on the law of succession and was quite separate from accession and the other methods or expressing consent to be bound by a treaty recognized by the general law of treaties.

28. As to the question of a possible time-limit, he realized that it would be in the interests of new States not to set any time-limit at all, but he had some doubts about the desirability of such an extreme solution. The question of a time-limit was very relevant to the question of continuity. Under the formula adopted at its Buenos Aires Conference by the International Law Association, continuity would be assumed unless and until the newly independent State had declared “within a reasonable time after the attaining of independence” that the treaty was not in force with respect to it. The formula proposed in article 7, however, gave no such assurance of continuity, unless the new State declared that its notification was intended to have retroactive effect.

29. If the new State made a notification under article 7, but made it effective only from the date of notification, there would be a break in the continuity of application of the treaty. It seemed rather excessive, in that case, to allow the new State an indefinite period in which to exercise a virtual right of accession. For the new State would thus be permitted to disclaim all obligations under a multilateral treaty for as long as it wished, without losing its right to become a party to the treaty.

30. Mr. BILGE said that the rule stated in article 7 reflected international practice and had its place in the draft. He approved of the exceptions set out in sub-paragraphs (a), (b) and (c). The exception in sub-paragraph (a), however, was almost general, and he wondered whether it was appropriate to mention it in an article which was intended to give new States a relatively restricted right, since it applied only to general multilateral treaties.

31. It was stated at three places in the commentary that the article dealt with general multilateral treaties concluded by the predecessor State. The rule stated in the article was based on the idea that a legal nexus had been established between such treaties and the right of the new State. If that was so, a nexus already existed between the territory of the new State and the general multilateral treaties.

32. He doubted whether any incompatibility between participation by the new State and the object and purpose of the treaty was conceivable, particularly since there was no obligation, but a right, which the new State might or might not exercise.

33. At the previous meeting the Special Rapporteur, had when asked whether the date at which notification
produced its effect should not be specified in article 7, had said that the matter was dealt with in article 12.\(^6\) Perhaps it would none the less be better to make that clear in article 7, which, unlike article 12, dealt only with multilateral treaties in force. Such a statement would also be useful as an answer to the question Mr. Reuter had raised at the previous meeting\(^6\) and would make the article easier to understand for the governments which would have to interpret it.

34. Article 7 mentioned only notification of "the parties", whereas article 11, which dealt with the procedure for notifying succession in respect of a multilateral treaty, also mentioned notification of the depositary. It would therefore be better in article 7 either to replace the words "notify the parties" by "notify in accordance with article 11" or to keep the same wording, but specify in addition the date on which the notification produced its effects.

35. Mr. RUDA said that the basic principle underlying not only article 7, but other articles in Part II, such as articles 5 and 6, was that a new State could not become a party to a treaty without expressing its consent. The Special Rapporteur had wisely rejected the formula adopted in 1968, at the Buenos Aires Conference of the International Law Association, which was based on a presumption that the new State consented to be bound by a treaty formerly binding on its predecessor. The formula embodied in article 7 was much clearer and was better calculated to protect the right of a new State to become a party to a treaty only after having clearly given its consent.

36. The most important feature of the provisions of article 7 was that the new State became a party to a multilateral treaty independently of the consent of the other parties to the treaty. Its right of participation was derived not from the general law of treaties, but from the general law of succession.

37. The provisions of article 7 established notification of succession as a means of expressing consent to be bound by a treaty; that represented an addition to the various means of expressing consent set out in article 11 of the 1969 Vienna Convention on the Law of Treaties.\(^7\) As he saw it, the fact that consent to be bound was established by means of machinery based on the law of succession and not by means of accession or one of the other forms specified in the law of treaties, did not make any material difference.

38. He was not at all concerned at the fact that no "reasonable" time-limit was specified in article 7. Where a treaty was open to accession, a State could accede to it at any time and become a party to it as from that time. The position would be similar under the rule in article 7.

39. On the question whether the notification took effect from the date of independence or from the date of the notification, the provisions of article 12 were quite clear. The essential point was to safeguard the right of the new State to be bound only with its consent, so as to avoid having a treaty imposed on it.

40. Mr. SETTE CÂMARA said he fully supported article 7, which was a useful provision and satisfied the needs and interests of international co-operation.

41. The rule stated in the opening sentence, however, was in a sense a departure from the basic rule in article 6. For the first time in the present draft it was recognized that the new State inherited a right. As to the nature of that right, it should be remembered that the right did not arise from the treaty itself, since a new State was not bound by the treaties of its predecessor and could therefore enjoy no rights by virtue of those treaties. The inheritance related to the legal link between the predecessor State and the treaty. The position was made clearer by the fact that, as stated in article 8, even if a multilateral treaty was not yet in force, the successor State still inherited the right to notify succession to the treaty.

42. He agreed with Mr. Ruda that notification of succession was a new form of expressing consent to be bound by a treaty. There was abundant material in the commentary to show that a considerable State practice in that sense existed.

43. He had no objection to the exceptions stated in sub-paragraphs (a), (b) and (c). The first of those exceptions was a normal consequence of the general law of treaties. The second was a perfectly valid exception; even if the constituent instrument of an international organization did not lay down any special prerequisites for admission to membership, certain formalities were still necessary. The case was not merely one of succession; a new State would have to deposit an instrument of acceptance of the obligations of membership of the organization.

44. Mr. AGO said he had no fault to find with the substance of article 7. The provision it set out applied only to general multilateral treaties and the exception provided for in sub-paragraph (c) should dispel the fears of those members of the Commission who had doubts about the application of the article to restricted multilateral treaties.

45. With regard to the wording, the French expression a le droit was not a satisfactory rendering of the English "is entitled to"; a better translation should be found.

46. He would be glad, however, if the Special Rapporteur would explain how the provision in article 7 operated in relation to the "Vienna clause". Of course, the article only applied to new States. But to dispose of the problem it was not enough to say that the treaties in question had already been in force for the territory of the successor State, any more than it was enough to say that the faculty in question derived from the law of succession and not from the law of treaties. If the law of treaties included a rule like that which had been proposed by several delegations at the Vienna Conference, namely, that every State had the right to accede to a multilateral treaty, there would be no problem. But that rule had not secured a majority at the Vienna Conference and it was the Vienna

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\(^6\) See previous meeting, paras. 72 and 73.
formula that had been adopted. The question which accordingly arose was whether it could be assumed that there would never again be any recurrence of the situation created by the partition of certain territories, which had given rise to the difficulties mentioned. The Commission would be wrong to shelve the problem, because in that case the diplomatic Conference would certainly take it up.

47. Mr. ALCÍVAR said he could not agree with those who suggested that article 7 was not absolutely necessary. Its provisions were essential as a complement to those of article 6, the last sentence of which stated expressly that a new State was not "under any obligation to become a party" to a treaty concluded by its predecessor. Article 7 served to state the rule that the new State nevertheless had a right to become a party to a general multilateral treaty concluded by its predecessor; that right applied mostly to multilateral treaties.

48. The right of participation enjoyed by a new State derived from the law of succession and not from the law of treaties. Mr. Ago had referred to the final clauses of the Vienna Convention on the Law of Treaties, but it should be remembered that the restrictive formula embodied in those clauses was based on purely political considerations and had no legal basis whatsoever. Those clauses were, of course, part of the Vienna Convention, and he could only express regret at their inclusion.

49. Article 7, however, related to a case in which the right of participation of the new State was not derived from the final clauses of the treaty itself. For that reason, the legal effects of a notification of succession were not the same as those of an accession. An accession took effect only from its own date, a notification of succession, on the other hand, took effect from the moment when the new State had attained its independence, as rightly expressed in the Special Rapporteur's draft.

50. He supported the three exceptions set out in sub-paragraphs (a), (b) and (c).

51. He hoped that the Special Rapporteur would give careful consideration to the drafting change suggested by Mr. Bodjouli.

52. Mr. EL-ERIAN said he supported the Special Rapporteur's formulation of the right stated in article 7; his analysis of the practice, as depositaries, not only of the Secretary-General, but also of the Swiss and United States Governments made a convincing case in favour of that formulation.

53. He also accepted the Special Rapporteur's analysis, in paragraph (4) of his commentary, of the resolution adopted by the International Law Association at its Buenos Aires Conference, in which he said that "recognition of a right to contract out of a multilateral treaty would seem clearly to imply, a fortiori, recognition of a right to contract into it; and it is the latter right which seems to the Special Rapporteur to be more consonant both with modern practice and the general law of treaties".

54. The safeguards embodied in article 7 were adequate, the main one being the criterion that the treaty must have been in force in respect of the new State's territory at the date of its succession.

55. He had some doubts, however, about the advisability of including the provision in sub-paragraph (b) on succession to membership of international organizations. In a footnote to paragraph (9) of his commentary, the Special Rapporteur had rightly drawn attention to the Commission's decision at its nineteenth session to leave aside for the time being the "third aspect" of the topic of succession, namely, "succession in respect of membership of international organizations". It would be consonant with that important decision of the Commission to reserve the question, rather than attempt to regulate it as was done in sub-paragraph (b). He would urge the Special Rapporteur either to drop sub-paragraph (b) altogether, or at least to amend it so that it merely reserved the question of membership in international organizations.

56. Apart from that question of method, there were also considerations of substance involved. The example of Pakistan's admission to the United Nations in 1947, given in paragraph (10) of the commentary, was not convincing. Many writers had expressed serious doubts regarding the necessity of an application by Pakistan. Certainly, no such application had been required from Syria after it had separated from the United Arab Republic on 28 September 1961; the President of the General Assembly had simply made a statement to the effect that, if no objections were received by 14 November 1961, he would invite Syria to join the Assembly as a member. Of course, it could be argued that there was a special feature in that case; for Syria had been a member of the United Nations before merging with Egypt on 22 February 1958 to form the United Arab Republic, so that it had, in a sense, merely recovered its separate membership. The fact remained, however, that the formula adopted for Pakistan in 1947 constituted a doubtful precedent.

57. He hesitated to criticize the rich and scholarly commentary prepared by the Special Rapporteur, but he felt bound to place on record his disagreement with the interpretation of the Suez Canal Convention of 1888 given in paragraph (22). The example of the Conference of Users of the Canal, convened in London in 1956, was not a valid one. The convening of that Conference had been a political move made entirely outside the United Nations, and the Government which had convened it had had no status to do so under the 1888 Convention. Moreover, the criterion adopted for inviting certain States rather than others to participate in the conference had been entirely political. Even thinking purely in terms of users of the Suez Canal, the list of invited States had been selective, not to say arbitrary. Leaving aside the question whether the provisions of the 1888 Convention were to be regarded as the expression of rules of general international law on waterways of international concern, it should be noted that the history of that Convention showed that no State had acceded to it since 1888 or applied to accede to it.

58. Lastly, he wished to draw attention to the declaration to the United Nations made by Egypt on 24 April 1957 and registered by the Secretary-General, whereby
Egypt accepted the compulsory jurisdiction of the International Court of Justice with regard to any question of interpretation or application of the provisions of the 1888 Convention that might arise between Egypt and any of the other parties to that Convention. No State had raised any objections to the Egyptian position on that matter.

59. Mr. QUENTIN-BAXTER said he had listened with great interest to Mr. El-Erian's remarks, but it was his understanding that article 7 was intended to exclude cases of membership in international organizations. In his opinion, the Special Rapporteur, in dealing with that article, had produced a formula which ensured that result.

60. The Commission's aim should be to codify practice in areas for which treaties ordinarily made no special provision. But at the same time it should endeavour not only to preserve the freedom to contract, but also to prevent any disturbance of established State practice in any particular treaty. It was an open question whether practice had established the absolute right of succession of a new State to a multilateral treaty concluded by its predecessor, but that right was usually conceded and, indeed, encouraged by the international community.

61. With regard to the notion of retroactivity, that seemed to him to be another phrase, like the "clean slate" rule or the doctrine of "novation", which might well lead to confusion. In his opinion, what the Commission was considering was not so much retroactivity as retrospection; the new State did not enter international life with a clean slate, but it had an option between expunging and retaining such parts of the contents of the slate as it saw fit. It was true that it might be a long time before the new State's final decision was known, but that would not constitute retroactivity in any sinister sense of the word.

62. He agreed with Mr. Rufa that there was no need to set a time-limit for notifying succession, since from a practical point of view that might entail grave disadvantages. In particular, in the case of normative treaties which involved no reciprocal obligations, all States had an interest in their continuity and the international community should be delighted if a new State, even years after its succession, informed it that it was claiming continuity in respect of such a treaty.

63. In the case of such conventions as those of the Berne Union, however, it was of importance to the new State itself to maintain continuity, since otherwise there would be a gap in the protection afforded to the works of its nationals. In that case, the depositary might well be pleased to see that the new State was applying the convention provisionally, but at the same time it might point out to that State that until it had definitely decided to be a party to the convention, it would not, for example, be entitled to participate in a conference for its revision.

64. Mr. Bedjaoui had suggested that if a new State's recognition of the continuity of a treaty was to be understood as relating backwards indefinitely in time, it might subject that State to unreasonable obligations. In such a case, however, the new State would usually have the option of acceding to the treaty rather than merely declaring that it recognized its continuity.

65. As he had already said in connexion with article 4, he was apprehensive about all articles containing time-limits and considered it important to exclude them. If, under article 4, a new State should make a declaration expressing its consent to the provisional application of the Berne copyright Convention, for example, that would merely serve as a warning to other States that for the time being it intended to apply that Convention, but without committing itself definitely to accepting the Convention or allowing the inference to be drawn that it considered itself a party. Once a time-limit was set, however, some of the other States parties might feel that if they did not react, they would be bound by their very failure to react, with the result that the depositary might be faced with a highly confused situation.

66. In his opinion, article 7, as drafted, was in accordance with State practice and should serve the purpose for which it was intended.

67. Mr. NAGENDRA SINGH said there could be no doubt that article 7, as drafted by the Special Rapporteur, was a clear and precise statement of the law on the subject and was in conformity with State practice.

68. He himself believed that the line of approach taken by the Special Rapporteur was the correct one. He could, of course, have proceeded along the lines of an analogy with municipal law, under which an individual who succeeded as a party to a contract was bound by all the acts of his predecessor, but that would have placed the developing countries, in particular, in a very difficult position. There were many treaties concluded by their predecessors to which new States might not wish to be parties, for that reason, and the requirement of notification and the expression of consent by the new State was a welcome feature of the Special Rapporteur's text.

69. In his opinion, the question when a succession became binding was clarified by article 12, which should be read together with article 7. As article 12 indicated, once notification had been given, the consent of the new State to be bound by a treaty would take effect as from that date unless the treaty provided otherwise. If there was a break in the continuity of succession, the only way to correct it was to give the new State, and in particular a new developing State, the right to notify the date on which it wished to be bound.

70. As Mr. El-Erian had said, international organizations constituted a separate subject; they would, indeed, seem to be excluded from the application of article 7 by sub-paragraph (b).

71. With regard to sub-paragraph (a), he wondered why a new State should be debarred from becoming a party to a multilateral treaty merely on the grounds that its accession would be incompatible with the object and purpose of the particular treaty. If the territory of the new State had been covered by the treaty in question it would seem that the new State should be entitled to become a party to it, although there might very well be some treaties, such as regional military pacts, by which

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the new State would not wish to be bound. On the whole, therefore, he was inclined to support the Special Rapporteur’s formulation, despite the limitation which it might appear to impose.

72. When the Commission came to consider article 12, he hoped it would recognize that it should be left to the new State to specify whether it wished to be bound from the date of its succession or the date of its notification.

73. Mr. BARTOS said he approved of the contents of article 7, which, like the preceding article, was based on respect for the sovereign will of the new State. Under that provision, a new State had to notify the parties to a multilateral treaty expressly that it considered itself a party to the treaty; its notification was therefore of a constituent character.

74. As Mr. Quentin-Baxter had pointed out, the principle of continuity should be safeguarded as far as possible, but it was essential to leave new States free to accept or refuse succession. It was not sufficient, however, for a new State to express its desire to be a party to a treaty; it must also fulfil the conditions for accession laid down in the treaty.

75. That comment, which he had already made at the previous meeting in connexion with article 6, might perhaps be illustrated by a twofold example. Both the International Union for the Protection of Literary and Artistic Works and the International Union for the Protection of Industrial Property required their member States to enact legislation laying down certain minimum provisions for protection in their respective fields. Several States created by decolonization had completely broken with everything they regarded as the vestiges of the colonialist régime and had modelled their internal legal system on their own customary law. As a result, their internal laws sometimes did not provide sufficient guarantees for the purposes of one or other of the Unions or of some other organization, such as the Intergovernmental Maritime Consultative Organization. Some time might have to elapse before a new State fulfilled the conditions for accession. A distinction should therefore be made between the time when a new State expressed its desire to become a party to a treaty and the time when it was authorized to accede to the treaty.

76. The CHAIRMAN, speaking as a member of the Commission, said that he had only a few minor comments to make on article 7, which had already been thoroughly discussed.

77. He wondered why article 5, paragraph 1, referred to a new State as becoming “a party to a treaty in its own name”, while article 7 used the words “a party to the treaty in its own right”.

78. On the question whether there should be some time-limit to the right of notification, he agreed with Mr. Ruda that it made no difference provided that the new State really had a right to accede to the treaty. The question would only be important in a situation where a new State had the right to notify its succession, but not the right to accede to the treaty.

79. He was somewhat concerned about the relationship between sub-paragraphs (a) and (c). Sub-paragraph (e) referred to participation in the treaty as “requiring the consent of all the parties”, but the question arose under sub-paragraph (a) whether the objection of one party would be sufficient to bar the new State. It appeared necessary, therefore, to make clear what the effect of such an objection would be. It might also be necessary to consider whether, in the event of a dispute, some machinery to resolve the dispute should be established.

80. Lastly, although not entirely sure of the exact philosophy behind article 7, he agreed that the article was necessary.

81. Mr. EL-ERIAN suggested that the Drafting Committee be asked to consider dividing article 7 into two paragraphs, of which the first would state the general rule and the two exceptions given in sub-paragraphs (a) and (c), while the second would consist of sub-paragraph (b) as a saving clause. The second paragraph might read: “The provisions of paragraph 1 are without prejudice to the rules applicable in an international organization in the case of a treaty which is the constituent instrument of that organization”.

82. Mr. USTOR said he agreed with Mr. Reuter that the draft articles might begin with a general reservation along the lines of that drafted by the Special Rapporteur in article 3 of his first report, concerning the relevant rules of international organizations. That solution might help to satisfy Mr. El-Erian.

83. He too believed that article 7 should consist of two paragraphs: the first would contain the general rule that a new State became a party to a multilateral treaty independently of the consent of the other parties, and the second would provide for exceptions in the case of those multilateral treaties which required different treatment because of their object and purpose and the limited number of parties to them.

84. With reference to the conventions on the projection of artistic and literary rights and on the protection of industrial property, he suggested that a new State might wish to become a party to a different text from that which had been acceded to by its predecessor.

85. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 7.

86. Sir Humphrey WALDOCK (Special Rapporteur) referring to the question of membership in international organizations, said it had been his original intention to include a general reservation of the kind contained in the Vienna Convention on the Law of Treaties, but that at an earlier session the Commission had appeared not to favour it. He had more than once urged the need for such a general reservation, and thought the Commission should consider whether the phraseology of the Vienna Convention might be sufficient to cover the present situation. If such a general reservation was eventually included, it might be possible to delete sub-paragraph (b) of article 7.

87. On the problem of retroactivity, he thought that the question of the date from which the

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89. Article 5 of that Convention.
Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(continued)

ARTICLE 7 (Right of a new State to notify its succession in respect of multilateral treaties) (continued) 1

1. The CHAIRMAN invited the Special Rapporteur to conclude his summing up of the discussion on article 7 (A/CN.4/224).

2. Sir Humphrey WALDOCK (Special Rapporteur) said that there was a certain difference between the notification of succession and that of accession. In the discussion on the question of retroactivity, it had been brought out that the important date was that on which the notification became effective; that was a point which would have to be considered carefully in connexion with articles 11 and 12.

3. He thought that in most cases the differences between succession and accession would not greatly alter the position of the new State in substance. But clearly there might be some differences; for example, a treaty might contain a clause providing that an accession would not bring the treaty into force until after a period of delay. When notification of succession was given to the depositary it was clear, under current practice, that the treaty was considered as applying at once from the moment of succession. In the last analysis, the differences between succession and accession, while primarily of a technical nature, were not unimportant, as would become evident in connexion with the subject of reservations.

4. On the question of time-limits, three or four speakers, including the Chairman, had expressed the view that they were unnecessary. He personally was inclined to that view, but the Commission would be in a better position to take a decision on the point when it had examined articles 11 and 12.

5. One or two members, including the Chairman, had suggested that sub-paragraphs (a) and (b) might possibly give rise to difficulties of interpretation and that it might therefore be necessary to provide for some machinery for the settlement of disputes. He agreed that that was a question which deserved further consideration at the final stage of the Commission’s work on the topic.

6. Mr. Bedjaoui had suggested that an explicit reference should be made to “all or part” of the new State’s territory. That was a point which had also been raised by Mr. Ago and which he (the Special Rapporteur) proposed to deal with in a special excursus which would follow his article on unions of States.

7. Lastly, with regard to Mr. Ustor’s suggestion that article 7 should be divided into two paragraphs, he thought that would very likely be the proper solution if it was finally decided to preface the draft articles with a general reservation regarding constituent instruments of international organizations.

1 For text see 1164th meeting, para. 42.
8. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 7 to the Drafting Committee.

*It was so agreed.*

**ARTICLE 8**

9. Multilateral treaties not yet in force

1. A new State may on its own behalf establish its consent to be bound by a multilateral treaty which was not in force at the date when the succession occurred if, in respect of the territory to which the succession relates, the predecessor State had before that date:
   (a) established its consent to be bound by the treaty; or
   (b) signed the treaty subject to ratification, acceptance or approval.

2. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a new State which establishes its consent to be bound by the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision.

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

11. Sir Humphrey WALDOCK (Special Rapporteur) said that article 8 was closely related to article 7 and, in fact, assumed acceptance of the general principle stated in article 7.

12. Multilateral treaties frequently contained a delaying provision which required a certain number of ratifications or accessions to have taken place before the treaty would enter into force. If the predecessor State had already established its consent to be a party to the treaty, the question was whether a new State could rely on that act to establish its own consent to be bound by the treaty by the process of transmitting a notification of its succession. To that question practice gave a clear affirmative answer.

13. There was also the secondary problem of whether a notification of succession should be counted as equivalent to an instrument of ratification, accession, acceptance or approval, although no mention of it had been made in the final clauses of the treaty. In such a case the successor State had established its consent to be bound by the treaty and it was therefore legitimate to ask whether it should not be included among the number of consenting States required by the final clause of the treaty.

14. The inclusion of a successor State among the required number might conceivably be argued to be an unauthorized departure from the final clauses of the treaty, but it was the practice of the Secretary-General of the United Nations to accept such expressions of consent as equivalent to an accession to the treaty. The Commission, of course, was not bound by the practice of the Secretary-General, but he himself thought that that practice should be supported whenever possible, unless there were strong reasons to the contrary, since the Secretary-General was the depository of so many multilateral treaties. Moreover, in the present instance the Secretary-General’s practice was in full accord with the spirit and intent of the clauses in question. Paragraph 2 therefore endorsed the rule acted on by the Secretary-General.

15. Paragraph 1 raised a further minor question as to what the position would be if the predecessor State had not actually established its consent to be bound by a multilateral treaty, but had merely signed it subject to ratification, acceptance or approval. Would that constitute a sufficient nexus between the treaty and the territory which had now become independent to allow the successor State to treat the signature as its own? The practice left that question open.

16. In the interests of encouraging the largest possible participation in multilateral treaties, it would seem that the rule proposed in paragraph 1 should be acceptable. The Commission was free to take whatever decision it thought fit, but the recent practice of the Secretary-General tended to recognize signature by the predecessor State as a sufficient title for a new State to proceed to ratification.

17. The CHAIRMAN asked whether the Special Rapporteur considered that article 8 should be subject to the restrictions stated in sub-paragraphs (a), (b) and (c) of article 7.

18. Sir Humphrey WALDOCK (Special Rapporteur) said that that was a valid point; in his opinion, the same exceptions should be made in article 8.

19. Mr. YASSEEN said that the exceptions in article 7 should apply *a fortiori* to article 8.

20. He could see no reason why the right conferred on a new State by article 7 should not be extended to multilateral treaties not yet in force, if the predecessor State had clearly established its consent to be bound by the treaty. What mattered was not so much the material link between the territory and the treaty, in other words, the effective application of the treaty in the territory, as its applicability. In that context there was very little difference between, on the one hand, a treaty which had entered into force but had not been effectively applied, or a treaty which had not entered into force but in respect of which the predecessor State had clearly established its consent to be bound as soon as the conditions laid down in the treaty for entry into force were fulfilled, and, on the other hand, a treaty which was already in force and being effectively applied.

21. With regard to paragraph 2, it seemed obvious that the consent established by the new State should be taken into account when numbering the parties to a treaty for the purpose of its entry into force.

22. He could not accept the position adopted by the International Law Association’s Committee on the Succession of States, as described in paragraph (2) of the commentary to article 8. To consider that a new State did not succeed to the rights and obligations deriving, for the predecessor State, from a treaty which was not yet in force entailed discrimination against new States and was contrary to the principle of the sovereign equality of States.

23. Paragraph 1 (b) involved choosing between a solution which would encourage new States to become parties to multilateral treaties, and a strictly legal solution. In
his opinion, a new State should not be able to establish its consent to be bound by a multilateral treaty which had merely been signed by its predecessor, unless the signature constituted the predecessor's consent to be bound; for a State which merely signed a treaty retained full freedom to ratify or not to ratify it. It would be strange if a new State were thus to acquire, by reason of a succession which was not a succession, more rights and obligations than the predecessor State had possessed.

24. There was, in fact, a difference in kind, not in degree, between the cases dealt with in sub-paragraphs (a) and (b). Where a State had ratified a treaty which was not yet in force, the situation was almost the same as if the treaty was already applicable: entry into force depended solely on a certain number of accessions. On the other hand, where a State had merely signed the treaty, it would never enter into force automatically in relation to that State. It was on the basis of that distinction that he rejected paragraph 1 (b).

25. As to the wording of the article, it seemed to him that if the Commission intended to base its approach on succession, it should, as far as possible, use the same terms as in article 7. As at present worded, article 8 might suggest that a new State's consent must be expressed in a manner different from that provided for in article 7.

26. The CHAIRMAN said that, in order to clear up the point raised by Mr. Yasseen, he would ask the Special Rapporteur to clarify the difference between the terminology used with respect to notification and that used with respect to the establishment of consent. Would article 8 require consent to be established as provided in the Vienna Convention on the Law of Treaties? 4

27. Sir Humphrey WALDOCK (Special Rapporteur) said that article 7 should be amended to show that the notification in question was one which established consent. The two articles must obviously be brought into line.

28. Mr. USTOR said that paragraph 1 (a) of article 8 seemed to provide for a mere notification, but he was not quite sure what was involved in paragraph 1 (b).

29. Sir Humphrey WALDOCK (Special Rapporteur) said that sub-paragraph (b) was covered by the words "establish its consent to be bound by a multilateral treaty" in paragraph 1. He agreed, however, that the two sub-paragraphs should be brought into line to show that there was an establishment of consent in both.

30. Mr. USHAKOV pointed out that article 7 differed not only from article 8, but also from articles 9 and 10. Whereas article 7 related to all multilateral treaties, including restricted treaties, articles 8, 9 and 10 concerned only general multilateral treaties.

31. With regard to general multilateral treaties, article 7 appeared to be applicable to all cases in which a new State was created, though questions might arise in the case of a merger. For although the new State would clearly succeed to treaties that had bound both of the two States which had merged, it was questionable whether notification of consent was also possible where only one of the two States had been a party to the treaties in question.

32. In order to avoid difficulties of interpretation in the case of restricted multilateral treaties, separate articles should perhaps be drafted for that class of treaty.

33. With regard to paragraph 1 (b), he agreed with Mr. Yasseen that it was difficult to accept the idea of a succession based on the mere signature of a treaty. He would be in favour of dropping that provision.

34. As to the language of articles 7, 8 and 9, he noted that different terms had been used to express the right of the new State to establish its consent. The Drafting Committee should try to find a single form of words, based if possible on that used in article 9.

35. Mr. HAMBRO said that on the whole he could accept the Special Rapporteur's draft for article 8; he did not share the difficulties expressed by Mr. Yasseen and Mr. Ushakov with regard to paragraph 1 (b).

36. In his opinion it was still mainly a question of succession. The successor State acquired the same right as its predecessor, namely, the right to ratify the treaty, so that paragraph 1 (b) was only an extension of the principle of nexus which had been embodied in article 18 of the Vienna Convention and confirmed by the International Court of Justice in its advisory opinion on Reservations to the Convention on Genocide. 5 That might represent a rather long step in the progressive development of international law, but he saw no danger in it, since everything possible should be done to strengthen the legal position of new States.

37. He was glad to know that the limitations contained in article 7, referred to by the Chairman, also applied to article 8.

38. He was somewhat puzzled by the wide difference between articles 7 and 8 concerning what actually was the right of the new State. Article 7 said that a new State "is entitled to notify the parties that it considers itself a party to the treaty", whereas article 8 said that a new State "may on its own behalf establish its consent to be bound by a multilateral treaty...". In the latter case, it would seem that the new State actually acquired no right but merely gave its consent to be bound by the treaty.

39. Lastly, he agreed with the Special Rapporteur that, while the Commission should not feel itself bound by the practice of the Secretary-General, it would be in the interests of the cohesion of international law to accept his practice whenever there were no strong reasons to the contrary.

40. Sir Humphrey WALDOCK (Special Rapporteur) replying to Mr. Hambro, said that at the United Nations Conference on the Law of Treaties, representatives had been troubled by the problem of the different relationships between States and treaties. In article 2 (Use of terms) of the Vienna Convention, therefore, specific definitions had been given of the terms "negotiating

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5 I.C.J. Reports 1951, p. 15.
49. Mr. RUDA said that both in article 7 and in article 8, paragraph 1 (a), there was a definite consent by the predecessor State, whereas in article 8, paragraph 1 (b) the consent of the predecessor State was only provisional or did not even exist. The problem in article 8, paragraph 1 (b) was to determine what the new State succeeded to if the treaty was subject to ratification, acceptance or approval. He shared the view of the Special Rapporteur that the successor State would inherit the right to become a party to the treaty and to express its consent thereto. Apart from purely legal considerations, there were also reasons of convenience which militated in favour of that view, since it appeared to be the most favourable solution for successor States and for the encouragement of multilateral treaties in general.

50. There were, however, two other problems in regard to article 8. First, it contained no indication of the procedure by which the successor State would express its consent, as it did not include the word “notification”. Since articles 7 and 8 were basically procedural in nature, some indication of the procedure to be followed, in addition to those provided for in article 11 of the Vienna Convention on the Law of Treaties, should be given.

51. Secondly, another important point not covered in paragraph 1 (b), although it possibly was covered in article 12, was the extent to which a new State’s consent to be bound by a multilateral treaty concluded by its predecessor might be affected by article 18 of the Vienna Convention, concerning the obligation not to defeat the object and purpose of a treaty prior to its entry into force.

52. Mr. RAMANGASOAVINA said that articles 7 and 8 were closely linked. Article 8 was acceptable; its purpose was to give the new State its full capacity as a subject of law. It accorded that capacity not only where the predecessor State had clearly established its consent to be bound by a treaty, but also where the consent had been expressed conditionally by a signature. In the latter case, ratification might merely have been delayed by the requirements of the national constitutional law.

53. Paragraph 1 (b) did not confer any greater right on the successor State than paragraph 1 (a). Signature of a treaty was an incomplete expression of will which the successor State might very well wish to complete.

54. The same applied to paragraph 2, which dealt with the case in which a minimum number of States had to express their consent to be bound before the treaty could enter into force. Counting the consent expressed by the new State also meant recognizing its full capacity as a subject of law.

55. Article 8 was thus entirely acceptable; it reflected the progressive development of international law and enabled new States easily to express their consent to be bound by multilateral treaties with immediate effect.

56. Mr. REUTER said that as its work progressed, the Commission was becoming increasingly aware of the pertinence of a comment made by Mr. Ushakov early in the session, to the effect that cases of decolonization should be treated separately from other cases of succession. * See 1154th meeting, para. 30.
57. Most of the United Nations precedents which had been invoked were cases of decolonization and the discussions had centred on newly independent States. In that sphere, he was prepared to accept very bold solutions which would confer a maximum of rights and a minimum of obligations on the successor State. He would even go so far as to attenuate the distinction between general multilateral treaties and other treaties, for decolonization had been the source of injustices which could not be disregarded when considering the succession of States.

58. In cases other than those of decolonization, no doubt a different line of reasoning should be followed: sentiment should give place to strictness. The "clean slate" doctrine, which was well suited to decolonization, was less justified in other cases. Articles 7 and 8 seemed to be based on the desire to mitigate certain consequences of that doctrine, which had been accepted for the treaties referred to in the preceding articles. He could accept such mitigation in articles 7 and 8 where they referred to cases of decolonization, but on their consequences in other cases of succession, he must reserve his position until the end of the Commission's work.

59. In the light of the explanations given by the Special Rapporteur, he wondered how far the concept of succession applied to treaties might lead. If a new State could succeed its predecessor despite the restrictive clauses of a treaty, might it not, by way of succession, have been the source of injustices which could not be disregarded when considering the succession of States.

60. Paragraph 2 of article 8, which derived both from the law of treaties and from article 7, raised no difficulty. Paragraph 1 (b) seemed unacceptable. Not only was it contrary to logic, but it did not conform to the jurisprudence of the International Court of Justice, which, apart from its advisory opinion on Reservations to the Convention on Genocide had ruled, in the North Sea Continental Shelf Cases, that the signature of a State did not bind it. That ruling should be taken into account, even if it was not favourable to the expansion of multilateral treaties.

61. If article 8 had been drafted for cases of decolonization, then, out of consideration for the new States created by decolonization, their will should not be treated as being dependent on that of their predecessor or complementing it, since the predecessor State had sometimes been the oppressor.

62. If the article was intended to apply more generally, it was difficult to see why, in cases other than those of decolonization, account should not be taken of treaty clauses stipulating a period of notice for accession to become effective. Such a period would offer a safeguard for third States.

63. He had serious reservations on paragraph 1 (b), but could accept the rest of article 8 subject to the reservations expressed by other speakers with regard to the drafting and to the views he had stated on article 7.

64. Mr. ROSSIDES said there appeared to be unanimous agreement regarding the right accorded to a new State under paragraph 1 (a) of article 8. Although, where a multilateral treaty was not yet in force, no legal nexus existed between the treaty and the territory, the fact remained that the predecessor State had done all it could to bind itself and thus the territory.

66. The position was different, however, in the case envisaged in paragraph 1 (b), where the predecessor State had merely signed the treaty subject to ratification, acceptance or approval. In that case, it might perhaps seem logical to say that the successor State inherited the rights and obligations of the predecessor State and could therefore proceed to ratify the treaty, even if the predecessor State did not do so; the successor State would then become a party to the treaty while the predecessor State remained outside it.

67. He would have been prepared to accept that proposition if the right of the new State to notify succession under article 7 had been expressed in terms of a presumption of continuity, in accordance with the formula adopted by the International Law Association at its Buenos Aires Conference in 1968. Under that formula, a successor State was bound by a multilateral treaty unless and until it made a declaration to the contrary.

68. The overwhelming majority of the Commission, however, had supported the formula in article 7, which in effect embodied the clean slate rule and specified that the new State would be bound by the treaty only on its notifying its consent. Under that formula, there could be a more or less long interval during which the treaty was not applicable to the new State. In the circumstances, he could not accept paragraph 1 (b) of article 8.

69. He fully agreed with the provisions of paragraph 2.

70. He also agreed with the idea put forward by Mr. Reuter of separating cases of decolonization from other cases, though he realized the difficulties that would involve.

71. Mr. AGO said he would like to reply to an observation by Mr. Ruda. Articles 7 and 8 dealt with a rather exceptional and marginal situation. It was the case of a State that wished to become a party to a treaty, but could not or did not wish to do so by the normal procedures of the law of treaties; it was now proposed to give that State the faculty to become a party on the basis of a right of succession deriving from the fact either that a treaty was already in force in respect of its territory at the date of its succession, as in article 7, or that, if the treaty was not yet in force, everything was ready for it to enter into force, as in article 8.

72. But that was not the case dealt with in paragraph 1 (b) and Mr. Ruda maintained that it would be possible to conceive of a right of succession linked not to the maintenance in force of a treaty in respect of the territory, but to a sort of succession by the new State to the predecessor State in the right to accede to a given treaty. If that were so, it might well be asked why the...
right should be limited to cases in which the treaty had been signed. For if a State had the right to accede to a treaty and the new State was to inherit that right from the predecessor State, it mattered little whether the treaty had been signed or not; the right of accession to the treaty was transmitted. But that was going too far: the right of accession could not be accorded to the successor State even when it was not recognized by the rules of the law of treaties.

73. Mr. QUENTIN-BAXTER said that in the course of the discussion two different meanings had been attached to paragraph 1 (b). The first was that the new State could become a party to a multilateral treaty simply by depositing a declaration of succession; that interpretation would impose an intolerable strain on the law of succession. The second interpretation, which was much more plausible, was that a notification of succession placed the successor State in exactly the same position as the predecessor State; it established the successor State's right to ratify the multilateral treaty.

74. With that second interpretation, the provision in paragraph 1 (b) was satisfactory and coincided with the existing practice. Its practical applications were likely to be few, but he could cite at least one example. The Hague Conventions establishing the Permanent Court of Arbitration were open to accession only by the States which had participated in the Hague Conferences and those which had been invited to participate in those conferences; accession to one of those Conventions by any other State required the consent of all the parties to the Convention. The provisions of paragraph 1 (b) of the present draft article 8 would facilitate accession to such a convention by a new State.

75. Mr. USHAKOV said that it was not so much a question of the inheritance of a right of ratification as of notification of succession.

76. The CHAIRMAN, speaking as a member of the Commission, said that for the same reasons as Mr. Quentin-Baxter, he supported paragraph 1 (b). That provision would require some elaboration, however, to make it clear that the basic right of the successor State was the right to ratify the multilateral treaty.

77. Sir Humphrey WALDOCK (Special Rapporteur) summing up the discussion on article 8, said that the members who had taken part in the discussion appeared to be almost evenly divided on the subject of paragraph 1 (b); perhaps that was because there appeared to be some misunderstanding about its meaning. The intention of paragraph 1 (b) was to recognize the succession of the new State to the right to perform the act of ratification, acceptance or approval, that would serve to complete the act of signature already performed by the predecessor State. Unlike some of the critics of that provision, he felt that the proposition was juridically perfectly defensible. The predecessor State had performed an act with regard to the treaty in respect of a territory, and the successor State inherited the right to avail itself of the consequences of that act.

78. With regard to the application to the new State of the provisions of article 18 sub-paragraph (a) of the Vienna Convention on the Law of Treaties (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), he would certainly not favour including in the draft any rule which would have the effect of making the new State automatically bound by those provisions without its consent; some notification by the new State should be required. Of course, the problem would not arise if the Commission were to decide to delete paragraph 1 (b).

79. But although paragraph 1 (b) was juridically defensible, it could be argued that its inclusion was not absolutely necessary. Action had now been taken to make the multilateral treaties concluded under the auspices of the League of Nations open to accession by new States without recourse to the principles of succession. One major category of multilateral treaties had thus been disposed of; moreover, in the case of other multilateral treaties, most new States were covered by the final clauses. There remained, however, a few cases such as those mentioned by Mr. Quentin-Baxter in which the provisions of paragraph 1 (b) might be useful in practice. The best course would be to leave it to the Drafting Committee to explore the question and reformulate paragraph 1 (b) in the light of the discussion.

80. He agreed that article 8, like article 7, did not apply to restricted multilateral treaties and that the language of both articles would have to be adjusted so as to make that point clear. Furthermore, a separate set of provisions on the subject of restricted multilateral treaties would have to be formulated.

81. Mention had been made during the discussion of a possible distinction between "general" multilateral treaties and other multilateral treaties. In its work on the Law of Treaties, the Commission had endeavoured to define the concept of a "general multilateral treaty", but without success. A further unsuccessful attempt had been made at the United Nations Conference on the Law of Treaties. As finally adopted, the Vienna Convention did not refer to that proposed category of treaties; it did, however, draw a distinction between multilateral treaties in general and a certain type of restricted multilateral treaty. His own suggestion in draft article 8 was that the Commission should adhere to that distinction for the purposes of the present draft.

82. Mr. Ago had referred to the application of the multilateral treaty to the territory. Personally he preferred to speak of the applicability, or the potential applicability, of the treaty to the territory. In many countries, like his own, municipal legislation had to be enacted in order to apply a treaty. The question, therefore, was not whether the treaty was actually applied to the territory, but whether it was applicable to it.

83. The CHAIRMAN suggested that article 8 be referred to the Drafting Committee for consideration in the light of the discussion.

* For resumption of the discussion see 1181st meeting, para 71.
ARTICLE 9

Article 9
Succession in respect of reservations to multilateral treaties

1. When the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession, it shall be considered as maintaining any reservations applicable in respect of the territory in question at the date of the succession unless:
   (a) The State, in notifying its succession to the treaty, expressed a contrary intention or formulated reservations different from those applicable at the date of succession; or
   (b) The particular reservation, by reason of its object and purpose, must be considered as appropriate only in relation to the predecessor State.

2. In such cases, if the new State formulates reservations different from those applicable in respect of the territory at the date of succession:
   (a) Any reservation formulated by its predecessor which differs from its own reservations shall be considered as withdrawn;
   (b) Any provisions regarding reservations which may be contained in the treaty shall, together with articles 19 to 23 of the Vienna Convention, apply to the successor State as from the date of its notification of its succession to the treaty.

3. (a) The rules laid down in paragraphs 1 and 2 regarding reservations apply also, mutatis mutandis, to objections to reservations.

   (b) However, in the case of a treaty falling under article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty. 10

85. Sir Humphrey WALDOCK (Special Rapporteur) introducing article 9, said that the article dealt with the important problem of reservations to multilateral treaties. It took into account the relevant provisions of the Vienna Convention on the Law of Treaties and the varied practice in the matter, especially the practice of the Secretary-General as depositary.

86. As could be seen from the commentary, most of the evidence of practice on which the provisions of article 9 were based had been derived from the Secretariat publication “Multilateral treaties in respect of which the Secretary-General performs depositary functions”. 11 There was little information in legal literature on the subject of succession to reservations to multilateral treaties.

87. The first point to be settled was whether, as proposed in the opening sentence of article 9, a notification of succession by a new State implied that it maintained the reservations formulated by the predecessor State. There was some practice in support of the provision contained in that sentence.

88. On the question of the freedom of the new State to formulate further reservations, dealt with in paragraph 2, the solutions adopted in practice had, on the whole, been pragmatic. Little distinction had been made between ratification and notification of succession. On such a notification being made, the practice of the Secretary-General allowed the new State not only to withdraw any of the earlier reservations formulated by the predecessor State, but even to vary those reservations.

89. The possibility of withdrawal of reservations did not give rise to any difficulty, because the Vienna Convention allowed the withdrawal of a reservation at any time. As for the right to vary reservations, it could be considered consistent with the proposition that notification of succession constituted a form of establishing consent to be bound by a treaty, although it might not be entirely consonant with the notion of inheritance from the predecessor State. The possibility of attaching reservations to a notification of succession could, on that basis, be admitted.

90. In paragraph 3 (a), he had made allowance for the right which the Vienna Convention granted to the other parties to the treaty to make objection to a reservation. He had used the expression “mutatis mutandis”, but he had drafted the provision well before that expression had come under criticism in the Commission. The Drafting Committee would deal with that point.

91. Another drafting question was that of legislation by reference to the Vienna Convention on the Law of Treaties. Personally, he shrank from reproducing all its relevant rules; he preferred to refer in each case, as he had done in paragraph 3 (b), to the relevant provision or provisions of the Vienna Convention—the only version of the law of reservations at present in existence which had any authority.

92. Mr. USHAKOV said that, in general, he supported the principle stated in article 9. However, instead of considering the silence of the successor State as acceptance of the reservations made by the predecessor State, it would be preferable to provide that the new State must declare its intentions with regard to those reservations explicitly. It would be sufficient to amend the wording of the introductory phrase of paragraph 1 to provide that, when the consent of a new State to be bound by a multilateral treaty was established by means of a notification of succession, it must at the same time state its position with regard to the reservations formulated by the predecessor State or formulate its own reservations.

93. In his opinion, it would be preferable to state the relevant provisions of the Vienna Convention in full instead of just referring to them.

94. He could not agree that the new State should be bound by its predecessor’s consent to reservations accepted by the other parties to the treaty, as provided in paragraph 3 (b). If the new State had the right to make its own reservations, it should also be able to make objections to reservations by other parties. Perhaps the Special Rapporteur would explain the justification for the principle stated in paragraph 3 (b).

95. Sir Humphrey WALDOCK (Special Rapporteur) said that paragraph 3 (b) related to a special category of treaties of a restricted kind. If the new State were to be allowed to object to a reservation which had already been accepted by all the parties to the treaty, it would have the

91 ST/LEG/SER.D/5 (United Nations publication, Sales No. E.72.V.7).
power to remove the character of a party to the restricted multilateral treaty from a State which had already become a party by virtue of its acceptance of the reservation.

96. Mr. USHAKOV said that the ambiguity would be removed if general multilateral treaties and restricted multilateral treaties were dealt with in two separate articles.

97. Mr. REUTER said he quite understood that paragraph 3 (b) referred to restricted multilateral treaties, but under the terms of article 7 there was no succession by notification in the case of those treaties.

98. Sir Humphrey WALDOCK (Special Rapporteur) said that the point raised by Mr. Reuter could be covered when special provisions were drafted to deal with the subject of restricted multilateral treaties.

Organization of work

99. The CHAIRMAN said that the Commission was about to complete its fourth week of work; considering that the last week of the session was needed for the discussion and adoption of the annual report. It had only five weeks left in which to discuss the two topics of succession of States in respect of treaties, item 1 (a) of its agenda, and the protection of diplomatic agents and assimilated persons, item 5.

100. The Commission would be hard pressed and, to speed up its work, it would be necessary for both the Drafting Committee and the Working Group on item 5 to meet on two afternoons each week. The Chairmen of those two bodies had agreed to that arrangement.

101. The next two weeks would be devoted to the completion of the draft articles on succession of States in respect of treaties. The Commission would then return to item 5, on which it should by then have some material from the Working Group. That would give the Special Rapporteur on succession of States in respect of treaties an opportunity of working on redrafting of the articles and formulation of the commentaries.

102. If there were no objections, he would assume that the Commission accepted those arrangements.

It was so agreed.

The meeting rose at 1 p.m.

1167th MEETING

Monday, 29 May 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra-Singh, Mr. Quentin-Baxter, Mr. Ramgasaovina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]
(resumed from the previous meeting)

ARTICLE 9 (Succession in respect of reservations to multilateral treaties) (continued) 1

1. The CHAIRMAN invited the Commission to continue consideration of article 9 (A/CN.4/224).

2. Mr. HAMBRO said there were three points on which he had serious misgivings about the article.

3. The first was that not enough attention had been paid to the important general consideration that reservations to multilateral treaties should be discouraged as much as possible, because reservations could greatly detract from the value of such treaties.

4. The logical basis for the rule allowing new reservations by a successor State was that the case was not simply one of succession to the rights of the predecessor State: the successor State benefited from a new rule which was outside the strict application of the principle of succession. The Special Rapporteur had very properly kept in mind the need to facilitate the widest possible participation by successor States in multilateral treaties, but he had been rather too liberal in suggesting that those States should be presumed to have maintained the reservations of their predecessors.

5. Personally, he thought that article 9 unduly enlarged the rights of the successor State. He therefore suggested, for the consideration of the Special Rapporteur, the adoption of a formula which would require a successor State to make a notification if it wished to maintain the reservations of the predecessor State; failing such notification, it would be presumed that it did not maintain them.

6. His second point related to the method of legislation by reference to the Vienna Convention on the Law of Treaties, as in paragraphs 2 (b) and 3 (b). He realized that it would be awkward to repeat in the draft all the relevant provisions of the Vienna Convention, but it should be remembered that the parties to the future instrument on succession in respect of treaties would in all probability not be the same as the parties to the Vienna Convention. It was therefore desirable that the present draft should be complete and self-contained.

7. His third point related to the use of the formula "mutatis mutandis", which would have the effect of leaving it to individual States and their legal advisers to decide to what extent the provisions on reservations would apply to objections. It was the duty of the Commission to specify the extent of the application. The Drafting Committee should reword paragraph 3 (a) so as to avoid using that undesirable expression.

8. Mr. TSURUOKA said that, like Mr. Hambro, he would prefer to see the presumption in paragraph 1 reversed: the silence of a successor State concerning reservations applicable in respect of its territory should

1 For text see previous meeting, para. 84.
be interpreted as a withdrawal of those reservations. If the emphasis was on the idea of succession, the presumption in paragraph 1 was justifiable; but if the interests of the international community as a whole were placed first, the presumption was reversed, since a reservation was an exception to the general rule, which was the application of the treaty in its entirety.

9. Unless the presumption were reversed, it could lead to situations like that in which certain African countries, on acceding to independence, had been considered as having accepted the reservation previously made by the United Kingdom, France and Belgium in respect of Japan, under article 35 of the General Agreement on Tariffs and Trade, because they had not clearly expressed their intention in that regard. As a result, there were no contractual relations between Japan and those countries, which paradoxically, regarded themselves as champions of non-discrimination, although the United Kingdom, France and Belgium had since withdrawn their reservation, of which the African countries in question nevertheless remained the inheritors. In order to prevent such situations from arising it would therefore be advisable to reverse the presumption in paragraph 1.

10. Mr. YASSEEN said he found the philosophy of article 9 quite understandable. Any State could notify its succession and, in principle, succeed a predecessor State under the same conditions with regard to reservations and objections. Such a rule was logical and acceptable.

11. The question arose, however, whether a successor State must declare its intentions expressly. As it was difficult to ask a State to make a clear statement of its position, it would be sufficient to choose a presumption whereby its silence could be interpreted either as an acceptance or as a refusal. Like the Special Rapporteur, he thought that the presumption of acceptance was in the interests of the successor State. To presume that a State withdrew its reservations might, indeed, lead to an irrevocable situation, since the State would be unable to re-establish them later, whereas it could always withdraw its reservations subsequently if it saw fit. Hence it was preferable that the presumption should be in favour of the maintenance of reservations.

12. Some members of the Commission thought that the successor State could not formulate reservations if the time-limit laid down for them in the treaty had expired. In his view, that attitude was not consistent with the concept of succession; the faculty of making reservations should be accorded to the successor State on the basis of a rule of law to be established in the light of consistent practice. On the other hand, he did not think that reservations formulated by the successor State, if different from the existing reservations, should be regarded as annulling the latter. New reservations were not necessarily incompatible with earlier ones; the fact that they were different did not ipso facto entail abandonment of the earlier reservations, as would be the case if the article had spoken of “reservations incompatible with those applicable at the date of the succession”.

13. The use, in paragraph 3 (a), of the expression “mutatis mutandis”, which the Commission had always tried to avoid, did not affect the substance. The Commission could leave it to the Drafting Committee to see whether some other form of words could be found.

14. Paragraph 3 (b) offered a hard, but reasonable solution, which, as between the general interests of the parties and the interests of the successor State, rightly chose the interests of the parties. It was therefore acceptable.

15. Mr. USTOR said that, during the discussion on article 8, he had not taken a position on paragraph 1 (b), on which opinions had been sharply divided. On reflection, he was now inclined to favour the retention of that provision, which regarded signature by the predecessor State as establishing a connexion between the treaty and the territory. Mere adoption of the treaty would, of course, not suffice for that purpose; a rule in that sense could not be substantiated by practice.

16. If paragraph 1 (b) of article 8 were retained, however, it would be necessary to redraft the opening clause of paragraph 1 of article 9; the language at present used would only be suitable if paragraph 1 (b) of article 8 were dropped. Paragraph 1 of article 9 began with the words “When the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession...”. But if paragraph 1 (b) of article 8 were retained, such a notification would not be the only way in which the new State could establish its consent to be bound; it could achieve the same result by means of ratification, acceptance or approval when the predecessor State had signed the treaty subject to ratification, acceptance of approval.

17. In view of the complexity of the subject-matter of article 9, its provisions should be as brief as possible. The main principle involved was that the new State generally had complete freedom to maintain or to abandon the reservations or objections expressed by the predecessor State; he would have preferred a clear statement of the complete freedom of the new State, subject to the exception specified in paragraph 1 (b).

18. He agreed with the proposition that the new State should be allowed to make new reservations to the treaty on its notification of succession, independently of the relevant clauses of the treaty.

19. With regard to the difficult question of the presumption to be written into the article for the case in which the new State was silent as to whether it wished to maintain or abandon the reservations or objections of the predecessor State, he thought the Special Rapporteur had made a convincing case in favour of his draft with the arguments set out in his commentary to the article, in particular in paragraph 12. And apart from those arguments, it should be remembered that a reservation was by its very nature a restriction of the obligation of the reserving State; it therefore followed that, in the event of the silence of the successor State, it could not be lightly presumed that it intended to shoulder any more onerous obligations than those which rested on its predecessor.

* For text see previous meeting, para. 9.
20. The provisions of paragraph 2 (a) should be interpreted as applying to reservations made by the new State and relating to the same subject-matter as the reservation formulated by its predecessor. Clearly, if the predecessor had made a reservation on one article of the treaty and the new State made a reservation on another article, it should be presumed that the intention was that both reservations should apply.

21. Sir Humphrey WALDOCK (Special Rapporteur) said it would be possible for the Drafting Committee to reword paragraph 2 (a) so as to give it the meaning attached to it by Mr. Ustor. The provision as now drafted was based on the basis that, since the new State had evidently addressed its mind to the old reservations before making new ones that were different, it should be presumed to want only its own reservations to stand, to the exclusion of the old ones.

22. Mr. TAMMES said he agreed with the provision in paragraph 1 to the effect that reservations expressed by the predecessor State were maintained unless the new State rejected them. A case could, of course, be made for the reverse and more natural presumption that, unless the reservations were confirmed, the treaty would become binding as originally signed, but he found the arguments given in paragraph (12) of the commentary quite convincing.

23. He could also accept the provisions of paragraph 1 (b), on reservations, which spoke for itself, as did its counterpart, paragraph 3, on objections to reservations. As far as the drafting was concerned, he thought that legislation by reference, to which so many speakers had objected, could be avoided in the present instance. Perhaps it was just a symptom of international legal systems coming of age, since all mature legal systems used that technique.

24. He had no difficulty with the provisions of paragraph 2, which followed from the basic philosophy of Part II of the draft. The previous provisions of section 1 enabled a new State freely to decide not to inherit a treaty signed by its predecessors; they also allowed a new State complete freedom to decide to inherit such a treaty if the treaty had been in force in respect of its territory at the date of succession. Article 8 allowed a new State freely to ratify a treaty which had only been signed by the predecessor State. Finally, by virtue of the principle embodied in articles 9 and 10, the new State was allowed freely to change the scope of application of the treaty.

25. The net result of all those provisions was to bring the new State very close to the legal position which it would have had if it had been in existence at the time when the treaty had been concluded. That result could be explained on the basis of the idea of justice and the principle of redress, wherever such redress was practically possible. He preferred that approach to basing the rules on the legal nexus between the treaty and the territory, a principle which had been useful to explain the traditional practice, but was of little help when framing new rules in response to new needs.

26. He supported the provisions of articles 8, 9 and 10, including paragraphs 1 (b) of article 8. He had not expressed his views on that last provision before, because he had preferred to do so in the context of the whole group of articles in which it belonged.

27. Mr. RUDA said that the adoption at the United Nations Conference on the Law of Treaties of the “maximum Pan-American rule”, in the form in which it appeared in article 20, paragraph 4 (b) of the 1969 Vienna Convention,4 had clearly shown that the international community preferred the most flexible possible system for reservations. He therefore fully supported the provisions of article 9, which took the same broad view of the matter.

28. There were two main considerations to be borne in mind. The first was that of ensuring the widest possible participation by new States in multilateral treaties. The second was that of protecting the rights already vested in the other States parties to those treaties.

29. He agreed with the presumption, in paragraph 1 of the article, that a reservation expressed by the predecessor State was deemed to be maintained by the new State if that State remained silent on the point. That was a matter of considerable importance. The treaty should continue to be applied in the territory in question on the same terms as before, unless the new State expressed a different intention.

30. If the presumption was reversed, and it was assumed that the silence of the new State meant that the reservations were withdrawn, the effect would be to apply to the territory certain provisions of the treaty which had previously not been applicable to it because of the reservations by the predecessor State. It seemed to him perfectly clear that such a result could not follow without a clear expression of intention to that effect by the new State. Consequently, he fully supported paragraph 1 as it stood.

31. He also fully agreed with the provisions in paragraph 2. Paragraph 2 (a) reversed the previous rule that the silence of the new State was taken to imply acceptance. Personally, he thought the position would depend on the nature of the new reservations expressed by the successor State. If those reservations were totally unrelated to the ones made by the predecessor State, the two sets of reservations should stand. It was only if the old reservations were incompatible with the new ones that they should be considered as withdrawn. That idea of complete incompatibility was not made clear by the words “which differs” and some more precise wording should be found.

32. In paragraph 3, he supported the provision in sub-paragraph (a), on objections, which paralleled the provisions of paragraph 2, on reservations. He also found sub-paragraph (b) acceptable.

33. Mr. RAMANGASOAVINA said that on the whole article 9 well expressed the faculty of every new State to exercise its freedom of choice with respect to a treaty to which it succeeded, by accepting, modifying or rejecting the reservations attached to the treaty, according to what suited its territory.

34. The presumption in paragraph 1 was right. It was natural that a new State which simply notified its consent to be bound by a treaty should be presumed to succeed to that treaty in its entirety. It was also natural that a State which succeeded another State should not be under an obligation to accept its predecessor's position unconditionally, but should have the faculty to maintain it or to adapt it to the country's needs. If the presumption were reversed, as some members wished, it might lead to inextricable situations.

35. Paragraph 2 made it clear that any new State could formulate different reservations and thereby express its will to withdraw the former reservations. The wording might perhaps be changed, but the basic idea, which followed logically from paragraph 1, should be retained.

36. Paragraph 3 also followed logically from what preceded it. Any new State which did not withdraw a reservation was presumed also to accept the objections to that reservation. He could see no reason to change the expression "mutatis mutandis", the meaning of which was quite clear.

37. Mr. ROSSIDES said that, since the Commission had not accepted his suggestion that the International Law Association's formula should be incorporated in the previous articles, he saw no justification for introducing into paragraph 1 of article 9 the presumption that the predecessor State's reservations were maintained. Such a presumption would have been logical if there had been at the same time a presumption of continuity of application of the treaty unless a notification to the contrary was made by the new State within a reasonable time, as had been suggested by the International Law Association.

38. The primary consideration should be the protection of the interests of the international community and of the parties to multilateral treaties, and that required that there should be maximum continuity in the application of such treaties.

39. He would suggest that the reference in paragraph 2 (b) to the articles of the Vienna Convention on the Law of Treaties should also be included in paragraph 1. In particular, the provisions of article 23 of the Vienna Convention, requiring that all reservations made on signature be formally confirmed at the time of ratification, should be made specifically applicable to the situations covered by paragraph 1. It should be remembered that under paragraph 1 (b) of article 8 a new State could succeed to an unratified treaty. It was therefore essential to make it clear that in such a case the new State, when it ratified the treaty, must confirm expressly any reservations made by its predecessor at the time of signature.

40. Mr. AGO said that article 9 dealt mainly with a marginal and exceptional case: that of a new State which was not authorized by the provisions of a treaty to become a party to the treaty. The article would enable that State to become a party on the basis of a right of succession. In such a case, the presumption adopted by the Special Rapporteur with respect to reservations was not only desirable, it was logically inevitable. For the case was one of succession; and in matters of succession, as a general rule it was the predecessor's exact situation that was inherited. It was difficult to accept the idea that the successor State could avail itself of the special faculty granted it to become a party to a treaty in order to formulate fresh reservations. That would tend to be contrary to the logic of the system.

41. He therefore supported those members of the Commission who approved of the Special Rapporteur's approach. Article 9 clearly referred to the case covered by article 8, paragraph 1 (a), since it referred to reservations made at the time of ratification, not of signature. Consequently the wording of article 9, paragraph 1, should be brought into line with that of article 8, paragraph 1, especially if the latter provision was amended.

42. Mr. BEDJAOUI said that the general approach in article 9 was acceptable. The presumption in paragraph 1 should be a presumption in favour of the maintenance of reservations, since otherwise rights and obligations which had never been assumed by the territory in question would be conferred upon the successor State against the express will of the predecessor State and without the expressly established will of the successor State. It would be wrong to reverse the presumption; to retain it did not mean limiting the sovereignty of the successor State, but interpreting its silence as being in favour of continuity.

43. With regard to paragraph 2, he was reluctant to accept the presumption of a withdrawal of earlier reservations merely because the new reservations were different. It was difficult to see the logic of that provision. He also had doubts about the words "or formulated reservations different from..." in paragraph 1 (a). The wording relating to the presumption of withdrawal in paragraphs 1 (a) and 2 (a) should be redrafted.

44. He supported paragraph 3, including sub-paragraph (b), since the reservation in question had been accepted by all the other parties.

45. Mr. NAGENDRA SINGH said that, for the reasons given by other speakers, he accepted the provisions of articles 8 and 9, including paragraph 1 (b) of article 8.

46. With regard to paragraph 2 (a) of article 9, there were three possibilities. The first, which would give rise to no difficulty, was that the new reservations made by the successor State were in full agreement with the earlier reservations made by its predecessor. The second was that the two sets of reservations were absolutely incompatible, in which case the provisions of paragraph 2 (a) would apply. The third possibility was that the new reservations partly agreed with the old ones and partly differed from them. His own view that in such a case the notification by the new State should make it clear that the new State might take such action.

47. Mr. REUTER said he thought that paragraph 3 (b) was incompatible with article 7, sub-paragraph (c).

48. Mr. EL-ERILAN said that he supported article 9 and considered it a useful addition to the draft, particularly because, as the Special Rapporteur had noted in para-
in connexion with notification of succession. There had to apply only to the former, since it referred to the rules in connexion with reservations. As it stood, paragraph 3 would appear to provide that a new State could mean that the reservation was to be regarded as abandoned. The matter could be further explored in the Drafting Committee.

56. The question of reservations and objections to them was not of merely academic interest, but arose frequently in connexion with notification of succession. There had been a long discussion on reservations in the Commission and at the Vienna Conference, and the rules which had ultimately emerged had been designed neither to encourage nor to discourage reservations. Those rules had been adopted deliberately because of the importance in international relations to-day of multilateral treaties and the need to facilitate the maximum participation in them.

57. In his opinion, since that flexible system of rules had been adopted at Vienna for reservations, it was essential to conform to it in the present connexion. On the other hand the Commission did not have to go out of its way, in paragraph 3 (a), to underline a successor State’s complete freedom to formulate reservations, which from a psychological point of view was inadvisable. He therefore preferred the present wording, subject to any drafting amendments which might be found desirable.

58. On the question of the presumption to be made, he agreed with Mr. Ago that to presume succession to reservations was logically correct. He also agreed with the additional consideration adduced by Mr. Ustor, that a new State should not be presumed to accept greater obligations in its territory than those which had been in force at the time of its succession.

59. As to the presumption to be made in paragraph 2 in cases where a new State had made reservations different from those of its predecessor, a rather different view of the new State’s intention could be taken from that of some members of the Commission. By making new reservations without referring to its predecessor’s reservations, a new State could be argued to have shown that it was abandoning the reservations made by its predecessor.

60. He could not agree that it might be enough simply to provide that a new State must declare its position regarding reservations at the time of notifying its succession. No doubt, it was desirable that the new State should do so, but in fact new States often made reservations without stating what they intended should happen to the reservations made by their predecessors. He was not sure whether he had correctly interpreted the practice, but it was his impression that the Secretary-General assumed that where a statement of reservations was made by a new State without any reference to reservations made by its predecessor, the latter reservations were to be regarded as abandoned. The matter could be further explored in the Drafting Committee.

61. Mr. Rossides’ point regarding the confirmation of reservations in cases of ratification was one which admittedly might arise if the possibility dealt with in article 8, paragraph 1 (b) was admitted, and might then require further consideration.

62. With regard to paragraph 3 (a), his intention had been to protect the position of third States, which should be entitled to make objections when new reservations were made. He did not think that any rule need be formulated in regard to objections to a new State’s continuance of reservations; certainly such a rule would not be easy to draft.

63. Reference had been made during the discussion to legislation by reference, but the only alternative to repeating large portions of the provisions on reservations in the Vienna Convention on the Law of Treaties would seem to be to include some such phrase as “the relevant rules of general international law”.

64. Lastly, he could see no really serious objection to the expression mutatis mutandis in paragraph 3 (a), but he recognized that the Commission had shown a certain
aversion to that phrase at its recent sessions and that it would therefore require to be changed.

65. Mr. YASSEEN said that it would be better to refer to the Vienna Convention, which was considered to state all the rules of the law of treaties. To refer to the general rules of international law would be a retrograde step in relation to the work of codification already accomplished.

66. The Commission should settle once and for all the question of references to general conventions, since it would no doubt often arise in the future, especially in connexion with instruments of such wide scope as the Vienna Convention.

67. Mr. ALCIVAR said he fully agreed with Mr. Yasseen. The Commission should refer expressly to the Vienna Convention, not to the general rules of international law.

68. Mr. REUTER said he must repeat his reservations on the general conception of the draft. Under cover of the law of succession, a new right of accession for the successor State had been introduced in article 9. It was true that the practice of the Secretary-General, which the Special Rapporteur had taken as a basis, was not very clear; it related mainly to decolonization and was difficult to apply to other cases of state succession. At the present stage of its work, however, the Commission could only continue on the same course.

69. He wished to ask the Special Rapporteur whether article 9, as at present worded, and particularly the reference to the Vienna Convention in paragraph 3 (b), authorized a new State which had become a party by the special means of succession, to make an objection to a reservation made by an original party. If that was the case, the Commission would be moving even further from the concept of succession as it followed from paragraph 1.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Reuter was right in his suggestion that paragraph 3, when taken in conjunction with the rule in article 17, did imply the right to formulate objections. Paragraph 3 (a), in fact, might go further than he had intended, and perhaps further consideration should be given to the element of mutuality of rights to which the Chairman had referred. One right which the successor State undoubtedly possessed was that of notifying its succession.

71. Mr. USHAKOV said he was categorically opposed to legislation by reference. It was obvious that if a convention contained a reference to an earlier convention to which a State was not a party, that was an insurmountable obstacle to its becoming a party to the later convention. If the State was not bound by the earlier convention it could not possibly be asked to be bound by any of its articles, even indirectly.

72. Paragraph 3 (b) contained a reference to article 20, paragraph 2, of the Vienna Convention on the Law of Treaties. By that reference the Special Rapporteur had intended to define restricted multilateral treaties. In reality, however, the provision referred to did not define that category of treaties, it related to the acceptance by all the parties of a reservation to a treaty formulated under a twofold condition, namely: "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty...".

73. Paragraph 3 (b) of article 9 should therefore be specially worded to apply to restricted multilateral treaties and should not refer to a provision which also mentioned the object and purpose of the treaty.

74. Sir Humphrey WALDOCK (Special Rapporteur) said that the wording of the Vienna Convention had been very carefully chosen; it clearly defined the category of treaties which was excepted from the general rule. In the present draft there were three or four articles which might call for a similar exception based on the distinction between multilateral treaties of a restricted character and other multilateral treaties.

75. There were many kinds of multilateral treaty which were open to many States, but which he would hesitate to call normative or general multilateral treaties. The ones referred to in the present case were narrowly based and required the consent of each State. The best course, as Mr. Ushakov had suggested, might well be to include a definition, although some care would have to be exercised in formulating it.

76. The CHAIRMAN, speaking as a member of the Commission, said that he could not agree with Mr. Ushakov that it was impossible to include a reference to the Vienna Convention in article 9. References to the Vienna Convention in treaties were, in fact, common; he need only mention the American Convention of Human Rights, which included a specific reference to articles 19-23 of the Vienna Convention.6

77. What the Commission was attempting to do in the present set of draft articles was merely to add another chapter to the law of treaties, and, as Mr. Yasseen had said, it seemed only reasonable to refer to what had already been done. He fully supported the idea of incorporation by reference.

78. Mr. AGO said it was necessary to settle once and for all the question of legislation by reference. Unlike Mr. Ushakov, he did not consider that reference, in a convention, to an earlier convention had the effect of making the latter binding on States parties to the later convention. The synthetic method of drafting by reference avoided a lot of repetition, but it did not mean that the rules borrowed applied in cases other than those for which they had been introduced by analogy.

79. If the Commission considered it undesirable to draft by reference, it was important that it should reproduce the existing provisions literally, in order to avoid any contradiction with the rules it had formulated in other contexts.

80. It would be inadvisable for the Commission to refer, in the case in point, to the rules of international law, because that would give the impression that the Vienna Convention was not a complete codification of

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all the general rules of the law of treaties. And that impression would be contrary not only to the opinion of the Commission, but also to that of the International Court of Justice, which had ruled that the articles of the Vienna Convention which had been adopted unanimously represented general international law.⁷

81. Mr. BARTOŠ said that there was a big difference between repetition of provisions already in force, and reference to such provisions. In the first case, the provisions could be given another interpretation according to the position they occupied and the meaning they bore in the convention into which they were introduced, even if they were reproduced literally. In the second case, where the provisions were merely referred to, they had to be interpreted according to their meaning in the convention from which they were taken. Sometimes it was necessary to modify rules borrowed in that way, because the law was constantly developing.

82. In the case in point, the Special Rapporteur’s intention had been to refer to certain articles of the Vienna Convention, without making any change in them. He approved of that method for the purposes of article 9, but it was important that the Commission should take a decision on the general question of legislation by reference.

83. Sir Humphrey WALDOCK (Special Rapporteur) said it was only by accident that the topic of the succession of States in respect of treaties had not been dealt with as a part of the law of treaties. He himself had always thought that it belonged in the law of treaties, but owing to lack of time he had been unable to include it in his draft and a reservation had accordingly been made with respect to it at the Vienna Conference.

84. He suggested that article 9 be referred to the Drafting Committee, which should also consider the question of the general articles that would ultimately form Part I of the draft, concerning which he would shortly submit a paper.

It was so agreed.⁸

The meeting rose at 6 p.m.

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Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(continued)

ARTICLE 10

1. Article 10

Succession in respect of an election to be bound by part of a multilateral treaty or of a choice between differing provisions

1. Except as provided in paragraphs 2 and 3, when the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession, it shall be considered as maintaining its predecessor’s:

(a) Election, in conformity with the treaty, to be bound only by a part of its provisions; or

(b) Choice, in conformity with the treaty, between differing provisions.

2. The new State, when notifying its succession, may declare its own election in respect of parts of the treaty or its own choice between differing provisions under the conditions laid down in the treaty for making any such election or choice.

3. After having notified its succession to the treaty, the new State may exercise, under the same conditions as the other parties, any right provided for in the treaty to withdraw or modify any such election or choice.¹

2. The CHAIRMAN invited the Special Rapporteur to introduce article 10 (A/CN.4/224).

3. Sir Humphrey WALDOCK (Special Rapporteur) said that the questions raised by article 10 were similar to those relating to article 9. The practice in the matter, which had been illustrated in his commentary by references to, inter alia, the 1949 Convention on Road Traffic, the 1951 Convention relating to the Status of Refugees and, the General Agreement on Tariffs and Trade, was quite widespread; it was largely the practice of the Secretary-General of the United Nations and some other depositaries.

4. It seemed essential to have some such rule as the one he proposed. The presumption in article 10, which was analogous to that in article 9, was inherent in the very notion of succession. It was only logical, therefore, to preserve the choice which had been made by the predecessor State unless its successor stated something to the contrary.

5. At the same time, it was desirable to give the new State an opportunity to review the situation and to make a choice or an election if it so desired. Once its choice had been made, however, the new State, having committed itself, should be considered as being in the same position as the other parties with respect to any right provided for in the treaty to withdraw or modify its election or choice.

6. Mr. BEDJAOUI said he accepted paragraph 1 of article 10, but had some doubts about paragraphs 2 and 3. As the Special Rapporteur had said, article 10 was based on the same principle as article 9, namely, the

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logical presumption of the maintenance of the predecessor State’s election or choice. Unless the successor State expressed its will to the contrary, it was natural that there should be continuity. In that respect, he fully shared the Special Rapporteur’s views, in particular those expressed in paragraph (8) of the commentary.

7. He hesitated to accept paragraph 2, not because he contested the rightness of the substantive solution it contained, but because it seemed to be only just on the borderline of State succession. He agreed, however, that it might be useful.

8. He had stronger doubts about paragraph 3, which provided that, once it had made its notification, the successor State must be considered a party to the treaty and was therefore fully entitled to withdraw or modify any prior election or choice. That was a statement of the obvious. Perhaps the Special Rapporteur had wished to include it because he feared that the successor State’s commitment by notification might be regarded as irrevocable. But he saw no need for the provision, unless it was to answer the question how a successor State which had elected to be bound by only one part of the treaty should proceed if it subsequently wished to be bound by another part. Should it proceed by accession or by notification? That question would justify paragraph 3. Personally, he considered that once a successor State had notified its succession and made an election or choice on its own behalf, it was a party to the treaty on the same footing as the other parties and enjoyed the rights conferred on all States.

9. Mr. RAMANGASOAVINA said that articles 9 and 10 were based on the same principle, namely, the presumption that the successor State accepted the situation created by the predecessor State and that it was on the strength of the legal situation of the predecessor State as a party to a multilateral treaty that the successor gave its consent to be bound by that treaty. The presumption of acceptance in article 10 should apply not to the original treaty, but to the treaty as signed by the predecessor State, which meant taking into account the elections and choices that the successor State inherited. Paragraph 1 therefore presented no difficulty.

10. With regard to paragraph 2, he shared Mr. Bedjaoui’s opinion. There was no longer any need to invoke the situation created by the predecessor State. The successor State was in the position of a State which acceded to an existing treaty and became a party to it on its own behalf. However, the form in which paragraph 2 was drafted made it acceptable.

11. Paragraph 3 quite rightly placed the successor State in the same position as any other party to a multilateral treaty. Paragraphs 1, 2 and 3 faithfully reflected the logical position of the successor State, which could either accept the situation created by the predecessor State without change, or exercise complete freedom of election or choice on its own behalf, or subsequently modify any prior election or choice as it pleased. Article 10, as submitted by the Special Rapporteur, was therefore acceptable.

12. Mr. RUDA said that article 10 was based on the same premise as that established in article 9. An election or choice made by the predecessor State in regard to parts of the treaty would continue to apply in respect of the same territory, subject only to an express statement to the contrary by the successor State, as indicated in paragraphs 2 and 3.

13. He fully supported the Special Rapporteur’s text for article 10, but would suggest that, on the lines of article 17 of the Vienna Convention on the Law of Treaties, it might be slightly expanded to include some such clause as “without prejudice to the reservations expressed in article 9”.

14. Mr. SETTE CÂMARA said that article 10 dealt with cases of the partial application of treaties arising from sources other than unilateral reservations. Those were the cases referred to in article 17 of the Vienna Convention, in which the treaty itself permitted the parties to be bound by only part of its text. In such cases it was only normal for the parties to choose the provisions by which they would be bound.

15. Article 10 was in conformity with sound logic. It established the presumption that the new State availed itself of the faculty of notifying succession to participation in the treaty on the same footing as the predecessor State. That presumption was established for the benefit of both the successor State and the other parties to the treaty, which shared the same interest in its continuity. At the same time, however, the succession should not, as the Special Rapporteur had pointed out in paragraph (9) of his commentary, be conceived of as “an automatic stepping into the shoes of the predecessor” but rather as “an option to continue the territory’s participation in the treaty by an act of will establishing consent to be bound”.

16. Paragraph 2 preserved the absolute freedom of the successor State to make its own election in respect of parts of the treaty, or its own choice between differing provisions of the treaty, if it so chose, provided always that the treaty itself admitted partial application. Paragraph 3 placed the new State on the same footing as the other parties in regard to the exercise of any right provided for in the treaty to withdraw or modify any such election or choice.

17. The Special Rapporteur’s text preserved the decisive element in treaty making, namely, the will of the party, in the present case the new State, which should be free either to accept the partial application of the treaty as it had been accepted by its predecessor State, or to establish its own election and choice of the provisions by which it intended to be bound upon notifying its succession. Article 10 followed faithfully the philosophy of the draft articles as a whole, and he had no difficulty in supporting it.

18. Mr. BARTOS said he congratulated the Special Rapporteur on the wisdom of his proposals, which, in article 10, were presented even more clearly than in previous articles. The general presumption in favour of continuity, as stated in paragraph 1, was perfectly correct.

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In paragraph 2 the opposite presumption—that the successor State might, after notifying its succession, declare its own election or choice irrespective of or even contrary to that of the predecessor State—freed the new State of any restriction which might have been imposed on it by the will of the predecessor State under the terms of the treaty. In other words, the new State was free to consider itself an original party to the treaty without, however, having the right to infringe its provisions.

19. Paragraph 3 served a useful purpose. It was well to emphasize that the successor State was bound by prior elections and choices, but was free to withdraw or modify them on the same conditions as the other parties—always within the limits laid down by the treaty itself. Article 10 was of very great importance for States created by decolonization; their right not to be bound by the decisions of the predecessor State appeared even more clearly from article 10 than from the preceding articles.

20. Mr. YASSEN said that article 10 was well balanced. The presumption in paragraph 1 that a State which notified its succession accepted the treaty as bequeathed to it by its predecessor, that was to say, together with the choices and elections made by the predecessor, was reasonable. The faculty of modifying the elections and choices, provided for in paragraph 2, was well-founded. Indeed, any new State should be able to adapt its contractual situation to its particular circumstances. Lastly, by placing the new State on an equal footing with the other parties to the treaty, paragraph 3 rightly abolished a privilege which was no longer justified. Article 10 as a whole was therefore entirely acceptable.

21. Mr. AGO said that he supported the spirit and content of article 10 unreservedly, but would like the wording to be modelled on that of article 17 of the Vienna Convention on the Law of Treaties.

22. Mr. HAM BRO said he had no criticism whatever of article 10 as presented by the Special Rapporteur.

23. Mr. USHAKOV said that the absence of any reference in article 10 to the agreement of the other contracting parties, which was provided for in article 17 of the Vienna Convention on the Law of Treaties, showed that article 10 related only to general, not to restricted multilateral treaties. Perhaps the words “if the treaty so permits” should nevertheless be inserted, as in article 17 of the Vienna Convention.

24. He saw no reason for choosing to interpret the silence of a State when it was possible to be explicit. Consequently, he could not accept paragraph 1. There was nothing to prevent a State from declaring its intentions clearly when it notified its succession.

25. Mr. NAGENDRA SINGH said that in general he agreed with the text presented by the Special Rapporteur, although, as Mr. Ushakov had pointed out, silence should not be taken as consent and perhaps some more precise formulation would be an improvement.

26. Mr. USTOR said that the main rule in article 10 seemed to be stated in paragraph 2, which provided that the new State was free to follow its predecessor’s choice or not, as it saw fit. Since that was obviously the main rule, and since paragraph 1 stated what was rather an exception to it, he suggested that the order of paragraphs 1 and 2 be reversed.

27. Mr. TSURUOKA said he agreed with Mr. Ustor. When considering article 9, the Drafting Committee would certainly take the point into account.

28. Sir Humphrey WALDOCK (Special Rapporteur), referring to Mr. Ustor’s suggestion, said that he had placed paragraph 1 first because that order made it more plausible to accept article 10 as part of the law of succession. If paragraph 2 had been placed first, it would have stood out as a rather abrupt departure from all notions of succession.

29. It had been argued that the new State should make its own choice of the part or provision of the treaty by which it proposed to be bound, but it would be a mistake to imagine that a new State would always do that. It would naturally assume that it was notifying its succession to the treaty as the treaty had applied to its territory prior to its independence.

30. On balance, therefore, he thought that he had been correct in first expressing article 10 in terms of succession and thus giving the new State the necessary freedom with respect to its election or choice. Once that had been done, the new State, as Mr. Yassen had said, should no longer be in a privileged position.

31. He agreed that the Drafting Committee should consider the possibility of including some such clause as “without prejudice to the provisions regarding reservations contained in article 9”, which would be analogous to article 17, paragraph 1, of the Vienna Convention.

32. Mr. USHAKOV said he did not share the view that silence was the primary element in the succession. On the contrary, he thought the primary element was the notification of succession, in other words, the possibility of becoming a party by notification and not by some other procedure. That was why he considered that paragraph 1 was not the key provision of either article 10 or article 9.

33. Sir Humphrey WALDOCK (Special Rapporteur) said he could agree that the new State succeeded to a right of notification, but the whole question in article 10 was what, precisely, the new State’s notification of succession related to.

34. Mr. BARTOS said that, like Mr. Ushakov, he thought the essential element was succession proper, provided it was associated with the possibility of an expression of will, failing which the succession would be automatic and definitive.

35. The Special Rapporteur had proposed two paragraphs which allowed the successor State to make the declarations needed to establish the conditions of succession; the situation was rather like succession under beneficium inventories in civil law. Succession remained the essential element; the difference lay in succession with or without conditions.

36. Mr. NAGENDRA SINGH said he wished to make it clear that he agreed with Mr. Ushakov that silence should not be taken as signifying consent in questions of notification.
37. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 10 to the Drafting Committee.

* It was so agreed.*

ARTICLE 11

38. Procedure for notifying succession in respect of a multilateral treaty

1. A notification of succession in respect of a multilateral treaty made under article 7 or 8 shall be in writing and shall be transmitted by the new State to the depositary, or if there is no depositary, to all the parties or, as the case may be, to all the contracting States.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State transmitting it may be called upon to produce full powers.*

39. The CHAIRMAN invited the Special Rapporteur to introduce article 11 of his draft (A/CN.4/224/Add.1).

40. Sir Humphrey WALDOCK (Special Rapporteur) said he wished first to draw attention to the definition given in the new text of article 1, sub-paragraph (f), which read: "Notify succession" and 'notification of succession' mean in relation to a treaty any notification or communication made by a successor State whereby on the basis of its predecessor's status as a party, contracting State or signatory to a multilateral treaty, it expresses its consent to be bound by the treaty". There might be some difficulty about the interpretation of the words "consent to be bound" until the Commission had taken a decision on the question of succession in respect of signature, but for the time being that was a matter which could be left to the Drafting Committee.

41. Article 11 attempted to state the formalities which were required for notification. Paragraph I provided that such notification should be in writing and should "be transmitted by the new State to the depositary, or if there is no depositary, to all the parties or, as the case may be, to all the contracting States". The words "contracting States", which followed the language used in the Vienna Convention, were designed to cover cases in which the treaty was not yet in force.

42. Paragraph 2 dealt with the question of the proof of authority to make the notification; it provided that, if the notification was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State transmitting it "may be called upon to produce full powers". Whether the latter requirement was too strict might conceivably be a matter for discussion, but some safeguards were obviously needed by the depositary; he believed that that requirement reflected the practice of the Secretary-General as depositary and was desirable.

43. In drafting the article, he had been mainly guided by article 67 of the Vienna Convention, on instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. The context was admittedly different in the two cases, but the problems of providing safeguards for the depositary was the same.

44. Mr. USHAKOV said that article 11 was not as simple as it appeared. In the first place, articles 9 and 10 were not mentioned, which raised a question of interpretation.

45. Secondly, the article was presumably applicable to general multilateral treaties as well as restricted multilateral treaties. And since it provided that the notification of succession should be transmitted to the depositary, the obligations of the depositary should have been stated. It was not sufficient in the present case to apply the provisions of the Vienna Convention, which, moreover, referred to cases other than succession.

46. The article also provided that if there was no depositary, the notification should be transmitted to all the parties. That provision obviously applied only in the case of restricted multilateral treaties, but it nevertheless raised the problem of the date of the succession, not to mention that it would be well to say what attitude the other parties might adopt.

47. In his view, it was always necessary to draft separate provisions for general multilateral treaties and restricted multilateral treaties. As it stood, article 11 was only the embryo of what it should be.

48. Mr. SETTE CÂMARA said he supported the text proposed by the Special Rapporteur for article 11, which, by requiring the notification to be made in writing, established the minimum degree of formality that should be observed by any new State assuming the obligations of a treaty concluded by its predecessor. Oral agreements had been declared to be outside the scope of the Vienna Convention, and obviously could not be included in the present case. The practice of some depositaries, who were prepared to accept notification even by cable, seemed very liberal, but the Special Rapporteur had acted wisely in insisting on the written form.

49. Paragraph 2, by requiring the representative of the State transmitting the notification to produce full powers if it was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, also established the necessary minimum degree of formality.

50. Sir Humphrey WALDOCK (Special Rapporteur) replying to Mr. Ushakov, said he had repeatedly accepted that it was necessary to include a provision on restricted multilateral treaties. Article 11, however, dealt with a relatively narrow point and there seemed to be no need to refer to articles 9 or 10.

51. He thought that it would be a mistake to state in article 11 the exact steps which should be taken by the depositary, since the latter could normally be relied on to do what was expected of it.

52. Mr. USHAKOV said that despite the existence of the Vienna Convention and its provisions on the obligations of depositaries in general, a great many treaties contained special clauses on the subject. It would be a pity to sacrifice precision for the sake of brevity.

53. Sir Humphrey WALDOCK (Special Rapporteur) said he could not agree with Mr. Ushakov's argument,
since the final clauses even of the Vienna Convention contained nothing about the duties of depositaries. It was not normal in the final clauses of a treaty to include references to the duties of the depositary with respect to many of the acts, e.g. notices of termination, which affected the operation of the treaty, unless there were special reasons for doing so. Articles 76, 77 and 78 of the Vienna Convention stated what was accepted as the general law concerning the functions and duties of depositaries and it should be enough to rely on those articles.

54. The CHAIRMAN, speaking as a member of the Commission, said that there was generally some such clause in certain unusual treaties, such as nuclear limitation treaties, for which there was a number of depositaries.

55. Sir Humphrey WALDOCK (Special Rapporteur) said that in article 11 he had thought it right to follow the general practice of the Commission.

56. Mr. RUDA said he was in full agreement with article 11, though he thought that in its commentary to the article, the Commission should make it clear that only the competent authorities of a new State should be entitled to commit the State with respect to the notification of succession.

57. The CHAIRMAN said that, if there were no objection, he would take that the Commission agreed to refer article 11 to the Drafting Committee.

It was so agreed.  

ARTICLE 12

58. 

Article 12

Legal effects of a notification of succession in respect of a multilateral treaty

1. A notification of succession establishes the consent of a new State to be bound by a multilateral treaty:

(a) If there is a depositary, upon its receipt by the depositary;

(b) If there is no depositary, upon its receipt by each party or, as the case may be, contracting State.

2. When, in conformity with paragraph 1, the consent of a State to be bound by a treaty is established:

(a) On a date before the treaty has come into force, the treaty enters into force in accordance with article 24, paragraphs 1 and 2, of the Vienna Convention and article 8, paragraph 2, of the present articles;

(b) On a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

3. In a case falling under paragraph 2 (b), the provisions of the treaty bind the new State in relation to any act or fact which takes place or any situation which exists after the date of the succession, unless an intention that they should be binding upon it from an earlier date appears from the treaty or the notification or is otherwise established.

59. The CHAIRMAN invited the Special Rapporteur to introduce article 12 of his draft (A/CN.4/224/Add.1).

60. Sir Humphrey WALDOCK (Special Rapporteur) said that the provisions of article 12 covered a number of different points, some of them complex. It might therefore ultimately prove desirable to separate them, for example, by making paragraph 3 into a separate article.

61. The rules on the legal effects of a notification of succession to a multilateral treaty, as set out in the article, took account of the provisions of article 78 (Notifications and communications), article 16 (Exchange or deposit of instruments of ratification, acceptance, approval or accession), article 24 (Entry in force) and article 28 (Non-retroactivity of treaties) of the Vienna Convention on the Law of Treaties, as explained in paragraph (1) of the commentary.

62. With regard to the reference in paragraph 2 (a) to certain of those provisions, on reflexion he thought it might be preferable to set out clearly the rules contained in article 24, paragraphs 1 and 2 of the Vienna Convention. The mention of article 8, paragraph 2 of the draft was not absolutely necessary and could perhaps be dropped. The Drafting Committee would no doubt consider those questions.

63. Paragraph 1 stated the rule that a notification of succession to a multilateral treaty took effect from the moment when it was received by the depositary or, where there was no depositary, by each party or contracting State. That rule was based directly on the provisions or article 16 of the Vienna Convention.

64. Paragraph 2, on entry into force, was similarly based on the relevant provisions of the Vienna Convention.

65. Paragraph 3 dealt with the very difficult question of the temporal aspect of the effects of a notification in a case falling under paragraph 2 (b). The Commission would have to decide whether it wished to adopt the rule in paragraph 3, which allowed the new State to express an intention to vary the date on which the treaty would be effectively binding upon it. The rule was that the treaty operated from the date of succession, that was to say, the date on which the new State had attained its independence, unless if was clearly the intention of the new State to bind itself from a different date.

66. In the commentary to the article, he had given details of the practice of States. It was not at all uncommon for a new State to declare its intention to regard the treaty as applying uninterruptedly in its territory as from the date when it had been extended to that territory by the predecessor State. Examples of that type of declaration were given in paragraph (11) of the commentary.

67. The question also arose whether to apply to a notification of succession, by analogy, a treaty provision prescribing a period of delay for entry into force—which might sometimes be several months—after the deposit of an instrument of ratification, accession, acceptance or approval. On the basis of existing practice, that question should be answered in the negative: a new State should be considered as having been a party to the treaty from the date of independence, regardless of any such period of delay that might be specified in the treaty for cases of ratification, etc. Clauses of that kind should be regarded as inapplicable, because the right of the new
State derived from succession and not from the treaty itself.

68. Mr. USHAKOV said that article 12 raised questions both of form and of substance.

69. As far as the form was concerned, he noted once again that the method of drafting by reference was unsatisfactory. Paragraph 2 (a) referred to the first two paragraphs of article 24 of the Vienna Convention, which concerned "the negotiating States", not the new State notifying its succession, which had not, of course, taken part in the negotiation of the treaty.

70. The last clause of paragraph 3 contained the expression "an earlier date". If it was a date prior to the succession that the Special Rapporteur had in mind, that clause was not acceptable, since the new State had not existed before the succession.

71. In paragraph 1 (b), it should be made clear who was to determine that each party had received the notification of succession and how that fact was to be established.

72. As to the substance, article 12 was intended to regulate the legal effects of a notification of succession. But the article should deal only with the date of entry into force of a multilateral treaty for the successor State; the legal effects should already have been set out in the substantive provisions relating to notification, namely, articles 7 and 8.

73. Both article 12 and the preceding articles had been drafted only from the standpoint of the new State; they did not state the consequences of a notification of succession for the other parties to the treaty. In the case of a general multilateral treaty, not only the new State, but all the other States parties to the treaty were automatically bound. In the case of a restricted multilateral treaty, on the other hand, the other parties had to consent to be bound by the treaty. Consequently, he must once again stress the need to devote separate articles to restricted multilateral treaties and general multilateral treaties.

74. Mr. BEDJAOUI said that, in principle, he supported the Special Rapporteur's proposed text for article 12. The questions it dealt with were very complex and could be summarized in the following terms: in the case of a treaty already in force, legal rights and obligations came into existence only on receipt of the notification by the successor State, whereas if the treaty was not yet in force, the successor State was in the same situation as the other State. In the latter case, article 8, paragraph 2, of the draft was applicable.

75. When a treaty provided for a certain period of delay, that period should not be enforceable against the successor State, because its right to become a party derived from the succession, not from the treaty. On that point, he fully agreed with the Special Rapporteur.

76. In paragraph (7) and the following paragraphs of his commentary the Special Rapporteur mentioned various dates which might be adopted as the date of entry in force of a multilateral treaty for a successor State. The successor State might be considered as bound by the treaty from the date on which it had been extended to its territory by the predecessor State, that was to say prior to its own existence, or from the date of its accession to independence, the date of its admission to an international organization or the date of its notification of succession.

77. All such questions of applicability depended on the intention of the parties and, principally, on that of the successor State. In order to avoid going into unnecessary detail, he suggested the following wording: "Failing the establishment of any contrary intention, the treaty applies from the date of notification of the succession".

78. The CHAIRMAN asked the Special Rapporteur whether the words "the date of the succession", in paragraph 3, were to be interpreted as meaning "succession of the State" or "succession to the treaty".

79. Sir Humphrey WALDOCK (Special Rapporteur) said that, in accordance with the provisions of subparagraph (a) of article 1 (Use of terms), the term "succession" had to be construed as meaning the fact of the replacement of one State by another in the competence to conclude treaties with respect to a given territory. He realised that, in the present context, and in view of the meaning attached to the term "notification of succession", the language was somewhat ambiguous. The Drafting Committee would no doubt try to clarify that point.

80. Mr. REUTER said that article 12 went to the heart of the problem. As Mr. Ushakov had observed, it did not just fix the date of entry into force of a multilateral treaty for a new State. By explaining that certain provisions of a treaty could be overridden because the situation was considered from the standpoint of succession to a treaty rather than from that of the general law of treaties, the Special Rapporteur had conveyed that article 12 dealt with the effects of succession.

81. On several occasions Mr. Ago had said that the proposed convention would be pointless unless differences were established between the fact of becoming a party to a treaty by means of succession and the fact of becoming a party under thegeneral law of treaties. The simplified wording proposed by Mr. Bedjaoui, which disregarded that distinction, would be open to criticism. Personally, he saw no objection to succession to a treaty taking place despite certain provisions of that treaty, but the Commission had not yet taken a final position on the respective roles of the law of treaties and the law of succession.

82. As Mr. Ushakov had pointed out, it was important to decide in which article the legal effects of a notification of succession should be set out. The last clause of paragraph 3 of article 12 referred to a number of legal sources: the treaty, the notification, and an intention "otherwise established" which, the Special Rapporteur had explained, meant a private agreement between the parties. In his opinion it was impossible to refer to the treaty as a legal source and at the same time set aside some of its provisions.

83. It appeared from article 7, sub-paragraph (c) that a new State could not simply notify the parties to a restricted multilateral treaty that it considered itself to be...
a party to that treaty; the consent of all the parties was also necessary. That was probably the case which the concluding phrase in article 12 was intended to cover. If that was so, the article concerned not only the legal effects of a notification, as its title indicated, but also the legal effects of the consent of all the parties.

84. Those members of the Commission who wished to set aside certain rules of the treaty because the draft dealt with succession should make it clear whether what they had in mind was the rules relating to the group of States which might become parties to the treaty when it took legal effect, or the rules relating to the rights of third States. For if mere notification could change the date when the treaty produced legal effects, as it would appear from the end of paragraph 3, the notification would have a certain retroactive effect which could be prejudicial to third States. Although that consequence was acceptable in certain cases, particularly cases of decolonization, it called for caution in others.

85. He hoped the Commission would make it clear whether article 12 should deal with dates or legal effects and that in all cases it would give very precise directions, without which the provision might give rise to serious difficulties.

86. Mr. Rossides said that paragraphs 1 and 2 of article 12 did not give rise to any special problems. The difficulties arose with regard to the provisions of paragraph 3, taken in conjunction with those of paragraph 2 (b).

87. There were three important dates to be considered: the first was the date of entry into force of the treaty itself; the second was the date of the succession, or the attainment of independence by the new State; the third was the date of notification by the new State of its consent to be bound by the treaty.

88. He noted that the great majority of members of the Commission were of the opinion that the new State should be bound only by its own act of notification. It would have been logical to consider that such a notification did not have retroactive effect. Nevertheless, it was proposed, in paragraph 3, to give it such effect if the new State so wished. Personally, he would be prepared to accept that retroactive effect as stated in the first part of paragraph 3, ending with the words “or any situation which exists after the date of succession”; but he had misgivings about the concluding proviso: “unless an intention that they should be binding upon it from an earlier date appears...”. Did “earlier date”, in that context, mean the date of entry into force of the treaty?

89. Sir Humphrey Waldock (Special Rapporteur) said that in drafting the rules in article 12 he had, as usual, based himself on the existing practice. There were in fact cases of notifications of succession that had been made expressly effective as from a particular date, usually later than the date of succession. In a few cases, the new State had declared its intention to accept responsibility for the application of the treaty as from a date earlier than the date of succession. Declarations of that kind were, for example, to be found in connexion with such conventions as that for the Protection of Literary and Artistic Works, mentioned in paragraph (11) of his commentary.

90. In such situations he saw no need to set aside the clearly expressed intention of a new State on the logical argument that it had not been in existence prior to independence. The case was one of succession to obligations and rights arising from a treaty.

91. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the underlying philosophy of paragraph 3, which accorded with the Commission’s general position on succession. At the same time, he realized that the provisions of that paragraph raised a number of questions with regard to the other parties to a multilateral treaty. One of them was the question of the obligations, if any, incumbent upon the depositary and the other parties to the multilateral treaty during the period which preceded a notification of succession with retroactive effect. Would the depositary be obliged to send all notifications relating to the treaty to the successor State in expectation of a possible notification of succession with retroactive effect?

92. For the other parties to a multilateral treaty, the question arose whether they were under an obligation not to take any action that might hinder the new State from becoming a party to the treaty. Were those parties under an obligation of good faith of the kind provided for in article 18 of the Vienna Convention on the Law of Treaties?

93. His own feeling was that it would be going too far to impose such obligations on the parties for an unlimited time. The new State should be given a reasonable time-limit in which to take advantage of the provisions of paragraph 3. If it made a notification of succession within, say, twelve months, it would be allowed to give the notification retroactive effect and could then invoke the rule of non-frustration against the States parties to the treaty. If, on the other hand, the new State allowed that period to elapse, it would no longer enjoy the rights set forth in article 12 and could then only make a declaration of accession of the ordinary kind; an accession by a new State would not, of course, involve all the problems that arose with regard to a declaration of succession under article 12.

The meeting rose at 1 p.m.

1169th MEETING

Wednesday, 31 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bedjoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramgosaovina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
Succession of States in respect of treaties

[Item 1 (a) of the agenda]
(continued)

ARTICLE 12 (Legal effects of a notification of succession in respect of a multilateral treaty) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 12 of the Special Rapporteur’s draft (A/CN.4/224/Add.1).

2. Mr. YASSEEN said he was quite satisfied with article 12, which was based on the Vienna Convention on the Law of Treaties.³ The provisions of the article were logical with regard both to the date when the consent of the new State to be bound by the multilateral treaty was established and to the date when the treaty entered into force for the new State.

3. He had some doubts, however, about the interpretation to be given to the words “after the date of the succession” in paragraph 3. That paragraph provided that, in the absence of any contrary intention, “the provisions of the treaty bind the new State in relation to any act or fact which takes place or any situation which exists after the date of the succession”. It seemed that the Special Rapporteur had wished to express the general principle of non-retroactivity, while providing for the possibility of exceptions. If that was the case, the term “succession” should not be understood as defined in article 1,² that was to say, as corresponding to the date of independence, but from the standpoint of succession to the treaty, that was to say, as from the date of entry into force of the treaty for the new State. The period between those two dates could be the subject of an exception to the principle of non-retroactivity.

4. That interpretation appeared to be the inescapable; it was based on the intention of the parties to derogate, in a particular case, from the principle of non-retroactivity. The precise meaning of “succession” as the term was used in paragraph 3 should therefore be clarified.

5. Mr. RUDA said that article 12 was one of the most important in the whole draft and a particularly delicate one. Paragraph 1, on the form in which consent to be bound was established, did not raise any problem; nor did the general principle stated in paragraph 2 (a), on the date on which consent was established.

6. Paragraph 2 (b) embodied a very important principle; it laid down that the treaty entered into force for the new State on the date of notification of its succession. That principle was in full accord with the principle underlying article 7, on the right of a new State to notify its succession in respect of multilateral treaties.

7. That brought him to the crucial question raised by paragraph 3, which made it possible, where the treaty entered into force on the date of notification, for the new State to make the treaty operative for itself from an earlier date. That right was granted to the new State not by virtue of the general law of treaties, but by virtue of the right of succession and the principle of continuity on which it was based. Article 28 of the Vienna Convention on the Law of Treaties laid down the principle of non-retroactivity of treaties, but that principle was appropriately set aside in the present case because the right of the new State derived from the law of succession and not from the law of treaties.

8. The Commission had reached a cross-roads. In article 7 ⁴ it had agreed to give the new State the right to become a party to a multilateral treaty independently of the consent of the other parties; by the same token, it should accept the rule in paragraph 3 of article 12 that the new State had the right to give its notification of succession retroactive effect so that it operated from the date of attaining independence.

9. No practical problems were involved. If the new States did not wish to be bound as from the date of its independence, it could in most cases elect to accede to the treaty instead of notifying succession. In that event, article 28 of the Vienna Convention would apply and there would be no retroactive effect, except by agreement of the parties.

10. He supported the solution embodied in paragraph 3 as being logically correct in addition to being based on a solid body of consistent practice.

11. Mr. TSURUOKA said he noted from the last clause of paragraph 3 that the intention established by the successor State was sufficient to make the treaty applicable retroactively. In view of the importance of the legal effects attaching to that establishment of intention, he thought that it should be permitted only during a certain period and suggested that the Commission set a time-limit.

12. Mr. ROSSIDES said he could not agree that the words “the date of the succession” in paragraph 3 could mean anything else than the date of independence. Only that interpretation would be consistent with the meaning attached to the term “succession” in article 1 (Use of terms).

13. During the discussion on article 7, he had stressed the need for continuity in cases of notification of succession. Unless a retroactive effect was attached to that notification so that the treaty became binding as from the date of independence, the new State would be enjoying an unlimited right of accession.⁵ He therefore agreed with the views expressed by Mr. Ruda.

14. Mr. YASSEEN said that the reason why he had doubts about the meaning of the term “succession” as used in paragraph 3 was that he saw a contradiction between the rule stated in paragraph 2 (b), under which the treaty entered into force for the successor State on the date on which its consent to be bound was established, and the rule in the first part of paragraph 3, under which

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¹ For text see previous meeting, para. 58.
⁵ See 1165th meeting, para. 29.
the provisions of the treaty bound the State from the date of the succession. If the words "date of the succession" meant the date of attaining independence, that date would generally be earlier than the date referred to in paragraph 2 (b), namely, the date of entry into force of the treaty for the new State. There would then be retroactive application of the treaty, which was the case covered by the last clause of paragraph 3.

15. Mr. QUENTIN-BAXTER said he supported article 12 as drafted by the Special Rapporteur. He also agreed that, in adopting that article, the Commission would be acting on a principle of succession; and continuity of obligation was of the very essence of that principle.

16. Some of the difficulties which had emerged during the discussion arose from a drafting problem. In article 1 (Use of terms), sub-paragraph (a) specified that the term "succession" was used as meaning the simple fact of replacement of one State by another in the competence to conclude treaties with respect to a given territory. In sub-paragraph (f), on the other hand, the terms "notifying succession" and "notification of succession" were stated to mean "any notification or communication made by a successor State" whereby it expressed its consent to be bound by the treaty"; in that paragraph, the term "succession" was thus used as implying a transfer of rights and obligations.

17. In article 12, however, he did not think there was in any sense a real conflict between the provisions of paragraphs 2 and 3 and the different points of time at which they operated. Article 7 established the right of the new State to become a party to the treaty if it so desired, and it also established that the right in question was a right of succession. It therefore followed that, as stated in article 12, a notification of succession should take effect as from the date of independence, unless the notification—and the acceptance by the other parties—proved a contrary intention. In that context, the consent of the other States concerned meant their agreement that the case was in fact one of succession.

18. It was also important to remember the relationship of the provisions of article 12 with those of article 4 on provisional application. In most cases, the new State would be applying the treaty on a provisional basis. But if and only if it ultimately decided that it did not wish to become a party to the treaty, it ceased to be bound by it and no serious problems arose. But if the new State made it clear that it was honouring the treaty, the other parties would be bound by it, unless they had rejected the provisional application of the treaty in the first place.

19. In that connexion, he was very sceptical of the idea of a time-limit. The international community had lived very well without a time-limit in a period during which there had been a much greater incidence of succession than was likely to occur in the future. In practice, a declaration of provisional application by a successor State under paragraph 2 of article 4 would give an indication of that State's wish ultimately to become a party. In some cases, it would not matter if the acts mentioned in article 12 did not take place for a long time. In other cases, where it did matter, the States concerned could always inquire about the intentions of the new State. Such had been the practice so far and there was every reason to encourage a similar practice in the future.

20. Mr. BEDJAOU said it was necessary for the Commission to take a clear position on the notion of continuity in State succession. That was a decisive factor for both sets of draft articles now being prepared on the subject.

21. For his part, he thought that, in the case of treaties, continuity derived from the right which article 7 conferred on the new State. That right was manifested by a notification of succession, associated with the freedom of the new State to arrange the modalities of its conventional legal ties, particularly those taking the form of reservations or elections. There was accordingly no continuity without the exercise of that right and without the complementing consent of the other States; but the successor State was free to choose retroactivity or non-retroactivity of the treaty. It followed that the effective application of a treaty immediately after the creation of a State depended not on a customary rule, but on the expressed will of that State and of the other States parties to the treaty. Under those conditions, there could be no presumption of continuity or retroactivity.

22. In short, the continued application of a treaty to the territory of the successor State required, in addition to the consent of the other States, either an express declaration by the successor State or the establishment of its will as deduced from its acts or conduct; otherwise continuity would not be presumed.

23. Personally, he was in favour of the principle of non-retroactivity of treaties, as stated in article 28 of the Vienna Convention. Retroactivity could, of course, be presumed, as an exception to that principle, in the special case where a new State notified its succession under article 7. But uncertainty would persist until the new State had expressed its will, and it might ultimately refuse to consider itself bound by the treaty. He therefore hoped the Commission would not introduce the concept of retroactivity into the draft.

24. For the rest, article 12 was acceptable, provided that the words "after the date of succession" meant "after the date of the notification".

25. Mr. NAGENDRA SINGH said that no problem arose with regard to paragraphs 1 and 2 (a) of article 12. On the question of retroactivity in the application of paragraphs 2 (b) and 3, he thought that those provisions conformed with the approach adopted in article 28 of the Vienna Convention. Under that article, retroactivity was not totally barred; sovereign States could give a treaty retroactive effect by clearly expressing their intention to do so; the words "or is otherwise established" made that clear.

26. Paragraph 3 needed clarification, particularly the meaning of the words "after the date of succession". In view of the overriding importance of the principle of consent, a new State should be allowed to decide the...
exact point of time at which it wished to be bound by a treaty. It should have the right to choose between three different dates: the date of independence, the date of the notification of succession, and the date of the ratification of the treaty by the predecessor State. The first and third of those possibilities were clearly covered by the terms of paragraph 3. The wording should be adjusted so as to make it clear that the new State also had the option of declaring itself bound only as from the date of notification. That might somewhat upset the concept of succession, which would call for a link with the date of independence or succession. However, succession in personal law must necessarily differ from the succession of sovereign States.

27. Mr. USHAKOV said that the presumption of retroactivity was not a subject for general discussion, because it did not apply equally to all cases of State succession. When States merged, it could be presumed that a treaty continued to apply without interruption, whereas in cases of decolonization or separation, the criterion must be the intention established by the new State. It was therefore important to deal with each type of State succession separately.

28. Mr. AGO, after explaining that he was concerned only with cases of State succession due to decolonization or secession, drew attention to the special meaning of the term “succession” in the current discussion on article 12. That article dealt with an exceptional mode of participation in a multilateral treaty, namely, “notification of succession” by a new State, which had the effect of making a certain treaty binding between the new State and the other States parties to the treaty.

29. For that effect to be retroactive, for example with respect to reservations, was inconceivable. For under article 9, the new State could withdraw the reservations made by its predecessor, and some believed that it could even make other reservations. Hence third States could not know what their position vis-à-vis the new State would be so long as the new State had not expressed its intentions.

30. Hence it was important to follow the principle that the rights and obligations of the new State and of third States came into being only from the time when their consent was established, that was to say, from the time of notification of succession.

31. Mr. YASSEEN said it was in the interests of the successor State to be bound, not from the date of its independence, but from the date of its notification of succession. He therefore suggested that in paragraph 3 the words “after the date of the succession” should be replaced by the words “after the date of the notification”.

32. Sir Humphrey WALDOCK (Special Rapporteur) said it was necessary for the Commission to take a stand on the question of the temporal aspect of the legal effects of notification. That question involved, of course, a number of subsidiary problems which were not dealt with in article 12, but it was a fundamental question with regard to the provisions now under discussion.

33. When the Commission had discussed succession in respect of reservations (article 9) and in respect of an election to be bound by part of a multilateral treaty or of a choice between differing provisions (article 10), it had been agreed that when a State deliberately made a notification of succession, it was performing an act different from accession. The presumed intention of the notifying State was to maintain the position of its predecessor; it therefore stepped into the shoes of the predecessor State with regard to reservations, election or choice.

34. The position should accordingly be the same with regard to article 12. A new State often had very important reasons to prefer a notification of succession to an accession. The implications of the two acts could be very different as far as their repercussions on municipal law were concerned. Certain treaties created rights and obligations for individuals and it might be important for the new State to ensure the continuity in municipal law of those rights and obligations by making a declaration of succession.

35. The existing practice in the matter was quite consistent. The effects of a notification of succession dated back to independence unless a different intention appeared. If the rule were now to be altered so that the notification produced its effects only from its own date, the result would be to reverse the present understanding as to the applicable rule.

36. As far as the terminology was concerned, he was becoming more and more convinced that it would not be possible in the present draft to use the term “succession” by itself. Two different expressions would have to be used for the terms defined in sub-paragraphs (a) and (f) of article 1. The fact of the replacement of one State by another in the sovereignty of territory, to which the first of those sub-paragraphs referred, should perhaps be called “succession of States”; in sub-paragraph (f), on the other hand, the word “succession” should be replaced by words such as “succession to a treaty”. That change in terminology would make it possible to keep apart the two ideas of factual replacement and transfer of treaty rights and obligations.

37. A number of subsidiary problems also arose. The first was that of a possible interim régime covering the rights and duties of other States parties to the treaty before notice of succession was given. That problem was much more difficult in the case of bilateral treaties than in that of multilateral treaties. In the case of multilateral treaties the existence of a depository who received notifications and made communications relating to the treaty made it possible to clarify the position. In the case of a bilateral treaty, it was often uncertain whether a particular declaration or act constituted an acceptance of continuity or merely a provisional arrangement.

38. The question of a possible time-limit was, of course, particularly relevant to the present discussion. One solution would be to introduce de lege ferenda a rule whereby retroactivity would be allowed only if notification of succession took place within a specified period. The rule would be an entirely new one because there was nothing in contemporary State practice which evidenced such a rule.

39. As to the suggestion that the operative date should be the date of notification, he thought it would defeat the principle on which several of the draft articles were
based. The Commission could nevertheless adopt that suggestion, provided it did so clearly. The present case was one in which it was essential above all to have a clear rule one way or the other, so that States would know how to act in a particular case.

40. Mr. USHAKOV observed that the practice cited by the Special Rapporteur related solely to decolonization and applied mainly to general multilateral treaties. It was necessary to consider other cases of States succession too, particularly fusion and separation, and to deal separately with restricted multilateral treaties.

41. Sir Humphrey WALDOCK (Special Rapporteur) said that article 12, like the previous articles in Part II, was based on a certain concept of the “new State”, which was set out in sub-paragraph (e) of article 1. Those articles did not deal with other cases of succession, such as fusion. He was preparing draft articles on those cases and would submit them to the Commission, together with an account of the State practice in the matter. The Commission would then have to decide whether, in the case of fusion, the rule of continuity operated ipso jure or by consent. The same issue would arise with regard to cases of separation or dismemberment of States and dissolution of unions.

42. Lastly, he wished to confirm the statement he had made during the discussion of certain other articles, that it would be necessary to frame special provisions on restricted multilateral treaties. The reservation relating to that type of treaty contained in sub-paragraph (c) of article 7 would not be sufficient to cover the subject. A clearer distinction would have to be drawn between restricted multilateral treaties and other multilateral treaties.

43. Mr. AGO said that the new State should not be left free to declare itself bound either from the date of independence or from the date of its notification of succession. If it were, the position of third States would remain uncertain as long as the new State had not expressed its will. Subsequently, the successor State might accuse a third State of having committed an internationally wrongful act by not complying with the treaty during the period between the birth of the new State and the date of notification.

44. The practice of States, on which the Special Rapporteur had based himself, had been formed from particular cases. He hesitated to consider it definitive and thought that in all cases the position of third States should be safeguarded, so that it would not depend solely on the will of the successor State.

45. Mr. BEDJAOUI said that current practice revealed a concomitance of conduct on the part of the successor State and third States which resulted in the treaty being maintained in force. That situation should be distinguished from retroactivity deriving from notification of succession.

46. The Commission could therefore refrain from mentioning retroactivity and simply provide that notification of succession following a parallel course of conduct by the successor State and third States confirmed the practice reflected by that conduct.

47. On the other hand, to accept a general presumption of retroactivity would be to exclude the case in which a successor State refused to consider itself bound by the treaty and the case in which third States did not desire to bind themselves with the successor State. An example of the latter case was given in paragraph (12) of the commentary to article 13 (A/CN.4/249). The practice certainly afforded several examples of non-application of the presumption of continuity and the rule of retroactivity.

48. Sir Humphrey WALDOCK (Special Rapporteur) said that it was really a question of determining the date on which notification took effect for the successor State as far as its obligations and rights were concerned.

49. The problem was not so much that of retroactivity as that of a deliberate choice made by the new State concerned in accordance with customary international law. It was not a question of presumption: the new State made a deliberate choice. A declaration of succession would sometimes indicate the date from which it was intended to take effect; but in the absence of any such indication, its intention was taken to be that the notification should take effect from the date of independence, not from the date on which the notification was made. That was the assumption on which the relevant entries had been made in the Secretariat publication Multilateral treaties in respect of which the Secretary-General performs depositary functions.

50. Mr. NAGENDRA SINGH said he appreciated that the practice of States concerning the effects of a notification was to date them back to independence; in a few cases, the entry into force was moved even further back to the date of ratification of the treaty by the predecessor State. Nevertheless, it would not be fair to the new State concerned to rule out entirely the date of notification as the operative date.

51. There was not much substantive difference between a new State which emerged from decolonization and one which emerged from some other process—secession, partition, dismemberment, disintegration, fusion or even the creation of a new State on a previously uninhabited territory. In all those cases, real or hypothetical, a new member entered the international community. That being so, he saw no reason to discriminate between a formerly dependent territory and another successor State, when it came to applying the paramount principle that consent was the basis of all international obligations.

52. Sir Humphrey WALDOCK (Special Rapporteur) said that far from discriminating against the new State, his draft articles gave it the privilege of choice between succession and accession. In some cases, the existence of that choice might even place a burden on the old States.

53. Mr. ROSSIDES said that, coming from a country which was a former colony, he was in full sympathy with the ideas expressed by Mr. Nagendra Singh. Nevertheless, he must admit that a new State could not be

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9 ST/LEG/SER.D/5 (United Nations publication, Sales No. E.72.V.7).
allowed to declare that it succeeded to a multilateral treaty with effect from any date it chose.

54. The new State would have to decide whether it preferred continuity, in which case it would notify succession, or discontinuity, in which case it would avail itself of the right of accession to the treaty like any other State. The desire to favour new States was understandable, but the fundamental principles of international law could not be disregarded.

55. Mr. RUDA said that, as he had already stated, the basis of all treaty obligations was consent; it was impossible to impose a treaty on a new State without its consent, and that consent should not be presumed, but should be expressed by some specific act of notification by the successor State.

56. Under the system provided for in article 7, a new State which elected to use its right to notify its succession in respect of a multilateral treaty would become a party to that treaty independently of the other parties; in that case, its right would derive from the general law of succession in respect of treaties and not from the law of treaties itself.

57. Having once chosen the path of notification, however, the new State could not fall back on the law of treaties, since it had already deliberately elected to be bound by the law of succession. In his opinion, therefore, the Special Rapporteur's solution in paragraph 3 of article 12 was correct, since it was important to take into account the interests of third States. In the event of silence on the part of the successor State, the legal effects of notification should be considered to apply retroactively to the time of its attaining independence.

58. Mr. USHAKOV said he would like to know whether it was on the strength of the tacit agreement of the other parties or of his own interpretation that the Secretary-General had adopted the practice of considering treaties as binding the parties from the date of succession.

59. Mr. SETTE CAMARA said he would refrain from commenting on paragraphs 1 and 2 (a), since opinion in the Commission seemed to be in favour of those provisions.

60. On paragraph 3, he agreed with Mr. Ago. Mr. Ruda had suggested that the Commission would now have to choose between following the law of succession and the law of treaties; in his own opinion, however, that choice had already been made when the Commission had accepted the definition of "succession" in article 1, and when it had adopted the "clean-slate" rule in connexion with article 6.

61. Article 7 did not involve succession in the traditional sense in which that term was understood in private law. What was inherited was a link which the predecessor State had had with the treaty, and it provided the successor State with nothing more than a different, and perhaps exceptional, way of establishing its consent to be bound by the treaty. In that respect article 7 differed from article 15 of the Vienna Convention.

62. It was his impression that certain prejudices about concepts of succession under private law had been injected into the discussion. Members always seemed to be thinking of retroactivity as something going back to the date of independence. Perhaps that difficulty could be resolved by replacing the words "an earlier date", in paragraph 3 of article 12, by "another date", which would make it clear that the date in question resulted from the consent of the parties.

63. Sir Humphrey WALDOCK (Special Rapporteur) replying to Mr. Ushakov, said his approach reflected the practice of the Secretariat as he understood it. That practice was based on the idea that when a State gave notification of its succession, it intended to establish continuity in respect of the treaty relations which had existed at the time of the predecessor State. In other words, the notification went back to the date of independence.

64. There was nothing arbitrary in the procedure adopted. Notifications were circulated to all the other States parties to the treaty, and, as far as he knew, none of them had ever questioned such a notification. It was simply a matter of using common sense and making a proper interpretation of the notification. To provide otherwise would mean a reversal of practice and would deprive States of the possibility of maintaining continuity in their treaty relations.

65. In many cases, it was true, a new State had the right either to succeed to, or to accede to, the treaty. Indeed, there were cases in which a new State had accepted to one multilateral treaty, but notified its succession to another on the same day, and in such cases it was clear that the State deliberately intended to achieve a different result in regard to the two treaties.

66. In his opinion, if a State gave notification of succession, it must be assumed that it meant what it said. In drafting the rule in paragraph 3, however, he had provided for the alternative that a State could date the effects of a treaty from a date other than that of independence if such an intention appeared in the notification.

67. Mr. Yasseen had suggested that paragraph 3 would be easier to accept if it had not been phrased in terms of retroactivity and if the phrase "on that date", in paragraph 2 (b), were amended to read: "on the date of the independence of that State". On that point, the drafting could be adjusted, but it was necessary for the Commission first to decide whether it accepted the general lines of his draft.

68. There were also some other points, such as those raised by Mr. Ushakov, which should be taken into consideration. It was undoubtedly important to protect the position of other parties.

69. On the question of time-limits, he would like to know the views of the Commission.

70. If article 12 was drafted in a different form and it was accepted, as Mr. Ruda had agreed, that a new State should be able to choose the date of its notification as an alternative, agreement could probably be reached on a text. He therefore believed that the article could now be usefully referred to the Drafting Committee.

71. Mr. BARTOS said he agreed with Mr. Ago that the rights of third States should not be neglected. A new provision should be inserted specifying whether or not third States should consider themselves bound pending
the notification of secession, and whether the notification should have retroactive effect even though the successor State did not consider itself bound, since it had the right either to make or not to make the notification.

72. Sir Humphrey WALDOCK (Special Rapporteur) said that at least it was reassuring that no trouble of that kind seemed ever to have occurred with respect to multilateral treaties.

73. Mr. REUTER said that the Commission was not drafting a text to govern only those cases which had arisen in the practice of the Secretary-General.

74. For example, in the case of an open economic treaty, the essential question would be a question of fact: whether, on the day it had attained independence, the successor State had continued to apply the treaty in fact. If it had, the other States would also apply the treaty, and it was quite normal that in that case notification of succession should have retroactive effect.

75. But if, having attained independence, the successor State no longer applied the treaty in fact, since it was not bound, but later changed its mind, after a period during which the other parties either had or had not applied the treaty, and then notified its succession, it could be accepted that the notification took effect as from its own date, but not that it had retroactive effect on earlier situations in which third States had taken a legitimate position because the new State had not in fact considered itself bound by the treaty.

76. It seemed that the whole of the Secretary-General's practice was based on treaties designed to protect the general interests of mankind. For example, it was clear that the rights of third States could not be impaired in the case of an international labour convention since, in that case, no reciprocity was involved in the legislation. It was when reciprocity was involved that retroactivity was inadmissible. There was no need to quote specific instances, but the treaties to be covered in the future would not always be of the kind which had given rise to the present practice; there would also be far more complex and delicate instruments.

77. If article 12 was considered to apply to all multilateral treaties, including those covered by the exception in article 7 (c), where it was, of course, the consent of the other parties which gave effect to the notification, the title and several of the provisions of article 12 would have to be amended.

78. Sir Humphrey WALDOCK (Special Rapporteur) said he had already accepted the point with respect to restrictive treaties. There might be a type of treaty in which the question of an interim régime might be important, but no difficulty of that kind had yet come to his notice. He was speaking on the basis of the practice not only of the United Nations, but also of the Swiss and United States Governments as depositaries.

79. All members had expressed concern about the problem of third parties; something obviously should be done to protect their interests, but with treaties other than those of a restrictive kind, notification was in practice given the effect which he had stated.

80. In the case of unilateral declarations, such as that which had been made by Tanganyika, a State might agree that it would keep bilateral treaties in force on a reciprocal basis and would apply multilateral treaties once it had made up its mind to do so. However, it might be difficult to know how and when the other parties acquiesced in such a declaration, and the situation might be particularly obscure with regard to economic treaties.

81. Mr. USHAKOV said that, in recasting article 12, account should also be taken of the effect of a unilateral declaration on the provisional maintenance in force of a treaty. That was a special case which should also be covered by the article.

82. Mr. CASTANEDA said he wondered whether paragraph 3 of article 12 was not dependent on article 7 (c), which referred to treaties requiring the consent of all the parties. As Mr. Reuter had suggested, special difficulties might arise in connexion with treaties of an economic type which called for reciprocal rights and obligations and where the consent of the third parties was more important.

83. Mr. REUTER said that if the position were always as Mr. Castañeda had described it, the problem would be much simpler; but that was not the case. The 1958 Conventions on the Law of the Sea for example, were broadly open treaties and so were not covered by article 7 (c), but they established reciprocal rights and obligations. If, on attaining independence, a State continued to apply those Conventions in fact without saying anything, as it was entitled to do, there was no objection to its declaring that its notification of succession was retroactive. But if it decided no longer to apply the Conventions in fact, as it was also entitled to do, and later changed its mind, it could then notify its succession, but without retroactive effect to the date of independence. The situation was thus more complicated than was provided for in article 7 (c).

84. The CHAIRMAN asked whether any member wished to comment on the Special Rapporteur's note on the question of placing a time-limit on the exercise of the right to notify succession.

85. Mr. TSURUOKA said he had raised the question of a time-limit, but he thought it was for the Drafting Committee to see what could be done about it.

86. Sir Humphrey WALDOCK (Special Rapporteur) said that when the matter had first come up in debate, both the Chairman and Mr. Ruda had appeared to consider it unnecessary to go into the question of time-limits. But in view of the Chairman's statement at the end of the previous meeting, he at least, seemed now to be of a different view.

87. The CHAIRMAN, speaking as a member of the Commission, said that the need for a time-limit would depend on how article 12 was ultimately drafted with respect to third parties. If some definite obligation was imposed on them to pursue a certain line of conduct,
it would seem to him only reasonable to give some indication of the period of time during which they would be under that obligation.

88. Mr. YASSEEN said he thought it was too early to take a decision on the question. The Commission would have a clearer view when its work was further advanced.

89. Mr. USHAKOV said that everything would depend on the new wording of the article.

90. Mr. SETTE CÂMARA said he agreed with Mr. Yasseen and Mr. Ushakov. After reading the Special Rapporteur's note he thought it obvious that at the present stage it would be risky to include any provision on time-limits. The successor State had a right to establish a time-limit by its own initiative and that had been the practice in most unilateral declarations. However, for the Commission to establish a time-limit would, in his mind, be a rather arbitrary procedure. He therefore agreed with the Special Rapporteur's suggestion, in paragraph (6) of his note, that for the time being no provision concerning a time-limit should be included in the draft articles dealing with multilateral treaties.

91. Mr. USTOR said that it was not a question of setting a particular time-limit in months or years, since the legislative effects of such a provision would be open to doubt. What was needed was to guard against a situation in which a new State might unduly delay its decision with respect to a treaty and to determine whether such a State should be entitled to declare itself bound by a treaty ab initio. Those problems would have to be decided at a later stage.

92. Mr. REUTER said he agreed with Mr. Ushakov. It would be unnecessary to fix a time-limit if the article protected the rights of third States, since the protection of those rights was the object of the time-limit, or if the article took account of whether the treaty was being applied in fact. If a new State continued to apply the treaty in fact, under beneficent inventaril and if, consequently, the interests of third States were protected, the new State, which would be grappling with considerable political difficulties, should be given as much time as it needed. Everything therefore depended on the extent to which the text of the article would protect the rights of third States.

93. Mr. QUENTIN-BAXTER said that although in principle he was opposed to time-limits, he agreed that it was necessary to protect the interests of third States. He was therefore unwilling to admit the absolute right of a new State to claim continuity in respect of a treaty after a supervening interval of time.

94. The new State did have an absolute right to accede to a multilateral treaty concluded by its predecessor, but if it had behaved in a way which was inconsistent with that treaty, it no longer had the right to inform other States that it had chosen to be bound by the treaty as a successor State and that those States would have to accept it as a party to the treaty from the date which it had indicated. On that point he felt compelled to reserve his position.

95. The CHAIRMAN said that question came under the rights and duties of third States.

96. Mr. EL-ERIAN said he agreed and assumed, with Mr. Reuter, that the interests of third States would be properly protected; in view of the difficulties with which successor States were usually confronted, however, he was opposed to laying down any time-limits.

97. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer article 12, together with the additional sub-paragraph of article 1 which had been prepared by the Special Rapporteur (A/CN.4/249), to the Drafting Committee.

It was so agreed.15

The meeting rose at 12.55 p.m.

15 For resumption of the discussion see 1196th meeting, para. 3.

1170th MEETING

Thursday, 1 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quinten-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties
(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256 and Add.1)

[Item I (a) of the agenda]

(continued)

ARTICLE 13

1. Consent to consider a bilateral treaty as continuing in force

1. A bilateral treaty in force in respect of the territory of a new State at the date of succession shall be considered as in force between the new State and the other State party to the treaty when:

(a) They expressly so agree; or
(b) They must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. A treaty in force between a new State and the other State party to the treaty in accordance with paragraph 1 is considered as having become binding between them on the date of the succession, unless a different intention appears from their agreement or is otherwise established.1

3. Sir Humphrey WALDOCK (Special Rapporteur) said that the situation with respect to the consent of a new

1 For commentary, see document A/CN.4/249.
State to consider a bilateral treaty as continuing in force was a very complex one because often that consent was not evidenced by any express statement. In some cases, of course, there were documents; indeed there was a well-developed practice of an exchange of notes between the parties regarding continuance of a treaty, which constituted an express agreement. However, in the numerous cases in which nothing was said to clarify the situation, it was necessary to determine what the rule should be.

4. There was a fundamental difference between multilateral and bilateral treaties. In the case of the latter, the new State had no right simply to notify its will to succeed to the treaty, since the relation was a bilateral one and the attitudes taken up by both parties were of equal importance.

5. As he had pointed out in his commentary, practice showed that there was a large measure of continuity in some types of treaties but not in others. The approach taken by the International Law Association was that the new State had to “contract out” of a treaty rather than “contract in”; in other words, there was a presumption that the treaty continued in force unless the new State gave some indication to the contrary. However, he himself had not felt that evidence of such a rule was to be found in the practice, while a rule based on “contracting in” was more consonant with the principle of self-determination.

6. He had also considered the possibility of approaching the question on the basis of provisional application of the treaty, on the lines contemplated in the unilateral declarations by Tanganyika and other States. But those declarations were based on the view that the new State should “contract in” rather than “contract out” of the treaty; the approach which he had taken for the present draft, therefore, was that it must be established that the new State and the other State party had agreed expressly or impliedly to continue the treaty in force.

7. He had not attempted to produce any detailed rule about the inferences to be drawn from the conduct of the parties. There were undoubtedly some types of treaties in regard to which the tacit consent of the parties might readily be inferred, but it would be difficult to enumerate all the circumstances from which a conclusion of tacit consent must be drawn and it would be better to leave the question as one of interpretation.

8. He had rejected the notion of the provisional application of the treaty, but that notion still had to be taken into account, since even if there was evidence of tacit consent, that might indicate only a provisional application and not a continuance of the treaty. He had tried to cover that aspect of the matter in article 14 rather than in article 13, but the two questions had to be linked together to that extent.

9. It was necessary to bear in mind article 4, concerning a unilateral declaration by a successor State, as well as article 3, on an agreement for the devolution of treaty obligations, as a background to the operation of article 13. In his opinion, the values of devolution agreements lay in the general indication of the new State’s attitude towards the continuance in force of its predecessor’s treaties.

10. Mr. TAMMES said he supported the fundamental rule with respect to bilateral treaties stated in article 13, since the continuance in force of a treaty after a new State had attained independence was obviously a matter for agreement, whether expressed or tacit, between the successor State and the other party.

11. He endorsed the explanation given by the Special Rapporteur in paragraph (20) of his commentary of why it was practically impossible to give any precise indication of how and when a tacit agreement came into existence. On the basis of the admirable series of studies made by the Secretariat, it was only possible to conclude that there was an endless variety of informal ways of reaching agreement.

12. Concerning the relationship between article 13 and article 4, he noted that the latter, which applied to bilateral as well as to multilateral treaties, contained rather detailed provisions about the continuance of a treaty. However, practice described in the Secretariat studies indicated so many ingenious methods of extending agreements without any express statement to that effect that he wondered whether the application of the provisions of article 4 should not be restricted to multilateral treaties; bilateral situations could then be dealt with exclusively in article 13.

13. Mr. HAMBRO said he agreed with the overall approach taken by the Special Rapporteur; it was a good idea to try to ensure the continuance of even bilateral treaties, if that could be done.

14. With regard to paragraph 1 (b), however, the Commission should be careful not to establish a presumption which might be dangerous to the successor State. The latter should be able to agree to the provisional application of a treaty without running the risk that such an agreement might be interpreted as a binding consent.

15. He would like to know whether the Special Rapporteur intended to make a fuller statement on the question of time-limits in connexion with article 13.

16. Sir Humphrey WALDOCK (Special Rapporteur) said he had included a note on the question of placing a time-limit on the exercise of the right to notify succession in his commentary to article 12.2 He would be in a better position to deal with that question when the Commission had completed its review of all the main articles, including those on bilateral treaties.

17. Mr. REUTER said the Special Rapporteur had explained that article 13 should be read together with articles 14 and 4. It seemed to him, however, that there was a need for yet another provision.

18. For multilateral treaties, special rules had been set forth in article 12 concerning the legal effects of a notification of succession. For bilateral treaties, there was no need for such notification, their maintenance in force derived from the general rules of succession of States. To consider that the application of a bilateral treaty depended solely on the consent of the new State and of the other State party to the treaty meant considering the

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position from the standpoint, not of State succession, but of the general rules of the law of treaties. But the maintenance in force of a bilateral treaty depended on the succession of States in so far as the consent of the States concerned had different effects from those which would result from the application of the general law of treaties. That was why the legal effects of the succession of States on bilateral treaties should perhaps be stated expressly in a separate provision. Some of those effects were set out in article 17, but in purely negative form.

19. On the question of the provisional application of bilateral treaties, he had now been convinced that new States, and not only those which had achieved independence, should be specially protected. Often their governments lacked experience, their administrative machinery was inadequate and they found themselves maintaining treaties in force de facto. Sometimes such treaties had required domestic legislation which could not be repealed at short notice and continued to be applied provisionally. It was not unusual for such a situation to continue for several years.

20. Like the Special Rapporteur, therefore, he thought that new States should be enabled to apply their bilateral treaties provisionally without finally committing themselves thereby. The fact that the new State and the other State continued to apply a treaty would merely be evidence of their common desire to maintain it in force provisionally, rather than of tacit assent to its definitive entry into force between them. It was quite possible that, after a period, one of the States might realize that it was not to its advantage to be bound by the treaty.

21. Everything should be done to encourage the immediate application of treaties, but only on a provisional basis. Article 13 should be redrafted, so as to present provisional application as the normal case.

22. Sir Humphrey WALDOCK (Special Rapporteur) said he agreed that it would be necessary to include an article near the end of the draft which would deal with the legal effects of succession.

23. He also had in mind the registration of an agreement to continue a treaty in force, on which there was a pertinent opinion given by the Secretariat and published in the United Nations Juridical Yearbook.

24. Mr. RUDA said that, in the case of bilateral treaties, it was obviously necessary to take into account not only the wishes of the successor State but also those of the other party to the treaty. In addition to the transfer of rights which might have been derived by the new State from the treaty at the time of its succession, it was necessary to have the express or tacit consent of the other party if the treaty was to be made applicable between them.

25. It seemed to him that the Special Rapporteur had been correct in stating, in paragraph (19) of his commentary (A/CN.4/249), that “both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the principle of self-determination appear... to indicate that the conduct of the particular States in relation to the particular treaty should be the basis of the general rule for bilateral treaties, rather than the general fact that a considerable measure of continuity is found in the practice of many States”. In other words, continuity should obviously depend on the agreement and consent of both parties.

26. Mr. Reuter had made the point that article 13 was based on the consent of both parties; that meant that by adopting that article the Commission would be acting in the field of the general law of treaties and not in that of the law of succession.

27. If, as provided for in paragraph 2, the treaty was considered as having become binding on the date of the succession unless some different intention appeared, it would seem that there was a presumption that the treaty came into force not at the moment of the conclusion of an agreement between the two parties, but rather at the moment of the succession of the new State.

28. Mr. USHAKOV said that he approved the rule in article 13, which derived from the law of treaties; two States might agree that a bilateral treaty, whatever its nature, should bind them in the future. The article, however, raised a number of questions regarding the rights and obligations of the States concerned by such novation.

29. Cases of fusion would be covered by separate provision, but what would be the situation in cases of decolonization or dismemberment of States? He was thinking of the case where a State which had concluded a commercial treaty, or technical or commercial assistance treaty, with a third State, split up into two States. The division would raise the question of the rights and obligations of the third State on the one hand and of the two new States on the other. Was the third State bound in relation to the two new States, as it had been in relation to the predecessor State, and did the two new States succeed the predecessor State in its obligations towards the third State?

30. Paragraph 2 raised a problem which was mainly one of drafting. Under its terms, the silence of the new State and of the other State was interpreted as having retroactive effect to the date of succession. That proposition was quite acceptable in the case of a multilateral treaty, but in the case of a bilateral treaty it was difficult to imagine States keeping silent regarding the date at which they intended to give effect to the treaty. It might be conceivable in the case covered by paragraph 1 (b), where the continuance of the treaty was assumed from the conduct of the States, but it was improbable in the case covered by paragraph 1 (a), where the States had expressly agreed to maintain the treaty in force. It would therefore be desirable to amend the wording of article 13 accordingly.

31. Mr. RAMANGASOAVINA said that the purpose of article 13 was to ensure the continued application of a bilateral treaty in the event of a succession of States. The case covered by paragraph 1 (a) did not raise any difficulties, since both the successor State and the other State party to the treaty had expressly stated their will to be bound by the treaty.

32. In paragraph 1 (b) the Special Rapporteur proposed that, where the two States had shown by their conduct...
that they regarded the treaty as applicable in their relations with each other, continuance of the treaty should be presumed. That presumption raised certain problems. Conduct could be reflected by acts or omissions. In the latter case, a new State might pay no attention to the treaty merely because it was not yet sufficiently organized. During the period of presumption, some action might be taken by the other State or time-limits might expire without the new State being aware of the unfavourable consequences which might result for it. He would therefore like to see the scope of the presumption in paragraph 1(b) limited so as to provide only for provisional application. The new State and the other State would then always be free to terminate the treaty.

33. Paragraph 2 presented no difficulties apart from the points raised by Mr. Ushakov.

34. Mr. SETTE CÂMARA said that he supported the approach taken by the Special Rapporteur in article 13. His text emphasized the essentially voluntary character of succession to bilateral treaties, the continuance of which should be a matter for agreement, whether express or tacit, between the two parties.

35. In his opinion, the Special Rapporteur had been correct in departing from the approach taken by the International Law Association and in abandoning the idea of establishing any presumption of continuity. The view taken by the International Law Association had been based particularly on practice in the field of air transport agreements, where continuity appeared to be a common feature.

36. The Special Rapporteur had also acted wisely in not trying to spell out the exact circumstances in which the conduct of the parties might be considered as signifying their consent to continue to be bound by the treaty. Circumstances could vary greatly and it would be very risky to embark on an enumeration of possible cases.

37. Mr. BILGE said that article 13 was very well drafted and filled a definite need. Since the law of treaties did not solve all the problems dealt with in that provision, the Special Rapporteur had had to take the practice into account. He had recommended rules which were entirely fair to the new State.

38. Some members of the Commission feared that the provisional application of a treaty under articles 13 and 14 might bind the States concerned definitively. But it should be noted that the articles in no way prevented the States concerned from recovering their freedom. Moreover, many treaties which were tacitly applied in cases of succession were of limited duration or contained an article enabling them to be amended and adapted to circumstances.

39. He was therefore in favour of article 13, which encouraged the continuance of bilateral treaties, while providing that the successor State should only be bound by its own express or tacit consent.

40. Mr. REUTER said that the Special Rapporteur had rightly provided for the possibility that, by their conduct, the two States might have agreed only to provisional application of the treaty; that was provided in article 14. But the crucial question was, if a new State emerged to independence by separation and the two States then continued to apply the treaty de facto, without saying anything, would the fact that they had continued to apply the treaty have the same force as a succession agreement? According to article 14, the intention had to be "established", a strong term; it had to be proved. He felt some reluctance to accept that, where there had been a de facto application of the treaty by both parties, it should be the new State on which fell the burden of having to prove that, although it had in fact applied the treaty, it had not done so with any intention that it should thereby become definitively bound by the treaty. Perhaps the Special Rapporteur would make his position on that situation quite clear.

41. Mr. USTOR said that the point raised by Mr. Ushakov led him to wonder whether it would not be better to expand the titles of sections 1 and 2 to refer to the position of new States and the position of other States in regard to multilateral or bilateral treaties in the event of State succession.

42. Article 13 stated that a bilateral treaty could be renewed by the successor State through its express or tacit agreement; that meant that in the absence of such express or tacit agreement there would be no succession to the treaty. He wondered, therefore, to what extent the successor State and the other party would be free not to conclude such an express or tacit agreement.

43. Two principles were involved. On the one hand, there was the principle of self-determination, which had been referred to by the Special Rapporteur in his commentary; that principle might be supported with particular tenacity by a new State which had emerged through the process of decolonization. On the other hand, there was the principle that all States had the duty to cooperate with each other in accordance with the United Nations Charter.

44. The question to what extent the parties would be free to conclude express or tacit agreements to be bound would seem to depend on the balance of forces between those two principles. He suggested, therefore, that the draft should include some reference to the idea that the other party to the treaty had a duty to co-operate with the new State which would take precedence over the principle of express or tacit agreement.

45. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ustor's suggestion would seem to equate bilateral treaties with multilateral treaties by asserting that a new State had a right to consent to a treaty, while at the same time implying that the consent of the other party was irrelevant.

46. Mr. USTOR said that a new State could become a party to a multilateral treaty independently of the will of the other party, whereas the latter's consent was necessary in the case of bilateral treaties. He merely wondered whether the other party was always free to consent or not to the continuance of the bilateral treaty as it saw fit, or whether there was some obligation on it to give its consent.

47. Sir Humphrey WALDOCK (Special Rapporteur), said that if a State had no right to withhold its consent,
it could hardly be regarded as consent in the ordinary meaning of the word.

48. Mr. USTOR said that, in his opinion, a new State which had emerged through the process of decolonization had a right to say that it did not wish to continue to be bound by a treaty. On the other hand, if it did wish to apply the treaty, the other State might not be completely free to refuse its consent. In other words, the question was whether both States would be equally free to consent or not, or whether there might perhaps be a greater burden on the other State to give its consent.

49. Mr. TSURUOKA said that he wished to raise a question concerning the general economy of the draft. The dominant principle of the succession of States in respect of treaties was that of the full freedom of the new State as a sovereign State. Succession to treaties applicable in the territory of the new State was merely a special case; it involved the application either of a rule of the general law of treaties or of a different or opposite rule.

50. In any legislative provision, the general principle was usually stated before the exceptions. But that was not the case with a number of the articles of the draft. Thus, if article 13 was regarded as a special application of article 6, the introductory phrase might be redrafted to read: "A bilateral treaty shall not be considered as in force between the new State and the other State party to the treaty unless . . . "; to be followed by sub-paragraphs (a), (b).

51. It might, of course, be argued that more prominence should be given to special cases, since the articles dealt specifically with cases of succession. Then they should be drafted so that the special features were stated first and thereafter corrected or limited by the general principle. However, the opposite method would in a great many cases make the articles more readily comprehensible.

52. Mr. CASTAÑEDA said that he agreed with the formulation of article 13, as well as with the reasons which the Special Rapporteur had given in support of it in his commentary.

53. He also agreed that the general rule stated in article 7 would not be applicable in the case of bilateral treaties, for the reasons given by the Special Rapporteur. In the case of a multilateral treaty, the new State acceded to a normative situation, but in the case of a bilateral treaty, the relationship was more personal for each of the parties and was regulated, as the Special Rapporteur had said, "by reference essentially to their own particular relations and interests". (A/CN.4/249, Commentary to article 13, para. (3).)

54. He could not, therefore, agree with Mr. Ustor that the other party was under any special obligation; the latter merely found itself in the normal situation of having to decide whether it wished to establish a treaty link with the new State or not.

55. He agreed that the Special Rapporteur had taken the right approach in not following the suggestion of the International Law Association with respect to a presumption in favour of continuity. There was, to be sure, an impressive amount of practice in favour of that presumption, but upon closer analysis the treaties in question seemed to be of a rather special kind, such as those relating to air transport, trade agreements or technical assistance. In those cases, continuity would almost automatically confer certain benefits on the successor State, but it was obviously impossible to distinguish between those cases where it would benefit the successor State and those where it would not.

56. Mr. USHAKOV said that, although in theory there was no objection to the principle embodied in article 13, which set forth a fundamental rule of the law of treaties, its application might come up against difficulties of a practical nature. For example, if a State undertook, by means of an agreement, to build a dam in Tanzania and the two States which had merged to form Tanzania separated again, the State which had signed the agreement with Tanzania would be released from its obligation to build the dam, just as the two new States formed by the division would be released from their obligation to repay the cost of the project. The same would apply in a case of decolonization, if the dam was to be built in the territory of the former dependent State. Perhaps the question came under the topic of succession in matters other than treaties, but it also arose with respect to treaties. In any case, the legal point should be dealt with somewhere, perhaps in the commentary.

57. Mr. YASSEEN said that, although it was in the general interest of the international community to promote the participation of all States, especially new States, in multilateral treaties, it had always been accepted, in the case of bilateral treaties, that any State must be free to choose its partners. No State could be forced to maintain a treaty relationship with another. Article 13, as submitted by the Special Rapporteur, was consistent with that principle: it provided that the other State could not be bound to the new State without its consent; in other words, the other State party could not be forced to maintain a bilateral relationship with the new State. That was a just solution of the kind sought by the Commission.

58. As at present worded, the article clearly inclined towards continuity on the basis of mutual consent and was therefore acceptable.

59. Mr. AGO said he agreed that, as far as bilateral treaties were concerned, the principle of freedom of consent must be respected by both sides. Article 13 was therefore acceptable as it stood.

60. Perhaps, however, the presumption in favour of the continuance of the treaty, as laid down in paragraph 1(b), was a bit too broad and should be limited by a reference to the object and purpose of the treaty. To take the example given by Mr. Ushakov, the agreement concluded by the predecessor State with a third State for the construction of a dam would no longer be of any interest to that one of the new States resulting from the division in whose territory the dam was not situated. So that there it was not a question of the conduct of States but of the object and purpose of the treaty. Moreover, continuance of the agreement might prove impossible in practice if, for example, the third State had undertaken to build the dam in that part of the territory corresponding to one of the two States born of the division in exchange for minerals situated in that part of the
territory corresponding to the other of the two States. Or, to take a decolonization example, if, under an agreement between a metropolitan State and a third State, a dam was to be built in a colonial territory in exchange for products from the metropolitan State, and if then the territory concerned became independent, it would seem materially impossible to continue to apply the agreement.

61. The principle stated in article 13 was therefore perfectly valid in theory, but in practice there could be a series of circumstances which could make continued application of the treaty impossible. Perhaps the wording of paragraphs 1 (a) and (b) leaned rather too much towards continuance of the treaty. The principle of freedom of consent should be established clearly and unambiguously.

62. Mr. QUENTIN-BAXTER said that he had already referred to the general issue of inheritance and continuity, both during the general discussion and during the discussion on articles 3 and 4. He had then stressed the importance, in many cases, of the right of a new State to continue to be bound by a treaty concluded by its predecessor. It was precisely in the area of bilateral treaties governed by article 13 that there existed a large body of evidence in favour of the notion of continuity.

63. For general multilateral treaties, the permissive rule embodied in article 7 was appropriate, since it was a matter of encouraging the extension of membership of those treaties to the new States. For bilateral treaties, however, the position was different and the State practice described at length in the commentaries to the various articles showed a definite belief on the part of the new States in the notion of continuity. Again and again, the unilateral declarations made by new States used language which implied a belief on their part that they had certain rights and obligations with respect to bilateral treaties concluded by their predecessors. Of course, those rights and obligations were regarded as requiring review but the idea of continuity was nonetheless present and could not be explained simply by reference to dispositive treaties, for a number of the new States concerned were island countries without boundary problems or other worries of a dispositional nature.

64. Admittedly there was an element of arbitrariness in State practice and the choice between accession and succession was sometimes accidental. One thing, however, was clear: if just a single rule were to be laid down in the matter, it was bound to do less than complete justice to the wide divergence of practice, and if that rule were to be based exclusively on the principle of consent, it would do some injustice to the whole spirit of succession.

65. He could not agree with Mr. Tammes regarding the relationship between articles 4 and 13. With article 13 in its present form, it was absolutely vital that the provisions of paragraphs 2 and 3 of article 4, on provisional application, should be maintained and should apply to bilateral treaties.

66. The Commission should also bear in mind the wider implications of its findings in relation to article 13. It was in the recent practice of the era of decolonization that the strongest evidence of a policy of continuity was to be found. If that policy had no reflection in law, where was the authority to be found for a rule of continuity in cases not arising from decolonization? Was the concept simply that of tracing the personality of the predecessor State, and applying a rule of State continuity rather than of State succession?

67. Article 13 was framed as a logical sequel to the general articles of the draft, on which he had expressed certain reservations. He found some comfort, however, in the fact that paragraph 2 emphasized the notion of succession and continuity rather than the principles of the law of treaties. He also relied on the provisions of paragraphs 2 and 3 of article 4, on provisional application, to provide some balance for article 13.

68. Mr. EL-ERIAN said that he agreed with the formulation of article 13 and accepted the underlying reasons for its contents, as given by the Special Rapporteur in paragraph (3) of his commentary (A/CN.4/249), namely, the more dominant role played in bilateral treaty relations by the identity of the other contracting party and the consequences that followed from that basic difference between multilateral and bilateral treaties.

69. In paragraph (9) of his commentary (A/CN.4/249), the Special Rapporteur had stated that the rule in article 13 did not apply to treaties of a "territorial" or "localized" character and had added that the question would be examined separately in the commentary to article 18. He approved of that exception but felt that it should be stated in article 13, or at the very least in the Commission's own commentary to the article.

70. The CHAIRMAN, speaking as a member of the Commission, said that some of the remarks which had been made during the discussion were directed more at the experience of the past than at the prospects for the future. In the future, new States were likely to have a much clearer idea of their rights and duties, especially if the present draft became an international instrument. They were also much more likely to know which treaties they wished to keep in force.

71. The treaties involved were likely to be neutral in character, such as extradition treaties and navigation treaties. A new State would naturally not consider continuing an unbalanced or unequal treaty that might have applied to its territory in a colonial past. As far as the United States was concerned, the practice was extremely liberal towards new States. Every effort was made to accommodate their wishes with regard to the continuation or otherwise of such treaties as consular conventions.

72. He did not foresee any difficulty in the operation of the provisions of paragraph 1 (b) of article 13. The wording was perhaps somewhat unduly restrictive; it was taken from article 45 of the 1969 Vienna Convention, which related to a question of estoppel of claims of invalidity of treaties. A claim of that nature naturally required strong proof. In view of the circumstances to which article 13 would apply, however, he suggested that

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a formula used elsewhere in the Vienna Convention, in particular in its article 14, would be more appropriate, namely the wording “or is otherwise established”.

73. Dispositive treaties constituted an exception to the application of the rule in paragraph 1 of article 13 and he supported the suggestion that that exception should be stated in the text of the article.

74. Lastly, he suggested, for the consideration of the Drafting Committee, that in the opening sentence of paragraph 1, the words “shall be considered as in force” be replaced by the words “shall be considered as remaining in force”, so as to place greater emphasis on the element of continuity.

75. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that article 13 had met with general approval.

76. Mr. Reuter, as he understood him, thought that in a case of application based simply on de facto conduct, it would be right to have a limiting rule saying that the inference to be shown from that conduct should be an inference only of provisional, not of definitive application. That suggestion should be considered by the Drafting Committee. He himself had avoided introducing that idea into article 13 because the provisions of article 14, on notice, seemed too stringent for cases of provisional application. If, in the interests of both parties to the treaty, it was desirable to require some notice of the termination of a treaty, twelve months seemed rather long for a treaty applied on a provisional basis. Certainly any rule on the question must take into account the fact that the matter was of interest to both States concerned and that there must be complete reciprocity on the point between the two parties.

77. Mr. Ushakov had raised an interesting point. It was the problem in a way of what some people referred to as unjust enrichment, in cases where, for instance, assistance had been given towards the construction of a dam in the territory subsequently taken over by the new States; the problem was touched on in paragraph (11) of his commentary (A/CN.4/249). The Commission would have to decide whether to treat cases of that type as exceptions to the rule in article 13 on bilateral treaties, or as cases to be governed by reference to principles outside the scope of the present topic and belonging perhaps to the topic of succession of States in respect of matters other than treaties. In practice, the new State generally still had some need for the continued co-operation of the other State party and the problems were settled by agreement between the two parties. The Commission would have to keep the question in mind but it would be difficult to deal with it in the context of article 13.

78. With regard to the point raised by Mr. Ustor, it was difficult to admit that the consent of the other State could somehow be dispensed with in the case of a bilateral treaty. Moreover, the introduction of an element of compulsion on that other State would be in flat contradiction with existing State practice.

79. With reference to Mr. Quentin-Baxter’s remarks, he felt it was essential to consider State practice as a whole. No doubt a desire for continuity did exist where rights were concerned, but at the same time States were reluctant to have obligations imposed upon them in the name of continuity. For example, whereas the United Kingdom had always favoured the idea of continuity for its dependent territories, when it had been confronted by a claim for continuity in its treaty obligations by a former French colony, it had answered that the continuance of the treaty must be a matter of agreement. His own belief was that the general philosophy of article 13 was certainly correct.

80. On the question whether the rules set out in article 13 applied equally in cases of fusion and separation, he would keep an open mind until he had completed his study of those categories of succession. The Commission would have to decide whether in those cases there was a basis for laying down a rule of ipso jure continuity.

81. He had been reminded by Mr. Quentin-Baxter’s remarks that nineteenth century writers, such as Hall, had urged that the key to the whole matter was to be sought in the personality of the State. If the personality of the State could be traced back, continuity of treaty relations existed; if the personality was different, no such continuity existed. In the light of contemporary practice, however, he felt that the problems which arose with regard to fusion and dismemberment of States were too complex to be solved simply by a single formula. Cases of division of States were even more complex.

82. The Commission had now before it the first addendum to his fifth report (A/CN.4/256/Add.1), containing article 19 on the formation of unions of States. In that same addendum, he had included an additional article for insertion at the end of part II, provisionally termed “Excursus A” and entitled “States, other than unions of States, which are formed from two or more territories”. That article was intended to deal with a composite State which was not a union formed of pre-existing States but had been formed from two or more territories that had not previously been States.

83. He had submitted different provisions to deal with those two separate situations because practice did not seem to support the approach adopted by the International Law Association of covering all composite States by means of a single formula.

84. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 13 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.

The meeting rose at 12.55 p.m.

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5 See para. 40 above.
6 See para. 29 above.
7 See paras. 42-44 above.
8 See paras. 63 and 64 above.
9 For resumption of the discussion, see 1196th meeting, para. 7.
Succession of States in respect of treaties


[Item 1 (a) of the agenda] (continued)

ARTICLE 14

1. A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is binding upon them until terminated in conformity with its provisions, unless it appears from their agreement or is otherwise established that they intended the treaty to be applied only:
   (a) Until a specified date;
   (b) Pending a decision by either State to terminate its application;
   (c) Pending the conclusion of a new treaty between them relating to the same subject-matter.

2. In cases falling under paragraph 1 (b) not less than twelve months' notice shall be given of the State's intention to terminate the application of the treaty, unless the treaty itself provides for a different period of notice in which event this period shall apply.

3. In cases falling under paragraph 1 (c) the application of the treaty shall be considered as terminated if the new State and the other State party conclude the new treaty, unless a contrary intention appears from the later treaty or is otherwise established.

2. The CHAIRMAN invited the Special Rapporteur to introduce article 14 of his draft (A/CN.4/249).

3. Sir Humphrey WALDOCK (Special Rapporteur), said he had been working on the basis that, when a bilateral treaty was considered as being in force in accordance with the provisions of article 13, the application of the law of succession was exhausted; thereafter the general law of treaties applied in every particular. He did not therefore consider it necessary to set out in detail all the possible applications of the Vienna Convention to a bilateral treaty maintained in force in accordance with article 13.

4. The treaty was maintained in force on the basis of the consent of the two States concerned. He thought they were all agreed that it was not desirable to emphasize the point that it was really a case of a collateral agreement continuing the treaty in force. The element of novation should be played down because the case they were dealing with was a special situation involving the operation of the principles of succession, and although there was a collateral agreement, the essence of the matter was that by that consent the treaty remained in force in accordance with its terms.

5. The purpose of article 14 was to deal with a special point. Paragraph 1 stated that a bilateral treaty maintained in force in accordance with article 13 was binding until terminated in conformity with its provisions, unless the parties showed their intention to apply it provisionally either until a specified date, or pending a decision by either State to terminate its application, or else pending the conclusion of a new treaty between the two States relating to the same subject-matter.

6. Paragraph 2 dealt with the important casewhere the treaty was applied pending a decision by either State to terminate its application; it specified that twelve months' notice had to be given of the intention to terminate the treaty. Clearly, in a case of that kind, the requirement of notice was a necessary safeguard and he had felt that a period of twelve months was reasonable. That was the period specified in article 56, paragraph 2, of the Vienna Convention, although admittedly in a somewhat different context.

7. Paragraph 3 dealt with the manner in which the rule applied to successive treaties on the same subject-matter. The exchange of notes which usually took place between the two States concerned ought to make the position clear but unfortunately that was not always the case and, when concluding a new treaty, the two States concerned did not always expressly cancel the old one. The formula in paragraph 3 represented a reversal of the presumption in paragraph 1 (a) of article 59 of the Vienna Convention, but he felt that there were good reasons for adopting a different approach.

8. Mr. YASSEEN said he supported article 14. A treaty maintained in force between a new State and the other State party undoubtedly came under the law of treaties but, looking at the situation from the point of view of succession, certain presumptions could nevertheless be formulated concerning the intentions of the parties.

9. According to paragraph 1 of article 14, the continuity in force of a treaty in accordance with article 13 implied that all its provisions were applicable, including those relating to its duration. That rules was not, however, categorical; the intention of the parties to apply another solution might appear from a specific agreement or from circumstances. Thus, they could choose from the three solutions listed in paragraphs 1 (a), (b) and (c), and that list was not exhaustive.

10. Paragraph 2 came into play where the treaty was applied “pending a decision by either State to terminate its application”, as provided in paragraph 1 (b). The twelve months' notice proposed by the Special Rapporteur was acceptable; it was taken from a similar provision.

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1 For commentary, see document A/CN.4/249.
3 Ibid., p. 297.
in the Vienna Convention and its purpose was to ensure that a State was not taken by surprise.

11. The presumption set forth by the Special Rapporteur in paragraph 3 was logical: when two States agreed to maintain the treaty provisionally in force pending the conclusion of a new treaty, they intended the provisional application to cease on the conclusion of the new treaty. That presumption was not, however, exclusive and the Special Rapporteur had reserved the possibility of a contrary intention being deduced from the new treaty or being otherwise established.

12. Mr. SETTE CAMARA said that article 14 was in perfect conformity with articles 54 to 72 of the Vienna Convention. The Special Rapporteur had stated that the problems arising with regard to the duration of a bilateral treaty considered as in force could have been left to be governed by the general law of treaties, had it not been for certain complications. The complications arose from the fact that the problem was mainly one of provisional application, which could only result from an agreement between the new State and the other State party. State practice showed that provisional application came into play in three specific situations, which represented exceptions to the general rule laid down in the opening sentence of paragraph 1.

13. The first exception, dealt with in paragraph 1 (a), was an obvious one, calling for no comments.

14. In stating the second exception, mentioned in paragraph 1 (b), the Special Rapporteur had considered it necessary to include the rule in paragraph 2, requiring not less than twelve months' notice of the intention to terminate the treaty. In paragraph (4) of his commentary (A/CN.4/249), the Special Rapporteur had stated that the reservation of the right to terminate must be considered as operating reciprocally. Twelve months was a reasonable time-limit which provided due protection for the interests of both parties, a very important consideration for bilateral treaties on such matters as trade, air transport, taxation and extradition. The parties were of course free to establish some other time-limit if they so wished.

15. The third exception, dealt with in paragraph 1 (c), came within the scope of article 59 of the Vienna Convention. It was a typical case in that respect, because the termination was not only determined by the hypothesis of article 59 but was the result of the agreement of the parties that the conclusion of the new treaty should have the effect of terminating the old one.

16. He would like to know why the Special Rapporteur had not included in article 14 a provision on the lines of article 59 of the Vienna Convention, to the effect that the earlier treaty would be considered as only suspended in operation if it appeared from the later treaty or was otherwise established that such was the intention of the parties. It could be argued that the case would implicitly be covered by the Vienna Convention, but since article 14 dealt extensively with the other situations falling under article 59 of the Vienna Convention, the omission might be interpreted as excluding the case in paragraph 2 of that article. On the whole, however, he supported the Special Rapporteur's text.

17. Mr. AGO said he thought article 14 was perfectly logical in both its conception and its drafting. The purpose of the article was to determine whether, at a given moment, a particular treaty was in force between the new State and the other State. If it was, the treaty was subject to the general law of treaties unless the parties decided otherwise.

18. Article 14 called nevertheless for a few minor comments. To begin with, the first sentence of paragraph 1 should be brought into line with the corresponding sentence in article 13 by replacing the word “for” by the word “between” in the phrase “in force for a new State and the other State party”.

19. Also in paragraph 1, the provision “A bilateral treaty... is binding upon them until terminated in conformity with its provisions” should at least be explained in the commentary. It should be made clear that, where the parties agreed to continue the treaty in force pending a decision by one of them to terminate its application, and where that condition was not fulfilled, the treaty could still be denounced if it contained a clause to that effect. Moreover, it remained subject to the general rules of the Vienna Convention in all other respects, particularly as regards its validity. Without such explanations, which seemed to follow the Special Rapporteur's general line of thought, it might be assumed that it was intended to exclude the treaty from the application of the general principles of the law of treaties.

20. Paragraph 3, which dealt with the provisional maintenance in force of the treaty pending the conclusion of a new treaty, also needed explaining in the commentary. The rule embodied in that provision existed side by side with the different rule of the law of treaties relating to the conclusion of a new treaty. In practice, it would sometimes be difficult to determine whether the parties really intended that the treaty being provisionally applied should terminate on the conclusion of the new treaty, or whether they merely wished to conclude a new treaty. In the latter case, it might be asked whether the old treaty ought not to remain partially in force, in so far as it was not fully covered by the new treaty. The point should be clarified.

21. Mr. HAMBO said that he could accept article 14, subject to drafting changes. The general principle it embodied was that once a bilateral treaty was accepted by the successor State, the law of treaties applied.

22. The article could be referred to the Drafting Committee, which would make any necessary changes to the wording and decide on the appropriate commentary to be attached to it.

23. Mr. REUTER said that when the Commission had prepared its draft articles on the law of treaties, it had left aside the question of collateral agreements supplementing a main treaty and had not elaborated any theory on that subject. The question would arise again when the Commission came to discuss treaties concluded between international organizations. For the time being, the Commission should simply note that the legal rights and obligations of the parties to a treaty could derive from three
sources: the general theory of treaties, succession of States and the theory of collateral agreements.

24. Referring to Mr. Ago's comments, he suggested that paragraph 1 (c) might be reworded to read: "pending the conclusion of a new treaty to replace it". If the present wording was to be maintained, specific mention should be made of the Vienna Convention.

25. In his view, the requirement of twelve months' notice laid down in paragraph 2 was too harsh. It should be remembered that that period, which was taken from article 56 of the Vienna Convention, related to a de facto provisional application. A new State frequently maintained a treaty in force without really being aware of the fact, simply because it continued to implement it by virtue of its internal law. Under the proposed rule, a new State that decided to terminate a treaty after a provisional application of two months would have to wait another year. Such a period would be acceptable only after a provisional application that had lasted long enough to imply the consent of the new State. The Commission should consider how long a period might reasonably be taken as implying consent.

26. Lastly, the expression "unless it appears from their agreement or is otherwise established", used in paragraph 1, seemed inadequate. Paragraph 1 was concerned with a bilateral treaty considered as in force in accordance with article 13, in other words, where the States had agreed, expressly or tacitly, to maintain it. Article 14 could not, therefore, speak of their "agreement" or intention otherwise established, because it referred to article 13, and article 13 was based not on a mere agreement or on something even more informal but on a genuine treaty.

27. Mr. RUDA said that the question of the duration of a bilateral treaty considered as in force for a new State and the other State party in accordance with article 13 gave rise to the application of three sets of rules: first, the rules governing the law of treaties, which were those of the 1969 Vienna Convention; secondly, the rules in the original treaty between the predecessor State and the other State party; and thirdly, the terms of the agreement between that other State and the successor State, which governed the entry into force of the treaty.

28. In paragraph (4) of his commentary (A/CN.4/249), the Special Rapporteur stated that a treaty considered as in force between a new State and the other State party, being a treaty in force for the purposes of the general law of treaties, was necessarily therefore governed by any relevant rules of the Vienna Convention, in addition to the rules governing succession of States. He fully agreed with that proposition but he did not agree that it was unnecessary to include in article 14 any reference to the general provisions of the Vienna Convention under which the termination of a treaty could take place.

29. In particular, it was necessary to include a reference to section 3 (Invalidity, termination and suspension of the operation of treaties) of part V of the Vienna Convention. It was not enough to say, as in paragraph 1 of article 14, that the bilateral treaty was binding upon the two States concerned "until terminated in accordance with its provisions". Unless a reference to the relevant provisions of the Vienna Convention were added, problems of interpretation would arise with regard to the question whether the treaty was or was not in force, bearing in mind the provisions of article 54 of the Vienna Convention. That article specified that a treaty might be terminated either in conformity with its provisions or at any time by consent of all the parties.

30. Mr. USHAKOV said he did not think the provision paragraph 2 of article 14 was necessary where the States had expressly agreed, in accordance with paragraph 1 (a) of article 13, to continue the treaty in force. In that case, they were free to agree whatever they liked concerning the termination of the treaty.

31. On the other hand, if the treaty was continued in force as a result of a tacit agreement, in accordance with paragraph 1 (b) of article 13, the period of notice indicated in paragraph 2 of article 14 was applicable.

32. Mr. USTOR said that the Special Rapporteur had started from the premise that the general rules of the law of treaties applied to a bilateral treaty considered as in force in accordance with article 13. Some doubts could arise however, particularly in the case of an oral agreement between the new State and the other State party to continue the treaty in force. Should such an agreement be treated as a treaty in the sense of the law of treaties or not?

33. His own feeling was that a provision on the lines of article 14 was useful in the present draft, subject to the reservations expressed by certain other members of the Commission.

34. With regard to the requirement of twelve-months notice laid down in paragraph 2, it should be remembered that, by its very nature, the international instrument which would emerge from the present draft would not be binding on those States to which rules of that kind were directed, since those States would be new States and, by hypothesis, not parties to the instrument. Under those circumstances, the adoption of such a strict rule might not be desirable.

35. Mr. NAGENDRA SINGH said that he agreed with the substance of article 14 and with the principle on which it was based. The formula adopted by the Special Rapporteur contained all the necessary safeguards.

36. With regard to paragraph 2, he agreed that a time-limit was inescapable and that twelve months notice was reasonable.

37. Mr. REUTER said that Mr. Ustor's observation on the practical scope of the future convention was very pertinent. There was no doubt that the articles would never be applied on a conventional basis to new States. The Commission should realize that, though it need not be discouraged by it. It was nonetheless true that the only value of a large part of its work, even if it resulted in draft conventions, was a customary law. The same could have been said during the drafting of the articles of the Vienna Convention on the Law of Treaties concerning international organizations, since the latter could not be parties to that convention.

38. The CHAIRMAN, speaking as a member of the Commission, said that article 14 seemed to raise no basic
problems. However, it might be asked whether paragraph 1 (c) was really essential, in which case paragraph 3 would also be called into question.

39. If the general rules laid down in the Vienna Convention were considered in relation to article 14, it would seem that whereas paragraphs 1 (a) and (b) conferred additional privileges on new States which they would not have in the absence of those paragraphs, paragraphs 1 (c) and 3 would constitute a slightly revised formulation of the Vienna rule. Personally, he considered it desirable to rely on the application of the Vienna Convention so far as possible and to depart from it only when there was some real and pressing need to do so.

40. With respect to paragraph 1 (b), it was clear that even if the agreement between two States was a tacit one, the provision regarding termination would have to be based on some communication between the States concerned.

41. Lastly, the requirement of twelve months' notice in paragraph 2 appeared reasonable, but even if the treaty itself provided differently, due weight should be given to any suggestion by the new State concerning a period of notice for termination of the treaty other than that specified in the treaty.

42. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that the fundamental point raised by Mr. Reuter after hearing Mr. Ustor was not a new one; it had already been made by the Chairman himself in connexion with the form of the draft articles. He himself had drawn attention in the Drafting Committee to the special difficulty of including in the present draft an express provision on non-retroactivity, because most cases of succession involved a new State which, ex hypothesi, would not have ratified the convention before it was born.

43. However, that point did not materially diminish the importance of concluding a convention on the law of State succession in respect of treaties; it merely provided a reason for not including an express provision on non-retroactivity. The real importance of any codifying convention was to consolidate those areas of the law where a certain practice existed but where there was doubt as to how far there were any generally recognized rules. Such codification provided a basis for the formation of legal opinion and a guide for new States. He hoped that no one in the Commission would have any misgivings about the value of the work it was undertaking.

44. Mr. Sette Câmara had suggested that article 14 should also cover the question of the suspension of the operation of the treaty. He himself had not thought that that would be a very likely situation, but the Drafting Committee might consider also covering that possibility in the same way as in article 59 of the Vienna Convention.

45. With regard to the question of the time-limit provided for in paragraph 2, he said that it was important from a practical point of view. He had envisaged the common situation of a unilateral declaration, such as that made by Tanzania, in which there was an invitation to continue a treaty in force provisionally for a specific period of time. There might, however, be other cases in which the question of intention was simply a matter of inference from the evidence, as for example the de facto application of the treaty, and then it seemed necessary to have some kind of safeguard between the parties. The period of twelve months might be considered too long, but without some time-limit there was a real possibility that, as Mr. Yasseen has said, one party might be placed in an awkward situation due to the sudden denunciation of the treaty. He was prepared to leave that matter to the Drafting Committee.

46. On the question whether paragraph 1 (c) was really necessary at all, which had been raised by the Chairman, it could be said that if the case was viewed as one of the conclusion of a new treaty relating to the same subject-matter, the rule would be that the older treaty was only terminated if the application of the second treaty appeared to be incompatible with that of the first. The basic hypothesis in those cases, however, was that the parties had specifically agreed to continue the application of the treaty only until the new treaty was concluded, and that intention should be given effect. If the question was merely left to be covered by the relevant provision of the Vienna Convention, as the Chairman had suggested, he thought that that provision would not really reflect the intentions of the parties.

47. The question had also been asked whether it was necessary to safeguard the application of other provisions of the Vienna Convention, including those providing for other grounds of termination. That was a question which might require consideration in connexion with the article on legal effects, but he was not convinced that it needed to be dealt with in the present context.

48. The CHAIRMAN said that, if there were no objections he would take it that the Commission agreed to refer article 14 to the Drafting Committee.

It was so agreed.

ARTICLE 15

 Article 15

49. The treaty not to be considered as in force also between the successor and predecessor States

A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is not on that account to be considered as also in force in the relations between the new State and the predecessor State which concluded the treaty with the other State party.

50. The CHAIRMAN invited the Special Rapporteur to introduce article 15 of his draft (A/CN.4/249).

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* See para. 37 above.
* See para. 16 above.
51. Sir Humphrey WALDOCK (Special Rapporteur) said that article 15 dealt with the question of the relationship between the successor State and the predecessor State when a bilateral treaty was continued in force in relation to a successor State. In his view, when a treaty was continued in force, the result was that the treaty became duplicated; in other words, the position was that there were two parallel but independent treaty relationships arising out of a single treaty: the first between the predecessor State and the other State party and the second between the successor State and the other State party. But that did not mean that the treaty also came into force as between the predecessor and successor States, as happened in the case of a multilateral treaty.

52. It was possible, of course, that the predecessor State and the successor State might put something like that treaty into force between themselves, as, for example, in the case of extradition treaties, where they might use the previous treaty as a model and agree to put its provisions into force between them; the position, however, was that any such agreement was an entirely new treaty, not arising out of the succession.

53. Mr. EL-ERIAN said that the Special Rapporteur had seen fit to include article 15 in order to remove any possible ambiguity; he wondered, however, whether it was necessary to include the phrase "on that account".

54. Sir Humphrey WALDOCK (Special Rapporteur) said that it would be possible to state the rule by some such phrase as "by consequence only of that fact", but he felt that in the present case it should be stated explicitly.

55. Mr. USTOR asked the Special Rapporteur whether he felt that article 15 should have general validity or should apply only to part II, on new States.

56. Sir Humphrey WALDOCK (Special Rapporteur), said he assumed that article 15 would apply only to section 2, on the position of new States in regard to bilateral treaties.

57. Mr. USTOR asked whether it would affect questions of the fusion or federation of States.

58. Sir Humphrey WALDOCK (Special Rapporteur) said that the position of the article might have to be reviewed; it was not a rule which applied only to situations of decolonization but to any case where there was a continuance of bilateral treaties.

59. Mr. REUTER said that he had serious doubts about article 15. First of all, the principle it laid down seemed so obvious that the Special Rapporteur himself had admitted that he had drafted it as a pure formality and that it could easily be deleted.

60. Secondly, the principle was not correct. There were some bilateral treaties which, by virtue of their very object, were liable to become twofold following a succession of States: in other words, there would then be two bilateral treaties instead of one, one between the other State and the predecessor State, and one between the other State and the successor State. In that case the predecessor State and the successor State would be obliged to conclude a new agreement in order that the other treaties might be applied simultaneously.

61. For example, suppose a treaty had been concluded between State A and State B concerning freedom of navigation on a river situated entirely on the territory of State A, and State A was subsequently divided into two States, A' and A", with the river serving as the frontier between the two; if States A' and A" both maintained the treaty with State B, that meant that they would have to conclude a treaty between themselves in order to make it possible for the two bilateral treaties to continue in force.

62. Or again, to take a case where the object of the treaty was a series of operations carried out entirely on the territory of the predecessor State, the successor State and the predecessor State would have to conclude an agreement, otherwise it would be impossible for the original agreement to become a twofold agreement. In short, he felt that article 15 was neither useful nor accurate.

63. Mr. TSURUOKA said he also wondered whether there was any point in keeping article 15, since the case which it was designed to cover was so simple that it could easily be dealt with by the law of treaties as established in the Vienna Convention. However, subject to certain drafting changes, he would not object to it being retained.

64. Mr. QUENTIN-BAXTER said that he supported the retention of article 15. Since it was necessary to make it clear that a bilateral treaty did not in some way become a multilateral treaty as a result of State succession. What was involved was a new agreement altogether.

65. Mr. HAMBRO said that he entirely agreed with Mr. Quentin-Baxter.

66. Mr. YASSEEN said that the purpose of article 15, which was perfectly clear, was to avoid any misunderstanding, and for that reason its inclusion in the draft was justified. He did not think that the case envisaged could give rise to a tripartite relationship, but the treaty could be continued between the predecessor State and the successor State by an agreement between them.

67. Mr. RAMANGASOAVINA said that article 15 was useful, even if at first sight it appeared superfluous. He did not think there could be any twofold application in the event of a division of the State, since it was clearly stated in the article that the bilateral treaty considered as in force for a new State and the other State, should not on that account be considered as binding on the predecessor State. That would need a new agreement because it was no longer the same State that was bound by the treaty.

68. The article was therefore perfectly clear, and even if the principle it laid down was self-evident, it was useful to restate it in order to avoid any ambiguity.

69. The CHAIRMAN, speaking as a member of the Commission, said that it was debatable whether article 15 was really necessary, but if it was to be retained, the phrase "on that account" should also be retained; otherwise the article might be too categorical and would not take into account many peculiar cases which might conceivably arise.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that any doubts which he might have entertained concerning the need for article 15 had been removed
by Mr. Yasseen’s observation that the article seemed necessary in order to avoid any possible misunderstanding.  
71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 15 to the Drafting Committee.

It was so agreed.  

Eighth session of the Seminar on International Law  

72. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.  
73. Mr. Raton (Secretariat) said he wished first to thank those members of the Commission, particularly Mr. Tsuruoka, who, when speaking in the Sixth Committee of the General Assembly, had stressed the value of the Seminar on International Law and described the organizational problems involved. He also wished to thank those members of the Commission who had agreed to lecture to the participants in the eighth session of the Seminar.  
74. Thanks were also due to those States which were financing fellowships but he must point out that, as a result of the recent monetary crisis, the Seminar had lost the equivalent of one fellowship and he hoped that an Asian country would be kind enough to finance one. There would be twenty-three participants in the eighth session of the Seminar, including thirteen fellows, who would be joined by four UNITAR fellows and, in accordance with the wish expressed by the Sixth Committee, by two young diplomats who had taken part in the work of the Sixth Committee.  
75. At the suggestion of former participants, two meetings devoted to practical work in the form of discussions would be arranged, one on the future work of the Commission and the other on the draft articles on the representation of States in their relations with international organizations, which the Commission had adopted at its twenty-third session.  

The meeting rose at 11.15 a.m.

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1172nd MEETING  
Monday, 5 June 1972, at 3.50 p.m.  
Chairman: Mr. Richard D. Kearney  

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties  


[Item 1 (a) of the agenda]  
(resumed from the previous meeting)

ARTICLE 16

1. Article 16  
Consent to apply a multilateral treaty on a reciprocal basis with respect to any party thereto

1. Articles 13 to 15 apply also when a new State, without notifying the parties to a multilateral treaty in accordance with article 7 that it considers itself a party, declares that it is willing to apply the treaty on a reciprocal basis with respect to any party thereto.  
2. Any agreement to apply a multilateral treaty in accordance with paragraph 1 terminates if the new State notifies the parties either that it considers itself a party in accordance with article 7 or that it has become a party in conformity with the provisions of the treaty.  
3. The CHAIRMAN invited the Special Rapporteur to introduce article 16 of his draft (A/CN.4/249).  
4. Sir Humphrey WALDOCK (Special Rapporteur), said that article 16 dealt with the comparatively limited cases in which a newly independent State made a declaration that it was prepared to apply a multilateral treaty on a reciprocal basis with respect to any party thereto which was willing to do the same. State practice showed that, in certain cases, a new State, in its declaration, would divide treaties into multilateral and bilateral treaties, reserving its decision on the former but stating its willingness to apply them in its reciprocal relations with any other State willing to do the same. Where a State party to a multilateral treaty responded in the affirmative, the result was to create between it and the new State a bilateral relationship.  
5. It was questionable whether article 16 was really necessary. Several declarations of the kind had undoubtedly been made, although he had not been able to ascertain whether any substantial number of bilateral arrangements had been concluded pursuant to such declarations. The purpose of a bilateral arrangement in such a case was to serve as a practical expedient to cover the interim period until a decision was made by the new State whether to become definitely a party to the multilateral treaty or not. It was on that basis that he had formulated article 16, paragraph 1 of which stated that, in principle, the rules relating to bilateral treaties, set forth in articles 13 to 15, applied to bilateral arrangements of that kind.  
6. Paragraph 2 stated the fairly obvious point that, if a State took steps to become an actual party to the multilateral treaty by notifying succession, by accession or otherwise, the multilateral treaty would then completely supersede the previous bilateral arrangement.  
7. Mr. YASSEEN said that article 16 fell within the realm of autonomy of the will, but was also linked with

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1 For commentary, see document A/CN.4/249.
State succession. It was obvious that, under the general law of treaties, States could apply a multilateral treaty on a bilateral basis. The condition of reciprocity was one of the characteristics of bilateral treaties.

8. The proposed solution allowed the new State time to consider its position with regard to the multilateral treaty as such. It was, however, merely an application of the general principle of the autonomy of the will and for that reason he doubted whether there was any need for the article. The only original feature in article 16 was reciprocity, on the basis of which bilateral relations were established between a new State and one or more States parties to a multilateral treaty.

9. Mr. HAMBRO said that to some extent he shared Mr. Yasseen's doubts regarding the need for article 16, but felt that, precisely for that reason, it was desirable to retain it ex abundanti cautela. Later, if States wished to eliminate it from the draft, they could do so; it was always easier to delete an article than to restore it.

10. As to the placing of the provision, he suggested that it would be better to move it to article 7, and that question of drafting led him to a point of substance.

11. He would suggest, for the consideration of the Special Rapporteur, that a right should be conferred on the new State to announce that it was provisionally bound by the multilateral treaty on a reciprocal basis in certain bilateral relations, on the lines of the right conferred upon the new State by article 7 to declare itself permanently bound.

12. Mr. USTOR said that if article 16 were retained, its proper place was following articles 13 to 15, since it related to a special type of bilateral agreement.

13. As drafted, paragraph 1 covered a bilateral agreement reached following a declaration erga omnes by the new State of its willingness to enter into reciprocal bilateral arrangements. He would suggest that the wording be broadened so as to cover any bilateral agreement for the reciprocal application of a multilateral treaty, even if made otherwise. Such an agreement could, for example, result from an offer made by the new State to only one party to the multilateral treaty. Clearly, articles 13 to 15 would apply to an agreement reached under those circumstances, but it was preferable to state as much in terms.

14. He noted the explanation given in the commentary that the application referred to in article 16 was provisional one. The text of the article itself did not specify that, but he believed it was correct because the bilateral agreement might in some cases continue indefinitely.

15. Usually, when a new State entered into a bilateral arrangement as provided for in article 16, it was not the multilateral treaty itself but the contents of its substantive provisions which constituted the bilateral agreement; the final clauses, and perhaps also some institutional clauses, would not become applicable if the contents of the multilateral treaty became operative only between the two States concerned.

16. It seemed obvious that when the two States agreed to maintain the multilateral treaty in their relations between themselves, they could also agree to maintain or relinquish any reservations made on the conclusion of the multilateral treaty. It might perhaps be necessary to provide for a presumption in the matter, as was done in article 9.

17. Mr. SETTE CÂMARA said that article 16 covered a case of provisional application which was additional to that dealt with in article 4 and which, like the latter provision, was based on the decisive element of consent. It constituted a very useful device to provide a newly independent State with a full opportunity to review the whole field of multilateral treaties before reaching a final decision on each of them.

18. Since the effect of paragraph 1 was to fragment a multilateral treaty into a set of bilateral agreements, it was logical to place those provisions in the part of the draft dealing with bilateral treaties.

19. Paragraph 2 was a logical consequence of the system embodied in the previous paragraph. If a new State became a party to the multilateral treaty, that arrangement necessarily superseded the bilateral arrangement contemplated in paragraph 1.

20. On the whole he supported article 16, which could now be referred to the Drafting Committee. He felt that the article was necessary, but if the majority were opposed to it, he would not press for its retention. His own view was that it was better to state the rules stated in the article because of the variety of different situations which occurred in practice. Besides, if article 16 were dropped, there would be a danger of having to drop article 17 also.

21. Mr. REUTER said that although he was sympathetic to article 16, he also had certain reservations.

22. In article 16, the Special Rapporteur was introducing a new concept in relation to the preceding articles, the concept of the collateral agreement. The new State did not become a party to the multilateral treaty but concluded a collateral agreement. That was the concept that had been retained in the articles of the Vienna Convention concerning the effects of treaties for third States. He himself had mentioned it in his first report on treaties concluded by international organizations (A/CN.4/258, paras. 74 and 75). Article 16 was justified because it established a right which had previously been merely a faculty to conclude collateral agreements.

23. The article did, however, raise certain difficulties, some of which had already been explained. It was questionable whether it applied only to a bilateral agreement "with respect to any party thereto". The new State might conclude a bilateral agreement either with a group of States or with all the States parties to a multilateral treaty; furthermore, not all multilateral treaties could be fragmented into bilateral agreements subject to reciprocity. That was the case, for example, with the international labour conventions, as regards the provisional application of some of their substantive articles. The formula "with respect to any party thereto" should therefore be reworded, and article 16 itself might be moved to some other part of the draft depending on whether it was more closely related to bilateral treaties or to multilateral treaties.

24. The main difficulty raised by article 16 lay elsewhere. During the discussion on the articles concerning multilateral treaties, he had wondered whether it should be
considered that a new State became a party to a treaty simply on the strength of a *de facto* application of the treaty for a certain period of time. Article 16 did not provide for *de facto* application but for notification of application, without specifying whether it was provisional. If it was provisional, there was no question of the State becoming a party to the treaty; it would be considered merely a party to a collateral agreement.

25. A distinction should thus be made between various situations: first, a *de facto* application without legal consequences; secondly, a notification of application, by means of which the new State would become a party to a collateral agreement; and thirdly, a *lasting de facto* application, by means of which the State would perhaps become a party to the treaty. Although it would be useful to provide for all those situations, careful consideration should also be given to the consequences to be attributed to application and to the notification of application.

26. Lastly, it was not made clear whether article 16 applied to restricted as well as to general multilateral treaties. While in his view there was no doubt about the faculty to conclude an agreement collateral to a general multilateral treaty, States should not be given that right with respect to restricted multilateral treaties.

27. Mr. EL-ERIAN said that, even if article 16 was not indispensable, it would be very useful to retain it for the consideration of the Sixth Committee of the General Assembly. Moreover, situations in practice varied so much that its retention was desirable on that account also.

28. The Commission had on several occasions included articles of an expository character in its drafts. Early in its work on the law of treaties, the Commission’s draft had been criticized in academic circles on the ground that it was too elaborate and more suited to a code than to a draft convention. Nevertheless, the Commission had adhered to its method of making its draft as complete as possible, even if some of the articles might not be essential for specifying legal obligations. For that reason also, he supported the retention of the article.

29. The question of the placing of the article should be left for the Drafting Committee to decide, in the light of the comments made during the discussion.

30. Mr. RAMANGASOAVINA said that the purpose of article 16 was to enable a new State to indicate what position it intended to adopt with regard to a multilateral treaty. Article 7 gave it the possibility of stating its intention to be considered as a party to such a treaty. Article 16 did not provide for *de facto* application but for notification of application, without specifying whether it was provisional. If it was provisional, there was no question of the State becoming a party to the treaty; it would be considered merely a party to a collateral agreement.

31. Article 16 could equally well be placed after article 7, which dealt with the right of a new State to notify its succession in respect of multilateral treaties, or as a link between the articles on multilateral treaties and those on bilateral treaties.

32. Mr. USHAKOV said he supported the principle stated in article 16, which should also be applicable to restricted multilateral treaties, since two States could perfectly well establish a bilateral relationship on the basis of the text of a treaty of that kind.

33. He noted that once again the method of drafting by reference presented certain disadvantages. Although the reference to article 15 did not present any difficulties, since article 15 was of a general character, that was not the case with articles 13 and 14. In particular, the provision in paragraph 1 (b) of article 13 was not applicable in the case of article 16; it was concerned with a tacit agreement, whereas article 16 was based on an express notification. Similarly, paragraph 2 of article 13, which dealt with the retroactive entry into force of the treaty, was not relevant to article 16, since in the latter case the treaty was binding on the two parties from the moment the third State accepted the new State’s offer.

34. The reference to article 14 was equally inappropriate. Not only was paragraph 1 (c), which concerned the conclusion of a new treaty, inapplicable, but also paragraph 1 (b), particularly the twelve months’ notice it provided for. It seemed clear from the Special Rapporteur’s commentary that such a period was not necessary in the case dealt with in article 16.

35. Mr. BARTOS said that he too doubted the desirability of referring to articles 13, 14 and 15, which were concerned with bilateral treaties, whereas article 16 was concerned with the application of a treaty with respect to any party thereto.

36. He would not comment on paragraph 2, but he supported the principles set out in paragraph 1. In particular, reciprocity should apply to all the parties to the treaty and not just to some of them; that was an essential condition and was in the interests of all the great international conventions.

37. Mr. TSURUOKA said he supported the principle expressed in article 16, though on reflection he doubted whether there was any need for the article and wondered whether it did not fall under the law of treaties, as codified in the Vienna Convention, rather than under State succession.

38. He hoped that the Drafting Committee would take account of Mr. Ushakow’s comments if the article was retained.

39. Mr. QUENTIN-BAXTER said that article 16 appeared to have a useful function to perform in correlation with the system of provisional application embodied in article 4. That system provided a bridge to enable the new State to consider its position and become a party to those multilateral treaties which it ultimately decided to join.

40. As laid down in the provisions of article 16, it was the essence of that interim period that only a series of bilateral relationships were established between the new State and the various accepting parties concerned.

41. The provisions of article 16 were perhaps a little more than merely expository. They ensured that the rules
as to bilateral treaties would apply to bilateral agreements to apply multilateral treaties, even though such agreements were not themselves treaties within the Vienna Convention definition.

42. Without an express provision on the lines of paragraph 1 of article 16, the provisions of articles 13 to 15 on bilateral treaties would not automatically apply to an arrangement made by the new State with a party to a multilateral treaty. He realized that the application of articles 13 to 15 by reference could create difficulties but he did not believe that they would prove very great. For the time being, the Commission could well agree on the principle of article 16.

43. Mr. REUTER said he wished to clear up a point concerning the application of article 16 to restricted multilateral treaties. Say, for example, that Algeria on acceding to independence had wished to notify its intention of becoming a party to the restricted multilateral treaties establishing the Common Market, it would have been entitled to do so. If the other States had accepted its offer, the result would have been a collateral agreement under the general law of treaties. From that standpoint, he was not opposed to Mr. Ushakov's idea of extending article 16 to restricted multilateral treaties, but he must emphasize that there was nothing original in that faculty.

44. If, on the other hand, it were desired under article 16 to give a new State the right to make a unilateral declaration resulting in a collateral agreement, its application would have to be restricted to general multilateral treaties. That right would then be justified in the context of State succession in respect of treaties.

45. Juridically, the collateral agreement would result on the one hand from the notification by the new State, and on the other from the express or tacit consent of the other States. If the consent was tacit and reciprocity was not observed, it would then have to be decided whether the collateral agreement should be considered as violated or as voidable.

46. Mr. YASSEEN said he still had doubts about the need for article 16. It was true that the Commission had not always restricted itself to essential rules and had sometimes formulated dispositive rules, but the right stated in article 16 already existed under the law of treaties: any State could propose to another that they should consider the provisions of a multilateral treaty as applicable in their relations on a reciprocal basis.

47. His doubts were reinforced by a further consideration. A multilateral treaty had a well-defined status in international law; to consider it as a bilateral treaty might undermine that status. For that reason, new States should not be encouraged to make use of the faculty of applying a multilateral treaty on a bilateral basis.

48. Mr. BARTOŠ said he agreed with Mr. Yasseen. A multilateral treaty to which article 16 was applied would take on certain features of a bilateral treaty. In his view, States might conclude a bilateral treaty incorporating the text of a multilateral treaty, and then state that the treaty would be applicable between them on a bilateral basis. On the other hand, it was hard to see how a multilateral treaty could be transformed into a bilateral treaty by the application of article 16.

49. Furthermore, the Commission should not encourage a procedure like the one laid down in article 16. Its duty was to preserve the authority of multilateral treaties, whose value depended on their general character. It was essential that multilateral treaties should retain their place in the hierarchy of legal instruments. If applied generally, they were likely to become a source of international customary law as well as of treaty law. To encourage the solution proposed in article 16 would be against the interests of the development of international law.

50. The CHAIRMAN, speaking as a member of the Commission, said that although he did not think that article 16 was really essential, it might be helpful in making clear the particular aspect of the problem of succession which arose when a new State wished to put into force in a limited way a multilateral treaty which had formerly been applicable to its territory.

51. He assumed that article 16 was limited to cases of succession. If that was so, he did not think there need be too much concern about the fact that what the article was doing was making a rule that in effect converted a multilateral treaty into a bilateral treaty.

52. The problem arose from the fact that many multilateral treaties contained provisions providing for certain machinery, such as commissions, secretariats and the like, so that the application of the multilateral treaty would necessarily have to be limited to only some of their provisions, because the two States obviously could not commit the treaty machinery to the bilateral agreement. Whether that limitation required any clarification or not he did not know, but it was an obvious limitation.

53. Once it was recognized, however, he did not think that the problems of restricted multilateral treaties caused any trouble. Certainly some restricted multilateral treaties could be applied without any difficulty at all, such as some of the treaties of the Hague Conference on Private International Law, for example, which were quite restricted since they required the approval of all the parties for the admission of any new member. But he did not think there could be any objection to applying treaties of that character, such as for judicial assistance, as between one of the parties and a new State. There were also other restricted treaties, such as the European Economic Community, referred to by Mr. Reuter, where the substantial amount of administrative and legislative operations constituted a real obstacle to their application on a bilateral basis.

54. With regard to the references to articles 13 to 15, there was some merit in the concern expressed by certain members about the application of article 16. Paragraph 1 of that article, in fact, might cause some difficulty because it appeared to apply mutatis mutandis.

55. Mr. Ushakov had expressed some concern about the application of article 13, paragraph 1 (b), but he himself thought that in the case of article 16 there was merely an offer on the part of one State and an acceptance on the part of another. In the case of paragraph 1 (b),

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4 See para. 43 above.
4 See para. 33 above.
a very high degree of proof was called for, since it stated that “they must by reason of their conduct be considered as having agreed to or acquiesced in the treaty’s being in force in their relations with each other”. That heavy burden of proof should not be necessary when a new State offered to apply a multilateral treaty on a reciprocal basis, since it should be possible to infer agreement from the evidence.

56. He wondered, however, whether article 15 had any real application in respect of article 16, since it would seem to him to be going beyond the farthest stretch of the imagination to conceive that a new agreement between the new State and the third State could affect relations between the new State and its predecessor.

57. Sir Humphrey WALDOCK (Special Rapporteur), said that article 16 was obviously less innocent than it had seemed to him at first. He assumed that a majority of members considered it useful to cover the point it dealt with, but the question was what precisely was that point? It had been his intention to cover the special situation of an attempt to set up temporary bilateral relations on the basis of a multilateral treaty. As Mr. Yasseen had insisted, that question was a matter of consent and properly belonged in the general law of treaties.8

58. The question which the Commission would have to answer was whether it was undesirable to encourage arrangements of that kind. It seemed to him that, unless they involved something which was incompatible with general practice under the law of treaties, it would be impossible to prevent States from making such arrangements if they so desired.

59. He personally did not think that there was much risk of disturbing multilateral relations, except possibly in some cases such as those involving interdependent agreements about disarmament and the like, if a new State, as a temporary arrangement, agreed to apply a multilateral treaty which had already been in force with respect to its territory. It had to be recognized, however, that it was a case of a State in respect of whose territory the treaty had formerly been in force.

60. The Commission obviously had to rearrange its thoughts about the whole question of provisional application. Article 4 (Unilateral declaration by a successor State), appeared to overlap somewhat with article 16. He thought that probably the solution would be to restrict article 4 to the main principle that a declaration did not have automatic effects for third States. The provisional application aspect might have to be brought to a later part in the draft, in which case it might be possible to make more coherent the relation between the particular problem and the question of provisional application.

61. Of course, as Mr. Ustor had pointed out, that question might be a little more complicated because it should not perhaps be confined to unilateral declarations. The latter were perhaps the most obvious examples, but there might be other cases in which the basis on which the new State wished to give provisional application to the treaty would be clear from its statement. In such cases, the situation would be more difficult and article 13 would seem to apply. The Commission would have to decide whether it was necessary to broaden the terms of the present draft.

62. He did not share the Chairman’s doubts about the proof required by paragraph 1 (b) of article 13, since, in his opinion, the more strongly the provision was expressed, the easier the burden of proof would become. Article 13 should apply word for word, although article 14 contained some sub-paragraphs which might not be appropriate. On the whole, he did not think that the references to articles 13 and 15 were out of place.

63. Mr. Reuter had rightly observed that it might be necessary to include special provisions on restricted multilateral treaties.8

64. The Commission would also have to consider whether it needed some general provisions which would permit the provisional application of multilateral treaties which were not restricted. He wondered, however, whether it would be possible, even in the case of a treaty which was open to many parties, for a new State to notify the depositary of its intention to apply the treaty provisionally and in that way to become a temporary party to it.

65. He agreed with the Chairman and those other speakers who had suggested that article 16 did not apply to the treaty as a whole if the latter included provisions concerning some machinery for its application.9 Additional language might be necessary to take that possibility into account.

66. Mr. Ustor had once more raised the spectre of reservations,10 he doubted, however, whether it was necessary to go into that question again, since, if not covered by some general provision, it might prove to be too complicated.

67. Lastly, since the Commission in general seemed to wish to see another version of article 16, he suggested that it be referred to the Drafting Committee.

68. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 16 to the Drafting Committee. It was so agreed.11

ARTICLE 17

69. Article 17

Effect of the termination or amendment of the original treaty

1. A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13:

(a) Does not cease to be in force in the relations between them by reason only of the fact that it has been terminated in the relations between the predecessor State and the other State party;

8 See para. 8 above.
9 See para. 26 above.
10 See para. 52 above.
11 See para. 16 above.
2. Similarly, when a bilateral treaty is terminated or, as the case may be, amended in the relations between the predecessor State and the other State party after the date of a succession:

(a) Such termination does not preclude the treaty from being considered as in force between the new State and the other State party in accordance with article 13;

(b) Such amendment shall not be considered as having amended the treaty also for the purposes of the application of article 13, unless the new State and the other State party shall have so agreed.19

70. The CHAIRMAN invited the Special Rapporteur to introduce article 17 of his draft (A/CN.4/249).

71. Sir Humphrey WALDOCK (Special Rapporteur), said that the point dealt with in paragraph 1 might seem to be an obvious one, but some jurists seemed to have thought it not free from doubt. In the case of a bilateral treaty which was considered to be in force on the basis of the principle of succession, what would happen if the original treaty should be terminated between the original parties? Would that bring about the termination of the treaty between the successor State and the other State party?

72. The rule should clearly be that there was no termination of the treaty between the successor State and the other State because a treaty relationship had been created on the basis of article 13 which constituted an entirely independent agreement between the successor State and the other State. Accordingly, anything which occurred between the predecessor State and the other State was res inter alios acta. The same would be true in the case of an amendment to the original treaty.

73. Paragraph 2 dealt with a similar problem where a bilateral treaty was terminated or amended between the predecessor State and the other State party, after the date of succession but before any agreement between the successor State and the other State party in regard to its continuance in force. In that case, termination did not preclude the continuance in force of the treaty between the successor State and the other State. In the case of a bilateral treaty, if the successor State had an agreement with the other State, that constituted an independent agreement and there was no reason why it should not continue in force merely because something had happened between the predecessor State and the other State after the date of the succession. In his opinion, paragraph 1 was necessary in order to avoid any possible misunderstanding.

74. Mr. USTOR asked the Special Rapporteur whether it was a correct assumption that the rule stated in article 17 applied to the arrangements made in article 16. If so, he felt that the articles might have to be rearranged.

75. Sir Humphrey WALDOCK (Special Rapporteur), said that there was no reason in principle why it should not apply equally to the arrangements made in article 16.

76. Mr. USHAKOV said that he approved of the substance of article 17 but felt that the wording should be more precise. It was hard to see the difference between the situations which paragraphs 1 and 2 respectively were designed to cover. Since it was expressly stated that paragraph 2 dealt with a situation occurring “after the date of a succession”, it might be concluded that paragraph 1 dealt with a situation occurring before the succession. If the situation envisaged occurred in both cases after the succession, what was the point of having two paragraphs?

77. Sir Humphrey WALDOCK (Special Rapporteur), said that paragraph 1 also applied to the situation which existed after succession, since it began with the words “considered in force for a new State and the other State party in accordance with article 13”. That obviously applied to a situation where a treaty was already in force, and he would have thought it clear that it dealt with a case which existed after the date of the succession of a new State.

78. Mr. USHAKOV said that he still did not see what difference there was between the situations covered by the two paragraphs, since in both cases they arose after the succession.

79. Sir Humphrey WALDOCK (Special Rapporteur), said that there was an essential difference between paragraphs 1 and 2. In paragraph 1, termination or amendment took place after the new State had given notice that it wished to have the treaty considered as in force between it and the other State, and the latter had expressed its agreement thereto.

80. Paragraph 2 dealt with a different situation where, before the new State had reached an agreement with the other State, there had been a termination or amendment of the treaty between the original parties. Paragraph 2 merely stated that those facts would not preclude the treaty from being considered in force between the parties if they so desired.

81. Mr. USHAKOV, thanking the Special Rapporteur for his explanation, said he understood how article 17 would apply when there had been an express agreement, but not in the case of a tacit agreement. That, however, was more a question of drafting.

82. Mr. SETTE CÂMARA said that paragraph 1 established in clear terms the parallel and independent nature of treaties considered in force for a new State and the other State party in accordance with article 13. When consent was established, either expressly or tacitly, a new treaty relationship was born between the successor State and the other State party. Neither the termination nor the amendment of the original treaty relationship between predecessor State and the other State party would affect the new treaty.

83. In paragraph (2) of his commentary (A/CN.4/249), the Special Rapporteur had dealt with a different case. If the treaty itself, by its own terms, established a date of expiry, that would affect the new treaty because it had been part of the agreement between the new State and the other State party when they had established their consent to consider a bilateral treaty as continuing in force. Nevertheless, nothing would preclude the new State and the other State party from establishing a different date for the expiry of the treaty between themselves.

19 For commentary, see document A/CN.4/249.
84. The case referred to in paragraph 2 had nothing to do with the expiry of treaties by the effect of their own provisions; it dealt with termination or amendment by agreement between the predecessor State and the other State party. In that case, the logical assumption was that the treaty between the new State and the other State party would be considered as in force.

85. He had some doubts concerning the case mentioned in paragraph (11) of the Special Rapporteur's commentary, where the predecessor State and the other State party terminated the treaty after the date of succession but before the new State and the other State party had taken any position regarding the continuance in force of the treaty. While accepting the logic of the solution offered by the Special Rapporteur, he personally thought that in the reality of international life it would be easier for the successor State and the other State party to conclude an entirely new treaty than to avail themselves of some legal nexus which had been established, so to speak, merely to resurrect a defunct treaty.

86. He was entirely in favour of the text proposed by the Special Rapporteur and it should now be referred to the Drafting Committee.

87. Mr. REUTER said he agreed with Mr. Ushakov that the wording of article 17 must be improved, but the Special Rapporteur's intention was quite clear and he approved of the substance of the article.

88. What Mr. Sette Câmara had just said was true enough, but article 13 contained only one new element as far as the general law of treaties was concerned, the presumption of retroactivity provided for in paragraph 2. If the Commission accepted that presumption, it could retain article 17, subject to drafting improvements.

The meeting rose at 6 p.m.

1173rd MEETING

Tuesday, 6 June 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Quentin-Baxter, Mr. Ramangasavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tamnes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen.

Letter of appreciation to Mr. Movchan, former Secretary to the Commission

1. The CHAIRMAN suggested that the Commission might like to send a letter of appreciation to Mr. Movchan, who had served as its Secretary for five years and had recently retired from the United Nations Secretariat in order to return to the Ministry of Foreign Affairs in Moscow. All members would recall the excellent work done by Mr. Movchan, not only in the Commission itself but also at the Vienna Conference on the Law of Treaties and in the Sixth Committee of the General Assembly.

2. Mr. YASSEEN said that he warmly supported the Chairman's suggestion; Mr. Movchan's merits and qualities had been outstanding.

3. Mr. ALCÍVAR said that he heartily supported the Chairman's suggestion. As Director of the Codification Division at Headquarters, Mr. Movchan had made an important contribution to the codification of international law. His services as Secretary to both the Sixth Committee and the Commission had been extremely beneficial to the United Nations.

4. Mr. TSURUOKA said that he too fully supported the Chairman's suggestion. As Chairman of the Commission at its twenty-third session, he had had an opportunity of appreciating the objectivity, efficiency and modesty of Mr. Movchan, who had loyally served the cause of the codification and progressive development of international law.

5. Mr. BARTOŠ said that he could only endorse the Chairman's suggestion. As an expert consultant on two occasions at the General Assembly, he had been impressed by the efficiency with which Mr. Movchan carried out his task as Secretary to the Sixth Committee. Mr. Movchan's modesty was equalled only by the tact with which he succeeded in applying his skill without wounding anyone's feelings. He had always been available to members of the International Law Commission, even between sessions, and had successfully guided its work without taking any of the credit for himself. It was the Commission's duty to acknowledge its debt of gratitude to its former collaborator.

6. Mr. RAMANGASOAVINA said that he wished to join the other members of the Commission in acknowledging Mr. Movchan as a distinguished, competent and discreet jurist who had undoubtedly contributed to the progress and efficiency of the work of the Commission.

7. Sir Humphrey WALDOCK said that he was glad to support everything which had been said by his colleagues in praise of Mr. Movchan. It was only proper that the Commission should formally place on record its own indebtedness to him for his services as its Secretary. When he himself had served as Chairman, he had had particular reason to be thankful to Mr. Movchan for his able assistance as Secretary. Mr. Movchan had also done much to smooth the work of the Vienna Conference on the Law of Treaties.

8. Mr. BEDJAOUI said that he too wished to pay a warm tribute to the merits and modesty of Mr. Movchan.

9. Mr. USTOR said that he wished to subscribe to all that had been said by his colleagues in appreciation of Mr. Movchan. It should also be pointed out that it was under his aegis that the Secretariat had prepared its Survey of International Law (A/CN.4/245) which was recognized as an outstanding achievement of its kind.

10. Mr. REUTER said that he wished to associate himself with the expressions of esteem and appreciation to which they had just listened.
11. Mr. SETTE CÂMARA said that he fully supported the suggestion to send a letter of appreciation to Mr. Movchan.

12. The CHAIRMAN suggested that the Commission send a letter of appreciation to Mr. Movchan and annex to that letter a summary of the observations which had just been made by its members.

_It was so agreed._

**Succession of States in respect of treaties**


[Item 1 (a) of the agenda]  
(resumed from the previous meeting)

ARTICLE 17 (Effect of the termination or amendment of the original treaty) (continued)

13. The CHAIRMAN invited the Commission to continue its consideration of article 17 of the Special Rapporteur's draft (A/CN.4/249).

14. Mr. YASSEEN said that where a bilateral treaty was in force between the successor State and the other State party by virtue of a collateral agreement, that was to say, by the effect of the mutual consent of the two parties, it was normal and logical that the new treaty should have a life of its own, independently of the original treaty, and that consequently termination or amendment of the treaty between the predecessor State and the other State party by those States after the succession had no effect on the new treaty between the successor State and the other State party. It might at first sight seem pointless to state so evident a truth in an article, but article 17 was not superfluous.

15. Paragraph 1 was useful as a prelude to paragraph 2, which was more essential because it went beyond the application of the general principles of the law of treaties by proposing a solution based on the fact of succession, that was, the replacement of one sovereignty by another. A provision of that kind was needed in order to safeguard the continuity of the treaty. It was useful to state expressly that, after the date of the succession but before it was clear that the treaty was still in force between the successor State and the other State party, nothing could prejudice the right of the successor State and the other State party to maintain the treaty in force between them. Such continuity, not to say retroactivity, was in the interests of the successor State. Article 17 was therefore useful and he was in favour of retaining it.

16. Mr. RAMANGASAOVINA said that in article 17 it was normal that stress should be laid on the fact that the termination or amendment of the original treaty between the predecessor State and the other State party had no effect on the treaty relations established between the new State and the other State party. In practice, it frequently occurred that the predecessor State, while bequeathing a treaty to the successor State, needed to establish treaty relations on fresh bases in order to take account of the emergence of the new State, for example in matters of air law. It was normal that those relations should be completely independent of the relations between the new State and the other State party.

17. However, the doubts that had been expressed during the discussion on article 13, and on paragraph 1 (b) in particular, concerning the presumption of continuity based on the silence or conduct of the successor State, were accentuated by paragraph 1 of article 17, under which, in the absence of any specific expression of will, the silence or conduct of the successor State was interpreted as indicating that it agreed that it was not affected by the termination or amendment of the original treaty. Article 17, which was intended to cover complex situations that were not mere academic hypotheses but reflected existing practice—examples were given in the commentary—was acceptable in principle but he had some reservations about its scope, particularly about the interpretation of the silence of the successor State.

18. Article 17, which was intended to cover complex situations that were not mere academic hypotheses but reflected existing practice—examples were given in the commentary—was acceptable in principle but he had some reservations about its scope, particularly about the interpretation of the silence of the successor State.

19. Mr. USHAKOV said that article 17 needed redrafting to make the meaning clear. Paragraph 1 provided for the continuance of the treaty between the successor State and the other State party in the event of the termination of the treaty between the predecessor State and the other State party on the one hand, and in the event of amendment of the treaty in force between the predecessor State and the other State party on the other. In the latter case, the question arose as to whether, in the absence of any specific expression of will by the successor State, its silence or conduct should be interpreted as tacit acceptance of the original treaty or of the amended treaty.

20. Paragraph 2 raised a more serious problem. The Special Rapporteur had explained that he had in mind cases where a treaty in force between the predecessor State and the other State party was not yet in force between the successor State and the other State party but where it was the intention of the two States to maintain it in force. The wording of sub-paragraph (a) could thus be amended to replace the idea of "being in force" by the idea of "coming into force"; but then it would no longer be possible to refer to article 13, which applied only to treaties in force at the date of succession. In other words, as paragraph 2 was now drafted, it would be even more difficult than in the case of paragraph 1 to interpret the silence or conduct of the successor State, in the cases envisaged in both sub-paragraphs (a) and (b).

21. It would perhaps be enough to retain paragraph 1 only, expanding it to cover the case of the entry into force, between the successor State and the other State party, of a treaty that had previously been in force between the predecessor State and the other State party.

22. Mr. USTOR said that the title of article 17 contained the words "original treaty"; he wondered whether that was the first time that that term had been used in the draft articles and if so, whether it should be introduced at such a late stage. The Drafting Committee might consider whether it should perhaps be used in the previous articles as well.

23. Both the title and the text of the article contained the words "termination or amendment". He himself would prefer the nomenclature of the Vienna Convention, which referred to the invalidity, termination or suspension
of operation of a treaty. He suggested, therefore, that article 17 should also contain a reference to the suspension of the operation of the treaty.

24. He found it difficult to make up his mind about the effect of the invalidity of the original treaty, a point which had been raised by Mr. Ushakov. Certainly the freedom of the successor State and the other State to enter into treaty relations was a point in favour of extending article 17 to cover the case of invalidity. Since, however, article 13 began with the words “A bilateral treaty in force in respect of the territory of a new State at the date of the succession”, that was a point which would have to be considered from the drafting point of view.

25. Lastly, he agreed that it was necessary to find some language to indicate that article 17 also applied to treaty relations. He suggested, therefore, that arrangements made under article 16.

26. Mr. REUTER said there were two points. First, it was clear that article 17 would be merely an application of a general principle of the law of treaties if it were not for paragraph 2 of article 13. It was that paragraph which justified the kind of provisions contained in article 17, because it established the continuity to which Mr. Yasseen had referred.

27. Secondly, the drafting of paragraph 2 was obscure. Paragraph 2 dealt with the case where the original treaty had been terminated or amended after the date of succession but before the consent of the parties had been established in accordance with article 13. If that point were explained in the introductory sentence, the meaning of the paragraph would be clear.

28. He understood the misgivings of Mr. Ushakov, but the usefulness of article 17 could easily be demonstrated by a concrete example. Supposing that part of the territory of a State party to a bilateral treaty in force seceded and became independent, in most cases the successor State would continue de facto to apply the treaty whereas the predecessor State, quicker to see that the treaty as it existed no longer had the same meaning, would terminate or amend it. If the successor State continued to apply the treaty on a de facto basis for a certain period, the conditions mentioned in article 13 would be fulfilled: the conduct of the successor State would have been sufficiently consistent to signify acquiescence in accordance with paragraph 1 (b) of article 13. That was the case which paragraph 2 of article 13 was intended to safeguard.

29. It was essential to allow new States as much latitude as possible during the initial period of their existence. They should not be too hastily considered as committed by de facto application, nor should they be deprived of the right to benefit from the continuity of certain treaties, as provided in paragraph 2 of article 13. He was therefore in favour of maintaining paragraph 2 of article 17, subject to both the French and English versions being redrafted.

30. Mr. USHAKOV said that there was no question of a de facto application of the treaty in paragraph 2 of article 17, since the treaty had been terminated. Not till the actual conduct of the States had established their consent would it begin to be applied again. The case to which Mr. Reuter had referred was therefore the one dealt with in paragraph 1, not paragraph 2.

31. Mr. BEDJAOUI said that article 17 was not open to any fundamental objection, at any rate paragraph 1, which stated an obvious rule deriving from the general principles of the law of treaties.

32. Paragraph 2 was less readily acceptable. It was linked with paragraph 2 of article 13, which stated a general presumption of continuity that had caused serious misgivings during the discussion. Paragraph 2 of article 17 gave rise to the same misgivings. In his view, the legal link between the treaty and the territory of the successor State gave the latter the right to consider itself as bound if it so declared in one way or another, and nothing more. Paragraph 2 should therefore be redrafted to give the successor State the faculty of being bound by its express or tacit consent, by a formal instrument or by its conduct.

33. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the fundamental purposes of article 17, although it did raise certain problems of drafting, particularly with respect to paragraphs 1 (b) and 2 (b). Those difficulties arose out of the possibility provided for in article 13, paragraph 1 (b), that an agreement might come into force on the basis of a course of action taken by the parties, a possibility which presented some difficulties with respect to timing.

34. He was not sure that it would be possible to eliminate all the difficulties merely by drafting. If, for example, an amendment should be made while the parties were engaged in the course of conduct which established that they were in the process of putting the treaty into force, the only possibility would be to rely on the facts of the case.

35. It was true that paragraph 2 (b) provided a slightly more rigid rule since the words “unless the new State and the other State parties shall have so agreed” could be taken to mean an agreement with respect to the amendment, and in the circumstances in which paragraph 2 (b) was intended to be applied, that would seem to be a reasonable safeguard. In spite of those difficulties, however, he was prepared to support article 17.

36. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that he would like to dispel the misunderstanding that seemed to exist concerning article 13. There was no question of continuity until after the parties had established an agreement to keep the treaty in force. In that article, paragraph 2 would only become applicable after the parties had established their agreement, either expressly or tacitly, in accordance with the provisions of paragraph 1.

37. The question of proof in article 13 was a difficult one, but it was inherent in the situation and in the problem which had to be solved. It was seldom that proof would be established by the conduct of the parties alone; on one side at least the situation was bound to be fairly clear, as for example in the case of a treaty which had been in force internally in the territory before succession had taken place. In such a case, if there was a continued application of the treaty in respect of the territory,
it might be asked whether that was a provisional arrange-
ment or a conscious continuation of the treaty.

38. Where the application of an existing treaty by one
party and certain actions by the other party indicated
mutuality, there might be some doubt whether the applica-
tion was purely provisional; nevertheless, it was the
type of case which justified paragraph 2 because the
treaty as applied to the successor State's territories
before succession would be the one which continued to
apply and not an amended version of it.

39. After the predecessor State and the other State
had decided to amend the treaty, it would not be un-
reasonable to say that those actions on their part did not
change the situation, even if the decision to continue the
treaty by succession was not taken until after the amend-
ment occurred. In such cases, steps might often be taken
on a purely practical basis. The predecessor State and
the other State might, however, wish to amend the treaty
for reasons which were not relevant to the territory of
the successor State but were sufficiently cogent among
themselves. For those reasons, he considered it plausible
to retain paragraph 2 of article 17.

40. He agreed with Mr. Reuter that some clarification
was needed of the precise situation in paragraph 2 where
there was an amendment after succession but before the
new State had agreed to continue the treaty.1

41. Mr. Ustor had suggested that a reference to the
suspension of the operation of the treaty should be inclu-
ded, in order to keep article 17 in line with the Vienna
Convention.2 He agreed with that suggestion, but thought
that any reference to invalidity should be omitted. Theo-
retically, there might be a challenge to validity after suc-
cession, but to go into all those possibilities would lead
the Commission too far afield.

42. Mr. Sette Câmara had said that paragraph 2 re-
ferred to treaties which terminated by their own force;
that was clearly correct and the point should be taken
care of by the Drafting Committee.3

43. On the question of proof, he agreed that there were
serious difficulties, but those difficulties were inherent in
much of the law of treaties. There were many articles
in treaties in which it would be necessary to take account
of an agreement or intention which would only appear
from the treaty or would be otherwise established, as
for example, by tacit agreement or by the interpretation
of certain actions of the parties. The difficulty of estab-
lishing proof was no reason for not tackling the problem
in the present case, since, as Mr. Reuter had said, de
facto application of a treaty was typical of new States.4

44. There appeared to be general agreement that para-
graph 1 could stand. The paragraph was useful because
misunderstandings could arise from the notion that all
rights were derived from the predecessor State and that,
accordingly, anything done by that State had implica-
tions for its successor. The purpose of paragraph 1
was to make it clear that that was not the case; as
Mr. Yasseen had said, the treaty between the successor
State and the other State started on a new life of its own
and the predecessor State became a stranger to it.5

45. Although members might have certain reservations
concerning article 17, there seemed to be sufficient general
agreement to justify sending it to the Drafting Com-
mittee.

46. The CHAIRMAN said that, if there were no objection,
he would take it that the Commission agreed to refer article 17 to the Drafting Committee.

It was so agreed.6

ARTICLE 18

Article 18

Former protected States, trusteeships
and other dependencies

1. Where the succession has occurred in respect of a former
protected State, trusteeship, or other dependent territory, the rules
set out in the present draft articles apply subject to the provisions
of paragraph (2).

2. Unless terminated or suspended in conformity with its own
provisions or with the general rules of international law:
(a) A treaty to which a State was a party prior to its becoming
a protected State continues in force with respect to that State;
(b) A treaty to which a State, when a protected State, became
a party in its own name and by its own will continues in force
with respect to that State after its attainment of independence.7

47. The CHAIRMAN invited the Special Rapporteur
to introduce article 18 of his draft (A/CN.4/256).

48. Sir Humphrey WALDOCK (Special Rapporteur),
said that article 18 was the first article in part III, which
would deal with particular categories of succession and
thus cover a series of problems not yet encountered in
the draft.

50. For the purposes of part III, it was necessary to
consider whether any special rules had to be framed to
deal with those particular categories of succession consti-
tuted by dependent territories, unions of States, dissolu-
tions of unions and dismemberment. Dependent terri-
itories themselves comprised protected States, mandates
and trusteeships, colonies and associated territories.

51. In paragraph (1) of the commentary (A/CN.4/256),
he had indicated that, having regard to the progressive
disappearance of dependent territories and of the modern
law regarding self-determination enshrined in the Char-
ter, it might be argued that the omission of provisions
concerning dependent territories would be both justifiable
and preferable. There were, however, certain arguments
in favour of including an article dealing specifically
with the question raised by particular types of dependent
territories. The first was that the process of emancipation
of dependent territories was not yet absolutely complete;
there were still a few situations which called for regula-
tion. Another consideration was that it could be relevant
historically to determine the law in existence at the

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1 See para. 27 above.
2 See para. 23 above.
3 See 1172nd meeting, para. 84.
4 See para. 29 above.
5 See para. 14 above.
6 For resumption of the discussion, see 1196th meeting, para. 13.
7 For commentary, see document A/CN.4/256.
moment of independence in order to ascertain whether at that time a treaty was in force. Moreover, the differences between the various types of dependencies were discussed in all the literature and it might therefore be desirable to cover that aspect of the topic of succession in the present draft, however briefly.

52. Article 18 itself was very much a provisional article, the purpose of which was to place before the Commission certain matters for discussion.

53. Paragraph 1 stated the general principle that the rules on new States applied to former dependent territories. A great deal was to be found in legal literature on trusteeships, mandates and colonies. Many writers had noted that the emergence of colonies to independence had often been an evolutionary process and had thought that the existence of an embryo State during the colonial period should have some effect on the law of succession. His own conclusion, however, was that no special rules were called for, except possibly those laid down in paragraph 2 with regard to protected States.

54. Paragraph 2(a) covered the case of a treaty to which a State had been a party prior to its becoming a protected State. Paragraph 2(b) dealt with the case of a treaty to which a protected State became a party in its own name and which continued in force by the will of that State after independence.

55. His commentaries dealt at length with the State practice and judicial precedents relating to protected States, mandates and trusteeships and colonies. There was also the case of associated States, a label which was used to cover a variety of different situations.

56. He would be glad if members would discuss the general question whether it was necessary to include in the draft separate provisions on the various types of dependent territories.

57. Mr. EL-ERIAN said the Special Rapporteur had provided the Commission with a very scholarly statement of the different categories of what had been termed “not fully sovereign States”. Personally, he had some doubts as to the advisability of including in the draft an article dealing with those categories of States or territories. His views were similar to those he had expressed in 1962 when the Commission had discussed article 3 (Capacity to become a party to treaties) of the Special Rapporteur’s first report on the law of treaties. In that article, the Special Rapporteur had included a paragraph 3 dealing with the capacity to enter into treaties affecting a dependent State. That paragraph, however, had been omitted from the article adopted by the Commission (Capacity to conclude treaties).

58. The view he had himself expressed was that, with the attainment of independence by so many countries in Asia and Africa, dependent status, and the restrictions on the capacity of dependent States to conclude treaties, were fast becoming obsolete; since the Commission was engaged in preparing drafts primarily intended to serve as a guide for the future of international relations, it ought not to deal with situations which belonged almost exclusively to the past. Those considerations were even more valid now, some ten years later, and he therefore did not consider it at all advisable to include in the draft any provisions dealing with mandates or protectorates, which at the present day hardly existed at all.

59. From the point of view of terminology, he would urge that in no case should language be used which was at variance with the terminology of the Charter. The Charter recognized only three categories of entities: sovereign States, trust territories—dealt with in Chapter XII of the Charter, and “non-self-governing territories”—dealt with in Chapter XI of the Charter. The use of any other terms should be carefully avoided.

60. Mr. TAMMES said that his study of the extensive commentary to article 18 had convinced him that a provision on protected States would even now have some value, since it would cover a case of succession which was not covered by any of the cases already dealt with. In the case of protected States, certain problems arose connected with the different stages of dependence or independence experienced by a State which had retained its personality in international law despite its protected status. The only way of dealing with the legal consequences of that type of situation was to include an article on the lines of article 18.

61. Although the nineteenth century type of protectorate was certain to have died out by the time the present draft became an international instrument, an article on the lines of article 18 would still be useful for dealing with special situations inherited from the past. The International Court of Justice had recently had occasion to deal with problems of that nature and could very well have to do so again in the future. It would be very helpful to provide an authoritative statement of the law applicable to succession with respect to dependent territories in order to help to resolve various controversial issues, even if the future international instrument on State succession might not be strictly applicable.

62. He believed that the solutions embodied in article 18 were sound; they would serve to promote continuity of treaties and they did not conflict in any way with existing State practice, though it was true that formerly protected States had often preferred to become parties to treaties by way of accession or by notifying succession as new States.

63. In paragraph 2(b), the phrase “by its own will” was particularly important because it opened the possibility for the formerly protected State of rejecting the continuance in force of the treaty imposed by the protecting power.

64. He agreed with the Special Rapporteur that cases of associated States could be left to be covered by the provisions on new States in part II, particularly since in those cases no period of full independence had preceded the period of dependence.

65. Mr. SETTE CÂMARA said that, since the process of decolonization was now in its last stages, there were very few cases left of trust territories or other dependent
territories, and by the time the present draft became an international instrument, such cases would have become a historical curiosity. The codifier, like the legislator, should focus his attention on the future, not on the past.

66. He realized, however, the need to avoid leaving any gaps or loopholes in the draft by omitting to cover certain situations, and he noted with appreciation that the Special Rapporteur had drafted the provisions of article 18 in the past tense.

67. Perhaps the whole problem could be solved by moving article 18 to the end of the draft, so that it would then become part of the final general provisions and serve to cover certain situations which were in the process of extinction.

68. Mr. RAMANGASOAVINA said that the various situations covered by article 18 were all related to the decolonization process, and territories which were not yet independent should be considered as being on the way to becoming so, in accordance with the principles proclaimed by the United Nations.

69. It seemed unnecessary to devote a special article to dependent territories, since, as soon as they became independent, they would have the status of a new State within the meaning of the draft, like any former colony which had acceded to independence.

70. The case envisaged in paragraph 2 (a), of an independent State becoming a protected State, was rather contrary to the current trend. It was, of course, conceivable that a State might agree with another State to form a single entity or to be merged in a pre-existing entity, but that case would fall under fusion of States or integration into a whole.

71. Article 18 was therefore unnecessary because it seemed to duplicate other provisions of the draft.

72. Mr. REUTER said he recognized the value of the article proposed by the Special Rapporteur, but for two reasons he could not recommend it.

73. First, the preceding articles were sufficient to deal with the cases covered by article 18. Those articles had clearly been based on the practice of decolonization, and the rules they laid down, particularly the application of the "clean state" principle, were equally appropriate to dependent territories. It might perhaps have been more logical to treat cases of decolonization separately from other cases of succession of States, as Mr. Ushakov had suggested, but that would have needed some fine theoretical distinctions.

74. Secondly, it would be inappropriate for the Commission to propose an article deliberately dealing with certain colonial situations. When it had prepared its draft on the law of treaties, the Commission had decided to disregard purely colonial questions.

75. As far as protectorates were concerned, it was noteworthy that not one had been established on a satisfactory legal basis.

76. If further problems arose in regard to dependent territories, they could be solved in accordance with general theory, particularly the theory of representation. There were still some systems which were not described as protectorates but in which responsibility for the external affairs of a State was partly assumed by another State. Such situations raised delicate questions of representation, which should be examined when the Commission came to consider unions of States. It would therefore be preferable to look ahead and not to deal specifically with problems peculiar to dependent territories.

77. The position which he had adopted nevertheless caused him one regret, in that he did not like having to lump together ordinary cases of colonialism with mandates and trusteeships. The more open to criticism the colonialist system may have been, the more detailed attention deserved to be given to the trusteeship arrangements made under United Nations supervision.

78. Moreover, there were in existence instruments providing for the possibility of placing territories under United Nations supervision, thereby raising a potential problem which should not be overlooked. Some conventions drawn up by the Intergovernmental Maritime Consultative Organization, for instance, provided that the United Nations might become a party to them on behalf of territories which it represented. That question, however, should not be considered under succession of States, since it was more precisely a case of succession of an international organization to a State. A similar situation would arise if, in accordance with the suggestion made by the Government of the United States of America at the International Court of Justice, the United Nations were to enter into commitments on behalf of Namibia. Problems of succession would arise the day Namibia became an independent State.

79. Mr. ALCIVAR said that he appreciated that the Special Rapporteur had submitted article 18 only as a tentative article and in order to obtain the views of members.

80. His first reaction was to reject it. There was now a new international legal order, and the international community was governed by the constitutional provisions of the Charter of the United Nations. The Charter recognized only three types of entities: sovereign States, non-self-governing territories and trust territories.

81. Article 77 (1) of the Charter specified that trust territories included territories held under League of Nations mandate, former colonies of enemy States detached from them as a result of the Second World War, and territories voluntarily placed under the trusteeship system. In accordance with the Charter, all such territories were administered by the administering authorities on behalf of the United Nations and with the aim of leading them towards self-government.

82. Colonies as such had disappeared with the adoption of the Charter. The term "colony" had no legal meaning.

11 See 1154th meeting, para. 30.
or standing, and the same was true of such designations as the “Overseas Provinces of Portugal”; the Charter only recognized the existence of “non-self-governing territories” administered on behalf of the international community; it was the duty of the administering powers to lead those territories towards self-government. The process of decolonization constituted the application of the principle of self-determination laid down by international law.

83. A trust territory, or a non-self-governing territory, had two of the elements of the State: a territory and a population. All that was required for it to be a State was the establishment of a government of its own.

84. With regard to the so-called “associated States”, he had serious doubts as to whether their status was in conformity with the provisions of the Declaration on the granting of independence to colonial countries and peoples, embodied in General Assembly resolution 1514(XV) which constituted the Magna Carta of decolonization. Admittedly the concept of “free association” with another State was mentioned in the annex to resolution 1541(XV), but he seriously doubted whether that concept could be reconciled with the basic provisions of resolution 1514(XV).

85. He thanked the Special Rapporteur for submitting the problem to the Commission but could not support the retention of article 18.

86. Mr. QUENTIN-BAXTER said it was natural that the rule suggested by state practice should have an emphasis upon the past. It was a question whether that practice was outmoded by the passing of the colonial era. There had, however, been cases concerning protected States before the Permanent Court of International Justice, and it was appropriate that a provision on the subject should be placed before the Commission.

87. He himself was more concerned with the case of the associated State; it received only a brief mention in the commentary because there was little practice, but it might well be the problem of the future. A case in point was that of the Cook Islands, which had established a precedent in the practice of the United Nations. The history of that case required some clarification of the terminological categories mentioned by other speakers in connexion with United Nations practice.

88. In accordance with the Charter, a plebiscite had been held in the Cook Islands, which endorsed their choice to become a State in free association with New Zealand. It was an associated State, not a non-self-governing territory, and still less a colonial territory. A clear decision had been taken by the United Nations General Assembly to release the Cook Islands from any colonial status. The practical implications of its free association with New Zealand were that New Zealand remained responsible for the external affairs of the Cook Islands, and that Cook Islanders retained New Zealand citizenship—thereby extending considerably the area in which they were free to live and work.

89. The Cook Islands were, however, completely self-governing. The New Zealand Parliament could not make laws for the Cook Islands any more than the United Kingdom Parliament could make laws for New Zealand. Though New Zealand exercised the treaty-making power on behalf of the Cook Islands, only the Cook Islands Government and legislature could take the steps necessary to give effect to treaty obligations within the Cook Islands. Thus, the treaty-making power could be exercised only at the behest of the Cook Islands authorities or with their full agreement.

90. The question of the status of the Cook Islands was also of regional importance. A small regional organization had now been established in the South Pacific which comprised Australia, New Zealand, Fiji, Tonga, Western Samoa, Nauru and the Cook Islands. The admission of the Cook Islands was a clear indication of its non-dependent status. No colonial territory could be admitted to the new organization because of its very nature.

91. The status which he had just described was not a legal fiction; it was perfectly real. Cases of that kind could perhaps be covered by means of the provisions on the subject of federations or unions rather than by means of provisions in the part of the draft at present under discussion. He had referred to the matter simply because there had only been a brief mention of associated States in the commentary and he had wished to draw attention to a case which was fully in accord with United Nations practice.

The meeting rose at 1 p.m.

1174th MEETING

Wednesday, 7 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bedjaui, Mr. Bilge, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda] (continued)

ARTICLE 18 (Former protected States, trusteeships and other dependencies) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 18 of the Special Rapporteur's draft (A/CN.4/256).

2. Mr. YASSEEN said that in view of the fact that the rules already approved by the Commission were much more general than had been thought at first sight and
applied to all the cases mentioned in article 18, and in view also of the explanations given in the commentary, it seemed that there was no need for article 18.

3. Like Mr. El-Erian, he thought there should be no mention in the draft of colonies, mandates or other anachronistic institutions at a time when the universal trend was towards decolonization; associated States formed a separate category and should be dealt with under unions of States, since theirs was a régime that might be found again in the future.

4. The rules relating to protected States, in paragraph 2, served no purpose. Treaties concluded by the protected State before the establishment of the protectorate could be considered as treaties applicable to the territory during the protectorate, on which the State would be completely free to pronounce when it recovered its independence. As for treaties concluded on behalf of the protected State, it was an illusion to believe that that had been done with its free consent, since the protectorate or mandate régime had always been an instrument of exploitation and, it could even be said, of a certain form of colonization. There was thus no justification for adding a special rule for protected States.

5. Mr. BEDJAOUI said he understood the considerations that had prompted the Special Rapporteur to propose article 18. The preceding articles as a whole applied to situations where there was a legal link between the territory and the treaty effectively applied to the territory, on the basis of which the Commission had recognized a right of succession for the successor State.

6. Article 18 dealt with a new situation because, in addition to the legal link between the treaty and the territory, there was the question of the consent expressed before independence by the territory that was to become the successor State. The question now was whether that consent merely gave the right to notification, or whether it was possible to go further and consider the treaty as being in force ipso jure, without any need for notification. The Special Rapporteur proposed that the latter should be the case, subject to the reservations he had expressed in the commentary, but he himself did not share the Special Rapporteur’s view.

7. Establishment of previous consent could take three forms: first, conclusion of a treaty before the establishment of the protectorate; secondly, delegation to the protecting State by the protectorate, considered as a subject of international law even if its capacity to conclude treaties was exercised by the protecting State, of the power to represent it for the purpose of concluding treaties in its own name and by its own will; or thirdly, the association of dominions, or embryo States, which had progressively acquired varying degrees of autonomy, with the expression of consent given by the Power on which they depended. Those cases had led the Special Rapporteur to the conclusion that protectorate situations were different from those dealt with in the preceding articles, since the treaty had been effectively applied to the territory, and the previous consent expressed before independence by the successor State was perfect or near-perfect.

8. In the nearest case to perfect consent, the case where it had been given by treaty at the first achievement of independence, and thus before the establishment of the protectorate, the Special Rapporteur asked the twofold question, whether the protected State was really a new State and whether it was really a successor State.

9. According to the Special Rapporteur, it was not a new State and the preceding articles were therefore not applicable to it. Nor was it a successor State because it would be succeeding itself. Consequently, consent to be bound by a treaty expressed at the first achievement of independence should be sufficient to maintain the treaty in force. There would not even be any State succession. The treaty concluded at the time of the first independence would remain in force during the period of protectorate and continue in force during the second period of independence after the termination of the protectorate.

10. Even if that idea were correct—and he would demonstrate that it was not—its formulation in paragraph 2(a) was ambiguous and had even been interpreted by some as suggesting, contrary to the Charter and the universal trend, that an independent State today could become a protected State tomorrow. The paragraph should have stated that “a treaty concluded by a protected State prior to its becoming a protectorate remains in force during the period of the protectorate and continues to bind the State when it again accedes to independence”.

11. But the whole idea underlying article 18 was false because it was based on a legal fiction. There had never been a pure protectorate where the protecting Power solemnly respected the sovereignty of the protected State. Even the International Court of Justice itself, in the “Rights of Nationals of the United States of America in Morocco” case, after referring to the protected State as a sovereign State, had been forced in the same opinion to qualify its statement considerably.

12. Consequently, before deciding that a treaty concluded prior to the establishment of the protectorate remained in force after the new independence, the question should be asked whether the treaty had been effectively applied during the protectorate and whether the protecting State had not applied the clean slate principle, particularly in the case of the so-called colonial protectorates. In point of fact, there had often been a twofold and genuine succession of States: one at the time of the establishment of the protectorate, and the other at the time of the second independence. The question whether the treaty remained applicable was thus pointless, since it had ceased to be applied during the period of the protectorate.

13. The case contemplated in paragraph 2(b), that of a treaty concluded during the period of protectorate in the name and by the will of the protected State, was also a legal fiction. In reality, consultation with the protected

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1 See 1173rd meeting, para. 58.

2 I.C.J. Reports 1952, p. 188.
State was illusory or non-existent. It was the problem of representation in international law, referred to at the previous meeting by Mr. Reuter. There was, it was true, the example of Cambodia which, in the "Temple of Preah Vihear" Case, had contended against Thailand that France had represented her in concluding a friendship treaty in 1957, preferring the idea of representation to that of succession. But that was the only time Cambodia had taken that line and it had been careful not to invoke the idea of representation for a number of other treaties.

14. It all confirmed the impression that article 18 served no purpose, because there was still the question of the validity of representation in international law. Even in cases of representation, there were situations in which a State could have valid reasons for considering the representation as void. Furthermore, there was no such thing as pure representation in the protectorate system. Between near-perfect representation, which did not exist, and the authoritarian extension pure and simple of a treaty by a protecting State to the protected State, there were many different degrees, and it would be very difficult to assign a definite value to the expression of consent by the protected State in any given situation of that kind.

15. But the crowning defect of article 18 was that it did not reflect practice. If the treaty remained ipso jure applicable to the former protected State which had become independent, how was it possible to explain the existence of such an extensive practice of notification of succession, even of accession, by former protected States such as Tunisia, Cambodia, Laos and Viet-Nam? Even the existence of devolution agreements showed that the continuation of the treaty was not taken for granted. In practice, protectorates had been treated as colonial territories; any purported representation was fictitious.

16. The Commission should therefore retain only paragraph 1 of article 18, under which former protected States, trusteeships and other dependent territories might be considered as new States for the purposes of succession in respect of treaties, so that the preceding articles would apply to them.

17. Especially the Commission should take into account the anti-colonial philosophy of the United Nations and the work of the Committee on Decolonization. The distinction originally established in the Charter between non-self-governing territories and the international trusteeship system had to a large extent been attenuated in practice. Today everything was described as either a colonial or a semi-colonial situation. The distinction drawn in article 18 between different categories of succession thus ran counter to the general trend both in the United Nations and in the whole world. Article 18 was consequently not in conformity with practice; it served no purpose because it was unsuitable for regulating former situations, some of which still persisted, and it was undesirable that it should be used to justify new or future situations of States falling under the protectorate system, like Sikkim or Bhutan.

18. The problem of representation in international law arose not in the case of protected States, mandates or trusteeships, or dominions, which were all survivals of colonial or semi-colonial situations condemned by the Charter, but perhaps more fruitfully in the case of unions or dismemberments of States. It also arose in the case of succession of international organizations to States, for example in the case of Namibia, and might arise more frequently in the future. The International Court of Justice's opinion of 21 June 1971 concerning the obligation to refrain from invoking or applying treaties concluded by South Africa in the name of Namibia had not been based on the law of State succession, but nevertheless provided an interesting indication. But that was a question which belonged rather to the topic of succession between an international organization and a State, between international organizations, or between a State and an international organization.

19. The problem of treaties of a dispositive or territorial character, which according to the Special Rapporteur might justify a provision such as article 18, was one that arose for all new States, and not only for former protected or dependent States. A special provision for such treaties was therefore needed. Perhaps the idea of representation could be adopted there, but there were other principles supporting the idea of continuity for treaties of that kind which might be invoked.

20. Mr. TSURUOKA said that the question whether the cases dealt with in article 18 ought to be included in the draft or not should be considered from the standpoint both of substance and of form. So far as the substance was concerned, no one contested the right to self-determination of the political entities referred to in article 18; the question was, therefore, whether the preceding provisions were sufficient to guarantee them that right and to facilitate its application. He was not yet in a position to give a categorical answer to that question.

21. So far as the form was concerned, it was clear from the earlier discussions that the draft would probably comprise a first part, containing general provisions on the use of terms, the "clean slate" principle, the predominance of the successor State, succession to multilateral and bilateral treaties, and perhaps dispositive treaties; a second part, containing specific provisions concerning the different types of succession, and perhaps the case of protected and associated States; and lastly, final clauses. If that was so, the cases dealt with in article 18 should be considered. Since such cases still existed in the world today, it would be helpful to ascertain whether rules could be formulated to assist such countries to achieve the right to self-determination in the matter of succession in respect of treaties.

22. Mr. USHAKOV said that paragraphs 1 and 2 of article 18 raised two different questions. In paragraph 1, where it was clearly stated that former protected States, trusteeships and other dependent territories were in the

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6 See 1173rd meeting, para. 76.

same situation as any other new State and were thus governed by the preceding articles, the question was whether there was any need for such a paragraph. Everything depended on the definition adopted for the expression "new State". If it was clear that it also covered the entities referred to in article 18, the paragraph was redundant; if not, it would have to be specified in a provision of that kind that they were covered by the draft. It was therefore too early to say whether paragraph 1 should or should not be deleted.

23. Paragraph 2 dealt with an exception. All the preceding articles had laid down the "clean slate" principle, coupled with the right of the former dependent territory to make known its will with regard to the treaty. Paragraph 2 provided that a protected State continued to be bound by a treaty in force with regard to its territory that had been concluded before the establishment of the protectorate. However, it was clear from paragraphs (16) to (22) of the commentary (A/CN.4/256) that the rule in paragraph 2 conflicted with the practice, since many former protected States had refused to consider themselves bound by treaties concluded in their name by the former protecting Power. It was the "clean slate" principle, coupled with the right of the former protected State to express its will either way with regard to the treaty, that seemed to be the prevailing practice.

24. Even accepting the hypothesis that the former protected State was bound by a previously concluded treaty, the wording of paragraph 2 was ambiguous. The treaties referred to in sub-paragraph (a) had in some cases been in existence for a very long time and there was a question whether, first, they still had any effect, and secondly, whether the third States also continued to be bound by them and had been bound by them during the period of the protectorate.

25. The question also arose whether paragraph 2 covered the case of non-colonial protectorates, in other words, entities whose legal situation was ill-defined, such as Liechtenstein, Monaco, Andorra or San Marino. A specific provision would be justified for those cases but not for colonial protectorates, which should be treated like any other former dependent territory to which the rules already approved by the Commission applied, even in cases where the protected State had become a party to the treaty "in its own name" and "by its own will", as provided in sub-paragraph (b), expressions which described situations more fictitious than real.

26. In short, paragraph 1 might be useful for making it clear that the expression "new State" covered all forms of colonial dependence and that the preceding articles were applicable to them; paragraph 2 could only cover the case of States whose situation was rather that of a non-colonial protectorate.

27. Mr. BILGE said that article 18 appeared to propose special rules, applicable only to protected States, but there was some doubt whether it was really a question of succession. According to the definition in paragraph 1 (a) of article 1, which had been accepted by the Commission for working purposes, succession meant "the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory". In the case of genuine protectorates, protectorates of a non-colonial character, it was not possible to speak of replacement in the sovereignty or in the competence to conclude treaties, since on the one hand the protected State retained its sovereignty or its separate personality—as the International Court of Justice had confirmed—and, on the other, the protected State participated in the conclusion of the treaties relating to it. Furthermore, in referring to a treaty concluded "in its own name", it was more a question of representation than of succession. He therefore hesitated to reply in the affirmative to the question whether article 18 should be retained.

28. In addition, according to the commentary, non-colonial protectorates had "individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development" (A/CN.4/256, para. 4). It seemed unlikely, therefore, that it was possible to elaborate a general system common to those States, particularly as, according to the International Court of Justice, there was no consistent practice that could be taken as a basis. He doubted therefore whether article 18 should be retained.

29. The situation of the former dependent territories referred to in article 18 could be settled by enlarging the definition of a "new State"; otherwise specific provisions were needed.

30. Mr. USTOR said the Commission was indebted to the Special Rapporteur for the rich commentary he had prepared for article 18. The conclusion drawn by the Special Rapporteur from his thorough examination of the practice was that no special rules were needed for cases of succession relating to former mandates, trustee- ships and colonies or other States which had emerged from various forms of colonial status.

31. There appeared to be complete agreement in the Commission that paragraph 1 of article 18 could be dispensed with provided that in article 1, on the use of terms, the wording of paragraph 1 (e), defining the meaning of the term "new State", was altered so as to refer not to a territory which had "previously formed part" of an existing State, but to a territory which had been "previously under the sovereignty or administration" of an existing State. With that change of wording, the term "new State" would clearly cover former mandates, trustee- ships and colonies, so that the rules set out in the draft would apply to them.

32. The main purpose, however, of article 18 was to establish, by means of paragraph 2, a different régime for protected States. The question therefore arose of determining the practical effect and utility of the two sets of provisions contained in sub-paragraphs (a) and (b) of that paragraph.

33. Paragraph 2 (a) stated that a treaty to which a State was a party prior to its becoming a protected State continued in force with respect to that State after the abolition of the protectorate and the attainment of independence. In order to determine the practical effect of...
that provision, it was necessary to take stock of the protected States and of the treaties that might be covered by the provision in question.

34. The number of protected States was at present extremely small. Several cases of associated States were mentioned in the commentary and Mr. Ushakov had drawn attention to certain other special relationships. The concept of a protected State was clearly not a uniform one and many of the cases mentioned could be explained otherwise than by reference to that concept. At all events, it was perfectly clear that the number of situations in which paragraph 2 (a) could apply was very limited indeed, because protected States were a mere relic of the past. It was of course highly improbable that, under the United Nations, any new protectorates would ever be established, because such a measure would be at variance with the purposes and principles of the Charter.

35. Similarly, if an effort were made to search for treaties corresponding to the description given in paragraph 2 (a), it would be found that their number was extremely small. The Roman law maxim de minimis non curat praetor clearly applied in the present instance, and paragraph 2 (a) could safely be dispensed with.

36. The argument drawn from the very limited number of protected States in existence at present applied with equal force to paragraph 2 (b). There were perhaps cases in which it could be said that a treaty had been concluded with some measure of voluntary consent by the protected State, and in which the authorities of the protected State had been able to express their wishes during the conclusion of the treaty. Nevertheless, it was questionable whether it was desirable to establish a different régime for treaties concluded under such circumstances.

37. The practical effect of paragraph 2 (b) would be to give to the newly independent State, formerly a protected State, an additional right to maintain the treaties in question. Unfortunately, that advantage was offset by the fact that an additional burden was also imposed on the new State by making those treaties binding upon it. On balance, therefore, he inclined to the majority view that the retention of paragraph 2 (b) was not warranted.

38. Mr. NAGENDRA SINGH said that in its time the Indian sub-continent had probably contained the largest number of protected States in the world; there had, in fact, been approximately 600 such States, of which about fifty were now included in Pakistan. The problems of those States, however, had now been completely resolved, in both India and Pakistan, so he did not think that there was any need to include specific provisions concerning them in the present draft, especially in a colonial context.

39. It could be fairly assumed that the problem of former protected States, trusteeships and other dependencies no longer existed in a form that would call for codification; for that reason, he doubted whether it was really necessary to retain article 18. If any provisions were needed to cover the particular categories of succession referred to in article 18, the Special Rapporteur could perhaps include the provisions of paragraph 1 in his definition of a "new State".

40. There remained the problem of self-governing areas, but since those cases were very few and were rapidly diminishing, they too would not perhaps require separate treatment.

41. Mr. BARTOŠ said he agreed that, in principle, the Commission should not deal with any relic of colonialism or other form of dependency, since it was equally opposed to both. Nevertheless, there were good grounds for asking, as the Special Rapporteur had done, whether the problem of dependent territories should not be specifically dealt with in the draft, since despite the fact that the principle of the sovereign equality of States had been duly proclaimed, there were still in existence a number of territories having dependent status.

42. To take the case of the Principality of Monaco, France was not a true protectorate State but a friendly State with which Monaco had concluded a treaty by virtue of which France appointed the head of its Government and policed its territory, while for currency matters there was a monetary union. It followed that the Principality of Monaco was not a truly independent State but rather the disguised relic of a protectorate.

43. Again, in Andorra the executive power was exercised jointly by the President of the French Republic and a Spanish bishop, in virtue of a kind of international treaty concluded between France and a Spanish bishop in the age of absolutism. The executive power was therefore exercised independently of national sovereignty. Moreover, both France and Spain had the right to intervene to maintain the established régime.

44. Liechtenstein was an independent State but lacked treaty-making capacity and the right to maintain diplomatic relations; Switzerland represented it in its external economic relations. It was therefore clear that Liechtenstein too did not enjoy full independence.

45. And now, just at the very time when a number of Arab protectorates in the Persian Gulf had been declared independent, the protecting Power had allowed a third State to seize three small islands inhabited by Arabs. Some small islands in the English Channel had also demanded independence. Thus, although it was drafted in the past tense, article 18 could also apply to existing situations.

46. With regard to Mr. Ushakov's comments, it was essential to take into account the possibility that some treaties concluded during a protectorate might be important for the future of the territory after it had become independent; the "clean slate" principle, which he (Mr. Bartoš) supported, should not be invoked to prevent a State in that situation from availing itself of the rights accorded in the draft to new States. Paragraph 2 of article 18 should perhaps be redrafted to make that clear. That applied not only to protectorates, but also to mandates, trust territories and any other similar régime.

47. An example was the case of Namibia, which South Africa still intended to administer in accordance with the rules of the mandate. The question consequently arose what was to become of the treaties concluded since the establishment of the trusteeship on the termination of the mandate, and the present time, for South Africa had...
entered into a number of international commitments on Namibia's behalf during that period. There was also the quadrupartite treaty on the status of Berlin concluded by the former victorious Powers, which was binding on that territory. It was quite evident that the Special Rapporteur had had in mind all those situations in which the status of a territory had been settled by third Powers with no sovereign rights over the territory.

48. In a word, there were sufficient dependent territories in existence to warrant devoting a special article of the draft to them.

49. Mr. AGO said that article 18 as proposed by the Special Rapporteur was intended not as a definitive text but rather as a basis for discussion of the desirability of applying to certain special situations the rules already established in the draft, or providing separate rules for them.

50. The cases covered by article 18 were extremely varied. Although former trusteeship or dependent territories could, to a large extent, be assimilated to the newly independent States covered by articles 1 to 15, the same was not true of protected or associated States. He would therefore confine his comments to those two categories. Each case, moreover, had its own special features, and only by a process of generalization could the variegated forms actually found be reduced to categories.

51. The term "protectorate" had sometimes been applied to disguised colonies which had not been subjects of international law. However, according to the traditional idea, a protected State was a subject of international law which had rights and obligations at the international level and might even have treaty-making capacity, subject perhaps to a kind of veto by the protecting Power. When the Special Rapporteur had introduced the first articles of his draft, he had made it clear that this definition of "Succession of States" covered not only transfers of sovereignty, but also simple transfers of treaty-making capacity. And it should be noted that the protecting Power, when representing the protected State in international relations and concluding international treaties on its behalf, often took the protected State's interests and wants into account.

52. Whatever the form of protection, he doubted whether the "clean slate" principle could be applied. Such situations did not, in fact, give rise to a true succession of States; it was more a question of the continuation of the existence of a State which had previously been placed under the protection of another State and had now recovered its full autonomy of decision in the matter of international relations. There were indeed cases, as mentioned in paragraph 2 (a), where the State had had a separate existence prior to the protectorate and had concluded treaties; such treaties might then remain in force both during and after the protectorate.

53. Nor did he think the "clean slate" principle could be applied to treaties concluded by the protector State on behalf of the protected State, especially if the had in

54. With regard to associated States, it would also be inadvisable to apply a rigid rule like the "clean slate" principle on the termination of an association which, far from being tainted by colonialism, had sometimes been entered into by mutual agreement. It would be quite unrealistic to assimilate all forms of association to colonial domination.

55. If the Commission felt that it did not have sufficient time to consider in detail all the situations which might arise, it should leave them aside. Personally he thought it would be better to review them all, provided appropriate rules were drawn up for each.

The meeting rose at 1 p.m.

1175th MEETING

Thursday, 8 June 1972, at 10.20 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. AGO, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Co-operation with other bodies

[Item 8 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Molina Orantes, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. MOLINA ORANTES (Observer for the Inter-American Juridical Committee) said that during the past year the Committee had held two regular sessions, at which it had commenced the study of a number of topics.

3. First, it had discussed the revision of various treaties of world-wide and regional scope, with a view to bringing them up to date. In order to facilitate that process at the regional level, the Organization of American States had entrusted the Committee with the preparatory work of analysing and evaluating a number of multilateral treaties in force between member States, in order to decide whether they were in need of revision. In the first part of that task, the Committee had studied various agreements of world-wide scope referred to in General Assembly resolution 2021 (XX), and had expressed its opinion about the approach which should be taken to each of them by the American States.
4. Next, it had made a critical analysis of various inter-American treaties signed during the present century and primarily either of juridical interest or concerning educational, scientific and cultural affairs. They had been evaluated in order to determine, first, whether they were up to date with present American juridical thinking; secondly, whether there had been any far-reaching change in the circumstances which had originally led to their conclusion; and, lastly, whether they had been ratified by a sufficient number of countries.

5. As a result of the Committee's evaluation, various measures had been proposed with respect to each of the conventions in question. In the case of some of them, it had been suggested that a greater number of accessions should be encouraged in order to extend the scope of their application, whereas in that of others, due to the very small number of ratifications, it had been concluded that in practice they were not accepted by the OAS countries.

6. In some cases, it had been recommended that conventions which had become obsolete in their secondary aspects, but not in their fundamental purpose, should be brought up to date. In other cases, it had been thought that a regional agreement had been superseded by another of world-wide scope and that it would be more advisable to accede to the latter because of its greater precision and comprehensiveness.

7. The Committee had taken that view, for example, concerning the Convention on Treaties signed at Havana in 1928, which so far had been ratified by only eight American States. The Committee had felt that the Vienna Convention on the Law of Treaties of 1969, which had been signed by sixteen American governments, was to be preferred because of its universal significance, and that the American States should therefore abandon the Havana Convention in its favour.

8. Secondly, the Committee had devoted a lot of time to the topic of conflicts of treaties, particularly with reference to the constituent instruments of international organizations, both regional and sub-regional. The Committee had considered all aspects of that topic, and had compared the rules contained in various documents which were either the result of juridical research or which embodied some positive law. It had finally concluded that the provisions on conflicts of treaties contained in the Vienna Convention were not only adequate and correct but also applicable in cases where the constituent instruments of regional organizations were amended, unless they presented problems of a political nature, in which case the OAS should lay down the relevant rules for their amendment.

9. Thirdly, the Committee had examined the question of legal means for the protection and preservation of the historic and artistic heritage of the American countries. That topic was of particular interest for those countries because of the acts of vandalism and spoliation continually being committed against the property which constituted their cultural heritage. The Committee had reviewed the conventions in force on a world-wide, regional and bilateral level, as well as the domestic laws of various States, and had reached the conclusion that it was necessary to bring up to date the inter-American conventions dealing with the protection of that heritage, particularly in order to establish an effective system of international co-operation which might help to prevent the growing illicit traffic in archaeological, historical and artistic objects.

10. Fourthly, the General Assembly of the OAS had asked the Committee to study those treaties and conventions which constituted the inter-American system of peace and security, on the basis of the experience gained in their application and with a view to strengthening the system.

11. From the time of their birth as independent States, the American Republics had endeavoured to solve their international disputes or conflicts by peaceful means; a similar concern had been evident when the inter-American system had been inaugurated, by convening periodic conferences of the States of each region. Thus, for example, as early as 1902 a treaty of compulsory arbitration had been signed at the second Pan-American Conference, while in the following years, nine more treaties had been signed providing for the peaceful settlement of disputes by procedures of investigation, conciliation, good offices and mediation, and progressive arbitration.

12. At the ninth American International Conference, held at Bogotá in 1948, the American Treaty on Pacific Settlement, generally known as the “Pact of Bogotá”, had been signed on the basis of a draft prepared by the Inter-American Juridical Committee. That Pact combined in a single instrument all the pacific procedures for solving disputes laid down in the specific conventions he had just mentioned and which had since been regulated in a more complete and harmonious manner.

13. In addition to the methods of settlement already prescribed, the States signatories had accepted the obligation to resort to the International Court of Justice for the solution of disputes of a juridical character and, in certain cases, to arbitration. Up to now, the Pact of Bogotá had been ratified by almost two-thirds of the States members of the OAS.

14. After considering the possible alternatives, the Committee had reached the conclusion that the Pact of Bogotá was a suitable juridical instrument for the purpose of consolidating and perfecting the inter-American system of peace and security and that it was more practical to recommend its ratification by States which had not yet done so than to embark on the long road leading to the conclusion of a new treaty.

15. Some members of the Committee had expressed reservations with regard to Article 20 of the Charter of the Organization of American States, which had been signed at the same time as the Pact of Bogotá. In their opinion, it might be interpreted as restricting the

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1 Supplement to the American Journal of International Law vol. 29, No. 4, 1935.
3 Ibid., vol. 119, p. 58.
right of an American State to resort directly to the organs of the United Nations for the solution of disputes, without first applying to the organs of the regional system.

16. Fifthly, the greater part of the Committee's last two meetings had been devoted to an examination of the law of the sea, a topic which had been introduced in 1970 and was still on its agenda. The main purpose of the study had been to combine in one document the common principles upheld by the majority of American States with regard to the most important aspects of international maritime law, with a view to contributing to the codification work on that topic which was being prepared on a world-wide scale by the United Nations. The Committee had considered all the questions connected with the law of the sea now being discussed in world and regional forums and had felt that, because of their close inter-connexions, they should be considered together and not separately, including such questions as the juridical status of the sea-bed and ocean floor and the continental shelf.

17. An analysis of the legislation of the American States, as well as of various regional declarations and agreements, had revealed new trends in the law of the sea, especially with regard to the delimitation of zones of exclusive jurisdiction. The claim for exclusive jurisdiction was based mainly on the need to exploit the natural resources of the adjacent waters, which were considered to be of vital importance to the coastal populations. Regional principles of that kind had found their expression in the declarations of Montevideo and Lima of 1970, which had proclaimed the right of coastal States to establish zones in which they would exercise their sovereignty or maritime jurisdiction without affecting the freedom of international communications.

18. Sixthly, as one of a number of topics concerning credit documents, and as a contribution to the process of regional economic integration, the Committee had approved a draft convention on the Latin American traveller's cheque, which had recently been submitted for the consideration of States members of the OAS.

19. Seventieth, at the request of the OAS Council, the Committee had made a study of the juridical status of so-called "foreign guerrillas" in the territory of States members, but had not reached any agreement on the drafts presented. A discussion had also been opened on the topic of the treatment of foreign investments, which it had been agreed to continue at the coming meetings.

20. The next regular session of the Committee would be held at Rio de Janeiro from 17 July to 26 August 1972; on behalf of the Committee he took pleasure in extending an invitation to the Commission to send an observer to represent it at that session.

21. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee for his very interesting statement.

22. Mr. TSURUOKA said that he was very sorry not to have been able to attend, in his capacity as Chairman of the Commission at its twenty-third session, the previous session of the Inter-American Juridical Committee; Mr. Sette Câmara had been requested to replace him.

23. Mr. Molina Orantes had given a most lucid account of its activities in various spheres. The choice of topics considered the previous year bore witness once again to the value of close co-operation between the Committee and the Commission. Although some of the topics dealt with by the Committee were primarily of a regional nature, others were of interest to the international community as a whole.

24. Mr. SETTE CÂMARA said that he wished to thank Mr. Molina Orantes for his substantial report, which gave a clear idea of the work done during the past year by the Inter-American Juridical Committee. Mr. Molina Orantes was himself one of the outstanding personalities on that Committee, since he had served as Minister for Foreign Affairs of Guatemala, was the Dean of the Law Faculty of the University of Guatemala and was well known as a writer on international law.

25. The Latin American legal system was one of the oldest in the world and the Committee itself, which had been established fifty years ago, was rich in tradition. It now found itself faced with the task of bringing old conventions up to date, including not only those which had been prepared by the Committee itself but also general treaties of world interest. The work being done by the Committee in that field was of great practical significance and would benefit the world community as a whole.

26. Of particular interest was its work in bringing up to date the inter-American conventions for the protection of cultural and artistic treasures, as well as its efforts to strengthen the inter-American system of peace and security and to obtain additional ratifications of the Pact of Bogotá.

27. The Committee's work on the law of the sea was also very important, in view of the fact that a world conference on that subject was expected to be held in 1974. If the Latin American countries succeeded in reaching a consensus on that question, it would have a great impact on the conference.

28. The draft convention on the Latin American traveller's cheque prepared by the Committee, although not such a glamorous topic as the others, was nevertheless of real practical utility.

29. The Latin American countries, while proud of their own legal institutions, fully realized that international law today was tending more towards universalization and towards a world corpus of legal norms. The interchange of observers between the Committee and the Commission ought therefore to be encouraged in every way.

30. Lastly, he noted with satisfaction that, although the members of the Committee, like the members of the Commission, served in their personal capacity, they were accorded the diplomatic status of ambassadors by the host State.

31. Mr. TABIBI said that he wished to associate himself with the welcome to Mr. Molina Orantes. It was an excellent practice to exchange observers between the Commission and such regional organizations as the
Inter-American Juridical Committee and the Asian-African Legal Consultative Committee. The Commission, as a universal body, composed of representatives of the main legal systems of the world, always found it most useful to obtain the views of the regional organizations. As an Asian, he was pleased to note the increasing participation of Latin American jurists in the meetings of the Asian-African Legal Consultative Committee.

32. Mr. ALCIVAR, speaking also on behalf of Mr. Castañeda, said that he was glad to welcome Mr. Molina Orantes, who was not only a brilliant diplomat but also a distinguished professor at one of the oldest establishments of higher learning in the American continent, the University of San Carlos in Guatemala City.

33. Mr. Molina Orantes had presented a very full report on the work done during the past year by the Inter-American Juridical Committee. Although everything Mr. Molina Orantes had said deserved special attention, he would himself confine his remarks to two important points.

34. The first point related to the pacific settlement of international disputes, where the inter-American system was considerably weaker than the United Nations system although, under Chapter VIII of the Charter, the obligation in that respect was the only justification for regional arrangements or agencies as factors in cooperation for the maintenance of international peace and security. Article 52 of the Charter went beyond the modest scope of the Dumbarton Oaks draft and gave to regional arrangements and agencies the character of a sort of preliminary court in the effort to achieve a pacific settlement of any dispute that might arise among its members, before referring it to the Security Council of the United Nations. That provision was reproduced in article 20 of the Charter of the OAS (now article 23). Efforts at the regional level were not meant to continue indefinitely, however, and any party to the dispute might abandon them whenever it deemed it appropriate to have recourse to the competent organ of the world organization. Furthermore, paragraph 4 of Article 52 of the United Nations Charter stated that the provision in that Article “in no way impairs the application of Articles 34 and 35”, which meant that, in the cases covered by those Articles, regional courts were ruled out.

35. In his view, the Inter-American system had done nothing to perform the sole function which it could fulfill without the prior authority of the Security Council of the United Nations. The addition made to article 23 (now 26) of the Charter of the OAS related to the establishment, by a special treaty, of adequate means for the settlement of disputes. That treaty, known as the “Pact of Bogotá”, began by violating the provisions of Article 103 of the Charter of the United Nations when it stated in its article II “the obligation to settle international controversies by regional pacific procedures”, adding almost ironically, “before referring them to the Security Council of the United Nations”. Moreover, it was a betrayal of Latin American legal thinking in that the legal doctrine which had been formulated in that part of the American continent in order to get rid of the old concepts of traditional international law imposed by power politics was destroyed by article VI of the Pact, which set out to uphold not validly concluded treaties but “agreements or treaties in force”, even if they had been imposed by force, thereby endorsing the tainted doctrine that the *pacta sunt servanda* rule was sacred.

36. He regretted, therefore, that the Committee, instead of proposing a revision of the Pact of Bogotá, had contented itself with recommending that those States which had not yet ratified it should do so. It should be borne in mind that many States had already ratified the Pact subject to so many reservations that it meant little to them.

37. The other point to which he wished to refer was that the Inter-American Juridical Committee was dealing with the problems of ocean space. The General Assembly of the United Nations had decided, at its twenty-fifth session, to convene an international conference on that subject. It was to be hoped that, on that occasion, the Latin American countries would adopt a common attitude towards the formulation of the new principles of the law of the sea which, by doing away with the out-of-date privileges imposed by power politics, would protect the interests of the developing world.

38. Mr. NAGENDRA SINGH said that, on behalf of the Asian-African Legal Consultative Committee, he would like to extend a warm welcome to Mr. Molina Orantes. The Commission was always keenly interested in the progress of regional organizations active in the field of international law and he had been impressed by the long list of topics which the Committee had on its agenda.

39. In view of the obvious need for close co-operation between the Commission and the Committee, he felt it was imperative that the Chairman should attend the next session of the Committee in July and August of the present year.

40. Mr. RAMANGASOAVINA said that the statement by the observer for the Inter-American Juridical Committee brought out clearly the value of co-operation between the Commission and other bodies. Among the important subjects considered by the Committee, its study of the advisability of bringing up to date and supplementing regional conventions or alternatively, recommending accession to international conventions instead, was of great interest. The Committee's efforts to strengthen the peace-keeping system were also noteworthy, as was its work on the protection of the cultural and historical heritage, a particularly important matter for young countries.

41. American jurists had often been the first to take up topics of major concern to the international community and on several occasions the Commission's work had been facilitated by such earlier studies.

42. Mr. USHAKOV, speaking also on behalf of Mr. Ustor, said that the observer for the Inter-American Juridical Committee was to be congratulated on his excellent

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statement. The Committee had been the first intergovernmental organ to concern itself, like the Commission, with the codification and progressive development of international law. Although it was a regional body, its activities had world-wide repercussions. It had a number of multilateral conventions and draft multilateral conventions to its credit and had influenced the Commission to some extent, particularly in regard to the codification of diplomatic law. For that reason the links between the Committee and the Commission should be consolidated as much as possible.

43. Sir Humphrey WALDOW said that he wished to thank the observer from the Inter-American Juridical Committee for his very interesting observations. He would particularly like to ask him to explain to the Commission the methods of work followed by the Committee in producing its texts. Did it, for example, follow the procedure used in the Commission of assigning special rapporteurs to particular topics?

44. Mr. MOLINA ORANTES (Observer for the Inter-American Juridical Committee) said that he must first thank members of the Commission for their cordial expressions of welcome and for the encouraging interest they had shown in his oral report and in the fruitful cooperation between the Commission and the Inter-American Juridical Committee.

45. In reply to the question put to him by Sir Humphrey Waldock, he would explain that it was the practice of the Committee to appoint a Rapporteur from among its members to prepare the work on each topic. The Rapporteur’s report was then submitted to a working group, which in its turn reported to the plenary session of the Committee. The Secretariat of the OAS, in particular its Department of Legal Affairs and Codification Department, made a valuable contribution to such work by producing compilations of relevant material, which included not only regional instruments but also worldwide international instruments. The Committee was empowered to appoint outside experts to study particular subjects but only rarely had it availed itself of that faculty. The method was useful for highly technical topics and it was probable that it would be adopted for the study of intellectual property.

46. Mr. AGO, speaking also on behalf of Mr. Reuter, thanked Mr. Molina Orantes for the excellent report he had submitted to the Commission and asked him to convey to the Inter-American Juridical Committee his warm thanks for the work it had done on the law of treaties. It was most gratifying to learn that the Inter-American Juridical Committee was now moving away from a regional towards a universal approach, as it was imperative that the essential chapters of international law should be the subject of universal conventions. It was also significant that the largest group of signatories of the Vienna Convention on the law of treaties was the Latin-American countries; he hoped that their signatures would quickly be followed by ratifications.

47. The work done by the Inter-American Juridical Committee on the question of State responsibility had always been most instructive and he was sure it would continue to be so in the future. Mr. Molina Orantes could be assured that Latin-American jurists might count on the support and friendship of Latin-European jurists.

48. Mr. BARTOŠ said that he wished to express to Mr. Molina Orantes his admiration for the work of the Inter-American Juridical Committee, which, for almost fifteen years, had been taking a steadily more international approach, thereby contributing to the development of universal public international law. It was thanks to the influence of the Latin-American jurists that international law had developed considerably in such fields as immunity and diplomatic relations between States. Eminent Latin-American jurists were now taking part in every serious study in the field of international law, both public and private.

49. At the same time, the Inter-American Juridical Committee had not neglected regional, inter-American problems, some of which, under its influence, were acquiring world importance. Such matters as travellers’ cheques, maritime law and the limits of territorial waters were examples of such problems. The whole international community was benefiting from the results of those regional studies.

50. He expressed the hope that the Commission would maintain increasingly close relations with the Inter-American Juridical Committee.

51. The CHAIRMAN said he had been interested to hear the explanations given by the Observer for the Inter-American Juridical Committee on all the various topics, especially those relating to private international law.

52. He regretted that it would not be possible for him to attend the Committee’s next session in July and August 1972, but the Committee would be holding a second session in February 1973, at Rio de Janeiro and he was almost certain to be able to attend that one.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/244 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (a) of the agenda]

(resumed from the previous meeting)

ARTICLE 18 (Former protected States, trusteeships and other dependencies) (continued)

53. The CHAIRMAN invited the Commission to resume its consideration of article 18 of the Special Rapporteur’s fifth report (A/CN.4/256).

54. Mr. TABIBI said that article 18 covered certain transitional situations and a number of cases from the past. Even if the Commission decided not to retain article 18 as such but to alter the wording of other articles in order to cover those matters, the Special Rapporteur’s commentary would always be very valuable, not only to members of the Commission but to jurists throughout the world.

55. He was not himself in favour of retaining article 18, because it would not cover all the cases and because its provisions conflicted with the well-established principles of international law of the “clean slate” and the right of self-determination.
56. The question of associated States, which had caused concern to the Special Rapporteur and to certain other members of the Commission, could be covered by adjusting the language of other articles of the draft, such as the article on unions of States.

57. Mr. REUTER said that as regards the subject matter of article 18 he agreed with Mr. Ago that the Commission should either be specific and comprehensive, or else say nothing.8 He himself favoured the second alternative, in view of the experience of the Vienna Convention on the Law of Treaties and the rules which the Convention contained.

58. Article 6 of the Convention stated that “Every State possesses capacity to conclude treaties”. The purpose of that formula was to prevent the occurrence of certain situations such as that of former protectorates. It meant that it was now impossible for a State to accept a protectorate régime, but not that a State was prohibited in any circumstances from renouncing its capacity to conclude treaties. Indeed, had article 6 gone as far as that, it would have settled one of the most difficult cases of succession of States, that of merger and absorption. Article 6 was designed to prohibit only certain treaties, those which were contrary to the principles of the Charter; it had been impossible to go further because it had been impossible to define the precise criteria by which it might be decided that a treaty established a protectorate and was therefore prohibited. He doubted whether the Commission could now do any better than the Vienna Convention.

59. Any system, however lawful, was open to abuse. For example, the quite important question of clandestine protectorates had been mentioned. Some alleged that there were a great many of them, others that they were to be found even in federal unions where minorities were deprived of their right of self-determination. Article 6 designed to prohibit only certain treaties, those which were contrary to the principles of the Charter; it had been impossible to go further because it had been impossible to define the precise criteria by which it might be decided that a treaty established a protectorate and was therefore prohibited. He doubted whether the Commission could now do any better than the Vienna Convention.

60. But, even if the Commission managed to draw up rules for detecting situations contravening article 6 of the Vienna Convention, he doubted whether it would be possible to get them accepted by an intergovernmental conference. That seemed fairly clear from the fate of paragraph 2 of the Commission’s draft article 5, on the capacity of States members of a federal union to conclude treaties.9 on which the Commission itself had agreed only with difficulty 10 and which the Vienna Conference had rejected.

61. He would like to make one point on the question of Monaco. He had no doubt that all members of the Commission were agreed that Monaco was not a clan-

destine protectorate. Certainly the message of thanks which the Commission had addressed to Prince Rainer at the conclusion of its session at Monaco in 1966 contained no suggestion of any criticism of the structure or administration of the Principality.

62. With regard to the true protectorates, such as Morocco, it must be remembered that, under articles 51 and 52 of the Vienna Convention, a treaty was void if its conclusion had been procured by coercion. Consequently, not only had many protectorate treaties now become void, but a large proportion of the treaties concluded under the protectorate régime had also become void. Moreover, it was not just a simple validity since, under article 45 of the Vienna Convention, even confirmation of such treaties was impossible. In cases such as that of Morocco, where the protecting Power had deposed the head of the Protectorate because it was displeased with its conduct, he was willing to agree that there was a general presumption of invalidity with respect to treaties concluded under the protectorate régime, but that could be harmful to the interests of former protected States and a more moderate approach was desirable.

63. For that reason he fully endorsed article 18 as proposed by the Special Rapporteur. The article might be unnecessary, since the question was settled by the Vienna Convention, but it was perfectly correct in the sense that it was for the protected State itself to decide whether or not it had been coerced. There were two situations: either the protected State having become independent considered that the treaty had not been concluded against its will—an example was the Pilgrimages to Mecca treaty 11 which had been negotiated by France in the name of Morocco and certainly at the instigation of the Sultan—in which case there was no succession; or the protected State considered that it had been coerced, in which case the treaties were void and it was impossible to speak of succession.

64. If the former protectorate wished to conclude a new treaty with the same content, it was free to do so, but it was entirely contrary to the Vienna Convention on the Law of Treaties to let it be supposed, by adopting new articles, that there could be any question of succession where States had been subjected to coercion. If the Commission nevertheless wished to deal with all those questions, it was only right that he should draw attention to the fate of one of its earlier drafts.

65. Mr. QUENTIN-BAXTER said that the general opinion on article 18 appeared to be that paragraph 2 could not stand as an exception to the rule in paragraph 1.

66. Paragraph 1 dealt with a number of categories of dependent territories among which it mentioned protected States, but even in the old days it was usual to draw a careful distinction between protectorates and dependencies. For example, the Kingdom of Tonga, now restored to full sovereignty during the century of its quite happy British protection, had never willingly allowed

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8 See 1174th meeting, para. 55.
itself to be assimilated to a dependent territory. On all appropriate occasions it had gone to some lengths to emphasize the difference between its status and that of a dependency.

67. The State practice on which the provisions of paragraph 2 were based provided strong evidence of the appreciation by the international community, and in particular by its judicial organs, of the fact that a protected State retained some kind of international personality. Nevertheless, the old-fashioned term "protected State" unfortunately placed too much emphasis on form and too little on the substance.

68. During the discussion, certain small States of Europe had been cited as possible examples of dependent territories. In his opinion, those cases need not give rise to much concern, for under traditional international law, very small States which were recognized members of the international community—if for example, they were parties to the Statute of the International Court of Justice—could not be confused with dependent territories.

69. There was more room for concern with regard to associated States or territories, which were of two kinds. The first included areas which had exercised real autonomy for so long that their status as self-governing entities had never been questioned. The second was that of territories which had not been self-governing but which, in the full light of international surveillance, had emerged to self-governing status and had freely chosen to do so in association with an existing State.

70. Viewed in that light, the provisions of paragraph 2 would be seen to be really concerned not so much with protection as with representation. The substance of subparagraph (a) was likely to be subsumed by the provisions of the article on federations.

71. The idea in subparagraph (b) was of considerable importance in the context of associations of States and he hoped that some place would be found for it in the article on unions or federations.

72. As far as the wording was concerned, he would urge the retention of the important formula "by its own will", which went to the heart of the matter. On the other hand, he did not favour the retention of the formula "in its own name", which placed the emphasis on form rather than on substance. It might prove difficult for an associated State to contract in its own name because of inhibitions on the part of the other contracting State. The other State might be willing to sign an agreement relating to the territory of the associated State, an agreement to which the associated State might succeed later on attaining independence, but it might at the same time not wish to contract with the associated State in the latter's own name because such a procedure would raise the whole question of the status of associated States under international law.

73. He hoped that the questions he had mentioned would be taken up by the Commission in connexion with article 19.

74. Mr. USHAKOV, referring to paragraph 2 (b), asked who decided whether the former protected State had become a party to a treaty "by its own will". If it was a State other than the successor State, that was incompatible with the successor State's sovereignty. If it was the successor State itself, that was tantamount to recognizing the successor State's freedom of choice and its right to give notification or otherwise, which was the situation provided for in the preceding articles.

75. The CHAIRMAN, speaking as a member of the Commission, said that there was unanimity as to the great value of the Special Rapporteur's commentary but there was anything but unanimity on the question of the text of article 18.

76. As he saw it, the subject dealt with in paragraph 2 was important. The application of the provisions of subparagraph (b) would depend on the determination whether the protected State had become a party to a treaty "by its own will". In order to decide that issue, it might be necessary to investigate such matters as whether the authorities of the protected State represented a puppet régime, or a government with authority of its own based on free elections. The practical problems involved in settling that issue led him to the conclusion that the net result to be expected from the provisions of paragraph 2 (b) was not worth the difficulties likely to be encountered in their application.

77. Paragraph 2 (a) raised the question whether it was worthwhile to embody in a draft article the effect of the decision by the International Court of Justice in the Rights of Nationals of the United States of America in Morocco case,\textsuperscript{13} which seemed to him reasonable. That decision, however, also gave rise to difficult problems of proof as to a question of fact, namely, whether it was not the will of the protecting power rather than that of the protected State which was involved in maintaining the treaty in effect. That was not as complicated a problem as the previous one.

78. Nevertheless, he was inclined to share the views of those members who favoured dealing with those matters in other contexts.

The meeting rose at 1.5 p.m.

\textsuperscript{13} I.C.J. Reports 1952, p. 176.

\textbf{1176th MEETING}

Friday, 9 June 1972, at 10.20 a.m.

\textit{Chairman: Mr. Richard D. KEARNEY}

\textit{Present:} Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tamnes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
Succession of States in respect of treaties

[Item 1 (a) of the agenda]

(continued)

ARTICLE 18 (Former protected States, territories and other dependencies) (continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 18 of his draft (A/CN.4/256).

2. Sir Humphrey WALDOCK (Special Rapporteur), said that the majority of members had expressed themselves in favour of dispensing with a special article on the lines of article 18, on the understanding that some aspects of its contents would be covered by a revision of the definition of the term “new State”, or “newly independent State”, and some other aspects in connexion with unions of States.

3. The main inspiration of the articles in part II, which related to cases of emergence into independence, had been drawn from the process of so-called decolonization which was now almost terminated. Since protected States had been involved in that general process, it would be somewhat illogical not to consider whether to include in part II any provisions relating to those States.

4. His purpose in submitting article 18 had been to make the Commission consider whether there were any grounds for laying down special rules for particular categories of dependent States.

5. Paragraph 1 of the article might seem necessary in order to remove doubts as to whether mandates and Trusteeships had any special characteristics in that respect. The point had to be disposed of because in the books the suggestion was made that class A mandates were comparable to protected States. It was argued that the end of the mandate gave rise more to a change of government than to a true succession.

6. He had not himself proposed any definition of the term “protected State” but if paragraph 2 of article 18 were retained, such a definition would undoubtedly be necessary because of the many variations of constitutional relations covered by the term.

7. It would be for the Commission to decide whether, for the reasons stated in paragraph (1) of the commentary (A/CN.4/256), it might not be desirable to avoid including in the draft any reference to the vanishing protectorate system.

8. Subject to that consideration, he wished to make it clear that it was not only paragraph 2 but also paragraph 1 which applied to protected States. The “clean slate” principle applied to those States, except on the points mentioned in paragraphs 2 (a) and 2 (b). Those two sub-paragraphs reflected the relevant State practice as described in the commentary.

9. There had been considerable discussion of the problem of associated States. That type of association covered a variety of relationships. In some cases, there was a similarity with unions of States, whereas in some others, associated territories were not very distinguishable from dependent territories.

10. Some associated States actually resembled protected States. The fundamental difference between a modern associated State and a protected State of the colonial era was that, in the case of the latter, there was often doubt as to the voluntary character of the operation whereby the foreign relations of the protected State had been entrusted to the protecting Power. The modern case of the Cook Islands, on the other hand, was that of a freely established association where the treaty-making power had been handed over to New Zealand but the associated State was at liberty to reject a particular treaty. In point of fact, that situation was very similar to the position until recently of the protected Kingdom of Tonga.

11. Other examples could be given, such as that of Puerto Rico, the association of which with the United States had been approved by the United Nations and which retained its absolute freedom to ask for its independence; constitutionally, treaty-making power for Puerto Rico was vested in the Federal Government of the United States.

12. In the case of the Netherlands Antilles, the association was reflected in the fact that there was a single crown for different territories; there was a constitutional relationship which vested treaty-making power in the Netherlands Government, subject to certain safeguards for the territory of the Netherlands Antilles.

13. There were, in addition, the older relationships existing between Liechtenstein, Monaco and San Marino and certain powers, to which reference had been made during the discussion. There was also the special relationship between Belgium and Luxembourg, whereunder economic treaties were concluded by Belgium on behalf of the two countries but were actually signed separately by both of them.

14. Members would recall that, in his draft on the law of treaties, he had originally introduced provisions on the subject of the capacity to make treaties on the part of dependent territories and on the representation of one State by another in the treaty-making process.1 None of those draft provisions had survived the discussions in the Commission,2 so that they had not even been submitted to the Vienna Conference on the law of treaties.3

15. The interesting question had been raised by Mr. Reuter of a United Nations trusteeship where there was no administering Power in the shape of a State, but an administering Power in the shape of the United Nations.4 There was no practice on that point and his own feeling was that, when the problem arose, it was likely to be settled ad hoc in each case. Presumably, a case of that kind would be governed by a General Assembly resolution. The United Nations had, of course, taken part in the creation of new States such as Libya and of the relationship between Eritrea and Ethiopia arising out of the termination of trusteeship, and some very nice questions could arise as to what really was the legal

3 See 1173rd meeting, para. 78.
status of the General Assembly resolutions which was
the basis of the constitution which was established.4
But the Commission could not go into problems of that
nature at the present stage and he would suggest that
article 18 might now be referred to the Drafting Com-
mittee.
16. The CHAIRMAN said that, if there were no further
comments, he would take it that the Commission agreed
to refer article 18 to the Drafting Committee for con-
consideration in the light of the discussion.

It was so agreed.5

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

17. The CHAIRMAN invited the Chairman of the
Drafting Committee to introduce the draft articles pro-
posed by his Committee, contained in document A/CN.4/
L.183.

18. Mr. USTOR, Chairman of the Drafting Committee,
said that the Commission had instructed the Drafting
Committee 6 to consider the question of the general
provisions which would ultimately form part I of the
draft. The Drafting Committee had considered the mat-
ter and now proposed that part I, entitled “General
Provisions”, should consist of articles 0, 1, 1 (bis),
1 (ter), 1 (quater), 3, 4 and 5. Article 2 would form
part II, entitled “Transfer of territory from one State to
another”.
19. The texts of articles 0, 1 (bis), 1 (ter) and 1 (quater),
adopted by the Drafting Committee on the basis of texts
proposed by the Special Rapporteur, were to be found
in document A/CN.4/L.183, which also contained
articles 2 and 3.

20. In accordance with its usual practice, the Committee
had deferred consideration of article 1, on the use of
terms, until it had completed its work on the other draft
articles. It had nevertheless taken two decisions concern-
ing that article: the first was to include in it the definition
of the term “treaty” appearing in article 2 of the 1969
Vienna Convention; the second related to article 0
which, if the Commission agreed, he would now introduce.

It was so agreed.

ARTICLE 0

21. Mr. USTOR, Chairman of the Drafting Com-
mittee, said that the Drafting Committee proposed the
following text for article 0:

Article 0
Scope of the present articles

The present articles apply to the effects of succession of States

22. The Drafting Committee had considered it desirable
to include in the draft an article corresponding to article 1
of the Vienna Convention on the Law of Treaties.7

23. The purpose of article 0 was to make it clear that
cases of succession of subjects of international law other
than States were outside the scope of the draft. The Com-
mittee had therefore used the new term “succession of
States” instead of the term “succession” defined in para-
graph 1 (a) of the Special Rapporteur’s article 1.8 The
new term would naturally be used throughout the draft
whenever reference was made to the actual fact of suc-
cession and would, of course, replace the term “success-
ion” in article 1.

24. In order to avoid any ambiguity as to the meaning
of the term “succession” in the present context, the Com-
mittee had used the phrase “the effects of succession”
so as to indicate that the term “succession” referred to
the fact of the change of sovereignty and not the impact
of succession.

25. The Committee had not as yet taken any decision
as to whether article 0 should be the first or the second
article of the draft but he assumed, on the pattern of
the Vienna Convention, that it would be the first.

26. The CHAIRMAN, speaking as a member of the
Commission, said that, instead of introducing into
article 1 a set of definitions, such as that of “treaty”,
taken from the 1969 Vienna Convention, it would be
preferable to add a general clause to the effect that the
meanings specified for particular terms in article 2 (Use
of terms) of the Vienna Convention were also to be given
to those terms for the purposes of the present articles,
unless the draft indicated that they were used with a
different meaning.

27. It was true that the formula he suggested would
involve the method of incorporation by reference, to
which some members objected, but it was justified
in the present circumstances; the draft articles were in
effect intended to form an addition to the 1969 Vienna
Convention.

28. Mr. USHAKOV said that in his view a provision
should be added reproducing paragraph 1 (a) of article 2
of the Vienna Convention on the Law of Treaties, which
specified that “treaty” meant an international agreement
concluded between States in written form. That definition
was not included anywhere in the draft.

29. Sir Humphrey WALDOCK (Special Rapporteur),
said that he himself had proposed a formula such as
that now suggested by the Chairman. It had taken the
form of paragraph 1 of article 1 (Use of terms) in his first
report.9 He realized, however, that the present draft,
particularly articles 2 and 3, would be more easily
understood by anyone unfamiliar with the Vienna Con-
vention if a definition of the term “treaty” were included

4 See Official Records of the General Assembly, First Session, reso-
lution 289 (IV).
5 Draft article 18 was subsequently deleted for the reasons
explained in paragraph (6) of the commentary to article 1 (A/CN.4/
L.187/Add.19) (article 2 of the final text of the draft), and in foot-
note 25 of the report of the Commission.
6 See 1167th meeting, para. 84.
in the article on the use of terms. For similar reasons, definitions of the terms "reservation", "contracting State", "party", and "international organization" should also be included; they should be drafted on the pattern of paragraphs 1(d), 1(f), 1(g) and 1(i) of article 2 of the Vienna Convention. He did not believe that it would be necessary to introduce into the present draft any of the other definitions in the Vienna Convention.

30. Mr. TSURUOKA said that, since the scope of the draft articles had been changed, consideration should perhaps be given to the possibility of amending the title.

31. Sir Humphrey WALDOCK (Special Rapporteur), said that the same restriction of scope had been introduced into the draft on the law of treaties, but no change had been made in the title and the 1969 Vienna Convention had been adopted as the Convention on the Law of Treaties.

32. Mr. NAGENDRA SINGH said he supported article 0. It was fully appropriate to follow the precedent of the 1969 Convention.

33. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission approved article 0 as proposed by the Drafting Committee.

Article 0 was approved.\textsuperscript{10}

ARTICLE 1 (bis)

34. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1 (bis):

Article 1 (bis)

Cases not within the scope of the present articles

The fact that the present articles do not apply to the effects of succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(a) The application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(b) The application as between States of the present articles to the effects of succession of States in respect of international agreements to which other subjects of international law are also parties. (A/CN.4/L.183)

35. As a result of the introduction of article 0 and of the Drafting Committee's decision concerning the definition of the term "treaty", various categories of agreements were excluded from the scope of the draft articles. It had therefore been considered necessary to include in the draft a provision on the lines of article 3 of the Vienna Convention in order to safeguard the potentially relevant principle embodied in the draft articles in respect of agreements not within the scope of the draft.

36. The Committee now therefore proposed article 1 (bis) which, a part from necessary drafting changes, differed from article 3 of the Vienna Convention in two respects. First, the words "or between such other subjects of international law" in the introductory sentence had been omitted, since a case of succession in respect of treaties between subjects of international law other than States clearly would not be a succession of States. Secondly, the article contained no provision corresponding to sub-paragraph (a) of article 3 of the Vienna Convention, since such a provision would not be relevant in the present text.

37. Sub-paragraph (b) was an adaptation of sub-paragraph (c) of article 3 of the Vienna Convention to the present context: the words "as between States" had been used so as to limit the impact of the draft articles to the relations of States, in order not to bind other subjects of international law.

38. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved article 1 (bis) as proposed by the Drafting Committee.

Article 1 (bis) was approved.\textsuperscript{11}

ARTICLE 1 (ter)

39. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1 (ter):

Article 1 (ter)

Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to the effects of succession of States in respect of:

(a) Any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(b) Any treaty adopted within an international organization without prejudice to any other rules of the organization. (A/CN.4/L.183)

40. The Committee had deemed it desirable to include in the draft articles a provision to parallel article 5 of the Vienna Convention. It had considered, however, that in the context of succession, instruments constituting international organizations and treaties adopted within an international organization raised different problems. With respect to the second category, the Committee had followed the language of article 5 of the Vienna Convention.

41. As for constitutional instruments of international organizations, the question had been raised in the Committee whether it could really be said that the draft articles applied to constituent instruments at all, since sub-paragraph (b) of article 7 in the Special Rapporteur's third report\textsuperscript{12} excluded those instruments from the right of notification and, moreover, membership in an international organization was generally governed by the

\textsuperscript{10} Article 0 was adopted without change at the 1197th meeting.

\textsuperscript{11} Article 1 (bis) was adopted without change at the 1197th meeting.

relevant rules of the organization and not by the law on succession of States.

42. The Committee had, however, noted that succession in respect of a constituent instrument was not necessarily limited to a question of membership; it had therefore adopted a text which, in respect of constituent instruments, contained the general reservation concerning the relevant rules of the organization and a specific reservation concerning the rules on acquisition of membership.

43. The CHAIRMAN asked whether it would result from the provisions of sub-paragraph (a) of article 1 that a successor State might become a party to the treaty which was the constituent instrument of an organization without at the same time becoming a member of that organization.

44. Mr. USTOR, Chairman of the Drafting Committee, said that the purpose of the provisions of sub-paragraph (a) was to draw a distinction between the rules concerning acquisition of membership and the other rules of the organization.

45. Sir Humphrey WALDOCK (Special Rapporteur), said that the provisions of sub-paragraph (a) had been introduced ex abundanti cautela. The wording that he himself had proposed to the Drafting Committee had been somewhat different: "...only to the extent that the rules of membership admit and without prejudice to any other relevant rules of the organization".

46. The practice showed that, in a large majority of cases, the rules concerning membership negated any real application of succession. The "moving treaty-frontiers" rule, however, applied. In addition, there were certain organizations such as BIRPI in which the rules of succession had at times been applied. There was also the interesting case of the action taken by the United States Government as depositary of the constituent instrument of IAEA with regard to the readmission of Syria following the breaking up of the UAR; both States had approached the matter as one of succession.

47. Therefore, to say outright that the rules in the present articles did not apply would be as false as saying that they did apply, without taking some special account of the rules concerning membership.

48. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the language originally proposed to the Drafting Committee by the Special Rapporteur.

49. Mr. YASSEEN said that in his view the two cases were different. There were, on the one hand, the rules concerning acquisition of membership, subject to which the articles formulated by the Commission could apply to the constituent instrument of an international organization, and on the other hand, the relevant rules of the organization concerning succession to the constituent instrument, which were not the same.

50. He could accept the wording of sub-paragraph (a), but would like to suggest that the word "other" be deleted from the second reservation, in order to make it clearer.

51. Mr. REUTER said he could accept the proposed text but thought it would require some explanation in the commentary.

52. What Mr. Kearney and Mr. Yasseen had said was not without foundation. He himself did not interpret the formula "any other relevant rules" as referring only to the rules relating to succession itself. In his view, the reservation concerning the relevant rules was sufficient in itself, since the rules concerning acquisition of membership were part of them. The purpose of sub-paragraph (a) was precisely to call attention to that fact. A provision of that kind was not absolutely necessary, but it was valuable in so far as it emphasized that to be a party to the constituent instrument of an international organization might be different from being a member of the organization.

53. Mr. USHAKOV said he would have preferred some other wording and, although as a member of the Drafting Committee he had accepted the present wording, he would like to be sure that the formula used obviated the need to make reservations in other articles of the draft.

54. Mr. USTOR, Chairman of the Drafting Committee, said that the purpose of sub-paragraph (a) was clearly to lay down a reservation which operated for all the articles. There was therefore no need to introduce a reservation in any of the other articles.

55. Mr. TSURUOKA said the difficulty could perhaps be overcome by reversing the order of the two reservations and saying: "without prejudice to any relevant rules of the organization, including those concerning acquisition of membership". That would express the idea better, since the rules concerning acquisition of membership were part of the relevant rules of the organization.

56. Mr. EL-ERIAN said that he found article 1 (ter) satisfactory in that it provided for the application of the draft articles without prejudice to the rules concerning acquisition of membership. Its provisions were consistent with existing practice. In the case of the fusion of two member States and later re-emergence of the original member States, the General Assembly had taken a pragmatic approach.

57. As to the proviso "without prejudice to any other relevant rules of the organization", it was appropriate to retain that broad language in order to cover any unexpected situations that might arise in the future.

58. Mr. REUTER said he supported Mr. Tsuruoka's suggestion.

59. Mr. BILGE said he would have preferred there to be no mention of the rules concerning acquisition of membership, since they were part of the relevant rules of the organization; it would be sufficient to explain the matter in the commentary.

60. If the two reservations were maintained, it would be more logical to state them in the order proposed by Mr. Tsuruoka. There again, however, everything depended on what explanation was given in the commentary.

61. Sir Humphrey WALDOCK (Special Rapporteur), said that the idea put forward by Mr. Tsuruoka had been duly considered by the Drafting Committee but the Committee had felt that there was an advantage in commencing with the proviso relating to the rules concerning acquisition of membership. Those rules would exclude, in
four-fifths of the cases, the application of the rules on State succession.

62. Mr. USTOR, Chairman of the Drafting Committee, said that, like the Special Rapporteur, he was not in favour of reversing the two provisos in sub-paragraph (a).

63. Mr. NAGENDRA SINGH said that the basic principle in the matter was that the rules of the organization were paramount. The proposed wording of article 1 (ter) did not state that principle clearly enough.

64. Sir Humphrey WALDOCK (Special Rapporteur), said that although he himself was not enamoured of the formula “without prejudice to”, he appreciated that it was necessary to adhere to it because it had been used in the 1969 Vienna Convention.

65. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved the text of article 1 (ter) on the understanding that, if it had an opportunity, the Drafting Committee would take into account the comments of members on the wording.

On that understanding, article 1 (ter) was approved.33

ARTICLE 1 (quater)

66. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1 (quater):

Article 1 (quater)

Obligations imposed by international law independently of a treaty

The fact that a treaty is not in force in respect of a successor State as a result of the application of the present articles shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty. (A/CN.4/L.183)

67. Article 1 (quater) was modelled on article 43 of the Vienna Convention (Obligations imposed by international law independently of a treaty). The Drafting Committee deemed it desirable to include such a provision in the draft articles in order to make it clear that the non-continuance in force of a treaty upon succession in no way relieved the successor State of obligations embodied in the treaty which were also obligations under international law independently of the treaty.

68. Mr. TSURUOKA said that he approved of the contents of article 1 (quater) but hoped that the Drafting Committee would reconsider the translation of the word “subject”, which had been rendered in French by “soumis”.

69. Mr. USTOR, Chairman of the Drafting Committee, said that he assumed that the French version followed that of article 43 of the Vienna Convention. If that were so, he hoped that Mr. Tsuruoka would be satisfied.

70. Mr. TSURUOKA said that he was fully satisfied by Mr. Ustor’s explanation.

71. Mr. RAMANGASOAVINA said that he endorsed the principle stated in the article, which was fully consistent with the progressive development of international

72. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 1 (quater).

ARTICLE 2 34

73. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 2:

Article 2

Transfer of territory from one State to another

1. When territory under the sovereignty or administration of a State becomes part of another State:

(a) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession; and

(b) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

2. Paragraph 1 is without prejudice to the provisions of article 22 [Territorial treaties]. (A/CN.4/L.183)

74. It had been agreed in the Drafting Committee that article 2 should be removed from part I, “General Provisions”, and should constitute a separate part II of the draft as a whole. The situation of the transfer of territory from one State to another represented a special case of succession and did not belong to the general provisions.

75. The phrase “under the sovereignty or administration of a State” was intended to cover the various possible situations, including that of trust and non-self-governing territories, which had been recognized as having “under the Charter a status separate and distinct from the territory of the administering State.” 35

76. The Drafting Committee had considered it more logical to reverse the order of paragraphs 1 (a) and (b).

77. It had also considered it necessary to include paragraph 2 in order to reserve the case of territorial treaties, on which the Special Rapporteur intended to submit a separate article.

78. The question had been raised in the Committee whether it should not be stated that, in the situation envisaged by the article, the predecessor State was released from its treaty obligations. The Committee, however, had taken the view that that might be going too far in the case of certain treaties, such as technical assistance agreements, where the predecessor State might retain

33 Article 1 (ter) was adopted without change at the 1197th meeting.

34 Article 1 (quater) was adopted without change at the 1197th meeting.

35 For previous discussion, see 1158th meeting, para. 19, to 1159th meeting, para. 39.

some obligation as a guarantor. It had been agreed that that point should be mentioned in the commentary.

79. Mr. ALCÍVAR, speaking also on behalf of Mr. Castañeda, proposed that the word “legally” (“de modo legítimo”) be inserted before the words “becomes part of another State”, in paragraph 1.

80. Mr. USTOR, Chairman of the Drafting Committee, said that the Drafting Committee had considered, in the light of the discussion in the Commission as a whole, the possibility of drafting a general article on the lawfulness of transfers of territory. It had felt, however, that it was self-evident that the present article applied only to lawful transfers and that it might therefore be better not to include a general article on the subject, since otherwise the door might be left open to the possibility of legal transfers of territory. It had felt, however, that it was self-evident that the present article applied only to lawful transfers and that it might therefore be better not to include a general article on the subject, since otherwise the door might be left open to the possibility of bad faith in the interpretation of those drafts previously adopted by the Commission which did not include similar provisions. The question was one which could be discussed either in connexion with article 2, or later in connexion with the general provisions.

81. The CHAIRMAN invited members to comment on Mr. ALCíVAR’s formal proposal to insert the word “legally” before the words “becomes part of another State”, in paragraph 1.

82. Mr. TABIBI said that he supported Mr. ALCíVAR’s proposal, although for the English version he would prefer the word “lawfully” to the word “legally”. The inclusion of that word was very necessary in article 2, since even the devolution treaties concluded by the United Kingdom frequently referred to “valid treaties”. Alternatively, the question might be postponed until the Commission discussed the general provisions.

83. Mr. TSURUOKA suggested that article 2 be approved, either in its present form or in a slightly modified version, on the understanding that at a later stage the Commission would consider whether further elucidation should be given in the commentary or whether a separate provision should be added.

84. Mr. ALCíVAR said that he had no objection to Mr. Tabibi’s suggestion; the article would, after all, be merely provisional and would be submitted to Governments for their comments. He proposed, therefore, that the word “lawfully” be for the time being placed within square brackets and that the Commission make it clear in its commentary that it had not yet taken a final decision in the matter.

85. Mr. SETTE CÂMARA said that, while he had some sympathy for the proposal put forward by Mr. ALCíVAR and Mr. Castañeda, he wondered whether it was really necessary. The Commission was dealing with normal legal situations of the transfer of territory from one State to another, and could hardly be expected to deal with illegal situations which had been brought about by conquest.

86. Personally he would prefer to retain article 2 as it stood.

87. Mr. USHAKOV said that all members seemed to be in favour of Mr. ALCíVAR’s idea, since it was evident that the article covered only lawful or legal situations. If that point were made clear in the text of article 2, it would also have to be specified in the articles dealing with other cases of succession. In such circumstances it would be preferable to prepare a general provision which would apply to the draft as a whole.

88. With regard to the title of the article, he would point out that a territory placed under the administration of a State did not constitute a part of that State’s territory. Either the words “from one State to another” should be deleted or it should be explained in the commentary that the heading was not entirely in conformity with article 1.

89. Mr. RAMANGASAOVINA said that he supported the idea of the amendment to indicate that the territory had been acquired “legally”, not unlawfully, but the notion of legality suggested a link with the domestic law of the State and so might seem to call its competence into question. Since some States promulgated annexation laws, the word “legally” seemed hardly precise enough.

90. The purpose of the amendment was to indicate that the transfer of territory must be in accordance with international law, in other words, was accepted by the international community. That idea would be better expressed by the wording “becomes an integral part of another State”, thus excluding the possibility of a unilateral act of annexation.

91. Mr. BILGE said it was obvious that the situations covered by the draft must be legal or lawful, which meant in conformity with international law and with the Purposes and Principles of the Charter. If the Commission made that point clear only in article 2, it might be concluded that unlawful situations were not excluded in other cases of succession. It would therefore be better if the question were dealt with in a general article.

92. Mr. TSURUOKA said he could accept both the substance and the form of article 2 but would like the Chairman of the Drafting Committee to explain why the idea of treaty-making competence had been excluded and the idea of administration introduced.

93. Mr. ALCíVAR said that article 2 dealt with the case where a territory under the sovereignty or administration of one State passed under the sovereignty of another State. In the latter event, it would be a non-self-governing territory, a former colony, which had not yet achieved complete independence and statehood. In neither event was there any formation of a new State.

94. The case of the transfer of territory under the moving treaty-frontiers rule represented a special situation which was quite distinct from the others dealt with in the draft. It should not therefore be dealt with among the general provisions. Moreover, in view of the special nature of the case, the inclusion of the word “legally” was undoubtedly necessary.

95. The Commission had originally considered it better to include a general provision which would cover all such cases and the Special Rapporteur had accordingly submitted two alternatives, but it had eventually been decided that they caused more problems than they solved.

96. The CHAIRMAN said that the Commission should not become involved in questions of drafting at the present stage, but should try to discuss the principle involved in Mr. ALCíVAR’s proposal. It should also consider whether
it would be necessary to include a reservation to article 2 and whether that question should be a controlling or a secondary issue.

97. Mr. USTOR, Chairman of the Drafting Committee, suggested that the Commission dispose of article 2 and reserve its position on the question whether to include a general article on the question of the lawfulness of the transfer of territory.

98. Mr. BARTOŠ said that in article 2 the transfer of sovereignty and the transfer of administration had been seriously confused. When a territory was placed under the administration of a State, the latter did not exercise sovereignty over that territory and could not transfer it. It could relinquish its administration, which then passed to another State, but that did not mean that there was a succession of States. The case was therefore completely extraneous to succession and should be considered separately. History furnished many examples of territories placed under the administration, but not the sovereignty, of a State. One administering State had often been replaced by another without there being any succession. He would have no objection to article 2 if the words "or administration" were deleted.

99. Sir Humphrey WALDOCK (Special Rapporteur), said that article 2 did not cover the transfer of territory from one administering State to another; it dealt with the case where territory which was not under the sovereignty of any State was administered by a State as a trusteeship or non-self-governing territory and subsequently became a part of another State. He might refer, for example, to the situation which had existed when part of the Cameroons had become part of Nigeria.

100. He agreed that the words "transfer of territory" in the title were unfortunate, since the principle embodied in article 2 applied equally to cases where there was no real transfer. His original language, in fact, had referred to the "passing of territory".

101. Mr. Ushakov had suggested the deletion of the words "from one State to another" in the title; that was a possible solution, but the rule would not then correctly represent the situation of the passing of territory. The purpose of the article was merely to indicate that territory had moved from the treaty regime of one State to that of another. The present provisions were correct, but he personally did not like the use of the word "transfer".

102. The question remained whether a general article could be drafted to safeguard the point of the lawfulness of a transfer of territory. As Special Rapporteur, he had originally provided for two alternatives, first that of a negative reservation and, secondly, that of a more affirmative one. He personally favoured the negative reservation and was prepared to produce a text along those lines.

103. The CHAIRMAN said that it would undoubtedly be better to consider a concrete text rather than continue to discuss the question in abstract terms. He suggested, therefore, that the Commission defer its decision on article 2 until it had had an opportunity to examine the Special Rapporteur's new text.

104. Mr. TABIBI said that he supported that suggestion.

It was so agreed.

The meeting rose at 1.5 p.m.
6. As the Commission was aware, the main achievements of the Sixth Committee of the General Assembly at its last session related to certain aspects of what was generally known as "diplomatic law". In its resolution 2780 (XXVI) of 3 December 1971, the General Assembly had expressed the desire that an international convention should be elaborated and concluded expeditiously on the basis of the draft articles on representation of States in their relations with international organizations, prepared by the Commission. That convention should codify the status, privileges and immunities of missions to international organizations and delegations to organs or international organizations and to conferences convened under their auspices. The adoption of such a convention would add a fresh chapter to the contemporary diplomatic law which had been codified by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

7. With regard to the procedure, however, the General Assembly had postponed its decision. In view of the hesitation of some delegations, based mainly, although not exclusively, on financial considerations, it had been decided to reflect further on the matter. The item had been included in the provisional agenda for the next session of the General Assembly and in the meantime Member States, together with Switzerland as a host State, had been invited to submit their written comments and observations, not only on the draft articles themselves, but also on the procedure to be adopted for the elaboration and conclusion of the convention.

8. In the light of experience, he personally agreed with the recommendation of the Commission to convene an international conference of plenipotentiaries. Certainly the financial aspects should be studied seriously with a view to reducing expenses to a minimum, but such aspects should not be the decisive factor. Since a plenipotentiary conference was a specialized conference, it was always a more appropriate forum for concluding codification conventions than the Sixth Commission of the General Assembly.

9. In response to a widespread and growing concern for the protection of diplomats and the security of missions, the General Assembly, at its last session, had also taken a number of important steps relating to the implementation of some existing rules of "diplomatic law". In endorsing the initiative taken by the Commission, it had requested the Commission to prepare a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law. Again, in resolution 2819 (XXVI) it had decided to establish a "Committee of Relations with the Host Country" to deal with the question of the security of missions and the safety of their personnel, as well as all the categories of issues previously considered by the Informal Joint Committee on Host Country Relations.4

10. The newly established Committee on Relations with the Host Country was also authorized to study the Convention on the Privileges and Immunities of the United Nations and to consider and advise the host country on issues arising in connection with the implementation of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.5

11. The Commission had decided to give priority, at its present session, to the preparation of sets of draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, and on succession in respect of treaties.6 It had already taken steps to comply with the General Assembly's request on the first of those two topics by establishing a Working Group to prepare a preliminary draft for submission to the Commission and, in due course, to the General Assembly.

12. In preparing draft articles on succession in respect of treaties, the Commission was embarking on one of the main topics of its current programme of work. He was fully aware that codification was a very lengthy process and that, in a ten-week annual session, the Commission could not undertake the codification of all those important and different subjects at once. However, he would be failing in his duty if he did not call the Commission's attention to the expectations of the General Assembly. The Commission could perhaps examine those aspects of the codification process and of its methods of work which might be and should be improved. More frequent recourse to working groups would probably prove a valuable means of achieving the desired improvement.

13. As for the other main topics on the Commission's current programme, succession in respect of matters other than treaties, treaties concluded between States and international organizations or between two or more international organizations, the most-favoured-nation clause and, in particular, State responsibility continued to be regarded by the General Assembly as topics meriting codification as soon as possible.

14. He was fully aware that codification was a very lengthy process and that, in a ten-week annual session, the Commission could not undertake the codification of all those important and different subjects at once. However, he would be failing in his duty if he did not call the Commission's attention to the expectations of the General Assembly. The Commission could perhaps examine those aspects of the codification process and of its methods of work which might be and should be improved. More frequent recourse to working groups would probably prove a valuable means of achieving the desired improvement.

15. In that connexion, he believed that the Commission should not unduly delay the review of its long-term programme. The Survey and the written observations thereon submitted by the members of the Commission provided a sound basis for such a review. The matter, however, could be postponed until 1973 because the Commission had to give priority at its present session to the completion of the two provisional sets of draft articles on the protection of diplomats and succession in respect of

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5 Ibid., para. 7.
6 See 1149th meeting, para. 46.
treaties, for submission to the forthcoming session of the General Assembly.

16. With regard to other chapters of international law, he would like to point out that two important instruments had been adopted in 1971 in connexion with outer space and disarmament, namely, the Convention on International Liability for Damage caused by Space Objects and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Such United Nations bodies as the Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee, the Sub-Committee on the Peaceful Uses of the Sea-Bed and UNCITRAL were continuing their efforts to deal with the subjects allocated to them.

17. The CHAIRMAN thanked the Legal Counsel for his interesting and informative statement.

Succession of States in respect of treaties


(Item 1 (a) of the agenda)

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 2 (Transfer of territory from one State to another) (continued)

18. The CHAIRMAN invited the Commission to continue its consideration of article 2.

19. Mr. ALCİVAR said that at the last meeting, speaking also on behalf of Mr. Castañeda, he had reserved his position with respect to article 2 (A/CN.4/L.183), since he had considered it necessary to insert the word “lawfully” before the words “becomes part of another State” in paragraph 1. He was, however, prepared to consider some general provision, such as that proposed by the Special Rapporteur (A/CN.4/L.184).

20. Mr. CASTAÑEDA said that he fully agreed with Mr. Alcivar that some reference to the lawfulness of the transfer of territory was particularly necessary in article 2. It was not sufficient to assume, as some members had done, that the lawfulness of the transfer was implicit in the article; the Commission was engaged in a work of legislation and it was necessary that it should say definitely what it meant.

21. He would be prepared to accept a general article of the type proposed by the Special Rapporteur (A/CN.4/L.184) but failing that, he would suggest that article 2 should contain a new paragraph 2 stating that the rules set forth in paragraph 1 would not apply if the transfer of territory had not been made in conformity with the purposes and principles of the United Nations.

22. Mr. TABIBI said that he agreed with Mr. Castañeda that it would be better to include a reservation concerning the lawfulness of the transfer in article 2 itself. He would have no objection to a general article such as that proposed by the Special Rapporteur, though the reference to the Charter in both alternatives A and B of that text should be expanded to include other resolutions and declarations by the United Nations on the subject, as well as principles of general international law which had existed even before the founding of the United Nations.

23. Sir Humphrey WALDOCK (Special Rapporteur), said that he had prepared his general article (A/CN.4/L.184) as a possible means of covering the question of “lawfulness”, in order to present the Commission with an alternative way of dealing with the problem in case a compromise should prove necessary.

24. In the Drafting Committee, considerable doubt had been expressed as to the wisdom of including an express reference in article 2 to the lawfulness of the transfer of territory, particularly if such a reference were not included in other articles, such as those concerning the union and separation of States. He thought that the Commission would be more likely to find common ground on the basis of a general reservation than by including a reference to lawfulness in article 2.

25. Mr. AGO said he fully supported what the Special Rapporteur and the Chairman had said. He himself would prefer that the question should not be mentioned in the draft. It was an obvious truth, which went without saying.

26. If, however, the Commission insisted on stating it, it should do so in a general provision since, as the Chairman had rightly said, the question could arise in situations other than the one dealt with in article 2. If the Commission spoke of lawfulness only in article 2, thereby implying that it was not concerned with the lawfulness of succession in the cases covered by the other articles, it might be inferred that those articles related to unlawful situations also, which was absurd. He therefore proposed that nothing be said in article 2 and that the question be considered generally, perhaps by adding a provision to article 0 or by making a separate article.

27. The CHAIRMAN said that if the Commission proposed to hold a general debate on the two alternatives proposed by the Special Rapporteur, it would probably need more time to study them.

28. Mr. CASTAÑEDA said that he could understand that a reservation concerning the lawfulness of the transfer might not be necessary in all the draft articles, but he felt strongly that article 2 was the one which might give rise to most doubts in that respect.

29. He hoped, therefore, that the Commission would at least give some consideration to his proposal for a new paragraph 2 as a working hypothesis. For that paragraph, he would propose the following English text: “Paragraph 1 does not apply when the territory became part of another State by means and in a manner incompatible with the Charter of the United Nations”.

30. He would suggest that article 2 be kept in abeyance until the Commission had considered the question of a
that proposed by the Special Rapporteur were not approved, he would wish to reserve his position with respect to his own proposal.

31. Mr. HAMBRO said that he fully agreed with Mr. Ago that it was unnecessary to include any provision concerning the lawfulness of the transfer, but that if such a provision were included, it should be stated as a general rule.

32. Mr. YASSEEN said that the Commission, like any legislator, had to legislate on the basis of lawfulness. The transfers referred to in article 2 could only be lawful transfers; no member of the Commission disputed that. It would be dangerous to mention lawfulness only in article 2. A general reservation might be useful, but it was not necessary.

33. If, however, the Commission still wished to specify that the situations covered by the draft articles were lawful situations, it should refer not only to the Charter but to the whole of international law, using some such formula as “in accordance with the rules of international law, including the Charter of the United Nations”.

34. Mr. USHAKOV said that it would be premature to amend article 2 now or to put the amendments to the vote, since it was the Commission’s practice merely to approve articles at the present stage of its work, and not to adopt them until it considered its report to the General Assembly. So long as the text of an article was only provisional, any member of the Commission had a right to propose amendments later. Indeed, it frequently happened that articles already approved had later to be amended in the light of other articles. It would be better therefore to accept article 2 provisionally, without prejudice to any amendment that might be adopted later.

35. The substance of article 2 raised no difficulty. It went without saying that it was concerned only with lawful situations. In his view, it was not necessary to say so specifically but he was prepared to consider later the general provision proposed by the Special Rapporteur (A/CN.4/L.184).

36. Mr. ALCÍVAR said that he fully supported the statement by Mr. Castañeda. He would reserve his position with respect to article 2 until the Commission had considered the general article proposed by the Special Rapporteur.

37. Mr. NAGENDRA SINGH said he feared that the proposal to add a separate paragraph to article 2 would mean placing altogether too much emphasis on that article and neglecting the other articles where too the reservation should apply. In fact they were talking throughout about the normal legitimate event of a transfer of territory, and the entire régime of State succession to treaties had to respect the Charter. The reservation must therefore apply to the whole régime visualized in the draft and not to any one particular article. In his opinion, it would be better to have a general reservation, such as that proposed by the Special Rapporteur in his alternative B.

38. Mr. USTOR (Chairman of the Drafting Committee) said he had omitted to mention that the Drafting Committee had proposed the deletion of the words “from one State to another” in the title of article 2. The title should accordingly read simply: “Transfer of territory”.

39. The CHAIRMAN, speaking as a member of the Commission, said that personally he doubted whether the introductory clause in paragraph 1 of the Drafting Committee’s text for article 2 was an improvement on the original text, which read: “When an area of territory, which is not itself organized as a State possessing treaty-making competence, passes under the sovereignty of an already existing State...”. In his opinion, that formulation was clearer for the purpose of introducing the “moving treaty-frontiers” principle, which had been referred to by Mr. Tammes in connexion with the incorporation into the Kingdom of Sardinia in 1860 and 1861 of a number of pre-existing Italian States.

40. He agreed with Mr. Bartoš that the reference, in the Drafting Committee’s text, to territory under the “administration” of a State raised a whole series of problems, such as, for example, those to be found in connexion with military occupation. In particular, he felt that the words “possessing treaty-making competence” in the original formula should be retained.

41. Paragraph 2 of the Drafting Committee’s text read: “Paragraph 1 is without prejudice to the provisions of article 22 [Territorial treaties]”. That paragraph was necessary, but it might very well apply to a large number of other articles also.

42. Mr. USHAKOV said the reason why the Drafting Committee had replaced the phrase “When an area of territory, which is not itself organized as a State possessing treaty-making competence”, which appeared in the original wording, by the phrase “When territory under the sovereignty or administration of a State” was in order to cover the case of a non-independent territory which, after having been under the administration of a metropolitan State without being an integral part of its territory, become an integral part of the territory of another State. In such a case, there was no transfer properly speaking from one State to another.

43. However, if the expression “under the administration of a State” was not clear and might give rise to difficulties of interpretation, perhaps the Drafting Committee could find a better formula.

44. The CHAIRMAN said he had wondered whether it had been the intention of the Drafting Committee, by adopting the language “When territory under the sovereignty or administration of a State becomes part of another State”, to eliminate the need for the additional article for inclusion at the end of part II which was proposed in the Special Rapporteur’s fifth report (A/CN.4/256/Add.1, p. 30). That article referred to States, other than unions of States, which were formed from two or more territories.

45. Mr. USTOR (Chairman of the Drafting Committee) said that the use of the word “transfer” in the title of the Drafting Committee’s text for article 2 showed that it referred to the passing of territory from the sovereignty

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1 See 1158th meeting, para. 23.
2 See 1176th meeting, para. 98.
of one State to that of another. That word itself excluded
the Chairman’s hypothesis.

46. Sir Humphrey WALDOCK (Special Rapporteur)
said that he himself was not enamoured of the present
draft and thought that his original text was a more
correct presentation of the principle involved. He also
preferred the words “passes under the sovereignty”,
which was a very neutral phrase and did not necessarily
include unlawful situations.

47. He hardly felt that the present text could apply to
cases of military occupation, but that possibility could be
covered by a proper definition of State succession.

48. He would suggest that article 2 might now be refer-
red to the Drafting Committee for final retouching.

49. Mr. BARTOS said he was glad the point he had
made at the previous meeting about the difference
between sovereignty and administration of a State had
been noted by the Chairman. As long, however, as the
terms “sovereignty” and “administration” were used
together, he would be unable to approve article 2.

50. Mr. REUTER suggested that a possible wording
might be: “over which a State exercises sovereignty or
in a similar situation”. Most trusteeship agreements sti-
pulated that the administering Power should exercise
its sovereignty over the territory under trusteeship by
treating it as an integral part of its own territory, but it
was never stated that it was really part of the adminis-
tering Power’s territory. It was therefore important to avoid
using the term “administration”.

51. The CHAIRMAN said that, if there were no further
comments, he would take it that the Commission agreed
to refer article 2 back to the Drafting Committee for
reconsideration in the light of the discussion.

It was so agreed.\(^{11}\)

ARTICLE 3\(^{12}\)

52. Mr. USTOR, Chairman of the Drafting Committee,
said that the Drafting Committee proposed the following
title and text for article 3:

\textbf{Article 3}

\textit{Agreements for the devolution of treaty obligations or rights
from a predecessor to a successor State}

1. A predecessor State’s obligations or rights under treaties in
force in respect of a territory at the date of a succession of States
do not become the obligations or rights of the successor State
unless there is an agreement providing that such obligations or
rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the
effects of a succession of States on treaties which, at the date of
that succession of States, were in force in respect of the territory
in question are governed by the present articles.

53. A correction had been made to the text as given in
document A/CN.4/L.183: the words “prior to that
succession” in paragraph 2 had been replaced by the
words “at the date of that succession”.

54. The end of the title had been changed from “upon a
succession” to “from a predecessor to a successor State”, which was thought to be clearer.

55. The text of the article was very similar to that of the
draft originally submitted to the Commission by the
Special Rapporteur in his second report.\(^{13}\) The Drafting
Committee had modified the wording of the French
version a little and had brought the English version of
paragraph 1 into line with the French by inserting the
word “only” after the words “in consequence”.

56. In paragraph 2, the opening phrase had been re-
placed by the words “Notwithstanding the conclusion of
such an agreement”, in order to emphasize that the
devolution agreement could not of itself transmit to the
successor State vis-à-vis third States any treaty obliga-
tions or rights which would not in any event pass to it
under general international law. The wording had also
been simplified by using the phrase “the effects of a
succession of States”.

57. Mr. USHAKOV said that there appeared to be a
discrepancy between the English and the French versions
of the title: in English, the first word of the title was
“Agreements” but in French it was “Traités”.

58. The CHAIRMAN said that, in English, it was
customary to speak of “devolution agreements”.

59. Sir Humphrey WALDOCK (Special Rapporteur)
said that it was preferable to use the weaker word “agree-
ments”. Under the Vienna Convention the expression
“treaty” was defined in terms of an international agree-
ment. It should also be remembered that some doubts
had been expressed regarding the international character
of a devolution agreement signed by a colony with its
metropolitan Power.

60. Mr. USHAKOV suggested that, in the French title,
the word “Traités” be replaced by the word “Accords”.

61. The CHAIRMAN said that, if there were no further
comments, he would take it that the Commission
approved article 3 subject to that change in the French
version of the title.

\textit{Article 3 was approved}.\(^{14}\)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 19 (Formation of unions of States)

62. The CHAIRMAN invited the Special Rapporteur
to introduce his article on unions of States (A/CN.4/256/Add.1)

\textbf{Article 19}

\textit{Formation of unions of States}

Alternative A

1. When two or more States form a union of States, treaties in
force between any of these States and other States parties prior to

\(^{11}\) For resumption of the discussion, see 1181st meeting, para. 44.
\(^{12}\) For previous discussion, see 1159th meeting, paras. 40-75, and
1160th meeting, paras. 1-63.

\(^{13}\) See Yearbook of the International Law Commission 1969, vol. II,
p. 54.

\(^{14}\) For resumption of the discussion, see 1181st meeting, para. 49.
the formation of the union continue in force between the union of States and such other States parties unless:

(a) The object and purpose of the particular treaty are incompatible with the constituent instrument of the union; or

(b) The union of States and the other States parties to the treaty otherwise agree.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States.

Alternative B

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the union of States and such other States parties if

(a) In the case of multilateral treaties other than those referred to in article 7 (a), (b) and (c), the union of States notifies the other States parties that it considers itself a party to the treaty;

(b) In the case of other treaties, the union of States and the other States parties

(i) Expressly so agree; or

(ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty’s being in force in their relations with each other.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States. (A/C.4/256/Add.1)

64. Sir Humphrey WALDOCK (Special Rapporteur) said that he had submitted two alternative texts for unions of States: alternative A was based on the concept of *ipso jure* continuity, whereas alternative B was based on consent. If, as he believed, the Commission preferred alternative A, it would not be necessary to examine very closely the text of alternative B, which did not perhaps go into enough detail; he had not attempted, for example, to deal there with the question of restricted treaties.

65. He had also put forward, for addition to article 1 (Use of terms), a paragraph on the term “union of States” which read:

“Union of States” means a federal or other union formed by the unioning of two or more States which thereafter constitute separate political divisions of the united States so formed, exercising within their respective territories the governmental powers prescribed by the constitution. (A/CN.4/256/Add.1)

66. As indicated in that paragraph, the term “union of States” was used to mean a union formed of entities which, prior to union, were themselves States. The question of composite States formed of two or more territories, not pre-existing States, raised problems that were not identical with those of unions of States; he had submitted draft article “Excursus A” (A/CN.4/256/Add.1) to deal with that question. The commentaries to that article, as well as those to article 19, should be borne in mind during the present discussion.

67. Unions of States involved considerable difficulties, partly because of the many different kinds of unions; a certain type of economic union was tending to become more common, for example. His own approach had been to regard intergovernmental unions as falling outside the scope of the draft, which should cover only constitutional unions.

68. The problem of associated States had been mentioned by some speakers but he was reluctant to introduce that problem into article 19. Associations usually related to former territories which were not previously States, and it would therefore be difficult to deal with them under the heading of “Unions of States”.

69. On the basis of the somewhat varied practice in the matter, which was analysed in the commentary, he had put forward two alternative texts for unions of States: alternative A was based on the concept of *ipso jure* continuity, whereas alternative B was based on consent. If, as he believed, the Commission preferred alternative A, it would not be necessary to examine very closely the text of alternative B, which did not perhaps go into enough detail; he had not attempted, for example, to deal there with the question of restricted treaties.

70. In discussing article 19, members should perhaps take up the concept of the definition of “union of States” put forward by him, rather than its actual wording. That wording was appropriate for the formation of unions, dealt with in article 19, but might prove less appropriate for the situations dealt with in article 20 (Dissolution of a union of States) (A/CN.4/256/Add.1).

71. Mr. USHAKOV said that under the terms of paragraph 2, the wording of which was identical in both alternatives, treaties which continued in force in accordance with paragraph 1 were binding only in relation to that part of the union of States in respect of which the particular treaty had been in force prior to the formation of the union, unless it was otherwise agreed. He wondered whether, in the case of multilateral treaties, the provision would have the same effects in both alternatives. In particular, he would like to know why the Special Rapporteur had laid down the principle that treaties continued in force only in relation to that part of the union in respect of which they had previously been in force, even though in the case of multilateral treaties it frequently happened that all the merging States were parties to them.

72. Sir Humphrey WALDOCK (Special Rapporteur), said that, in conformity with what he had found in State practice, he had framed paragraph 2 in identical terms for both alternative texts. The effect of that provision would be that, where continuity existed, whether *ipso jure* or by consent, each treaty was binding only in relation to that part of the union of States in respect of which it had been in force prior to the formation of the union, unless the States concerned otherwise agreed. Possibly that principle should not apply, in the case of alternative B, where restricted treaties were concerned. As he had stated in his introductory remarks, he had not taken into account the complications arising from restricted treaties when he had drawn up alternative text B.

73. Mr. AGO said that he would confine himself to commenting on a few preliminary questions which the Commission would have to settle before drawing up any real rules. The Special Rapporteur’s task had been
complicated by the diversity of the situations to be considered and by the poverty of the legal language.

74. The term “union of States” was very ambiguous because as a general rule it was applied primarily to organizations like the League of Nations or the United Nations, which were specifically excluded from the present topic. The unions dealt with in article 19 were not unions in international law, but unions in constitutional law which, seen from outside, appeared to form a single State. That was why he was very dubious about the use of the term “union of States”.

75. When two or more States entered into an association, the results could be very different according to the case. The Swiss cantons, for instance, retained, to some extent, a separate international personality; Bavaria had enjoyed some limited international capacity and had still been a subject of international law in the German Empire; but the constituent States of the United States of America were States only under constitutional law. In the case of Italy, the former States had disappeared even from the constitutional order and had been replaced by provinces with completely different limitations. Allowance must therefore be made both for forms of association which did not lead to the establishment of a completely unitary new State and for those which did.

76. In the French version of the definition of the term “union of States”, the expression “pouvoirs exécutifs” was inadequate, since the political divisions of the united State normally exercised legislative powers as well.

77. Mr. REUTER said that the French version of the article did not accurately reflect the English version and expressions like “état uniifié” should not be taken literally.

78. Referring to Mr. Ago’s comments, he said that what the Commission had to consider was the situation where a single State was formed from two or more States. The Special Rapporteur had rightly not committed himself as to whether the component entities retained or lost their status as States. His proposed text seemed to cover both possibilities.

79. Any other situation must be deliberately excluded because it would belong, not to succession of States, but to succession of a State to an international organization. That was why the term “union of States”, which used to be applied to international organizations, must be avoided; it was too general for the single case being considered by the Commission. Personally he would prefer the term “composite State”; there was no need to specify what composed it, once it was formed, the essential point was that it was States that had formed it.

80. Mr. USTOR asked whether he was correct in thinking that what Mr. Reuter was proposing amounted to saying that a “union of States” means a State formed by uniting two or more States.

81. Mr. REUTER said he would prefer to speak of “a composite State” (état composé) rather than “a union of States”.

82. Mr. USTOR, Chairman of the Drafting Committee, said that the concluding sentence of paragraph 50 of the commentary (A/CN.4/256/Add.1) showed that the term “union of States” covered only unions where the element of “separateness” of the constituent units was present after the formation of the Union. The term would thus exclude the case where there was a complete absorption of the constituent States in a new unitary State. Certainly, alternative A could not stand if such a case were included. With alternative text B, on the other hand, it might be possible to reword the definition of “union of States” so as to cover both the case where the element of “separateness” was present after the formation of the union, and the case of complete absorption.

The meeting rose at 6 p.m.

1178th MEETING

Tuesday, 13 June 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 19 (Formation of unions of States)

and

ADDITIONAL PROVISION FOR INCLUSION IN ARTICLE 1 (Use of terms) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 19, together with the new paragraph on “union of States” for addition to article 1, submitted by the Special Rapporteur in his fifth report (A/CN.4/256/Add.1).

2. Mr. SETTE CÂMARA said that, in the suggested additional definition for article 1, he doubted the need to retain the words “federal or other” before the words “union formed by the uniting of two or more States...”.

As was stated in paragraph 40 of the commentary, the Special Rapporteur had accepted the view of the Committee of the International Law Association “that the variety of constitutional forms on which unions rest, with their different gradations of federation, do not make it easy to draw neat distinctions between federal and other unions”. The Special Rapporteur had accordingly expressed his preference for a single solution to be applied to all unions, without distinction. In those circumstances, retention of the words “federal or other” could be misleading, since it might give the impression that the two categories of unions were going to be treated differently, which was not the case.
3. With regard to the rule to be included in article 19, he preferred alternative A, which embodied the rule of continuity *ipso jure* of preunion treaties. Admittedly, alternative B was more consistent with the system of the other articles of the draft, in particular with the general rules contained in part II. Careful examination of the Special Rapporteur's learned commentary, however, left little doubt that the opinions of writers and the practice of States supported the solution proposed in alternative A.

4. It was undeniable that the case of unions of States was completely different from that of new States, contemplated in part II. The "clean slate" doctrine, embodied in article 6 for the case of new States, rested on the consideration that, for obvious reasons, no valid manifestation of will on the part of the new State prior to independence could be said to have existed.

5. Since the case of unions formed through the amalgamation of dependent territories was clearly outside the scope of article 19, the present discussion related exclusively to cases where two or more sovereign States united to form another State. Those pre-union States, as independent States, had established for themselves during the span of their sovereign life a network of treaty relations with other States which involved rights and obligations. It would be contrary to the interests of the other States and to those of the international community as well, to suggest that those States could be free to terminate all those treaties simply by joining a union of States.

6. It was for those reasons that he supported the idea in alternative A that in such cases the "clean slate" principle should be replaced by the rule of continuity *ipso jure*. Similarly, the moving treaty-frontiers rule should give place, in the case of a State joining an already existing union, to the rule of continuity.

7. The two sub-paragraphs of paragraph 1 of alternative A established the usual exceptions of incompatibility with the object and purpose of the treaty and of express agreement; they should prove readily acceptable. The Special Rapporteur had been right not to enter into details of the problem of the degree of incompatibility between the treaty and the constitution of the union of States. It would be dangerous to try to exclude from the rule of continuity certain categories of treaties, such as the so-called "political" treaties. The attempt to define categories of treaties by their subject-matter had been abandoned by the Vienna Conference on the Law of Treaties because of the difficulties involved, and it would be a mistake to embark on that course now, as was pointed out by the Special Rapporteur in paragraph 46 of his commentary, where he said that "compatibility of the object and purpose of the treaty with the constitution of the new State may be as near as the Commission can get to a legal criterion for determining the limits of the principle of continuity".

8. Paragraph 2 stated the rule that pre-union treaties remained in force only within their respective regional limits, unless otherwise agreed. The process of novation of treaties concluded prior to the union could neither extend nor diminish the territorial area to which they were intended to apply. The treaties therefore bound *ipso jure* the union government within the territories in regard to which they had been applicable prior to the union.

9. He fully supported the Special Rapporteur's exclusion from article 19 of the problem of States formed from two or more dependent territories. That problem was dealt with in excursus A (A/CN.4/256/Add.1), an additional article to be included in part II, on newly independent States. The problem was different from that in article 19 and the solutions should therefore be different. He reserved the right to speak on the text of excursus A when it came to be considered by the Commission.

10. Mr. TAMMES said that the problem was one of a particular category of succession, in that a treaty régime of an existing State was continued after its disappearance as an international person, just as under the previous articles a treaty régime for a State which had not yet come into existence continued after its birth as an international person.

11. At the same time a new union, or composite State, was born, so that the problem remained one of succession. The question arose whether, despite the "clean slate" rule, the union was under an obligation to take over the treaty régime of the absorbed State, if only within the latter's territorial limits. International practice was scanty and not very clear. In both modern cases, the formation of the United Arab Republic and of the United Republic of Tanzania, the new international entity had made a formal declaration that it was prepared to take over the treaty régimes of the absorbed States.

12. There was, however, no evidence whatsoever that the union, or composite State, had any obligation to take over those treaty régimes. In the much older case of the admission of the then independent State of Texas into the United States of America in 1845, there had been a straight rejection of any such obligation and the treaties of Texas had lapsed.

13. In view of the scarcity and uncertainty of practice, he was inclined to prefer alternative B, which left it to the new union to declare its consent to continuance of the treaty régime of an absorbed State and to accept responsibility for the performance of its treaties within the territorial limits of that State. Under alternative B, a presumption was made, in the opening sentence of paragraph 1, that the union was bound; in order to rebut that presumption, it was necessary, as stated in paragraph 1 (9), for the union to agree otherwise with the other States parties to the treaty.

14. If, however, the Commission wished to submit to Governments the automatic presumption embodied in alternative A, thereby taking a further step in the direction of the progressive development of international law, he himself would not oppose such a step, although he preferred alternative B.

15. With regard to the consent of the other parties to the treaty, he thought there need not be the same concern as in the case of earlier articles. Unless there was an incompatibility with the constitution of the union, an old treaty would acquire fuller guarantees of performance on becoming the responsibility of a union of States rather than of one State.
16. On the question of the definition of the term to be used, he would not attempt to find a more neutral name for the political result of the process of the formation of unions of States; the only two points he would emphasize were that provision should be made for the coming into existence of a new international person and that the constituent units should remain identifiable.

17. The Special Rapporteur had proposed as one of the criteria of a union that the component States should constitute, after the formation of the union, “separate political divisions of the united State so formed, exercising within their respective territories governmental powers described by the constitution”. That criterion raised the question whether provision should not also be made for the different case of the merger of independent States into a more centralized State than was apparently contemplated in the Special Rapporteur’s definition. One example was that of the unification of Italy, if the view of Anzilotti was accepted that united Italy was a new State and the case was not regarded as one of the application of the moving treaty-frontiers principle. Since the degree of federation had been set aside as an impractical criterion, the question arose whether the emphasis on the self-governing powers of the separate political divisions was really necessary, once the territorial identity of the component entities remained clear; whatever the name of those entities—States, Provinces, Länder—there could be no misunderstanding regarding the limits of the continuing treaty régime and of the responsibility of the succeeding union of States for its continued application.

18. Examples could be given, such as that of Germany in the past century or so, of a State that had gone successively through different stages of centralization and decentralization. It was therefore not always relevant, from the point of view of succession, to make distinctions between degrees of autonomy. He would therefore suggest that the constitutional nature of the component entities of the union should be described independently of the stage of integration and in the widest possible terms consistent with their remaining identifiable. Such was his understanding of paragraph 10 of the Special Rapporteur’s commentary (A/CN.4/256/Add.1).

19. With regard to the rule formulated in excursus A (A/CN.4/256/Add.1, p. 30), in view of the fact that it would probably find only very limited application in the future, he felt that it might be better to deal with the matter in article 19 itself. The two situations that could arise with regard to the formation of a new international person—from independent States and from dependent territories—were of course quite different. The practical results of the formation of the union envisaged in excursus A, however, could very well be similar to those of the union envisaged in article 19. For that reason, the Commission should perhaps consider the more simple approach adopted by the International Law Association and referred to in paragraph 29 of the commentary. He would revert to that difficult question at a later stage.

20. Mr. QUENTIN-BAXTER said that he would comment only on the definition of “union of States” in relation to the problem of associated States, reserving his right to speak on article 19 itself at a later stage.

21. He strongly favoured two propositions that had received wide support in the Commission: that put forward by Mr. El-Erian, that the classification of States and territories must be congruent with United Nations practice rather than merely reflecting traditional conceptions; and that advanced by Mr. Yasseen, that provision for associated States should be made in article 19, dealing with unions of States, and not in an article on dependent territories.

22. If the composite State, or union, were defined as composed of several States, or of one or more States in combination with other self-governing territories, so that there was always at least one State among the component entities, the definition would be quite distinct and separate from the case covered in excursus A, dealing with a new State “formed from two or more territories, not themselves States”. It would refer to “self-governing territories” and the commentary would explain that that term represented the exact antithesis of the term “non-self-governing territories” used in the Charter.

23. He realized that his suggestion would involve major drafting difficulties, but those difficulties might perhaps be overcome by introducing into article 1 a definition of the expression “associated State”, in terms of a self-governing entity. The question was, of course, more important in relation to article 20, which dealt with the dissolution of unions, than in relation to article 19.

24. Even in relation to article 19, however, there was at least the germ of an idea expressed in article 18. If the associated State had at some stage in its history been a protected State endowed with international personality, albeit an imperfect personality, there was no reason why it should not carry into the union any fragments of treaty régimes that it had gathered during its existence as a protected State. It was of course an important question whether a provision of that kind might weaken Charter doctrine, and in particular the rules on decolonization embodied in the Charter and developed by the General Assembly. Under those rules, a dependent country might choose either integration or free association as an alternative to independence. Either option was, of course, capable of abuse. It had been suggested that the claim that a territory was an integral part of the metropolitan Power might be used in an attempt to evade Charter doctrine on decolonization. The method of free association could conceivably lend itself to similar abuse, although he knew of no example so far.

25. In any case, the draft articles which the Commission would formulate need not lend themselves to such abuse. Therein might lie the justification for the general article on the question of a “lawfulness” (A/CN.4/L.184). As a rule, he did not favour articles of that kind, but he thought it far preferable to include such an article in the draft rather than to introduce the adjective “lawful” in a particular article.

26. The United Nations doctrine on decolonization provided a specific justification for including such a general article, without raising the implication that it should hav
been included in every other codification instrument. Its purpose would be to make it clear that none of the provisions of the present draft would operate in derogation of the Charter provisions on non-self-governing territories and decolonization.

27. In addition to that negative aspect of not encroaching on Charter provisions, there was also a positive aspect to be considered. The last two incumbents of the office of Secretary-General of the United Nations had both been deeply concerned at the possible proliferation of non-viable very small States. There was a great awareness of that problem in his own country, New Zealand, which was separated from other States by the vast stretches of the Pacific Ocean. In that ocean were a large number of small island groups widely separated from one another. It was essential to give to those small islands some real alternative to the burdens of statehood which they were sometimes unable, and unwilling, to shoulder. But it was necessary at the same time to make certain that the device adopted to overcome those difficulties did not put the small States back into a limbo where they were neither self-governing nor non-self-governing.

28. For those reasons, he felt that article 19 should cover associations of States. An association of States could fairly be considered as falling within the same rule as a union of States; for its whole basis was that an associated State retained the complete right to secure its independence at any time, if it so wished. If such cases were excluded, the whole scope of the article would be so narrow that it would seem to him to have little purpose. As for the actual text of the article, he reserved the right to speak again.

29. Mr. YASSEEN said that, unlike the previous articles, which applied to cases of succession involving former dependent territories, concerning which there was some doubt whether their interests and freedom had been fully safeguarded, article 19 dealt with the union of equal sovereign States. International law must therefore be respected. It was the principle pacta sunt servanda which applied and which should be respected as far as possible. In principle, everything justified the thesis of continuity ipso jure. He therefore favoured alternative A.

30. Alternative A not only ensured the continuity ipso jure of the treaty, however; it also safeguarded the fundamental interests of the union of States by laying down as a condition of the continuance of the treaty that its object and purpose must be compatible with the constituent instrument of the union, and by providing, in accordance with the general principles of the law of treaties, that the treaty was binding only in relation to that part of the union of States in respect of which it was in force prior to the formation of the union.

31. Furthermore, it was correct to consider the treaty as a treaty of the union, although it applied to only one of the States forming the union; in that way, the existence of the union was recognized without prejudicing the interests of the other States of the union. On the other hand, he could not accept that the fate of the treaties with respect to the territories composing the union should be made dependent on the constitutional provisions relating to capacity to conclude treaties.

32. For those reasons, he preferred alternative A, which struck a nice balance between the interests involved and proposed judicious solutions that took account of the realities of present-day international life.

33. Mr. BARTOŠ said that unions of States posed various problems in international law, the first being the problem of the relations between the States composing the union and the union as such, in other words, the problem of possible conflicts between international law and internal constitutional law.

34. Mr. Ago, quoting the United States of America and Switzerland as examples, had referred to the tendency for composite States to act as unitary States in matters of foreign policy. That was true in general, but in fact, in the case of the United States and of Switzerland, frontier States or cantons still had the power to conclude treaties with neighbouring States, for example with regard to electric power, transport, fishing, navigation or any other question of purely local interest.

35. However, it was a question whether that power belonged to the States themselves or was delegated to them. Furthermore, where such treaties had not been ratified by the central Power, there was also the question whether they were binding on the union as a whole, or only on the part of it which had concluded them. It was true that that practice was disappearing, even though the central Power sometimes found it convenient not to have to take a stand that might lay it open to criticism from the other States forming the union. But the practice did exist and the question remained whether, in the event of the union being dissolved, treaties thus concluded would be binding on the successor State as a whole or only on the part of it which they concerned. The effects were not always localized and might have implications both for the other parts of the union and on the international plane.

36. He favoured alternative A since it took better account of the problems which he had just described and which should perhaps be mentioned in the commentary.

37. Mr. RAMANGASAOVINA said there was justification for making a distinction between unions of States and States composed of two or more territories, since the legal basis was not the same. There was also justification for excluding inter-governmental unions from the scope of article 19, since they were more economic than political unions.

38. Unions of States were characterized by the fact that, on the one hand, they were composed of former sovereign States already parties to treaties concluded by them, and, on the other hand, they were formed not by one State being incorporated in another but by fusion of two or more States that had previously enjoyed their own sovereignty. The question was therefore whether the treaties concluded by one of them remained tacitly in force or whether the clean slate principle should be applied.

39. One rule seemed to emerge from the Special Rapporteur's study, namely, that treaties concluded before

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3 See 1177th meeting, para. 75.
the formation of the union remained in force within their territorial limits, provided their object and purpose was not incompatible with the constituent instrument of the union. That rule took account of the former sovereignty of the States forming the union, which justified the continuity of the treaties. That rule was stated in alternative A which, while ensuring the continuity of the treaties, also gave unions of States the faculty not to accept them. He therefore preferred alternative A.

40. Alternative B conflicted with the idea of the former sovereignty of the States forming the union. Indeed, by providing that there must be either notification, express agreement or implied consent, it placed unions of States in the same situation as new States, which was incorrect.

41. Mr. USHAKOV said that the first question to be considered was the scope of article 19. It was implied in paragraph 25 of the commentary that the article applied to a sovereign State born of the merger of two or more independent sovereign States. However, federations appeared to be excluded from its field of application by the definition given by the Special Rapporteur of the term “union of States”, according to which the unitary State was formed by the uniting of two or more States “exercising within their respective territories the governmental powers prescribed by the constitution”, and no longer having capacity to conclude treaties. Only the unitary State would therefore be competent to conclude treaties, unless the exercise of “governmental powers” also included that power.

42. Furthermore, it was clear from the definition of “union of States” and from the last sentence of paragraph 50 of the commentary that unitary States were also excluded from the scope of article 19. It was difficult to see what was meant by the expression “complete absorption” used in paragraph 50 of the commentary. Legally speaking, a merger was not an absorption. Nor, if it was freely agreed to, was it an absorption from the political standpoint, even if one of the two uniting States was much larger than the other. In any event, whether the constituent parts of a unitary State retained a measure of autonomy or whether they had not the capacity to conclude treaties, there would still remain the question of the continuity of the treaties within the territorial limits of the original treaty. He did not therefore see why article 19 could not be applied to all possible forms of fusion.

43. Alternative A was the better of the two alternatives proposed. A union of States was not in the same situation as a newly independent State. The “clean slate” principle was therefore not applicable. On the contrary, the continuity ipso jure of the treaties should be ensured, as it was in paragraph 1 of alternative A, subject to the provisos in sub-paragraphs (a) and (b), which sufficiently safeguarded the interests of the union.

44. In paragraph 2, however, although the rule formulated was logical in the case of bilateral treaties and restricted multilateral treaties, for which it might sometimes be necessary to obtain the agreement of all the parties, it was difficult to see why the application of an open multilateral treaty should be restricted to the part of the union of States in respect of which the treaty was in force prior to the formation of the union. In such a case, it would be better to provide for accession to the treaty by the composite State as a whole.

45. The rule stated in paragraph 3 should be reworded. Where a State “joins an already existing union of States”, it was in fact a merger.

46. Mr. HAMBRO said that for various reasons he preferred alternative B.

47. In his opinion, it was necessary to look to the future and not to the past; in considering article 19, the Commission should base its decision not on the situation of decolonization, which hardly existed any more, but on the consideration that many States which would come into existence in the future might be too small and too poor to be viable as sovereign independent States. Such States should obviously be helped to form larger unions, if they so desired, and it would be easier for unions to come into being and to start life in the community of nations if they were free to choose whether they accepted old treaties or not. There was generally a sound reason why two or more States formed a union, and it was only reasonable that the new union should not be bound by treaties which had been concluded when its constituent parts had been independent. The necessary freedom of choice seemed to be more open to them under alternative B than under alternative A.

48. If article 19 was compared with article 20, it was obvious that there was a much greater need for alternative B in the latter than in the former; if that was so, it seemed more logical that it should also be adopted for article 19, which would then be more in accordance with the spirit which had guided the Commission’s work so far.

49. In dealing with the question of the fusion of States, he said that that case provided still another argument for including a general article on the question of “lawfulness”.

50. Mr. TSURUOKA said that, since the only case dealt with in article 19 was the formation of a State from two or more independent States, too much importance should not be attached to the special features of each situation.

51. For the reasons mentioned by other members, particularly Mr. Yasseen, he preferred alternative A. The rule which it stated seemed to be logical and close to what little practice there was. Also, alternative A made more allowance than did alternative B for the interests of the other parties to the treaties, in other words, the interests of the international community.

52. Mr. NAGENDRA SINGH said that for a number of reasons he was inclined to support alternative A, which was neat, elegant and precise, whereas alternative B was somewhat complex and went into too much detail. Alternative A recognized the principle of continuity, subject to the conditions of mutual consent and compatibility with the object and purpose of the treaty.

53. On the question of governmental powers, he thought that the constituent instrument of the union would determine what powers were assigned to its separate parts. As a rule, such instruments did not permit the parts of the union to have their own treaty-making powers.
54. It was clear that the proposed article 19 dealt only with succession of States in respect of treaties and not in respect of membership of international organizations. Such organizations were obviously excluded from its purview.

55. Mr. REUTER said that he wished to state his general views on article 19; at the previous meeting he had confined his comments to the concept of unions of States. The Special Rapporteur had made great efforts to overcome the difficulties involved in the delicate problem of the formation of unions of States, but he questioned the wisdom of taking practice as a basis; the Commission should keep clear of the practice, which was meagre, contradictory and obsolete.

56. The two alternatives proposed by the Special Rapporteur were very different, not so much in drafting as in substance. If the Commission kept to the line it had followed so far and followed the “clean slate” principle, which was simpler and easier, then he was in favour of alternative B, but at the same time, his first preference would be to delete article 19 altogether.

57. Alternative A contained a new principle which ran counter both to practice and to a fundamental principle of international law, that of the personality of the State. But alternative A could still be accepted as a solution, because the draft covered only cases of lawful succession in conformity with the principles of the United Nations Charter, and because all future successions of States would have to be freely consented to, either by treaty or by some less formal agreement. In accordance with the principle of the right of self-determination, in future no State should disappear except as the result of a deliberate act of suicide. The continuity principle, which was in conformity with the interests of third States, was therefore justified, for it was inconceivable that a State, in order to rid itself of existing treaty obligations, should resort to the device of concluding a treaty with another State at the expense of third States.

58. If the principle in alternative A was accepted, the question of the definition of “union of States” again arose. The Special Rapporteur, when he had decided to include paragraph 3, had been guided by the logic of the idea and not by the logic of the definition. In fact, the paragraph did not reflect the one case which had to be considered, that of the formation of a new State by two or more States.

59. The Special Rapporteur had claimed that there was no reason to apply article 19 when two or more States constituted themselves into a new unitary State, and had supported that claim by invoking the absence of precedents. However, the continuity argument was valid in that case too, and there was no need to consider whether or not the entities composing the new State exercised governmental powers.

60. To be consistent, the continuity principle must be applied not only to unitary States but also to the case covered by paragraph 3, namely, the case where a State had freely decided to join an already existing union of States. If the principle reflected in alternative A, that the treaties continued in force in the interests of third States, were accepted, it would have to be extended to cover all cases. Personally he could accept alternative A, since if separate articles had been drawn up for each category of succession, the Commission would certainly not have attached so much importance to the “clean slate” principle.

61. Mr. BILGE said that, for the reasons explained by Mr. Yasseen, he preferred alternative A, which was more in accord with the situation which article 19 was designed to regulate. There were, however, two questions he would like to ask the Special Rapporteur.

62. Mr. AGO said that at the previous meeting he had expressed some doubts regarding the kind of situations covered by article 19. He now felt that the article should be extended to cover both fusions involving the complete disappearance of the previous States, and fusions, in which the previous States continued to exist under the internal constitutional arrangements of the union. He noticed, incidentally, that by “complete absorption” the Special Rapporteur meant, not the absorption of one State by another State already in existence, but the integration of two or more States into a new State.

63. The ease with which the Commission seemed to accept novel rules requiring careful consideration was a little surprising. Mr. Reuter’s suggestion that a State might seek to free itself from a treaty by merging with one or more other States was hardly realistic. Also, the continuity principle hardly covered all the cases envisaged, since in those cases former subjects of international law

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4 See 1177th meeting, para. 74.
5 See para. 58 above.
disappeared and were replaced by a new one. Furthermore, it was extremely difficult to deduce the principle from practice.

68. Article 19 raised other questions of an even more fundamental nature. Thus it was debatable whether the condition that the object and purpose of the treaty must be compatible with the constituent instrument of the union, which was laid down in paragraph 1 (a) of alternative A, was sufficient. It was rarely that a constitution, either federal or unitary, contained provisions with respect to which the question of compatibility might arise.

69. In any event, it would seem that a treaty should not automatically continue in force whenever its object and purpose were not incompatible with the constituent instrument of the union. Certain treaties concluded by a small State lost all meaning when the latter joined a union of States. For instance, it was quite inconceivable that the newly constituted Kingdom of Italy should have had to apply to the province of that name certain treaties concluded by the Duchy of Modena. Sub-paragraph (a) should therefore be amended so as to refer, not to an incompatibility with the constituent instrument of the union, but to an incompatibility with the new situation created by the formation of a new State, since it was most unlikely that the purpose of a treaty would ever be incompatible with the constituent instrument of a composite State.

70. In paragraph 2, a treaty could continue to be binding on that part of a union in respect of which it had previously been in force, only if the part concerned continued to exist under the union’s internal constitutional law; but that was often not the case. Moreover, many treaties had no precise territorial application, so it was a question whether the union was bound by such treaties.

71. His general impression was that the Commission, in dealing with the various problems posed by article 19, was inclined to be less circumspect than the Special Rapporteur.

72. Mr. CASTAÑEDA said that he was fundamentally in agreement with the idea behind article 19, which, as the Special Rapporteur had made clear in his commentary, was limited to authentic cases of the fusion or union of States and not to certain other cases which he had carefully distinguished.

73. In modern practice, cases of the formation of unions were not numerous, those of Tanzania and the United Arab Republic being the best known, but the basic rule seemed to be the need to maintain continuity in international relations.

74. Concerning the two alternatives presented by the Special Rapporteur, he shared some of the scruples which had been expressed by Mr. Ago. Paragraph 1 (a) of alternative A provided that treaties in force should continue in force “unless the object and purpose of the particular treaty are incompatible with the constituent instrument of the union”. Surely, however, the important thing was not whether the object and purpose of the treaty were incompatible with the constituent instrument, but whether they were incompatible with the new situation which had arisen as a result of the formation of the union.

75. The latter possibility seemed to be better provided for in alternative B which, by its explicit reference in paragraph 1 (a) to article 7 (b), covered the case where a treaty was a constituent instrument of an international organization. Then paragraph 1 (b) (ii) provided for the case when the union of States and the other States parties “must by reason of their conduct be considered as having agreed to or acquiesced in the treaty’s being in force in their relations with each other”. That provision was very important, since it was not at all clear that continuity could be considered to be automatic.

76. The formation of a union of States was a political event of the greatest importance. The new State was thenceforth something separate and distinct from the mere sum of its parts and it could not be said that a treaty formerly in force in respect of one of those parts should be binding on the new State. He felt, therefore, that, because of its specific requirement in paragraph 1 (b) of the express or implied consent of the parties, alternative B was to be preferred.

77. Mr. USTOR said that, as other speakers had already pointed out, the Special Rapporteur had made it clear in his commentary (A/CN.4/256/Add.1) that article 19 was not a case of the codification of international law, as defined in the Commission’s Statute. Article 19 could hardly provide “the more precise formulation and systematization of rules of international law in fields where there already had been extensive State practice, precedent and doctrine".

78. Some practice did exist, but it was scant, and, as Mr. Reuter had said, much of it was already obsolete. The Commission was legislating for the future, and the growing need to allow for unions of States was shown by the general trend towards integration throughout the world today. Regional organizations, in fact, had already proved to be an economic necessity.

79. He agreed with Mr. Reuter, therefore, that the Commission should not attempt to legislate on the basis of practice but should rely on those principles of international law which it considered useful to the international community. What were those principles? Mr. Yasseen had mentioned the principle of pacta sunt servanda. But Mr. Ago said that pacta sunt servanda could only apply between subjects of international law, and if one subject disappeared the treaty lost all meaning. He himself believed that they should start from the principles of the stability of international relations and cooperation between States, and in that case he would be inclined to support alternative A.

80. The exception provided for in paragraph 1 (a), it was true, did raise the difficult question to what extent a union of States should be free to lay down rules in its constituent instrument which might amount to the termination of previous treaties.

81. Moreover, certain serious problems might arise in connexion with paragraph 2. If, for example, a third State had concluded treaties concerning consular privi-
leges and immunities and containing somewhat different provisions with both of the original States which made up the subsequent union, on which of those treaties could the latter rely in pressing its claims against the third State?

82. In spite of those possible difficulties, however, he felt that the Commission should adopt alternative A and embody in it the necessary safeguards to solve any problems which might arise with regard to its application.

The meeting rose at 1.5 p.m.

1179th MEETING

Wednesday, 14 June 1972, at 10.30 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256 and Add.1 and 2)

[Item 1 (a) of the agenda]

(continued)

ARTICLE 19 (Formation of unions of States) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 19 of the Special Rapporteur’s draft (A/CN.4/256/Add.1).

2. Mr. ALCÍVAR said that he found it difficult to make a definitive choice between alternatives A and B. The principle of continuity ipso jure embodied in alternative A had been defended by Mr. Yasseen on the basis of the pacta sunt servanda rule. He did not share that view because, among other reasons, that rule was limited by other higher rules. Mr. Ustor had referred to fundamental change of circumstances, but the rebus sic stantibus rule, which was now considered an express rule of international law instead of an implied clause as it had been in the past, was scarcely a ground for terminating a treaty. At any rate, it was a secondary rule to those which invalidated a treaty ab initio, like those relating to defect of consent.

3. He shared many of the doubts which the Special Rapporteur himself had expressed concerning the theory of continuity. On the other hand, he also doubted whether it was possible to accept the “clean slate” doctrine embodied in alternative B, although that alternative did possess certain attractive features, such as its insistence on the need for the express or implied consent of the union of States.

4. In paragraph 42 of his commentary (A/CN.4/256/Add.1), the Special Rapporteur had rightly stated that the problem was to find a satisfactory formula for reconciling the principle of continuity with the new constitutional situation resulting from the formation of the union. Since that problem, as Mr. Ago and Mr. Reuter had pointed out, raised a whole series of problems which needed careful study, it should be referred to the Drafting Committee.

5. Mr. USHAKOV said that he preferred alternative A. The two alternatives proposed by the Special Rapporteur were based on diametrically opposed concepts. According to alternative B, which reflected the “clean slate” principle, all the treaties lapsed and could be revived only by novation. In his view, that solution was not in the best interests of the union of States, since it was often to its advantage that third States should have obligations towards it. The same was true for third States with regard to the obligations contracted towards them by the States which had merged.

6. He therefore preferred alternative A, though he recognized that it might give rise to difficulties in view of the infinite variety of possible cases. To overcome those difficulties, the principle stated in alternative A should be accompanied by saving clauses designed to protect the lawful interests of the union and third States.

7. Mr. HAMBRO said that the more he had heard during the debate in favour of alternative A, the more convinced he had become that it was not advisable to adopt that alternative as article 19.

8. It should be remembered that the States which had had an independent status before the union were no longer the same afterwards; the various components had changed their complexion completely, not only from a political but also from a social, economic and legal point of view, so that it would often be impossible to apply the rule stated in paragraph 2, particularly with respect to extradition treaties and others dealing with legal problems.

9. It was also necessary to consider the interests of third parties, which might have entered into a treaty only after long debate between the two parties involved. A third State might very well hesitate to consider itself bound by a treaty with another State which had subsequently become part of a Union. That was especially true when the third State in question had the rule that ratification needed the consent of parliament, since such consent might in fact be invalidated by reason of an ipso jure continuance of treaties after succession. The Commission should be very careful before laying down that treaties concluded with third States should be applied ipso jure to the other party, without affording the latter any opportunity for negotiations concerning the future of the treaty.

10. Finally, though precedents did exist, the practice was far from coherent and could be interpreted in different ways, which was undoubtedly the reason why the Commission had been asked to introduce some order into the situation. He hoped, however, that the Commission...
would exercise extreme care before adopting the principle of ipso jure continuity.

11. Mr. CASTAÑEDA said that he would like to associate himself with the views expressed by Mr. Hambro. Normally, a union of States created a new political reality which might radically alter the position of the parties to an existing treaty. It was better to give new States, and particularly third States, an opportunity to reflect before deciding whether they wished to continue with the treaty or not.

12. It was an exaggeration to say that alternative A basically embodied the theory of continuity and that alternative B embodied that of the “clean slate”. In reality, there was not much difference between them. On the whole, however, he agreed with Mr. Hambro and Mr. Ago that preference should be given to alternative B.

13. Mr. REUTER said that the Commission had reached a turning-point in its work on succession of States in respect of treaties. The principle of the legal personality of the State, which had been invoked by several speakers, was not the only one that could be taken into consideration. Incidentally, a party could not invoke change of circumstances as a ground for release from a treaty when it was the party itself that was responsible for the change.

14. Whatever solution might be proposed, there would always be opposing interests that ought to be protected. If the Commission adopted the “clean slate” solution in the name of the principle of legal personality, it would be obliged to adopt the same solution for localized treaties, since they were subject to the same principle.

15. He had no objection to the question being referred to the Drafting Committee, as Mr. Alcivar had suggested, but he must make it clear that he could not accept a compromise solution for article 19 until he knew exactly what the Commission’s position was going to be on future articles of the draft. If the Commission decided that the “clean slate” rule applied in all cases, he would either have to abstain or to vote against the draft as a whole, because it would mean that important interests would then be sacrificed.

16. Mr. QUENTIN-BAXTER said that, after listening to what Mr. Hambro had to say in favour of alternative B, he felt it would be possible to formulate almost the same compromise solution for article 19 until he knew exactly what the Commission’s position was going to be on future articles of the draft. If the Commission decided that the “clean slate” rule applied in all cases, he would either have to abstain or to vote against the draft as a whole, because it would mean that important interests would then be sacrificed.

17. He himself favoured alternative A, but would not wish to exaggerate the importance of the precedents of Tanzania and the UAR; in those cases, it appeared evident that there had been a strong tacit feeling that the components of those States had not entirely lost their identity. He fully understood the Special Rapporleur’s difficulties, but he would not like to leave the matter to turn solely on the form of the constituent instrument of the union, as provided in paragraph 1(a).

18. He sympathized with Mr. Castañeda’s view that it would be somewhat exaggerated to make a choice between the principle of continuity contained in alternative A and the “clean slate” principle in alternative B. In his opinion, however, there would always be a certain margin of appreciation. He preferred to start with the presumption of continuity; the situation was analogous to one of far-reaching constitutional changes in a single State, where it might be necessary to revise certain treaty obligations but where it would be possible to accomplish that purpose by way of negotiation.

19. He agreed with Mr. Reuter that the Commission now found itself at a turning-point where it was impossible to arrive at a consensus merely by counting heads. He would suggest, therefore, that the Commission should reserve the possibility of taking another look at article 19.

20. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the view expressed by Mr. Ustor at the previous meeting that there was no established international law in the matter which could provide any specific rule. Practice was, indeed, an inadequate guide and it would be necessary to make rules for the future on the basis of principles.

21. In his opinion, the Commission should rely on the Vienna Convention, which would tend to support alternative A, not necessarily because of the rule of pacta sunt servanda, but also on the basis of other articles in that Convention.

22. Mr. Hambro had said that the changes which might come about as the result of the formation of a union of States might make it impossible for the latter to carry out treaties previously concluded by its component parts. He would call his attention, however, to paragraph 2 of article 61 of the Vienna Convention (Supervening Impossibility of Performance), which stated that such an alleged impossibility could not be invoked as a ground for terminating the operation of a treaty if the impossibility was a result of a breach of an obligation under the treaty.

23. The main difficulty in alternative B arose in connection with the need to protect the interests of a third State. The latter was clearly entitled to adequate performance of the treaty; therefore, any difficulties connected with the union of States should be borne by the State which had originally created those difficulties.

24. In the interests of promoting the stability of treaties, he thought that alternative A was to be preferred. Like Mr. Quentin-Baxter, however, he was somewhat dubious about paragraph 1(a), which would terminate a treaty if its object and purpose were incompatible with the constituent instrument of the union. He himself did not see why that should be the prime criterion, since it would leave it to the component States of the union to determine whether they would agree to an instrument

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See para. 12 above.

See para. 13 above.

See 1178th meeting, paras. 77 and 78.
which might defeat the purpose of the treaty. After all, it was not impossible that two States in a union might decide to have provisions in the constituent instrument which would relieve the union of their previous treaty obligations.

25. Such a formulation seemed to go beyond the problem of State succession in respect of treaties and to raise the question of State responsibility. He doubted whether it would be reasonable to include in alternative A a rule which would eliminate State responsibility in those circumstances. If alternative A were accepted, it should include a different type of rule, such as that laid down in sub-paragraph (a) of excursus A (A/CN.4/256/Add.1).

26. There might be some validity in the objections to the use of the term “union of States”, which was rather broad; he himself would suggest the term “unitary State”. After all, it was up to the unitary State to maintain the necessary internal administration to enable it to fulfil its treaty obligations; the exact geographical organization of its constituent units was immaterial. Consequently, he would prefer a simpler definition, possibly along the lines of that originally proposed by Mr. Reuter: “A unitary State is one formed by the uniting of two or more States”.

27. Mr. TABIBI said that he would like to state for the record that he had supported alternative A because it was clear, concise and in line with the definition of a union of States. In particular, he felt that paragraph 1 (b) covered the point made by Mr. Castañeda and Mr. Hambro.

28. Mr. CASTAÑEDA said that not enough attention had been given to paragraph 1 (b) (ii) of alternative B, which stated that treaties would continue in force between the union of States and other States if they “must by reason of their conduct be considered as having agreed to or acquiesced in the treaty’s being in force in their relations with each other”.

29. He did not see any real difference between the two situations in alternatives A and B. Alternative A said that the treaties would continue in force unless the parties agreed otherwise, while alternative B said that the parties would have to take some decision in the matter, whether express or implied. Both alternatives called for some kind of agreement and he did not think that the difference between them was very great.

30. Mr. NAGENDRA SINGH said he would like to ask the Special Rapporteur to clarify the distinction between alternatives A and B. Was it correct that alternative A was based primarily on the principle of continuity, while alternative B stated that the express or tacit agreement of the parties was necessary?

31. Sir Humphrey WALDOCK (Special Rapporteur), replying to Mr. Nagendra Singh, said he would think that there was a clear and strong difference between alternatives A and B. Alternative A was a rule of ipso jure continuity which provided that the treaty would continue in force unless the parties agreed otherwise. The case in alternative B, on the other hand, was fundamentally different, since everything depended on the express or implied consent of the parties.

32. In alternative A there was a legal basis for the ipso jure rule. When States decided to form a union, the change in their position resulted from their own voluntary acts and it was arguable that they remained bound by the rule of pacta sunt servanda with respect to their pre-union treaties. Indeed, when the state of Texas had joined the United States of America, the British law officers had advised that, since that was a voluntary act on the part of Texas, it could not divest itself of its former treaties and that the United States would in consequence have to accept the previous treaties by which Texas was bound. In other words, where there was a voluntary act by a State, that act could not impose an obligation on other parties to a treaty by unilaterally terminating their rights.

33. There were, however, other points which had to be taken into consideration. Mr. Yasseen had pointed out that the Commission should be careful not to formulate a rule which would inhibit constitutional changes in a State. By reason of economic and political pressures, such changes were clearly very likely to occur in future in the life of the international community. To hold new States automatically bound by prior treaties might impede the creation of unions of States, since today virtually every State accumulated a large complex of treaty relations, including both bilateral and multilateral treaties, and those might be incompatible with the new situation created by the union.

34. A new union of States, for example, might create a new economic system which might be incompatible with many former bilateral treaties. In such a case, could one say that it was impossible to form such a union without first obtaining the agreement of the other States parties to the treaty? His intention in drafting paragraph 1 of alternative A had been to give effect to the principle of continuity without inhibiting the creation of unions of States.

35. With regard to the scope of article 19 and the definition of a union of States, Mr. Ago had been right in saying that international law suffered from a paucity of legal language in that field. The term “union of States” was to be found in all the text-books, although sometimes it was used in a looser sense to include intergovernmental, and especially economic unions. He personally did not like the Chairman’s term “unitary State”, which was normally understood as meaning a State with a concentrated central government which was not a federation. The question whether a “union of States” should comprise cases of the complete disappearance of the component parts as separate entities was a difficult one. That was illustrated by the case of the United Arab Republic, the constitution of which was unitary in form, but which in practice maintained the separate identity of its component parts.

36. Moreover, he wondered whether the same rules should apply to the dissolution of States, dealt with under

* See 1177th meeting, para. 80.
article 20. It was clear that the former practice had accorded significance to the element of separate international personality. But that element was absent in the cases of the UAR and Tanzania, at least on paper, and that had led the International Law Association to disregard it as a basis for formulating the rule. The element of separate international personality had been given emphasis by older writers who had attached significance to the retention of treaty-making powers by the cantons of Switzerland and the States of Germany. Their position had been logical, though it was not now consistent with the more recent practice. The International Law Association seemed rather to give significance to the possession by the constituent parts of power to implement the treaties. But that went too far in introducing internal law into international law. In his opinion, it would be for the union of States itself to arrange for the performance of treaties concluded by or binding upon its component parts.

37. Since he had retained in the definition of "union of States" the element of the separate identity after the union of the component States, it might be necessary to prepare a separate article to deal with the case where two or more States merged to form a unitary State.

38. With regard to the text of article 19, he noted that thirteen members favoured alternative A, while five members had expressed themselves more or less strongly in favour of alternative B. Both alternatives had their advantages and disadvantages but undoubtedly alternative B would raise fewer drafting problems.

39. It was possible that, when States reflected on the constitutional and other problems which the adoption of alternative text A would involve, they might be inclined to prefer a more flexible system.

40. State practice in the matter was not altogether easy to interpret. The action taken on the formation of the United Arab Republic and of the United Republic of Tanzania, however, gave an indication of a movement in the direction of continuity. The principle of continuity meant that States could not, by forming a union, simply get rid of their pre-existing treaty obligations. If modifications were desired, it would be for the union to negotiate with the other States parties to the treaties and arrive at suitable agreements with them.

41. The case of the European Economic Community was really quite different, since the EEC was an intergovernmental union and not a union of States. It was the member States of EEC which were each responsible for making arrangements with the other contracting parties to their treaties in order to bring their treaty relations into line with the EEC system.

42. With regard to the provisions of paragraph 1(a) of alternative A, he realized the inadequacy of the terms in which the concept of incompatibility was expressed. In that respect, he was inclined to favour the suggestion by the Chairman to replace the reference to incompatibility "with the constituent instrument of the union" by language on the lines of the concluding portion of sub-paragraph (a) of excursus A. The constitution of the union was bound to be in some way incompatible with almost any treaty. For example, new designations might be given in the constitution of the union to State organs, thereby rendering inappropriate—in the formal or literal sense—the references to those organs under their old names in, say, an extradition treaty. The Drafting Committee should therefore try to find other language for paragraph 1(a), bearing in mind the remarks of members and in particular of the Chairman.

43. Several members had drawn attention to the difficulties which might arise from the operation of paragraph 2, which called for the application of a treaty only to a part of the union of States, namely, that part in respect of which the particular treaty had been in force prior to the formation of the union. In practice, difficulties of that kind had been overcome by the union entering into negotiations for the extension of the treaty to the whole of its territory. That certainly had been the case when the United Arab Republic had been formed.

44. The provisions of paragraph 2 were consistent with State practice in the cases of the United Arab Republic, the United Republic of Tanzania and the Republic of Somalia. In the case of the latter, one particular extradition treaty had remained applicable to the territory of the former protectorate of British Somaliiland, but was not applied in the former Italian trust territory of Somalia. The situation was certainly anomalous but the system was not unworkable, as experience had shown.

45. He fully agreed with the remark by Mr. Reuter that, with article 19, the Commission had reached something of a crossroads. On the specific point raised by Mr. Reuter, however, he felt that the problem of localized treaties was a general one which would exist whatever choice were made between alternatives A and B. If the Commission agreed that "dispositive, localized or territorial" treaties constituted an exception, then that exception would have to be framed so that it operated all along the line.

46. The importance of the discussion on article 19 resulted rather from the fact that the Commission had had to enter for the first time the area of the personality of the State and consider the effects of that personality on succession. As he had already had occasion to recall, some nineteenth century writers regarded the personality of the State as the key to the whole question of succession. When the Commission came to consider the problem of the dissolution of unions, problems of State personality would once more come to the fore.

47. In reply to Mr. Bilge's first question, he would explain that although he had framed his definition of "union of States" with reference to article 19, on the formation of such unions, it was meant in principle to apply also to article 20 (A/CN.4/256/Add.2), on the dissolution of unions. The wording, however, would have to be carefully scrutinized because he had some mis-

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10 See para. 25 above.
11 See para. 13 above.
12 See para. 36 above.
13 See para. 14 above.
14 See para. 25 above.
15 See para. 14 above.
16 See para. 13 above.
givings as to whether it was altogether suitable for application to article 20.

48. Mr. Bilge's second question had been whether paragraph 1 (b) of alternative A was intended to apply to bilateral treaties.18 It applied in fact to all treaties, although in practice it was more likely to operate for bilateral treaties and restricted multilateral treaties.

49. Mr. Ushakov had asked whether the term "governmental powers" in the definition excluded treaty-making powers;16 it did not. A limited treaty-making capacity was in some cases retained by the component units of a union; when that occurred, the treaty-making powers would be exercised within the territory of the separate political division formed from the component State.

50. On another point raised by the same member,17 he considered that the word "joins" was correctly used in paragraph 3. The case had occurred, for example, of three new component States entering the Federation of Malaysia. A case of that kind could be expressed equally well in two ways: either as that of three new States joining an existing union of States, or as that of a second fusion.

51. The question of associated States had been raised by Mr. Quentin-Baxter,18 but he felt that it would be very confusing to try and deal with it in article 19. If need be, it could be dealt with in a separate provision; he would discuss the matter informally with Mr. Quentin-Baxter.

52. In conclusion, he suggested that article 19 be referred to the Drafting Committee for consideration in the light of the discussion.

53. Mr. AGO said that the Special Rapporteur's statement had brought out clearly the difficulties involved in article 19. He himself had always thought that article 19 referred to a number of very different cases: the case of communities of States, like the European Economic Community, to which the rule in alternative A applied very well; the case of composite States, which raised serious problems when the former States had lost their international legal personality but retained a constitutional legal personality; and the case of total fusion, where the former States disappeared completely, even as separate constitutional and territorial entities.

54. Perhaps the best solution might be to prepare separate rules for each case. He suggested that the article be referred back to the Drafting Committee, with a broad mandate to consider a number of possibilities rather than to make an immediate choice between alternative A and alternative B. The Commission had not yet got to the root of the matter and there was still some spadework to be done, but it was better in the meantime that it should be done by the Drafting Committee than that the discussion should begin all over again in the Commission.

55. Mr. REUTER, referring to the Special Rapporteur's comments on the position he had adopted during the discussion,19 said he wished to explain that he had not said that the solution of the problem of localized treaties depended on the choice made between alternative A and alternative B; what he had said was that the grounds on which the Commission chose one or the other had consequences for localized treaties.

56. It was quite possible to opt for alternative B and to have a good article on localized treaties. If the Commission categorically laid down the principle of State personality as an absolute rule in successions and accordingly preferred alternative B, that would lead to an unsatisfactory solution of the problem of localized treaties.

57. He realized that the difficulties involved were exceedingly complex, and he was prepared to consider any kind of compromise, but one element of the compromise must be the precise content of the article on localized treaties. A fairly broad definition of localized treaties would defuse the conflict between alternatives A and B. The Drafting Committee should therefore be given a broad mandate, as Mr. Ago had just suggested. Moreover, the Commission should not be asked to consider the Drafting Committee's text for article 19 in isolation; it should have before it all the texts, in order to see what could be saved of the treaties in force when fusion occurred. If the Commission was willing to accept a very broad formula for localized treaties, the problem of article 19 would be greatly simplified; if not, it would remain a very real one.

58. Mr. CASTAÑEDA said that during the discussion on the provisions of paragraph 1 (b) (ii) of alternative B, he had pointed out that the case envisaged in those provisions was very close to that contemplated in alternative A.20 He hoped his comments on that point would be taken into account by the Drafting Committee.

59. Sir Humphrey WALDOCK (Special Rapporteur) said he fully agreed that it would be a mistake to regard the choice between alternatives A and B as a choice between an absolute "clean slate" rule and a rule of ipso jure continuity. There remained, however, a fundamental difference between alternative A and alternative B in that the first laid down the rule of ipso jure continuity, whereas the second embodied a solution based on consent.

60. Mr. USHAKOV said that the difference was that in alternative B the agreement of all the parties was required, whereas in alternative A, in the absence of express agreement, the treaty continued in force ipso jure. An express agreement was, however, always possible.

61. Mr. NAGENDRA SINGH said that he had no objection to article 19 being referred to the Drafting Committee, which was in a much better position to iron out the problems which had been raised during the discussion. He had, however, some misgivings regarding the suggested use of the term "unitary State". That term had a specific meaning in municipal constitutional law.

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15 Ibid., para. 63.
16 Ibid., para. 41.
17 Ibid., para. 45.
18 Ibid., paras. 20-28.
19 See para. 45 above.
20 See 1178th meeting, para. 75.
and was likely to create confusion, whereas the term “union of States” was to be found in every textbook of international law.

62. The CHAIRMAN, speaking as a member of the Commission, said that when he had referred to a “unitary State” he had meant a unified State.

63. With regard to the question of associated States, he understood that it required extensive treatment, and that could perhaps be given better in the commentary than in the article itself.

64. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to refer article 19 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.21

ADDITIONAL ARTICLE FOR INCLUSION AT THE END OF PART II (Excursus A)

65. **Excursus A**

States, other than unions of States, which are formed from two or more territories

When a new State has been formed from two or more territories, not themselves States, treaties which are continued in force under the provisions of articles 7 to 17 are considered as applicable in respect to the entire territory of the successor State unless:

(a) It appears from the particular treaty or is otherwise established that such application would be incompatible with the object and purpose of the treaty;

(b) In the case of a multilateral treaty other than one referred to in article 7 (c), the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(c) In the case of a multilateral treaty of the kind referred to in article 7 (c), the successor State and the other States parties otherwise agree;

(d) In the case of a bilateral treaty, the successor State and the other States party otherwise agree. (A/CN.4/256/Add.1).

66. The CHAIRMAN invited the Special Rapporteur to introduce the additional article in excursus A of his fifth report (A/CN.4/256/Add.1).

67. Sir Humphrey WALDOCK (Special Rapporteur) said that he had explained in a fairly extensive commentary (A/CN.4/256/Add.1) his reasons for submitting an additional article to deal with States, other than unions of States, formed from two or more territories which prior to the union had not themselves been sovereign States.

68. The fundamental problem which arose was whether a distinction should be drawn between a union of States formed from two or more pre-existing sovereign States and a State, which could be either a unitary State or a federation, which was simply composed of territories. Even where the component territories had a distinct identity in the federal structure, no problem of international existence arose. He therefore believed that the case envisaged in his excursus A constituted merely a separate type of newly independent State and as such should be covered by an additional article to be included in part II of the draft.

69. Mr. SETTE CAMARA said that he fully agreed with the Special Rapporteur’s approach. The whole of the rationale for the rule in article 19, on unions of States, rested on the fact that such unions consisted of former independent sovereign States having each a patrimony of treaties which ought to continue in the interests of the other parties to the treaties and of the international community as a whole. A union of territories such as that envisaged in excursus A, on the other hand, fell within the principles of part II of the draft.

70. Mr. USHAKOV said that the proposed additional article was acceptable but might be unnecessary if the case of a State composed of two or more territories were included in the notion of newly independent State.

71. If the article was retained, it would be advisable to make a slight drafting change in sub-paragraph (a) so as to make clear the exact meaning of the words “such application”.

72. He reserved his position with regard to the definition of the term “newly independent State”.

The meeting rose at 1 p.m.

**1180th MEETING**

*Thursday, 15 June 1972, at 10.15 a.m.*

**Chairman:** Mr. Richard D. KEARNEY

**Present:** Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambr, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphry Waldock.

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**Succession of States in respect of treaties**

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256 and Add.1 and 2)

[Item 1 (a) of the agenda]

(continued)

**EXCURSUS A—ADDITIONAL ARTICLE FOR INCLUSION IN PART II (States, other than unions of States, which are formed from two or more Territories)** (continued)

1. The CHAIRMAN invited the Commission to continue consideration of excursus A, the additional article for inclusion in Part II, submitted by the Special Rapporteur in his fifth report (A/CN.4/256/Add.1).

2. Mr. TAMMES said that, when he had spoken on article 19 at a previous meeting, he had made some very general and preliminary remarks with regard to excursus A. Its structure was similar to that of alternative A for article 19, in that a presumption was laid down in favour of the application of the treaty to the whole territory, unless it was otherwise agreed by the interested

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21 For resumption of the discussion, see 1196th meeting, para. 38.

1 See 1178th meeting, para. 19.
parties. Although he had not favoured a presumption of that kind in the case of article 19, he saw no harm in adopting it for excursus A.

3. He had a number of reasons for so doing. First, sub-paragraphs (d) and (c) made continuity dependent on an agreement between the successor State and the other State or States parties, where bilateral treaties or restricted multilateral treaties were concerned; since, for those categories of treaties, the consent of all the parties would in all cases be necessary, the parties would have an opportunity of considering whether the treaty should apply to the entire territory of the union or only to part of it. Secondly, sub-paragraph (b) provided for the possibility of a further territorial restriction. And thirdly, the presumption was also subject to the reservations specified in sub-paragraph (a) regarding incompatibility with the object and purpose of the treaty.

4. He did not, however, favour dealing with the matter in a separate article; he believed that the essence of excursus A could be conveniently amalgamated with the substance of article 19, as in the formula suggested by the International Law Association and reproduced in paragraph 29 of the Special Rapporteur's commentary to article 19 (A/CN.4/256/Add.1).

5. There were also sound reasons for not making too strict a distinction between unions of States and unions of territories. History provided examples of what might be called mixed cases. For instance, in 1918, when the union between Iceland and Denmark had been formed, Iceland was not a State but a territory forming part of Denmark.

6. He did not believe that many cases were likely to arise in the future of the simultaneous emergence into independence of a group of former dependent territories close enough to each other for it to be logical for them to constitute a single State. Since the hypothesis on which excursus A was based thus belonged rather to the past, it did not appear necessary to retain its provisions in the form of a distinct and separate article.

7. Sir Humphrey WALDOCK (Special Rapporteur) said that he had considered the last point raised by Mr. Tammes when drafting article 19 and excursus A, and also when preparing article 20.

8. There was a very real distinction between the cases envisaged in excursus A and those contemplated in article 19. The latter provision dealt with the formation of a union consisting of units which had participated in the treaty-making process. In the cases covered by excursus A, the problem was that of determining the manner in which the plurality of the territories affected the application to the new State formed by their merger of the rules for newly-independent States laid down in articles 7 to 17.

9. The case of Iceland was a special one, in that almost immediately after the union of 1918 it had achieved international personality, and foreign States had negotiated treaties with it during the period of the union.

10. If the provisions of article 19 were to be based on the principle of consent, it would be comparatively easy to amalgamate them with those relating to States formed from two or more territories. Since, however, the majority of the Commission had favoured basing the provisions of article 19 on the principle of ipso jure continuity, it would be necessary to have a separate provision on the lines of excursus A.

11. Mr. QUENTIN-BAXTER said that he was in full agreement with the very practical and useful rule embodied in excursus A, and with the relationship between that rule and the provisions of article 19 in alternative A. The distinction drawn between unions of States and the cases covered in excursus A was a valid one.

12. The CHAIRMAN, speaking as a member of the Commission, said that excursus A was a useful addition to the draft, even though it was likely to be applied only on comparatively rare occasions. It was desirable to lay down in the draft a series of rules for as wide a variety of situations as possible, in order to avoid any gaps or confusion in practice.

13. With regard to the text, he had no serious problems but felt that some clarification was needed regarding the relationship between sub-paragraph (a), on incompatibility with the object and purpose of the treaty, and sub-paragraphs (a) and (b) of paragraph 1 of article 13. As he understood those last two provisions, an express or implied agreement by the parties to apply a bilateral treaty would rule out any question of incompatibility.

14. Speaking as Chairman, he said that if there were no further comment, he would take it that the Commission agreed to refer excursus A to the Drafting Committee.

It was so agreed.

ARTICLE 20

Dissolution of a union of States

Alternative A

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States:

(a) Any treaty concluded by the union with reference to the union as a whole continues in force in respect of each such State;

(b) Any treaty concluded by the union with reference to any particular political division of the union which has since become a separate State continues in force in respect only of that State;

(c) Any treaty binding upon the union under article 19 in relation to any particular political division of the union which has since become a separate State continues in force only in respect of that State.

2. Sub-paragraphs (a) and (b) of paragraph 1 do not apply if the object and purpose of the treaty are compatible only with the continued existence of the Union of States.

3. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraphs 1 and 2 apply also in relation to this State.

Alternative B

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States, treaties binding upon the union at the date of its dissolution continue in force between any such successor State and other States parties thereto if:

* For resumption of the discussion, see 1196th meeting, where excursus A becomes article 17 (quinqueas).
(a) In the case of multilateral treaties other than those referred to in article 7 (a), (b) and (c), the successor State notifies the other States parties that it considers itself a party to the treaty;

(b) In the case of other treaties, the successor State and the other States parties

(i) Expressly so agree; or

(ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty’s being in force in their relations with each other.

2. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraph 1 apply also in relation to this State.9

16. The CHAIRMAN invited the Special Rapporteur to introduce article 20 of his draft (A/CN.4/256/Add.2).

17. Sir Humphrey WALDOCK (Special Rapporteur) said that article 20 dealt with a case which was the obverse of that dealt with in article 19, on unions of States. It related only to the dissolution of unions; he was preparing another article, which would be numbered article 21, to deal with other forms of dismemberment, such as secession from a State and the splitting apart of a State.

18. Article 20 raised the problem of the definition of “union of States”. As he had already pointed out in introducing that definition, it would be necessary to reword it so as to cover satisfactorily both article 19 and article 20, and such cases as the union between Iceland and Denmark in 1918, which was a union created not from two pre-existing States but from a State and a territory detached from that same State. The case was one of what used to be called in traditional textbooks a “real union”; it had a single crown and a single organ to exercise treaty-making powers, but there was a very distinct separation of identities between Iceland and Denmark.

19. There was not a very large practice on the subject. The question arose, as it had done in the case of article 19, whether that practice pointed to a rule of ipso jure continuity or to a rule based on consent. In fact, it provided elements of both. In view of the pragmatic position usually taken by the States concerned, it was often difficult to discern whether the action taken in a particular case represented an arrangement by consent of the parties or a recognition of some form of ipso jure continuity rule. That was why he had submitted two alternative texts: alternative A based on the ipso jure approach and alternative B based on the element of consent. It would be for the Commission to choose between them.

20. Mr. TAMMES said that as far as he was concerned, there could be no question of a choice between alternatives A and B. Alternative A simply did not work in practice, so that the text in alternative B would have to be used.

21. As shown by the opening words of paragraph 1 in both alternatives, when a union of States was dissolved, its constituent political divisions became separate States. They became in fact new States, since they had not been States while they were mere political divisions of the union.

9 For commentary see document A/CN.4/256/Add.2.

22. That being so, and in view of the clear provisions included in the articles on new States, he did not see how it would be possible to formulate a rule, such as that contained in alternative A, which imposed on a new State the treaties by which it would be bound in the future. Such a rule would be contrary to the basic philosophy of the draft.

23. Moreover, it should be remembered that a new State, such as a constituent State of a dissolved union, would not be bound by the future instrument on succession of States in respect of treaties, except to the extent that any of the rules therein contained was considered as declaratory of already existing customary international law. Clearly, no such claim could conceivably be made on behalf of the rule embodied in alternative A. The scanty, contradictory and ephemeral practice described in the commentary patently demonstrated that such was not the case.

24. In the circumstances, the only solution to the problem raised in article 20 was to rely on the old device of consent and to recognize that a new State could not be bound without its consent. He accordingly urged the Commission to adopt alternative B.

25. Mr. HAMBO said that he agreed with Mr. Tammes and supported alternative B.

26. The remarks which he had made during the discussion on article 19 were equally valid for article 20.4

27. Sir Humphrey WALDOCK (Special Rapporteur) said that in the discussion on article 20, just as in the discussion on article 19, the Commission had arrived at a cross-roads. It would have to decide whether it would allow the element of personality of States to have an impact on the rules of succession.

28. In article 19, the majority of the Commission had accepted that, in the case of a union of States, where in the past the component units had constituted international entities, the ipso jure rule applied. Similarly, with regard to the question of the dissolution of a union, dealt with in article 20, the question arose whether the existence of a trace of international personality would affect the situation.

29. Mr. NAGENDRA SINGH said that, although with regard to article 19 he maintained his preference for alternative A, he was prepared to accept alternative B as far as article 20 was concerned.

30. The position with regard to dissolution was different from that which obtained with regard to the formation of a union. On the dissolution of a union of States, the component units emerged as entirely new legal entities and constituted new States. With regard to new States, the principle of consent was paramount; a new State must be allowed to choose the treaty relations by which it wished to be bound. The text in alternative B answered that need.

31. Mr. USHAKOV said that the situations created by the dissolution of a union of States were even more complex than those arising from the formation of unions of States. In other words, the problems raised by
article 20 were even more difficult to resolve than those raised by article 19.

32. The first was how to make a distinction between dissolution and division. The Commission had already decided that a State that had seceded—in other words, where an existing State had been divided into two separate States—was in a similar situation to newly independent States in general. Where the entities were politically separate and had the capacity to conclude treaties, the situation was clear, but where it was only in one and the same State that they could be considered as political entities, it was more difficult. In the case of Bangladesh, for example, was it a separation, a division or a dissolution?

33. Secondly, neither alternative A nor alternative B satisfactorily answered the question whether, after a complete dissolution, the principle of ipso jure continuity or the “clean slate” principle should be applied. According to paragraph 1(a) of alternative A, any treaty concluded by the union with reference to the union as a whole continued in force in respect of each of the constituent States. That was the principle of ipso jure continuity. But that rule was not applicable to commercial or economic treaties, for example. It was inconceivable that, after a dissolution, the same obligations would be shared between two or more successor States in respect of which the treaty concluded in the name of the union would remain in force. Paragraph 2, which contained the proviso that the treaty would not remain in force if its object and purpose were compatible only with the continued existence of the union of States, did not solve the problem, since it ignored the rights and obligations of the third State towards the States arising from the dissolution.

34. The situation contemplated in paragraph 1(b) of alternative B was equally ambiguous. A third State would no longer be bound by a trade treaty, for example, in respect of two or more States arising from a dissolution. Consequently, apart from the simple case in which only one entity broke off from a union, neither alternative A nor alternative B dealt satisfactorily with the problems that arose after a complete dissolution.

35. With regard to the form of the article, paragraph 3 of alternative A and paragraph 2 of alternative B appeared to be superfluous, since the case of the separation of one of the constituent political divisions of a union was already covered in paragraph 1 of both alternatives. Paragraph 1(b) of alternative A dealt with a different situation, since treaties concluded by the union with reference to any particular political division of the union were localized treaties.

36. It would be as well to define clearly the concept of political division within a State; it was a political rather than a legal concept and the Special Rapporteur had not provided any definition. The Special Rapporteur and the Drafting Committee should give some thought to the question and perhaps draft a separate provision concerning such entities.

37. Mr. RAMANGASOAVINA said that, as the Special Rapporteur had pointed out, article 20 and article 19 were complementary. Just as he had preferred alternative A of article 19, he also preferred alternative A of article 20, which endorsed the principle of ipso jure continuity. He wished, however, to make two observations.

38. Alternative A of article 20 should include the same saving clause as was contained in paragraph 1(b) of alternative A for article 19, recognizing the right of States to express their will with regard to the treaties. Secondly, in paragraph 3, a State leaving a union because it had not approved the conclusion, by the union, of a treaty affecting the union as a whole must be given the possibility of expressing its will not to be bound by the treaty in question, as it otherwise would be under the terms of paragraph 1(a). Even if that possibility existed in law, it should be specified in paragraph 3.

39. Mr. AGO said that, like Mr. Ushakov, he found neither of the two proposed alternatives fully satisfactory. As in article 19, it was easier for him to accept alternative B but, however strange it might seem, he found alternative A more acceptable in article 20 than in article 19, for the simple reason that it was easier to pass from the general to the particular than from the particular to the general. It was logical that the parties of a whole, of a composite entity, should each remain bound by a treaty concluded for the entity as a whole, but it was not logical that a large entity should inherit obligations flowing from treaties concluded by a small entity.

40. As in the case of article 19, he felt that different provisions should be formulated to cover the different cases of a community of States, a composite State and a unitary State. Alternative A could be applied without difficulty to a community of States and to a composite State, but not so easily to a unitary State. The term “union of States” did not cover all possible cases and was not applicable to a unitary State; it would therefore have to be changed.

41. The same applied to the French expression “entité politique”, which did not properly convey the idea of “division”; moreover, the division might not be “political”, but in the case of a unitary State, for example, administrative. There again a drafting change was necessary.

42. The wording of paragraph 1(c) should also be amended to indicate more clearly that it referred to “ephemeral” unions.

43. In alternative A, the key to the article was paragraph 2, which was a saving clause, and for third States as well. The condition it laid down for the continuation in force of the treaty—compatibility of the object and purpose of the treaty with the continued existence of the union of States—was more concrete than that laid down in the corresponding provision of article 19—compatibility of the object and purpose of the treaty with the constituent instrument of the union; but again, it was not entirely sufficient. For instance, should a third State which has concluded a treaty with a union of States containing the most-favoured-nation clause continue to apply that clause to all the parties, after the dissolution, even though there was no real incompatibility with the dissolution? Yet again, if the third State granted certain advantages to a particular territory of the union in exchange for other advantages granted by the union,
should it continue to grant those advantages to the territory once it had become independent, when it would no longer obtain anything in exchange from the union? That showed that it was very difficult to formulate a single provision to cover all the possible cases.

44. The case contemplated in paragraph 3 would appear to be secession. The Commission had already decided that a State resulting from secession was in the same situation as a newly independent State. Whatever meaning was given to the term “union of States”, there would be scarcely any difference.

45. For those reasons, he considered that the proposed article 20 constituted a good working basis but needed to be considerably developed.

46. Mr. REUTER said that he fully shared the views expressed by Mr. Ushakov and Mr. Ago. Article 20 was not as straightforward as article 19 and, as far as the two proposed alternatives were concerned, it would be simpler if the Commission were to adopt alternative B in both cases. That would not satisfy him entirely from a practical standpoint, however, which was why he had expressed a preference for alternative A of article 19, though not without some misgivings.

47. The main difference between articles 19 and 20 was due to the fact that all the situations dealt with in article 19 originated in a treaty. The problems raised by article 19 seemed to fall within the province of the traditional law of treaties and could be summarized in a single question: could a State release itself from one treaty by means of a new treaty?

48. Article 20, on the other hand, did not seem to be limited to any treaty. It could not be maintained that the dissolution of a union of States always resulted from a treaty, although that was more often the case. That was why he found it difficult to consider article 20 from the same standpoint as article 19.

49. The Commission might be able to find more generally acceptable solutions if it approached the problem, not from the standpoint of the law of treaties, or at least not from that of the succession of States, but from that of the theory of responsibility. It could, for instance, adopt the approach that a State incurred responsibility when its behaviour made the application of a particular treaty impossible. The basic principle in matters of responsibility was that of *restitutio in integrum*; equivalent restitution was admissible only in case of material impossibility. If the problem were approached in that light, new prospects of solving it should emerge.

50. Nevertheless, he was not prepared to take a definite position on articles 19 and 20 until he knew the Commission’s attitude to localized treaties. Say a union of States acceded to the Treaty on the Non-Proliferation of Nuclear Weapons would that be considered a localized treaty, or would a dissolution of the union be sufficient to release the States from their obligations?

51. In a few clearly defined cases the Commission should accept the idea of a right of *ipso jure* succession. Thus, in some cases the parties should be under an obligation to negotiate in good faith an adjustment of the treaties in order that they might continue in force. That was the rule in GATT. Moreover, it had been recognized by the International Court of Justice, in the “North Sea Continental Shelf” case, where it had laid down the principle that, in a stalemate situation, the parties were under an obligation to negotiate in accordance with legal rules, but rules reflecting equitable principles. Such an approach could throw fresh light on a number of problems, though some treaties were so ill-adapted to a new situation that they ought to disappear altogether.

52. Mr. BARTOS said that he accepted the rules laid down in article 20 but would like to draw attention to a few exceptional situations. For example, a political division detached from a union could transmit some of its treaties to a unitary State. France had been a unitary State since the Revolution, but for purely political reasons connected with the special position of Alsace and Lorena, had agreed after the First World War that the Concordat which had been applicable to them before 1918 should continue in force. Conversely, the most-favoured-nation clause which had applied to relations between France and the Grand Duchy of Baden had, by the 1871 Treaty of Frankfort, been extended to the whole of the German Empire when Baden had been integrated into it. France had recognized that kind of succession in respect of treaties. Obviously, in neither case had there been an *ipso jure* succession but negotiation between the States concerned, culminating in the Treaties of Versailles and Frankfort respectively.

53. Yugoslavia had succeeded to Serbia in all treaty matters. The Concordat applicable to Montenegro had, however, been an exception, since Yugoslavia had tacitly agreed that it should continue in force. That had led to repercussions on relations between Hungary and the Vatican, since part of the territory concerned had been under the jurisdiction of the Archdiocese of Hungary and some people had claimed that such jurisdiction continued in accordance with the Concordat between Hungary and the Vatican. The problem had not been settled until after the Second World War.

54. In practice, then, some unitary States had made political concessions to other subjects of international law, thereby derogating from the principle of the unitary application of treaties. It was therefore essential for the Commission to realize that the rules which it was preparing did not have a general and absolute force, as was shown by examples from the past.

55. Mr. USTOR said that since he had already made it clear why he favoured alternative A for article 19, it was only logical that he should favour alternative A for article 20 as well.

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8 See 1178th meeting, para. 161.
11 de Martens; *Nouveau recueil général de traités, 1874*, vol. XIX, p. 188.
12 See 1178th meeting, paras. 77-81.
It had been said that alternative A would not work well in practice, but the Special Rapporteur's commentary showed that it had worked in the case of Hungary, since Hungary had continued to consider itself bound by treaties concluded during the Austro-Hungarian Monarchy after the dissolution of the monarchy in 1918 (A/CN.4/256/Add.2, para. 7). There might, of course, be many different cases and it would be difficult to draw the line between them, but in those which could be assimilated to the case of the Austro-Hungarian Monarchy, he felt that alternative A stated the law as it stood, and should be adopted.

The real problem, however, was that dealt with in paragraph 2, the case where there was a gap in continuity. There he shared the view expressed by Mr. Reuter that it might be advisable to refer to the general principle of the duty of States to co-operate with each other. And it might be that from that principle derived the duty of States, in such situations, to adjust their legal position and to find agreed solutions which would enable them to continue with the necessary changes, the legal relations which existed before the dissolution between the union and third States.

Mr. Reuter had mentioned the possibility that in the case of the dissolution of a union of States the separate members might conclude a devolution agreement to provide for the future of the existing treaties. He suggested, therefore, that the Commission look again at the article on devolution agreements which it had already adopted, and decide whether it would apply in the case of article 20.

Mr. BILGE said that he was in favour of alternative A of article 20, for the reasons stated by Mr. Ustor; he had already opted for alternative A of article 19. The two articles were inter-related, but their relationship could be made even closer. For example, the definition of the term "union of States" at the beginning of article 19 could be so worded as to apply equally well to article 20.

Some speakers had asked whether a new State could be bound by obligations contracted by the union of which it had previously been a part. But first it should be noted that it was not really a new State. The case was that of a union of States consisting of separate political divisions which generally established their consent to the conclusion of treaties by the union. That was obviously so for the treaties referred to in sub-paragraphs (b) and (c) of paragraph 1. As for treaties concluded by the union for the whole of its territory, it was clear that the political divisions of the union participated in the negotiations in some way or other, in accordance with constitutional law. Even if some cases might not be covered by the saving clause in paragraph 2, that was no great cause for concern, because extreme cases would always defy even the most carefully drafted rules.

Mr. CASTAÑEDA said that for article 19 he had supported alternative B. Although he supported the principle of continuity, he felt it was inadvisable to lay too much emphasis on it.

The formula proposed in alternative A of article 20, however, seemed to him to be somewhat more restrictive with respect to continuity than that set forth in article 19. The exception provided for in paragraph 1 (b) of alternative A for article 19 had been omitted in article 20, where the only exception provided for was that of the compatibility of the object and purpose of the treaty only with the continued existence of the union of States. Did the Special Rapporteur mean that the union of States and the third States parties to the treaties would have no right to agree otherwise?

Sir Humphrey WALDOCK (Special Rapporteur) said that the omission was purely an oversight on his part.

Mr. CASTAÑEDA said that he could see a certain logic in the argument that a treaty which had been in force for a union of States should continue in force for the separate States formed after its dissolution. In such cases, there could be no legal objection to the principle of continuity, but he had some doubts as to how it could be applied in a political context. He could easily imagine cases in which the application of quasi-automatic continuity would not be desirable. For example, if a union of States had assumed certain obligations as a great Power, such as the protection of other States, those obligations would have little meaning for the small separate States formed after its dissolution.

He was inclined to question, therefore, whether it was possible to accept the principle of continuity in any categorical form in article 20. Perhaps the Commission should consider the suggestion put forward by Mr. Reuter and introduce in article 20 the idea that an obligation did exist for the separate States after a dissolution, to negotiate in good faith an adjustment of the treaties in order that they might continue in force.

Mr. NAGENDRA SINGH said that if the definition of "union of States" in the preamble to article 19 also applied to article 20, it was obvious that alternative A was to be preferred. In that case, there would be two separate sovereign States that had united in a union which was now dissolving.

But if that definition did not apply to article 20 and article 20 was allowed to exist independently of article 19, article 20 would seem to apply also to a federal unit which seceded from a union of States. It the Special Rapporteur proposed to deal with that situation in his new article 21 on the separation and splitting-up of States, alternative A for article 20 would seem the best solution; he would then have to revise the statement he had made earlier in the meeting.

He would like, however, to see the Special Rapporteur's drafts for article 21 before taking a final decision on article 20, since if the problem of the secession or splitting-up of States was to be left to article 20, that might well spell confusion in such cases as that of Bangladesh.

The CHAIRMAN, speaking as a member of the Commission, suggested that in paragraph 1 (a) of alterna-

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10 See para. 57 above.
11 Ibid.
12 See para. 51 above.
13 See paras. 29 and 30 above.
tive A for article 20, the present wording be replaced by the words: "A treaty that applies to the union as a whole continues in force in respect of each such State".

70. In paragraph 1 (b), it might be necessary to deal with the problem of a possible plurality of the particular political divisions in question, since more than one might leave the union. In that event, the words "... continues in force only in respect of that State", would have to be amended.

71. In paragraph 3, he thought that the emphasis ought not to be placed on the dissolution of the union, since the situation was one in which the union was not, in fact, dissolved, and he accordingly suggested the wording: "The rules in paragraphs 1 or 2 apply if one of the constituent political elements withdraws from the union of States".

72. Lastly, a final paragraph might perhaps be necessary to cover the situation in which a member of a dissolved union either joined another union of States or became part of another State. For that purpose, he would suggest some such wording as: "Any of the constituent political divisions of a dissolved union which becomes a separate State or a union of States shall be governed by article...".

The meeting rose at 1 p.m.

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1181st MEETING

Friday, 16 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Usakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(Draft articles submitted by the Special Rapporteur)

ARTICLE 20 (Dissolution of a union of States) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 20 of the Special Rapporteur’s draft (A/CN.4/256/Add.2).

2. Mr. SETTE CAMARA said he could understand that, for reasons of consistency, those members who had supported alternative A for article 19, which embodied the principle of ipso jure continuity, would also favour alternative A for article 20. That alternative would present no difficulty in the normal case of the dissolution of a union of originally independent States. Incidentally, a minor drafting point arose in connexion with paragraph 3, since it was possible that more than one of the constituent political divisions of a union of States might decide to become a separate State.

3. The Drafting Committee should, however, bear in mind the complications which might arise in the event of the secession of a political division of a union of States, especially if that political division had formerly existed as an independent State and had subsequently joined a federation. It would also have to consider the case of a union which was composed not of independent States but of territories and which might subsequently be dissolved or dismembered. That might require something along the lines of excursus A (A/CN.4/256/Add.1). Another problem it would have to deal with was the possibility of secession from a union of non-independent States, of which the short-lived Republic of Biafra was an example.

4. Mr. QUENTIN-BAXTER said he too could understand why members who had favoured alternative A for article 19 would feel impelled to adopt the same position in connexion with article 20. He himself, however, did not think that there could be any completely cut-and-dried solution to the sort of problems the Commission was considering, and the Special Rapporteur himself had expressed a doubt as to whether the definition of a union of States which applied to article 19 was equally applicable to article 20.

5. At the previous meeting a member had very properly expressed concern as to where a case such as that of Bangladesh might fall in relation to article 20 and had argued that it plainly could not fall under article 20 because the State of Pakistan as it previously existed had not been formed of two existing States. However, it seemed to him that that was not necessarily the operative reason; that surely was connected with the circumstances of the dissolution rather than with the terms under which the union had been formed. In much of the learned writing on the subject, emphasis was placed not only on the tracing of personality, but also on the degree of disruption entailed by the secession of part of the State. That was a consideration that, he felt, could not be eliminated from the draft. Assuming, for example, that the State of Pakistan, East and West, had continued to exist in the old shape for a very long time, maintaining its unity by a process of devolution, by balancing the interests of the two parts, and had then, in the changed circumstances of the twenty-first century, decided that the remaining ties must be dissolved, could it fairly be said that the law governing that dissolution of the union should be determined almost solely by the situation which had existed before the formation of the union? It should be possible to place more emphasis on the kind of State that existed and on the length of time it had existed.

6. He had some sympathy with the International Law Association’s conclusion that it was not desirable to make a sharp distinction on the simple ground that a State had originally been composed of sovereign States, or of

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1 See 1180th meeting, paras. 66-68.
States plus territories, or even of territories alone. There would always have to be a certain margin of appreciation, and the draft must be careful not to hamper the reasonable accommodations normally reached by States in dealing with questions of succession.

7. He attached importance to the reservation in paragraph 2 concerning the case where the object and purpose of the treaty were compatible only with the continued existence of the union of States. As he had said before in connexion with article 19, that was undoubtedly contained in alternative A. As he had said before in connexion with article 19, that was undoubtedly the reservation in paragraph 2 concerning the case where the object and purpose of the treaty were compatible only with the continued existence of the union of States. On the whole, he thought it would be better not to qualify that exception but to leave the actual application of the principles to be determined by the circumstances of each particular case and by discussions between the parties.

8. Sir Humphrey WALDOCK (Special Rapporteur) said that a majority of the Commission seemed to favour a solution based on the principle of ipso jure continuity contained in alternative A. As he had said before in connexion with article 19, that was undoubtedly the more difficult line to follow in codification, since then it became necessary to provide qualifications and safeguards which were not altogether easy to formulate.

9. He wished to emphasize that article 20 would not stand alone, since he proposed to submit an article 21 which would deal with forms of dismemberment other than the dissolution of unions of States. Article 20 was intended to deal only with the case of succession in the event of the ultimate dissolution of a union of States, there being some practice to support the view that the dissolution of such a union came into a different category from the dissolution of a mere combination of territories. Members were thus entitled to reserve their final opinion until article 21 had been discussed.

10. If the number of precedents for the cases dealt with in article 21 might be limited, such precedents as existed suggested that the “clean slate” rule as formulated in article 6 would apply and that a newly independent State would not be bound to consider treaties concluded by its predecessor as being still in force. Neither classical nor modern precedents provided support for the principle of ipso jure continuity in those cases.

11. He agreed with Mr. Quentin-Baxter that it was difficult to draw neat distinctions. Some writers had made a distinction based on the continued possession of a certain treaty-making capacity as indicative of the separate international identity of the units of a union. Basing itself presumably on the cases of the United Arab Republic and Tanzania, the International Law Association had, however, concluded that that point of distinction should not be retained as there were cases where that element was not present. He himself endorsed that view in the light of the practice, although that point of distinguishing the cases had its logic. Even so, he felt that there was a concept of a union of States for which it was possible to justify rules different from those applicable to the ordinary case of dismemberment of territory.

12. The case of Bangladesh, which he would mention in his commentary to article 21, appeared to be an example of the classical solution adopted in the past, one political entity, namely Pakistan, being treated as the continuance of the State, while the other entity was regarded as having broken away from it. The same solution had been adopted in the case of Pakistan and India: the entity which had broken away had been treated as a new State, and there had been no question of applying any principle of ipso jure continuity. He would not take the matter further at that stage: he merely wished to make it clear that he had given thought to the relationship between the dissolution of a union of States and the dismemberment of a State which was merely a composition of territories.

13. If the Commission accepted the principle of ipso jure continuity in article 20, he agreed with Mr. Raman-gasoavina that it was necessary to include some qualifying clause, such as that contained in paragraph 2 of alternative A for article 19.

14. The safeguard provided in paragraph 2 of alternative A for article 20 presented certain difficulties, particularly with respect to its concrete application. He agreed with Mr. Reuter that, if any differences of opinion should arise between the parties, the provisions of the Vienna Convention should apply and that it would be the duty of the new State to resolve such differences by way of negotiation. Could it really be said, however, that in cases of State succession a duty devolved upon the new State to enter into negotiations in good faith to adapt itself to the new situation? To prescribe such a duty rather begged the question. Even if the principle of ipso jure continuity was accepted, the precise extent of any such duty might be difficult to formulate. For reasons of mere common sense, a new State and the other party would often be ready to enter into such negotiations, but the Commission should consider carefully whether it wished to formulate a specific provision along those lines.

15. He did not think that commercial treaties presented any particular difficulties in connexion with a dissolution of a union of States. Like other treaties, they might or might not be consistent with the situation which existed after the dissolution. In many cases, it could be expected that recourse would be had to mutual adaptations.

16. He too had been concerned by the question of the most-favoured-nation clause, which had been mentioned by Mr. Bartoš. He felt, however, that that problem should best be left to the Special Rapporteur for that particular topic.

17. Mr. Ago had referred to the problem of succession in connexion with the European Economic Community. He himself felt, however, that that problem should be omitted from the present draft, since EEC obviously came into the category of intergovernmental unions and not into the category which Mr. Ago had described as that of constitutional unions.

18. The CHAIRMAN suggested that it might be desirable to include in the commentary to the article a direct question to Governments concerning the obligation of States to negotiate in good faith on their difficulties.

19. Mr. USTOR said he thought that the commentary to the general articles should make it clear that whenever

\footnotesize{\textsuperscript{1} Ibid., para. 38.} \textsuperscript{2} Ibid., para. 51. \textsuperscript{3} Ibid., para. 52. \textsuperscript{4} Ibid., para. 52. \textsuperscript{5} See 1179th meeting, para. 53.
there was a continuance of treaties, which would be mostly bilateral or restricted multilateral treaties, there should be a duty to enter into new negotiations concerning the respective interests of the parties.

20. Mr. TABIBI said that the demarcation line between the dissolution of a union of States, dealt with in article 20, and the separation or dismemberment of States, with which the Special Rapporteur proposed to deal in article 21, was not very clear.

21. He would take the example of Bangladesh, to which several members had already referred. The State of Pakistan had consisted of several component parts constituting separate entities: the North-West Frontier Province, Sind, Punjab and East Bengal. The imposition of martial law in 1955 had led to restlessness in all those areas and to the final recognition of East Bengal's separate identity, even before the elections of 1970, and to the establishment of the separate legislature and Government which had been in existence before the military intervention of March 1971. The members of the present Legislative Assembly of Bangladesh were the same as those of the Legislative Assembly of East Pakistan. In his view, the case was clearly therefore one of the dissolution of a union of States, covered by article 20, and not one of separation, to be covered by article 21.

22. Some members had argued that a union of States had to have a constitutional framework that was clear and complete. But problems might arise even where that was the case. For example, Iraq and Jordan had at one time formed a union based on a common monarchy under the Hashemite dynasty. After the 1959 revolution in Iraq, the representative of that union had actually been recognized by the United Nations as continuing to represent Iraq; soon, however, Members had one by one recognized the new Government.

23. For those reasons, he would find it difficult to support article 20 in its existing form.

24. In his opinion, the principle of ipso jure continuity would be very difficult to apply in the case of economic treaties. What would happen, for example, if one component of a union should secede from the union and declare its intention of becoming a non-aligned State, while the other components remained committed to either the East of the West? Obviously, the rule of continuity would have to be sufficiently flexible to take such cases into account.

25. If the Commission decided to adopt article 20, he would prefer alternative B for the reason that it preserved the rights of the component parts as well as the rights of third parties. Until the Commission had considered article 21, however, it would be impossible to say what kind of cases would be covered.

26. Mr. USHAKOV said he noted that the Special Rapporteur regarded the constituent political divisions dealt with in articles 19 and 20 as former independent States. That approach did not give rise to any difficulty so long as the boundaries of the political divisions remained the same as those of the former States. However, in the case of a union of States which lasted several decades, it was not unusual for the constituent political divisions to undergo substantial changes by comparison with the former independent States. He therefore suggested that the Special Rapporteur and the Drafting Committee should consider the case where the political divisions constituting a union of States no longer coincided with the former independent States. Situations of that kind occurred where a nation had availed itself of the right of self-determination, and in such cases paragraph 1 (c) of alternative A for article 20 might prove difficult to apply.

27. Mr. REUTER said he was grateful to the Special Rapporteur for his efforts to take account of all the comments made during the discussion. Once again, however, he had to reserve his position with regard to articles 19 and 20; the Commission would perhaps ultimately decide that the questions dealt with in those articles were too complex and not yet ripe for codification.

28. He wished to clarify his earlier suggestion that article 20 should include a provision requiring the renegotiation of certain treaties. Although the Vienna Convention did not deal with State succession, it nevertheless contained certain rules, which were more or less complete and which had to be taken into account in the present instance. The questions now under discussion should be examined in the light of the rules laid down in article 62 of that Convention (Fundamental change of circumstances). The political transformations mentioned in articles 19 and 20 of the draft were clearly such that they could be regarded as constituting a fundamental change of circumstances justifying the application of the "clean slate" doctrine.

29. It should, however, be noted that article 62 of the Vienna Convention dealt only with two extreme cases, namely, the occurrence of a fundamental change of circumstances, when the treaty could be terminated, and the absence of such a change, when the treaty remained in force. There was, however, a third possibility, namely, that of a change which was sufficiently important to require an adaptation of the treaty. That possibility had not been dealt with in the Vienna Convention because that would have made it necessary to introduce another concept, also absent from that Convention, namely, that of balance. By virtue of that concept, an unbalanced treaty was an "unequal treaty" which had to be adapted or in extreme cases voided. The only provision of the Vienna Convention which referred to that concept was paragraph 3 (c) of article 44 (Separability of treaty provisions).

30. With regard to succession to treaties, the Special Rapporteur had included in both articles 19 and 20 a saving clause referring to the object and purpose of the treaty, which would rule out the application of the principle of continuity. For that reason, he was not unduly concerned about the fate of the important political treaties mentioned by Mr. Tabibi.

* See 1180th meeting, para. 51.
* See 1180th meeting, para. 51
31. With regard to treaties not covered by that saving clause, the possibility might be considered, in the cases contemplated in articles 19 and 20, of a solution other than that of regarding them either as having been terminated by reason of a fundamental change of circumstances within the meaning of article 62 of the Vienna Convention, or as remaining in force because a change of that character had not occurred. A third approach was possible, namely, to regard the situations mentioned in articles 19 and 20 as constituting changes other than fundamental changes involving the termination of treaties, since the Vienna Convention itself provided an exception to the rule in article 62, where the change of circumstances was the result of an action by the party to the treaty invoking that change. Examination of the cases mentioned in articles 19 and 20 showed that they invariably resulted from an expression of will—either the will to unite of a number of States or the will to separate—of the constituent political divisions of a union of States. He therefore suggested introducing a provision imposing an obligation to renegotiate treaties in good faith so as to arrive at a new balance. That solution might, of course, lead to deadlock in the absence of a jurisdictional clause, but a well formulated rule did not necessarily require the provision of sanctions.

32. The CHAIRMAN, speaking as a member of the Commission, said that the views expressed by Mr. Reuter led him to reiterate that the present articles should be regarded as a second chapter of the Vienna Convention, since there appeared to be a continuing interplay between them.

33. Sir Humphrey WALDOCK (Special Rapporteur) said he shared that view but was not sure how far article 62 of the Vienna Convention was relevant in the present case. To say that the provisions of article 62 should apply would be an over-simplification, since draft article 20 involved an additional element which was not present in article 62 of the Convention, namely, a succession of States.

34. The CHAIRMAN, speaking as a member of the Commission, asked whether the Special Rapporteur agreed that some effort should be made to adjust a treaty in the light of new circumstances.

35. Sir Humphrey WALDOCK (Special Rapporteur) replied that the circumstances of the different cases of succession necessarily varied and the question was whether a new State formed after the dissolution of a union should be under a particular obligation to negotiate. Mr. Reuter had suggested that there should be an obligation on such States to negotiate in good faith concerning the continuance of treaties; he himself, however, felt that it might be going too far to impose such an obligation.

36. Mr. REUTER said he should explain that he had not requested the application of article 62 of the Vienna Convention; he had merely suggested that the Commission should draw inspiration from the ideas contained in that article.

37. Sir Humphrey WALDOCK (Special Rapporteur) observed that the notion of adaptation to the new situation had been deliberately omitted from article 62 of the Vienna Convention. The idea had rather been that a party to a treaty might be able to use that article as a lever to persuade the other State to negotiate along more rational lines. It might therefore be going too far to say that the new State would be obliged to adapt itself to the altered circumstances.

38. Mr. AGO said there was a great difference between a fundamental change of circumstances affecting a treaty the parties to which had not changed, and the case dealt with in the articles under consideration. As he saw it, it was necessary first of all to determine whether or not the new State was bound by the treaty. If it was, third States should be given an opportunity to release themselves from their obligations by invoking a change of circumstances. He therefore favoured the idea of introducing a provision requiring renegotiation of the treaty. It was, however, first necessary to settle the question to which he had drawn attention.

39. Mr. REUTER said that even if the treaty was no longer in force, an obligation might subsist to negotiate a new treaty which would maintain between the new State and the other party to the treaty balanced relations on the subject-matter of the old treaty. Obviously, however, it was not possible to introduce a provision imposing an obligation to renegotiate the treaty and at the same time to consider that the treaty continued in full force. His suggestion was intended merely to mitigate the consequences of the solutions put forward by the Special Rapporteur in both alternative texts of the article under discussion.

40. The principle of continuity underlying alternative A would be watered down if a provision was introduced requiring the renegotiation in good faith of treaties where the balance had been upset, for any violation of that obligation could then lead to the termination of the treaty.

41. Mr. USHAKOV said he still preferred alternative A, which should be taken as the starting point, though certain special circumstances had to be taken into consideration and might require the inclusion of saving clauses.

42. Mr. TSURUOKA said he thought it would be more appropriate to specify in the commentary that treaties normally remained in force but that a change of circumstances might give rise to new negotiations for the purpose of restoring the balance of the respective rights and obligations of the parties.

43. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer article 20 to the Drafting Committee.

* It was so agreed.*

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 2 (SECOND READING) *

44. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 2:

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* For resumption of the discussion, see 1196th meeting, para. 49.
* For previous discussion, see 1176th meeting, paras. 74-104, and 1177th meeting, paras. 18-51.
Article 2
Transfer of territory

1. When territory under sovereignty or administration of a State becomes part of another State:

(a) Treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession; and

(b) Treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

2. Paragraph 1 is without prejudice to the provisions of article 22 [Territorial treaties]. (A/CN.4/L.185)

45. No substantial changes had been made in the article, except for the shortening of the title. The Drafting Committee had, however, included a footnote to the effect that it had proposed the present text on the understanding that the draft articles would include a saving clause concerning cases of military occupation, a point which had been raised by the Chairman of the Commission.11

46. The CHAIRMAN, speaking as a member of the Commission and referring to the Drafting Committee's footnote, said that he was still concerned about the use of the word "administration" in the introductory clause of paragraph 1, which he regarded as much too vague a term in that context.

47. Mr. ALCÍVAR said that he could accept the Drafting Committee's text provisionally until the Commission was able to reach agreement on a formula which would meet the concern of some of its members about the lawfulness of the transfer.

48. The CHAIRMAN suggested that the Commission approve article 2 provisionally.

It was so agreed.12

ARTICLE 4 13

49. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 4:

Article 4
Successor State's unilateral declaration regarding its predecessor State's treaties

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the succession of States on treaties which at the date of that succession of States were in force in respect of the territory in question are governed by the present article. (A/CN.4/L.183/Add.1)

50. The Drafting Committee had taken the view that paragraphs 2 and 3 of the Special Rapporteur's original text concerning provisional application should be placed somewhat later in the draft articles. The new article 4 retained only the substance of paragraph 1 of that text, since the Drafting Committee had thought it appropriate to model the paragraph on article 3, which involved the application of the same principle.

51. The Drafting Committee was aware that the words "the continuance in force of the treaties in respect of its territory" at the end of paragraph 1 might be open to criticism; they were, however, in common use and it had considered it advisable to include them. The suggestion that a unilateral declaration would necessarily lead to a new treaty might raise parliamentary difficulties with respect to ratification in certain countries.

52. Mr. BILGE asked what was the purpose of adding the words "regarding its predecessor State's treaties" in the title.

53. Mr. USTOR, Chairman of the Drafting Committee, replied that the Drafting Committee had regarded the new title as clearer and more complete.

54. The CHAIRMAN suggested that the Commission approve article 4 provisionally.

It was so agreed.14

ARTICLE 5 15

55. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 5:

Article 5
Treaties providing for the participation of a successor State

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party thereto, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present articles.

2. If a treaty provides that, on the occurrence of a succession of States, the successor State shall be considered as a party, such a provision takes effect only if the successor State expressly accepts in writing to be so considered.

3. In cases falling under paragraphs 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed. (A/CN.4/L.183/Add.1)

56. The Committee had considered that the article was necessary in order to deal with the case of participation by a successor State in a treaty by virtue of a clause included in the treaty itself, as distinct from the case where the right of participation arose from the law of succession.

57. Paragraph 1 dealt with the more frequent case where the successor State had an option under the treaty to consider itself as a party to the treaty. Paragraph 2 concerned the special case where the treaty provided that, in case of succession, the successor State "shall be con-

11 See 1177th meeting, para. 39.
12 For resumption of the discussion, see 1197th meeting, para. 11.
13 For previous discussion, see 1160th meeting, paras. 64-88; 1161st meeting, paras. 1-76; and 1162nd meeting, paras. 1-19.
14 Article 4 was adopted without change at the 1197th meeting.
15 For previous discussion, see 1162nd meeting, paras. 20-53 and 1163rd meeting, paras. 1-10.
considered as a party”. Under that paragraph, the successor State would, in such a case, be considered as being under no obligation to become a party to its predecessor’s treaty and would become bound by it only if it expressly so agreed in writing. Paragraph 3 was intended to ensure continuity of application of the treaty by providing that, as a general rule, the successor State, if it consented to be considered as a party, would be so considered from the date of succession. That rule was qualified by the concluding proviso which safeguarded the freedom of the parties.

Article 5 (A/CN.4/L.183/Add.1) was approved. 18

ARTICLE 6

58. Mr. USTOR, Chairman of the Drafting Committee, said the Committee proposed the following title and text for article 6:

Article 6
Position in respect of the predecessor State’s treaties

Subject to the provisions of the present articles, a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States relates. (A/CN.4/L.183/Add.1)

59. As the Commission would recall, the Drafting Committee had proposed that the whole draft should begin with a part I entitled “General Provisions” and consisting of articles 0, 1, 1 (bis), 1 (ter), 1 (quater), 3, 4 and 5, and that article 2 should form part II, which would be entitled “Transfer of territory from one State to another”. 18 Article 6 would be the first article of part III, provisionally entitled “Newly independent States”.

60. The Committee had taken the view that the expression “New States”, which had originally been proposed by the Special Rapporteur in his third report and which could cover cases other than those envisaged in part III, should be replaced by the expression “Newly independent States”, which was less equivocal.

61. It was clear from the opening clause of article 6 that the article sought only to establish a general rule and reserved the question whether there were categories of treaties which did not come under that rule; that question would be dealt with elsewhere in the draft. In the interests of brevity and simplicity, the Drafting Committee had combined the two sentences of the text originally submitted to the Commission by the Special Rapporteur. 19

62. In the French version, the expression “Newly independent States” had been rendered by the formula “Etats nouvellement indépendants” instead of by “Etats qui accèdent à l’indépendance”. 20

63. Lastly, the title of the article had been amended.

64. Mr. ALCIVAR said that it was proving difficult to find a suitable Spanish rendering for the expression “newly independent States” and he would be grateful to the Special Rapporteur for an explanation of the intended meaning, since that would facilitate translation.

65. Sir Humphrey WALDOCK (Special Rapporteur) said that the phrase “newly independent” was intended in English to mean a State which has just become independent. It covered any State in the period of its becoming independent and immediately afterwards.

66. Mr. ALCIVAR said that the Special Rapporteur’s very useful explanation would be of assistance in the search for a suitable Spanish expression.

67. Mr. NAGENDRA SINGH said that he found the provisions of article 6 most gratifying. The principle which it embodied would be very welcome to the decolonized States.

68. If the expression “newly independent States” were finally adopted, he would be willing to accept it, but he hoped the definition would make it clear that it referred to decolonized States, since at first sight it would also seem to cover cases of secession.

69. Mr. USTOR, Chairman of the Drafting Committee, said that the wording of the initial proviso “Subject to the provisions of the present articles”, was provisional. It might be altered later so as to refer only to certain specified articles.

70. Mr. USHAKOV said that the scope of the expression “newly independent States” would depend on the definition to be adopted later. For the time being, it covered States which had become independent either as a result of decolonization or of separation, like Bangladesh.

Article 6 (A/CN.4/L.183/Add.1) was approved. 20

ARTICLE 7 (Participation in multilateral treaties in force) 41 and
ARTICLE 8 (Participation in multilateral treaties not yet in force) 42

71. Mr. USTOR, Chairman of the Drafting Committee, said that the Committee proposed the following texts for articles 7 and 8:

Article 7
Participation in multilateral treaties in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession made in conformity with article 11, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the successor State may establish its status as a party to the treaty only with such consent.

18 Article 5 was adopted without change at the 1197th meeting.
17 For previous discussion, see 1163rd meeting, paras. 11-61, and 1164th meeting, paras. 1-41.
18 See 1176th meeting, para. 18.
20 Article 6 was adopted without change at the 1197th meeting.
41 For previous discussion, see 1164th meeting, paras. 42-74, 1165th meeting and 1166th meeting, paras. 1-8.
42 For previous discussion, see 1166th meeting, paras. 9-83.
Article 8
Participation in multilateral treaties not yet in force

1. A newly independent State may, by a notification of succession made in conformity with article 11, establish its status as a contracting State to a multilateral treaty which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates, if before that date the predecessor State had become a contracting State.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the contracting States, the successor State may establish its status as a contracting State to the treaty only with such consent.

4. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision. (A/CN.4/L.183/Add.2)

72. He was introducing articles 7 and 8 together because they were closely connected. He wished to begin by drawing attention to the fact that the object and purpose of the treaty, the participation of the successor State which that succession of States relates, if before that date the predecessor State had become a contracting State.

73. The Drafting Committee had simplified the title of article 7 by substituting the words “Participation in” for the words “Right to notify its succession in respect of”. It had not considered it necessary to insert the words “of newly independent States” after “Participation”, because article 7 belonged to part III, which was entitled “Participation in multilateral treaties not yet in force, and its title had therefore been modelled on article 7.

74. The Committee had rearranged the wording of the original text submitted by the Special Rapporteur, so that the general rule was laid down in paragraph 1 and the exceptions in paragraphs 2 and 3. The Drafting Committee had decided to eliminate the exception concerning constituent instruments of international organizations in the original sub-paragraph (b) because that question was now dealt with in article 1 (ter) as already approved by the Commission. The original wording of paragraph 1 had been criticized because it merely provided that a State was entitled to notify that it considered itself a party without indicating what the legal effect of such a notification would be. The Committee had therefore used the expression “establish its status as a party”. Paragraph 2 contained the exception provided for in sub-paragraph (a) of the Special Rapporteur’s text. Paragraph 3 corresponded to sub-paragraph (c) of that text.

75. With regard to article 8, the Drafting Committee had thought it desirable to bring out the parallelism between the rules in articles 7 and 8, the former dealing with multilateral treaties in force and the latter with multilateral treaties not yet in force. The wording of article 8 and its title had therefore been modelled on article 7.

76. The Drafting Committee had taken the view that, although the case envisaged in paragraph 1 (b) of the original text had become of marginal importance, since a procedure was now provided for new accessions to the League of Nations closed treaties, it was nevertheless worth providing for in the draft articles. It had noted, however, that the question of a successor State’s ratifying a treaty on the basis of its predecessor’s signature arose with respect to all multilateral treaties, whether in force or not. It had therefore agreed that sub-paragraph (b) should be removed from article 8 and a new article 8 (bis), dealing with both multilateral treaties in force and multilateral treaties not yet in force, should be included in the draft.

77. Throughout article 8, the Drafting Committee had used the expression “contracting State” which, under the Vienna Convention on the Law of Treaties, was the appropriate term in the case of a treaty not yet in force.

78. Mr. AGO said that he noted that, in paragraph 3 of article 7, it was indirectly deduced from two factors—the limited number of the negotiating States and the object and purpose of the treaty—that participation in the treaty by any other State required consent of all the parties. It seemed to him that consideration should also be given to the case where that requirement was specifically laid down in the treaty itself.

79. Sir Humphrey WALDOCK (Special Rapporteur) said that although it was not usual to include such a provision in a treaty, the point made by Mr. Ago was a valid one. If the treaty itself expressly indicated that participation in it required the consent of all the parties, the position would be the same as in the case envisaged in paragraph 3.

80. Mr. USTOR, Chairman of the Drafting Committee, said that, as he read it, the present text of paragraph 3 would cover the case mentioned by Mr. Ago. If the treaty expressly stated that the consent of all the parties would be required for the participation of a successor State, then the provisions of paragraph 3 as they now stood would apply; there would be a limited number of negotiating States, and the object and purpose of the treaty would clearly make it a restricted multilateral treaty.

81. Mr. AGO said that the case which he had mentioned did not relate to compatibility with the object and purpose of the treaty. Nor was he thinking of a clause restricting participation by way of succession. The case which he had in mind was that of a treaty containing a clause which specifically required the consent of all the parties for participation by any other State, successor or otherwise.

83 See 1176th meeting, para. 65.
82. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ago’s point could be covered by amending the opening words of paragraph 3 to read: “When, under the terms of the treaty or by reason of the limited number of the negotiating States…”.

83. It should be noted, however, that in article 20 of the Vienna Convention on the Law of Treaties (Acceptance of and objection to reservations), paragraph 2, which dealt with restricted multilateral treaties, made no allowance for the possibility of the treaty containing a specific clause to the effect that a reservation would require the consent of all the parties. He wished to place it on record that the proposal he had just made did not imply any uncertainty with regard to the interpretation of that provision of the Vienna Convention. There could be no doubt that if a restrictive clause of that type on the subject of reservations were included in any treaty, it would preclude reservations which were not accepted by all the parties.

84. Mr. USHAKOV said that he had no objection to the Special Rapporteur’s proposal, but questioned whether it could not be interpreted as an endorsement of the so-called “Vienna clause”, which restricted not the number of parties, but the categories of States which could become parties to the treaty.

85. Mr. AGO said he did not think that interpretation was possible. The purpose was simply to deal with the case where, as in the Treaty of Rome constituting the EEC, the treaty itself contained a specific clause on the subject.

86. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 7, with the amendment suggested by the Special Rapporteur.

* It was so agreed.

Article 7, as amended, was approved.26

87. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 3 of article 8 in the same manner as paragraph 3 of article 7.

* It was so agreed.

Article 8, as amended, was approved.27

The meeting rose at 1 p.m.

26 and 27 For subsequent abridgment of title, see 1187th meeting, para. 25, and for deletion of the phrase “made in conformity with article 11”, in the second line, see 1187th meeting, para. 28. Articles 7 and 8, as thus amended, were adopted at the 1197th meeting.

REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited Mr. Tsuruoka, Chairman of the Working Group established by the Commission at its 1150th meeting, to introduce the Working Group’s report (A/CN.4/L.186).

2. Mr. Tsuruoka (Chairman of the Working Group) said that the Commission had been requested by the General Assembly, in operative paragraph 2 of part III of resolution 2780 (XXVI) to study the question which formed the subject of item 5 of the Commission’s agenda, “with a view to preparing a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission considers appropriate.” The Commission had taken up the item at the very beginning of the present session and had set up a Working Group to review the problems involved and prepare a set of proposals for submission to the Commission. Between 24 May and 17 June the Working Group had held seven meetings, which had been attended by all its members except Mr. Thiam, who had been absent from Geneva during that period. In accordance with the Commission’s decision, those meetings had also been attended by its Chairman, who had prepared the working paper containing draft articles circulated as document A/CN.4/L.182.

3. Apart from that document, the Working Group had considered the written observations submitted by Member States (A/CN.4/253 and Add.1 to 5), the text of a draft convention submitted by Uruguay to the General Assembly at its twenty-sixth session (A/C.6/L.822) and the draft convention which the Government of Denmark had attached to its written observations (A/CN.4/253/Add.2). Other documents had been made available to the Working Group by the Secretariat, including the “Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion offenses against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission considers appropriate.” Other documents had been made available to the Working Group by the Secretariat, including the “Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion offenses against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission considers appropriate.” Other documents had been made available to the Working Group by the Secretariat, including the “Convention to prevent and punish the acts of terrorism taking 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4. The Working Group had first held a general exchange of views on the basis of an analytical summary of the Commission's debates at its 1150th, 1151st, 1152nd and 1153rd meetings and of a list of points for discussion drawn up by the Secretariat. At the Working Group's request, the Secretariat had then prepared a set of draft articles covering the points on which a general understanding had emerged among members of the Group. On the basis of that draft, the Group had proceeded to a more detailed consideration of the substance of the matter, article by article. The understanding reached on concrete formulations, some of them alternative, had been embodied in a second draft, the discussion of which had led to the Working Group's adoption of the set of draft articles contained in document A/CN.4/L.186.

5. In preparing those draft articles, the Working Group had kept in mind that, in conformity with standard practice, the outcome of the Commission's work on the subject to be submitted to the General Assembly at the end of the present session would be subject to review in the light of Government comments. In order to facilitate discussion in the Commission and subsequent comment by Governments, the Working Group had therefore decided to submit a text consistently aimed at ensuring the maximum protection for the persons concerned. It was in that spirit that the members of the Working Group had subscribed to the draft, even though some of them might wish to express their separate views on certain of the draft articles during the forthcoming discussion. That approach also explained why the Working Group had been able to agree on the submission of a single text for every article with the sole exception of article 1, where the words "of universal character" had been placed in square brackets in sub-paragraph (b).

6. As indicated by its title, the draft, which consisted of twelve articles, envisaged international co-operation relating to both the prevention and the punishment of crimes. The first aspect was specifically dealt with in article 3. The second centred on the obligation specified in article 2 for each State party to make the offences in question crimes under its internal law "punishable by severe penalties which take into account the aggravated nature of the offence", irrespective of the place of commission.

7. With a view to furthering international co-operation in the matter of punishment, articles 5, 6 and 7 of the draft contemplated the possibility of extradition in respect of the crimes in question. Article 4, paragraph 1 of article 5, and article 11 established certain obligations regarding the furnishing of information at all stages of proceedings resulting from the commission of one of those crimes. Article 10 made provision for mutual judicial assistance by States. Article 12 instituted a conciliation procedure for any disputes that might arise between the parties regarding the application or interpretation of the draft articles. Lastly, the scope of the draft was determined ratione personae by article 1, which defined the terms "internationally protected person" and "alleged offender", and ratione materiae by article 2, which set forth the criminal offences covered by the draft.

8. The purpose of the Working Group's draft was to make it easier to obtain the considered views of Governments on the whole question. In preparing its draft, the Group had drawn inspiration from recent international instruments dealing with other offences of international concern. The Working Group hoped that the Commission would find the draft a useful working tool.

9. The CHAIRMAN, speaking as a member of the Commission, said he understood that the Working Group had discussed at length the problem of terrorist activity as a whole and the feasibility of dealing with that problem. It had been agreed that a reference to the subject should be included in the commentary—probably in the introductory comments which would precede the whole draft—so as to draw the General Assembly's attention to the need to consider the possibility of taking action in the matter.

10. Mr. RAMANGASOAIGNINA, speaking on a point of order, and supported by Mr. BEDJAOUL, said that those members of the Commission who were not members of the Working Group had not had time to study document A/CN.4/L.186. He therefore hoped that the Chairman would postpone the general discussion on the draft articles until the following day.

11. Mr. USHAKOV, supported by Mr. BARTOS, suggested that those members of the Commission who had already formed an opinion on the text proposed by the Working Group, especially those who had participated in its work, be asked to express their views forthwith. In particular, it would be useful if they could indicate the main points discussed in the Working Group.

12. Sir Humphrey WALDOCK said that the Commission had already had a general discussion on the whole question at its 1150th to 1153rd meetings. It now had a set of draft articles before it and there was no need for another general discussion. The Commission could perhaps advance its work at the present stage by a discussion of articles 1 and 2 of the Working Group's draft, which determined the scope of the whole draft, the former by defining the terms "internationally protected person" and "alleged offender", and the latter by listing the offences covered. It could discuss those important general provisions without necessarily engaging in a discussion of the articles that followed. He therefore suggested that a member of the Working Group should explain the background to articles 1 and 2 and the reasons why the particular formulations appearing in document A/CN.4/L.186 had been adopted.

13. Mr. ALCÍVAR said that he wished to press for a general discussion because he had serious reservations on the draft as a whole. Indeed, he was much more concerned at what had been omitted than at what had been included. In his view, it was essential that there should be a general discussion before the Commission took up the draft article by article.

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3 Ibid., p. 133 (ICAO DOC. 8920).
4 Ibid., p. 1151 (ICAO DOC. 8966).
14. The CHAIRMAN, speaking as a member of the Commission, welcomed Sir Humphrey Waldock's suggestion that some explanation should be given of the reasons that had led to the adoption of the particular wording of each article. Since the articles had been drafted in English and since he himself had made some contribution to the drafting, he would be prepared to give some preliminary information on each of them, beginning with articles 1 and 2.

15. Mr. BEDJAOUI said it would be helpful if those members of the Commission who already had a thorough knowledge of the subject, including the Chairman, could state their views.

16. Mr. AGO suggested that the Chairman be requested to give a general account of the Working Group's proceedings, explaining, in particular, the criteria which had been adopted. The general discussion could be postponed until the following day.

17. Mr. TSURUOKA (Chairman of the Working Group) said he agreed that it would be useful if the Chairman could provide some information on each of the articles proposed by the Working Group, beginning with articles 1 and 2.

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLES 1 and 2

18. "Internationally protected person" means:

(a) A Head of State and a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

(b) Any official of either a foreign government or an international organization [of universal character] whenever he is in a State for or because of the performance of official functions on behalf of his Government or international organization and who is entitled to special protection by that State, pursuant to general international law or an international agreement, as well as members of his family forming part of his household, or as the case may be, who accompany him.

2. "Alleged offender" means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in article 2.

Article 2

The commission, regardless of motive, of:

(a) A violent attack upon the person or liberty of an internationally protected person,

(b) A violent attack upon the official premises or the private accommodation of an internationally protected person likely to endanger his person or liberty,

(c) An attempt to commit any such attacks, and

(d) Participation as an accomplice in any such attacks,

shall be made by each State Party a crime under its internal law that is punishable by severe penalties which take into account the aggravated nature of the offence, whether the commission of the crime occurs within or outside of its territory.
families accompanying them, reflected the accepted rules of international law at the present time.

23. The provisions of paragraph 1 (b) dealt with officials of foreign Governments or of international organizations and laid down three general requirements for their entitlement to special protection. The first was that the official should be in the service of the Government of a State other than the one from which special protection was claimed or of an international organization, regardless in that case of his nationality. The second requirement was that the official should be in that State "for or because of the performance of official functions" on behalf of his government or organization; the preposition "for" covered the special protection to be afforded by a receiving State, or host State, as the case might be, while the preposition "because" covered the special protection to be afforded by a transit State which an official might have to cross in order to be able to carry out his functions. The third requirement was that the official should be entitled to special protection "pursuant to general international law or an international agreement". The words "under general international law" were perhaps a little vague but some degree of imprecision was unavoidable if broad coverage was to be provided.

24. The Working Group had considered using the phrase "inviolability or special protection" in article 1 but had reached the conclusion that the term "special protection" would include all persons entitled to inviolability; it had therefore preferred to use the broader term.

25. With regard to the coverage of members of the family of protected officials, two expressions had been used in article 1: "forming part of his household", in order to cover the families of ordinary diplomatic agents, consular officials and the like, and "who accompany him", in order to cover the family of a visiting Head of State or Government, or of a member of a delegation to a conference.

26. The Working Group had considered whether it was necessary to include a definition of the person charged with committing one of the crimes to which the draft articles applied. It had decided that such a definition was necessary for the purpose of drafting the other articles and a definition of the term "alleged offender" had accordingly been included in paragraph 2.

27. Lastly, the Working Group had discussed the possibility of including definitions of the terms "official premises" and "private accommodation", which were used in sub-paragraph (b) of article 2, but had decided that their meaning was sufficiently clear not to require any explanation.

28. He would provide some information on article 2 at a later stage.

29. Mr. TAMMES said that he had already expressed his misgivings during the earlier discussions regarding the work which the Commission was then about to undertake on item 5.6

30. The draft, which the Working Group had produced in a remarkably short time, without the benefit of the well-tried methods of the Commission, followed the outline and, in parts, even reproduced the actual language of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.7 But the solution it proposed for certain important issues differed completely from the decisions taken by States by large majorities either at the Hague Conference, which had adopted the 1970 Convention, or in the General Assembly during the discussions which had led to the convening of that Conference. Since no commentaries were attached to the present draft articles, it would be very useful, not only to members of the Commission but also to Governments, if a careful explanation were included in the Commission's own report of the reasons why the 1970 model had, or had not, been followed in each particular case.

31. At the present stage, he would merely point out that there were differences between the 1970 model and the present draft in regard to basic principles, such as the extradition of offenders and the prosecution of offences. The relevant basic principles were, however, the same both for the offences covered by the 1970 Convention and for those it was proposed to cover in the present draft, even though the two categories of offences might be different.

32. The CHAIRMAN said that the suggestion by Mr. Tammes would certainly be taken fully into account when the Commission's commentaries to the various articles were drafted.

33. Mr. USTOR said that he would speak only on article 1, which met with his general approval. It was a commendably short text and it made for a broad coverage. While it might give rise to some difficulties of interpretation, that would be true of any text.

34. With regard to the drafting, he suggested that consideration might be given to aligning the texts of paragraph 1 (a) and 1 (b) in one respect. In paragraph 1 (a), the adjective "foreign" was used to qualify the State which had the duty to provide special protection, whereas, in paragraph 1 (b), the same adjective was used to qualify the government of the State to which the official himself belonged.

35. He suggested that the commentary to article 1 should make it clear that the term "Head of State" included members of a collective organ, since in some countries executive powers were vested in such an organ. The commentary should also explain that the words "a Head of State and a Head of Government" covered persons assimilated to Heads of State or Government, such as members of the highest political organ or the highest party leaders.

36. In paragraph 1 (b), it might perhaps be enough to state that the official should be "entitled to special protection" by the State concerned "pursuant to international law or an international agreement". It was not absolutely necessary to specify that he should be in the State concerned "for or because of the performance of official functions"; in most cases, that requirement would be covered by the stipulation that entitlement to special

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6 See 1151st meeting, paras. 2-9.
protection should exist under international law. It was, however, necessary to allow for the fact that, under international agreements, officials of foreign governments were sometimes entitled to protection even if their presence in the State concerned was not attributable to the exercise of official functions.

37. Mr. HAMBRO said that he had raised certain important points in the Working Group which had not been supported by other members. He did not intend to make any formal proposals at the present state, but would nevertheless mention those points, in the hope that other members might wish to pursue them further.

38. In the first place, he found the provisions of paragraph 1 satisfactory with regard to protection, but not fully adequate with regard to the prosecution and punishment of offences. In the matter of protection, it was correct to confine those provisions to foreign Heads of State or Government and members of their families but, where questions of prosecution, punishment and extradition were concerned, it was also necessary to cover the case where the victim was the Head of State or Head of Government of the country in which the offence was committed. A group of terrorists or freedom fighters, according to the term one chose to apply, might kidnap the Head of State or Government of another country, or a member of his family, and remove him to their own country as a hostage; their aims would be exactly the same as those pursued by offenders attempting to kidnap a Head of State or Government who was in a foreign country. Since both the crime and the purpose would be the same, there was no reason why the same provisions on punishment and extradition should not apply to both categories of offenders.

39. The same remark was true of the provisions of paragraph 1 (b). A diplomat or international official stationed at Geneva might be kidnapped or murdered while attending a concert at Divonne. If the offence was of the same character as that envisaged in paragraph 1 (b) and the purpose was the same, the provisions on punishment and extradition should apply whether the crime was committed in Switzerland or in France.

40. Lastly, he favoured the deletion of the words “of universal character”, which had been placed in square brackets in paragraph 1 (b). There was no reason why a representative to a United Nations body or high official of the United Nations Secretariat. He was therefore opposed to restricting the scope of the draft to the protection of officials of international organizations “of universal character”.

41. Mr. YASSEEN said that article 1 was the key article of the draft, in that it defined the scope of protection and punishment and, consequently, of the draft as a whole. It must therefore be worded clearly and unambiguously, so as to ensure that it could be effectively applied.

42. The draft articles came under the heading of international criminal law, and since individual liberty was involved, an appropriate method of interpretation was required in international law as in municipal law. Criminal law texts had to be interpreted strictly, so that their scope could not be extended either by analogy or by any process of free scientific research. It was solely a question of interpreting the law, not of making it. Thus the categories of persons to whom the draft applied were clearly defined in article 1 and could not be extended by analogy, or even by reference to the preparatory work, namely, the Commission’s commentary. He therefore did not agree with Mr. Ustor that the term “Head of State” could be applied to a collective organ. It could perhaps be applied to all the persons composing such an organ, but not to some of them only. If that was the Commission’s intention, it should be clearly stated. The criminal law permitted recourse to analogy in bonam partem, in favour of the accused, but not against him. In the present case, the basis of the charge was the definition of the categories of persons to be protected and, since it was impossible to extend the charge by analogy, the protection provided for in the draft could not be extended to the persons whom Mr. Ustor had described as “persons assimilated” to Heads of State or Government, even if they deserved to be protected.

43. He agreed with Mr. Hambro that there was no reason to limit the scope of protection to representatives to, or officials of, international organizations of universal character, especially in view of the fact that protection must be based on general international law or an international agreement. The words “of universal character”, which had been left in square brackets in sub-paragraph (b), should therefore be deleted.

44. The CHAIRMAN, speaking as a member of the Commission, suggested that in paragraph 1 (b) of article 1 the phrase “and who is entitled to special protection by that State, pursuant to general international law or an international agreement” be amended to provide broader coverage by adding the phrase “or has been accorded special protection by that State under its internal laws”.

45. Article 2 was somewhat different from the corresponding text in other drafts, particularly that prepared by OAS, inasmuch as it made no specific reference to such individual crimes as kidnapping, murder or assault. The Working Group had considered it better to use more general language in order to avoid possible disputes concerning the precise definition of a particular crime, since definitions would inevitably differ from country to country, depending on their system of criminal law. It had accordingly decided to use the expression “violent attack”, which would include not only kidnapping but any forcible attempt to occupy the official premises or private accommodation of an internationally protected person, an act which might or might not constitute kidnapping under local criminal legislation. It was a non-technical definition, aimed at providing broad coverage and meeting the criticisms which had been directed against the formulation in the OAS draft convention.

46. Sub-paragraph (b) incorporated a new idea that was not found in the OAS draft convention. Recently, violent attacks upon the official premises or the private accommodation of internationally protected persons, which might take the form of bombing an embassy,
breaking into a diplomatic mission or discharging firearms at the premises of the mission, had become so frequent that it seemed necessary to take them into account. The sub-paragraph would not, however, cover minor intrusions, such as the importunings of door-to-door salesmen.

47. Sub-paragraphs (c) and (d) covered attempts to commit violent attacks, as well as participation in such attacks as an accomplice. The Working Group had decided not to include extortion as a separate offence, since, in its opinion, the element of extortion did not broaden the scope of the crime committed. It had also decided not to include conspiracy as a separate offence, since its definition varied in different legal systems. The common law notion of conspiracy was in fact covered by the definition of “accomplice” in most systems of civil law.

48. Article 2 then went on to say that each State Party should make the acts mentioned in the preceding sub-paragraphs crimes under its internal law, a provision which provided the basis for universal jurisdiction over crime of that character. As a minor drafting change, he suggested that the last part of article 2 might be clearer if the clause “whether the commission of the crime occurs within or outside of its territory” were inserted directly after the words “a crime under its internal law”.

49. Article 2 also provided that the offences in question should be “punishable by severe penalties which take into account the aggravated nature of the offence”. The Working Group’s idea had been that violent attacks upon internationally protected persons who were engaged in carrying out the business of the world community should be more severely punished than similar offences under internal criminal law. The Working Group had also discussed the possibility of defining those penalties more precisely, but had finally decided that that would lead to complications. For example, if mandatory minimum sentences were laid down, it would be necessary to define each individual crime, and that would undoubtedly make it more difficult to secure general acceptance of the draft.

50. Sir Humphrey WALDOCK said he had some doubts about the words “regardless of motive” at the beginning of article 2, since they might raise problems in the criminal law of his own and other countries. For example, would those words apply to a burglar who broke into the premises of an internationally protected person without being aware of the fact that that person enjoyed diplomatic status?

51. The CHAIRMAN, speaking as a member of the Commission, said that those words had been taken from article 2 of the OAS draft convention, where their basic purpose, as he understood it, was to make it clear that the existence of political motives for the commission of the offence was no reason to shield the offender from prosecution. In the hypothetical case referred to by Sir Humphrey, the question was whether the burglar would have to run the risk of finding that the house he had broken into belonged to a diplomat, or whether the burden of establishing his motivation would lie with the prosecution. On the whole, the Working Group’s position was that the greater burden should be placed on the burglar rather than on the prosecution.

52. Sir Humphrey WALDOCK said that, as Mr. Reuter had pointed out on an earlier occasion, there was always the possibility of a motivation which had no connexion with the diplomatic status of the internationally protected person: a jealous husband might, for instance, attack a diplomat for wholly private reasons.8

53. The CHAIRMAN, speaking as a member of the Commission, said that the offender would normally be tried by the courts of the State where the offence had been committed, although there might be exceptional cases in which the offender fled to his own country, and the latter might then find itself obliged to sentence him to a more severe penalty than that provided for by its own legislation. He did not, however, think that the prosecution should be required to determine the motivation for the act.

54. Sir Humphrey WALDOCK said that the words “regardless of motive” might even be represented as barring a plea of self-defence.

55. The CHAIRMAN, speaking as a member of the Commission, said that as he understood it, criminal law generally considered the motive immaterial and held that what really mattered was the intent. Sufficient provocation might always be regarded as a mitigating circumstance. In any case, the words in question had been used because they were found in the OAS draft convention.

56. Mr. SETTE CÂMARA said that he himself had raised the question of motivation when the Working Group had discussed article 2. A crime might contain a political element and a personal element, and it was difficult to decide which should prevail. However, he thought that the question of motivation was one to be considered by the courts, which would undoubtedly give proper weight to a plea of self-defence.

57. Mr. TSURUOKA (Chairman of the Working Group) said that the general feeling in the Group had been that, in the exceptional cases referred to by Sir Humphrey Waldock, it was possible to rely on the wisdom of the authorities in the country concerned, and that there was no need to fear that there would be any abuse in the application of a convention of that kind. That was why the Working Group had taken the view that the use of the words “regardless of motive” presented no difficulty.

The meeting rose at 1 p.m.

8 See 1151st meeting, para. 48.
Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law


[Item 5 of the agenda]

Draft Articles on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons

Articles 1 and 2 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 1 and 2 of the draft articles submitted by the Working Group (A/CN.4/L.186).

2. Speaking as a member of the Commission, he said that article 1 of the Working Group's draft had been based in part on article 1 of the OAS Convention of 1971, which referred only to "those persons to whom the State has the duty according to international law to give special protection". It had also been based, in part, on article 1 of the Rome draft, which had referred to members of permanent or special diplomatic missions and members of consular posts, civil agents of States on official mission, staff members of international organizations in their official functions, persons whose presence and activity abroad was justified by the accomplishment of a civil task defined by an international agreement for technical cooperation or assistance, and members of the families of the above-mentioned persons (A/CN.4/253/Add.2). Article 1, while partaking of the ideas contained in both of those texts, was intended to give a clearer definition than that contained in the OAS Convention and a broader one than the more limited definition contained in the Rome draft.

3. Mr. CASTAÑEDA said that, as earlier in the session, he would like to state for the record that he was opposed in principle to the procedure which the Commission had adopted for dealing with the present topic, of appointing a working group instead of a special rapporteur.

4. The draft articles submitted by the Working Group did not seem to differ basically from those which had been submitted by the Chairman in his working paper (A/CN.4/L.182), even though the Working Group had eliminated the controversial terms "international crime", "political crime" and "right of territorial asylum". In his opinion, the present draft was still extremely restrictive, since in article 7 it had merely replaced the idea of political crimes by that of extraditable crimes.

5. By making extradition compulsory, the article eliminated the possibility of territorial asylum in the case of crimes which had been traditionally regarded as political offences. That constituted a serious breach of an ancient Latin American tradition. The new draft was, in fact, even more restrictive than the OAS Convention, which had gone to the extreme limit of what the Latin American States had at that time considered tolerable.

6. He was not surprised that France, a country with a great tradition in the matter of the granting of political asylum, had expressed its categorical opposition to the idea (A/CN.4/253/Add.3). He himself wished to make it quite clear that if the present draft articles were put to the vote, he would feel obliged to vote against them.

7. The CHAIRMAN, speaking as a member of the Commission, said that he would like to call Mr. Castañeda's attention to the fact that the Working Group had provided, in article 6, that the State Party in whose territory the alleged offender was found should, if it did not extradite him, "submit without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution". He could see some possibility of compromise with the position taken by Mr. Castañeda if the latter felt that the purpose of asylum was to prevent the return of an alleged offender to a State where he could not expect a fair trial, but not otherwise.

8. Mr. CASTAÑEDA said that it was not his wish that individuals responsible for crimes against internationally protected persons should escape punishment. He did not, however, see the need for a formulation which might have an adverse effect on the traditional principle of territorial asylum, which was already embodied in many regional extradition treaties. It had been due to considerations of that kind that the original draft of the OAS Convention has been amended to provide, in its present article 6, that: "None of the provisions of this convention shall be interpreted so as to impair the right of asylum".

9. Mr. RAMANGASOAVINA said that the text proposed by the Working Group was a compromise in which the authors had carefully avoided controversial expressions such as "international crime", "political offence" or "crime of international significance", but precisely for that reason, it might not have the desired psychological effect.

10. The convention which the Commission was drawing up had the twofold purpose of preventing and punishing the growing number of attacks on the persons of diplomats; but although it fulfilled its punitive function, it failed in its preventive role because it did not have the deterrent character which was desirable. The principle should have been established from the outset that, whenever the person of a diplomat was involved, crimes such as murder, kidnapping, unlawful restraint, holding to ransom and even complicity must be regarded as crimes under the ordinary law and punished accordingly, without the guarantees and privileges accorded to political offenders in many countries. That principle was clearly laid down in article 2 of the draft submitted by Mr. Kearney (A/CN.4/L.182) and in article 1 of the draft submitted by Uruguay (A/C.6/L.822).

11. It was not a question of eliminating the concept of "political offence", but of restricting it to relations between the Government and the citizens of that particular country. As soon as the perpetrators of such a crime attacked a foreign State or its representatives, they

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2 See 1151st meeting, paras. 10-14.
must be treated as criminals under the ordinary law, wherever they might be.

12. One difficulty was that such a rule had repercussions on the principle of asylum, which for some States was sacrosanct. Another difficulty was that the country in which the crime was committed was placed in a delicate situation, both internally and internationally. Internally, if it gave in to blackmail, it would be breaking its own laws by not respecting the separation of powers and by interfering with the normal operation of institutions; internationally, if it did not give in to blackmail, it risked becoming involved in a dispute with the sending State. It was therefore vital that the crimes covered by the draft articles should be prevented; potential offenders would be deterred as soon as they realized that they would no longer enjoy the protection generally accorded to political offenders.

13. With regard to sub-paragraphs (a) and (b) of paragraph 1, which defined the categories of protected persons, it might well be asked whether different persons were involved from those already covered by the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the draft convention on relations between States and international organizations. If that was not the case, it might be sufficient simply to include a reference to those instruments.

14. Mr. SETTE CAMARA said that on the whole he agreed with the text of article 1 presented by the Working Group. In some ways, it seemed to go back to the 1856 “attentat” clause, which had provided international protection for certain special categories of persons and whose scope had gradually been enlarged until it had culminated in the adoption by the League of Nations on 16 November 1937, of the Convention for the Prevention and Punishment of Terrorism. As the Second World War had begun shortly afterwards, that convention had never been ratified; nevertheless, it served to show that world public opinion at the time had been convinced that the international community should take some action to suppress terrorism.

15. In view of the steady increase in acts of terrorism, which were undoubtedly far more frequent than they had been in 1937, he personally was convinced of the need to adopt stern measures as a deterrent. The draft articles submitted by the Working Group had been inspired by the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted at The Hague in 1970, and by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted at Montreal in 1971. The Working Group had taken an objective approach and had avoided such controversial terms as “international crime”, “political crime” and the like.

16. The Working Group’s draft dealt with a special category of persons, and in that respect was a substantial improvement on the OAS Convention of 1971. He was prepared to support that draft on the understanding that, as Mr. Tsuruoka had pointed out, it was to be regarded as the first step towards a broader approach to the general problem of crimes of terrorism.

17. In article 1, the Working Group had abandoned the idea of enumerating all the categories of persons covered and had presented a general formula which included a large number of government officials, as well as officials of international organizations. He agreed with Mr. Hambo that the words “of universal character” between square brackets should be deleted and that protection should be extended to the officials of international organizations in general.

18. Mr. TAMMES said that he wished to comment on the important aspect of asylum referred to by Mr. Castañeda in connexion with the articles on extradition.

19. He was not himself an expert on criminal law and was therefore obliged to rely largely on generally accepted texts. He noted that the Working Group had used the term “crime” in both articles 1 and 2, whereas the parallel text in the 1970 ICAO Convention for the Suppression of Unlawful Seizure of Aircraft used the term “offence”. The OAS Convention also used the term “crimes”, possibly as a result of the translation into English of the Spanish word “delitos”. However, the word “crime” as a term of modern international law had a very special connotation, being used in the sense of the crimes tried by the Nuremberg International Military Tribunal and later of the crime of genocide.

20. Article 1, paragraph 2, of the Declaration on Territorial Asylum adopted by the General Assembly in resolution 2312 (XXII) stated: “The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”

21. He stressed that point because it had been raised at the 1970 Conference at The Hague at which the Convention for the Suppression of Unlawful Seizure of Aircraft had been adopted, and Governments would undoubtedly wish to know why the Commission had replaced the word “offence” by the word “crime”. At The Hague Conference, the United States, the USSR and ICAO had proposed that the unlawful seizure of aircraft should be described as “an international common crime”. The Conference, however, had rejected that proposal and had opted for the more usual term “offence”. The word “offence” was also used in the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, and in

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6 See paras. 5 and 6 above and 1151st meeting.
8 Ibid., p. 255.
22. He was aware that the Working Group’s draft did not use the term “crime under international law”, though article 2, sub-paragraph (d), referred to “a crime under its internal law”. In order to prevent any possible confusion, therefore, he suggested that the Commission should either employ the language used in earlier conventions or else explain in its commentary why it had departed from the language of the 1970 ICAO Convention for the Suppression of Unlawful Seizure of Aircraft. On that point, paragraph (6) of the observations of Denmark (A/CN.4/253/Add.2) was very pertinent when it stated: “It would seem, therefore, that if the Hague rules were to be disregarded in the preparation of a new convention, this would tend to create unnecessary difficulties on issues to which a widely acceptable solution has already been found".

23. Mr. BEDJAOU5 said that the subject dealt with in the draft articles was a particularly delicate one on account of its obvious and topical political overtones. That was why he had serious misgivings about the text now before the Commission, since the changes which the Working Group had made in Mr. Kearney's text (A/CN.4/L.182) had eliminated controversial terms such as “political offence” or “territorial asylum” without removing the difficulties underlying the draft as a whole.

24. He fully endorsed the observations of the Government of France (A/CN.4/253/Add.3), which had expressed serious doubts about the usefulness of a text on a matter on which international law was relatively clear and precise.

25. Any innovations which the Commission might make in that area of the law in the name of a political and legal philosophy of which he personally approved might have serious repercussions on other principles of legal or political philosophy. Far-reaching changes in those principles in a text which went beyond ordinary law might not be accepted by States, and the convention might suffer the same fate as the 1937 Convention for the Prevention and Punishment of Terrorism,12 which had not been ratified by a single State. In any case, a text of the type proposed would oblige many States to make substantial, and perhaps politically difficult, changes in their national law. Obviously, what the Commission was drafting was treaty law. It was not elucidating customary rules and therefore had no need to consider whether the rules it drew up were consistent with customary international law. It should, however, take fully into account the need to avoid creating new legal situations which went beyond ordinary law and would deter States from ratifying the convention owing to the resulting problem of having to amend their national law.

26. But there was another and more important question, and it was a question of principle. Of course the principle of the stability of international and internal order must be supported, but it should not be at the expense of other equally important principles, and involve acquiescence in the perpetuation of tyranny or injustice. The great defect of the proposed text was that it took account of only one aspect of the problem, the stability of the international political order, to the exclusion of the other aspect, injustice or tyranny, which was at the root of political terrorism.

27. The flexibility of the solution adopted in article 6, the choice between extradition or prosecution, was only apparent. Without in any way condoning the destructive excesses of an act or its disastrous consequences for human life, the State in which the offender sought refuge might sympathize with the political motives by which the act had been inspired.

28. The solution now proposed irrevocably excluded the principle of asylum, which was laid down in article 8 of the League of Nations Convention of 1937, as well as in the 1971 OAS Convention to Prevent and Punish Acts of Terrorism.13 It made extradition mandatory for political crimes. Yet it was not possible to treat the partisan inspired by a political ideal in his attempt to breached the defences of an oppressive Power on the same footing as a gangster demanding ransom.

29. The system adopted in the proposed text was based on the principle of the universality of the right to punish, which might be claimed by any State. It would create difficulties for countries whose criminal law was based on the opposite principle of the territoriality of criminal law. What was even more serious, however, was that it accorded the right to punish not only to the State in which the offence was committed and the State in which the offender was found, but to any State concerned; it was not difficult to imagine cases where such a possibility would lead to delicate political situations against which neither the text as a whole nor the choice provided for in article 6 provided complete protection.

30. A State clearly had a duty to ensure the safety of diplomatic agents and assimilated persons, but the protected persons themselves had a duty of neutrality, a duty which was not always respected. A State also had a duty to prevent its territory from being used as a base for an attack on another State and a further duty not to encourage the organization of plots. But the struggle against “subversive” movements did not impose a blind obligation on the State, and the problem of the exchange of information on such matters as plots and conspiracies, which had implications for two other problems, that of liberation movements and the struggle against the propaganda of political ideas, needed to be handled with the utmost circumspection.

31. Mr. USHAKOV said that the basic principle underlying the draft was the principle, well established in international law and universally accepted, of the protection by all States of diplomacy, which had been instituted for the purpose of ensuring good relations between States. The draft was designed to strengthen that principle. Neither the right of asylum nor political struggles were involved. As he saw it, the draft was solely intended to consolidate, to the greatest possible extent and on the basis of reciprocity, respect of a well-established principle.


of international law. Attacks on diplomatic agents were attacks on friendly and peaceful relations between States.

32. In paragraph 1 (b) of article 1 the word “government” should be replaced by the word “State”, so that it was not only ministers who were covered. A better French translation should also be found for the English word “official”. In the third line, the word “official” was superfluous, since the functions in question were always official. Those were, however, purely drafting points which he would not press. So far as the substance was concerned, he approved of article 1 in its entirety.

33. Mr. BARTOŠ said he would first present his point of view on the draft as a whole and then deal more specifically with articles 1 and 2.

34. The Working Group and the Chairman were to be commended on the draft they had now produced which was almost entirely satisfactory; many of the principles it stated he could endorse without reservation. His views on the Chairman’s draft he had already expressed earlier in the session.13

35. Recourse to terrorism in political disputes, especially when it affected international relations, must be banned. States must, therefore, take preventive measures to discourage the preparation, attempting or commission of crimes against persons entitled to special protection under international law or against members of their families.

36. It was right that serious crimes should not be treated as political crimes, even when committed for political motives, since they were crimes against humanity and thus endangered international relations. That was not a new concept in international law, as it had already been accepted in regard to war crimes.

37. He also agreed entirely with another principle contained in the draft, namely, that strong measures must be taken against persons committing acts of violence irrespective of their nationality or the nationality of their victims. States were under an obligation to take immediate action against perpetrators of acts of violence against diplomatic agents and to increase the severity of the penalties to which they were liable.

38. With regard to extradition, he endorsed the principle enunciated in article 6. He also believed that, where several States applied for extradition, it was the application of the State of which the victim was a national which should be granted, especially if the victim had died.

39. He endorsed the principle that States were under a special obligation to co-operate in the prevention and punishment of acts of violence. They were also under an obligation to suppress any illegal organization to which the offenders belonged, which they supported or on whose behalf they had committed acts of violence.

40. In his opinion, the rules laid down in the draft did not apply to criminal acts committed on the territory of a State when both the perpetrator and the victim were nationals of that State, since in that case the requirements for an international offence would not be met.

41. He had already expressed earlier in the session14 the view that diplomats were not always innocent victims. They sometimes violated their obligation of neutrality and interfered directly or indirectly in insurrectionist movements in the territory of the State where they exercised their functions. He was therefore in favour of including in the draft a general obligation of neutrality in any political dispute on the part of persons enjoying special protection. If diplomats and other assimilated persons failed to respect that obligation, they must take the consequences. It was generally accepted that, although diplomatic agents were entitled to special immunities, they nevertheless remained responsible for their actions. An act of terrorism should not therefore be regarded as provocation when it had been provoked by the victim himself.

42. With regard to article 1, he only wished to point out that the concept of an international organization referred to in paragraph 1 (b) should be taken to mean any intergovernmental international organization, whether universal or regional.

43. In the same sub-paragraph, the words “or on an official visit” should perhaps be inserted before the words “and who is entitled . . .”, as it was often on such occasions that attacks were made and official visits came under the heading of the performance of official functions.

44. Article 2 was acceptable as it stood.

45. Mr. TABIBI said that, like other members, he was in general agreement with the purpose of the Working Party’s draft. It was obvious that some measures needed to be taken to put a stop to attacks on diplomats: the real issue was how to deal with the problem.

46. With regard to the text of the draft, there were a number of points that called for further study. First was the question of the scope of the articles. In his opinion, certain persons who had not been covered were just as important as diplomats or officials of international organizations of universal character. He therefore supported the deletion of the words in square brackets, “of universal character”, so as to cover officials of all international organizations, large or small.

47. Secondly, there was the question of government officials, and that disclosed a loophole in the draft. Certain government officials, such as those working for a nuclear energy commission, might hold more important secrets than cabinet ministers; for security reasons, they should receive special protection when travelling abroad, even if travelling unofficially for the purpose of exchanging views with colleagues in other countries. The importance of affording special protection to an official who was on an unofficial visit was demonstrated by the recent case of Mr. Kissinger, adviser to the United States President, who had visited Japan on holiday, but with the admitted purpose of conducting official negotiations.

48. With regard to the form of the proposed instrument, he suggested that it should take the form of an additional protocol to the 1969 Vienna Convention on Diplomatic Relations; its provisions would help to strengthen the system established by that Convention.

13 See 1152nd meeting, paras. 8-14.

14 Ibid., para. 10.
49. Next, the tone of some of the articles should be softened. It would make the whole draft more acceptable to States if certain articles were not couched in language which appeared to dictate the manner in which States should manage judicial proceedings in their own territories.

50. He also doubted whether States would find it possible to accept the system of mandatory extradition for offences which were not always simple acts of terrorism but might sometimes be acts connected with political activities. As Mr. Tammes had mentioned, a number of delegations at The Hague Conference of 1970 had raised objections to the draft convention then under discussion precisely because of the provisions it contained on the subject of extradition.

51. His own country had a practical interest in the whole question, in that there were no less than 8 million people in the tribal areas on the borders of Afghanistan. Those who had read Kipling’s books knew that raids, involving killings and abductions, used to be carried out frequently from that area during the period of British rule in India. Such raids into neighbouring countries still occurred occasionally even now, whence Afghanistan’s concern with the whole problem of acts of violence committed across frontiers.

52. As regards individual articles of the draft, articles 1 and 2 were acceptable, subject to certain adjustments. The opening sentence of article 3 was acceptable but not sub-paragraphs (a) and (b). It would be proper to recommend to States that they should impose stronger measures to prevent the offences in question and also to recommend the exchange of information, but not to attempt to dictate to them the action they should take, as the present text of those sub-paragraphs appeared to do. If articles 4 to 7 were dropped, the rest of the draft would be acceptable to him.

53. The whole draft should be referred back to the Working Group for re-examination in the light of the discussion, with a view to producing a more acceptable text for submission to the General Assembly.

54. Mr. SETTE CÂMARA said that, in the Working Group, he had been responsible for the suggestion that the term “crime” should be used instead of the term “offence” which had been used in the earlier document (A/CN.4/L.182). In his opinion, the reasons which had led the 1970 Conference at The Hague not to use the term “crime” in the Convention it had adopted did not apply to the present draft. Those reasons had been connected with the fear that the maxim nullum crimen sine lege might be invoked with regard to the new offences against aircraft. The acts covered by the present draft had always been labelled as crimes in the domestic law of all countries and there was therefore no reason why they should not be so described in the draft.

55. Mr. QUENTIN-BAXTER said that the Working Group’s very lucid draft would be of great assistance to the Commission in crystallizing the problems involved.

56. The success of a convention of the kind proposed depended on two things. The first was whether the policy of the convention could be reconciled with what Mr. Castañeda called the “right” of asylum; the second was whether the requirements of the convention could be conveniently assimilated into the domestic laws of States, which had very strong traditions and clear procedural requirements in matters of extradition and criminal law.

57. In relation to article 1, only the first question arose. As the provisions of extradition laws and treaties clearly demonstrated, the majority of countries believed that the basic principle governing the right of asylum was that transactions between the rulers and the ruled in a particular State should not be passed upon by third States.

58. The typical case which had led to the demand for a convention on the lines of the draft articles now under discussion did not contravene that principle. An ambassador involved in a political situation which concerned the receiving State alone was being treated merely as a pawn in someone else’s game. The purpose of those who committed the offence against him might be simply to embarrass the Government of their country, which had a duty to protect diplomats, and which also had to demonstrate its will to be the master in its own house.

59. In that sense there was a true parallel with the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.16 That Convention was based on the view that the political situation in a country could provide no justification for imperilling the lives of air passengers. Similarly, it could provide no justification for endangering the traditions of diplomatic relations.

60. It should, however, be recognized that, with the definition of internationally protected person given in article 1, it could not properly be said that the draft now under discussion did not impinge at all on the right of asylum. In the typical case of an attack on a diplomat or other protected person in connexion with a political struggle to which the person concerned was alien, there was no conflict with the right of asylum. The draft, however, also covered the case of a politician on a visit to another country who was attacked by one of his fellow countrymen for political reasons. Undoubtedly, the country where the offence had occurred would consider it as an act endangering international relations and as an outrage to its hospitality. That State would have every reason to want to punish the offender and to want him back if he escaped. But it had to be recognized that such a case involved an overlap with the law of asylum because the person attacked was not unconnected with the political situation which had led to the attack. In view of that overlap, some States would hesitate to accept the draft.

61. Like Mr. Hambro, he saw no justification for drawing a distinction according to the place of commission of the offence.17 If a diplomat stationed at Geneva was the

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16 Ibid.

17 See 1182nd meeting, para. 39.
victim of an attack while on a visit to a nearby place in France, the position should be the same as if the attack had occurred in Switzerland. The situation which had
given rise to the need for a convention of the type proposed was the use of a diplomat of a foreign country for political purposes with which he was entirely unconnected.
From that point of view, the actual place of commission of the offence was immaterial and the Commission would do well to keep its draft within that framework.

62. Mr. BILGE said that at the beginning of the session he had expressed his approval of the set of draft articles prepared by the Chairman, but the text now proposed by the Working Group corresponded even more closely to what he had in mind than had the Chairman's original text.

63. He agreed with Mr. Bedjaoui that no-one could condemn liberation movements fighting for the principle of self-determination. But an exception had to be made when such movements acted blindly and attacked persons who were in no way concerned with such aims. The case was different where the victim was involved in the political dispute but such a case was covered by article 2, which referred to internal law. If the act of violence was committed in self-defence as recognized by internal criminal law, the perpetrator would clearly not be convicted. In general, the proposed articles would not hinder a legitimate struggle, but would discourage blind acts of violence against innocent persons.

64. It would of course have been preferable to broaden the scope of the draft, but the Commission was bound by the terms of General Assembly resolution 2780 (XXVI).

65. Like Mr. Hambro, he thought that the words "of universal character" should be deleted from paragraph 1 (b), since officials of regional organizations were particularly exposed to acts of violence as they were less anonymous than those of universal organizations. The verb "accompany" in paragraphs 1 (a) and (b) was not entirely suitable; it did not, for instance, cover the case where a member of the family of a person entitled to special protection was travelling to join him. It would therefore be better to adopt wording similar to that used in article 40 of the Vienna Convention on Diplomatic Relations.

66. He hoped the Working Group would introduce into article 2 the concept of the threat of violence.

67. Sub-paragraph (d) of article 2 referred only to "participation as an accomplice" in acts of violence. It would be desirable to introduce the concept of assistance, especially financial assistance, to a clandestine organization, without actual participation in the act of violence.

The meeting rose at 1.05 p.m.

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18 See 1182nd meeting, para. 40.
4. There was therefore no reason to believe, as did Mr. Castañeda, that the régime of asylum would be disturbed by the existence of a convention on the lines of the Working Group's text. That régime had never been intended for the protection of terrorists, particularly such as committed the offences covered by the draft articles.

5. He was prepared to accept articles 1 and 2 as they stood.

6. Some members had argued that the draft should also cover the case where the Head of a State or Government was kidnapped in his own country. In his view, such a situation was governed by the internal laws of the country in question. In fact, the reason why the draft referred to Heads of State and Heads of Government was because they were regarded as forming part of the diplomatic machinery. If, however, an act of violence was committed against them in their own country, the matter was one for traditional national justice.

7. The same applied to another hypothetical case mentioned by Mr. Hambro, namely, that of an attack at Divonne on a diplomat stationed at Geneva. Personally he felt that the draft articles were less likely to command wide acceptance if they departed from the narrow but traditional criterion of the performance of official functions.

8. With regard to the term “international organization”, as used in article 1, paragraph (b), the words “of universal character” might be deleted, since that provision contained an adequate guarantee in itself, namely, special protection for the official in question pursuant to international law or an international agreement.

9. Mr. ALCÍVAR said he wished to repeat his grave concern at the fact that the General Assembly should have chosen to refer to the Commission, which was a body of legal experts, a highly political subject such as the one now under discussion, thereby creating a situation fraught with danger for the Commission.

10. The Commission had invariably worked on the codification of the rules of general international law and, in that process, had already codified a large part of diplomatic law. Some aspects of that law still remained to be codified; in particular, the Commission had so far prepared draft articles only on representatives of States to international organizations; there still remained the question of the law applicable to international officials and to the organizations themselves. The Commission should concentrate on the type of work which it had been carrying out so far.

11. Attacks on diplomats had always been offences punishable under municipal law. He had serious doubts about the approach now proposed by the Working Group, which involved international judicial cooperation; he was not at all certain that that method would be of any assistance in the prevention of such offences.

12. As a general rule, the kidnapping of a diplomat led to a demand for the release of political prisoners—and only very occasionally to a request for an economic advantage—in return for the release of the diplomat. The use of those methods was certainly reprehensible and totally unjustifiable, but such acts could not be confused with ordinary crimes committed by gangsters.

13. In any case, the provisions of the draft now under discussion did not serve much purpose. They envisaged the case where the offender took refuge in another country after committing an offence against a diplomat, but in reality, individuals who committed such acts rarely sought refuge in a foreign country; those who did seek refuge abroad were the political prisoners whose release was secured as a result of the commission of the act.

14. It was the fundamental duty of the Government of a receiving State to protect diplomats accredited to it. If, as unfortunately sometimes occurred, it was unable to prevent the kidnapping of a diplomat, it had to take every possible step to secure his release. It had to pay whatever price was necessary to save his life. That obligation was not specified in the draft now under discussion, and he believed that the absence of such a provision constituted a serious gap. It could even be said that, by diverting attention in another direction, the draft articles under discussion tended to evade that obligation.

15. He was concerned that the draft did not contain any clause which safeguarded the right of asylum. He also had serious reservations regarding the proposed provisions on extradition.

16. Finally, he found the provisions of article 9 totally unacceptable. As a matter of principle, he could not agree that there should be no statutory limitation as to the time within which prosecutions might be instituted for a crime. Whatever the seriousness of an offence, the right to institute criminal proceedings must be subject to some time limit.

17. He welcomed the comment made at the previous meeting by Mr. Bartós that while a diplomat was entitled to special protection, he was also under a duty not to interfere in the internal affairs of the receiving State. He reserved his position with regard to the draft articles as a whole.

19. Mr. USHAKOV said that interference by a diplomat in the internal affairs of the receiving State was strictly prohibited under article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations. If a diplomat infringed that obligation, it was for the receiving State to take action. That State could declare the diplomat in question persona non grata at any time, without giving any reason.

20. The purpose of the articles, which was clearly defined, was the protection of diplomats. In that respect, they represented progress.

21. Mr. REUTER said it was the duty of the Commission, when a text was referred to it by the General Assembly for study, to make every effort to furnish a prompt reply to that request at the technical level. That was absolutely essential for the future of the Commission. The Working Group which had prepared the draft
articles on the basis of the Chairman’s draft had shown that, in an emergency, it was possible for the Commission to adopt an accelerated procedure.

22. He did not consider himself qualified to pass judgment on the suitability and efficacy of the solutions proposed in the draft articles. As in the case of hi-jacking, the position of Governments varied according to whether or not they were directly concerned. It was probable that those which now adopted a very liberal approach would soon change their attitude if confronted with the difficulties which the draft articles were attempting to solve.

23. It might perhaps have been useful if the Working Group had submitted alternative texts, but no doubt it had sound reasons for not doing so. In fact, the Group had adopted “maximum” solutions on all difficult points. It also seemed to him that some of his own observations had not been taken into account.

24. Articles 1 and 2 called for little comment. In article 2, violent attacks had been defined very broadly, in other words, without reference to their motive. That provision should be read in conjunction with article 6, which departed considerably from article 7 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft. In its present form article 6 was more stringent than article 7 of the Hague Convention. It would be desirable to draft a milder version of article 6, because some States would otherwise be reluctant to accept it. It was in fact conceivable that an offence committed in a given State might be followed by a coup d’état favourable to the perpetrators of the offence; in that case, no request would be made for extradition, but, under article 6 in its present form, the State in question would nevertheless be required to punish the offenders.

25. As regards the concept of international organization, the words “of universal character” should be deleted, because there were no compelling reasons for such a restriction.

26. Mr YASSEEN said that if there was one field in which international law was almost perfect, it was that of the protection of diplomats. Diplomatic law had been customary law before being codified and diplomats were adequately protected by contemporary international law.

27. He was convinced of the primacy of international over internal law. He therefore believed that the Commission’s main concern should be to ensure that States adapted their internal law to the requirements of international law.

28. The purpose of article 2 seemed to be, in part, to ensure that internal law met the requirements of international law in that field, but the French translation of the phrase following sub-paragraph (d) did not seem to render accurately the substance of the English text.

29. It would have been better if the Working Group had submitted alternative rather than “maximum” solutions, especially in regard to extradition and political offences, since it would have been useful to be able to offer alternative solutions to the international community.

30. Mr. AGO said he approved of the draft as a whole.

31. Some of his colleagues appeared to think that the obligations of the receiving State were not sufficiently clearly stated and one had maintained it should be expressly required to release political prisoners without hesitation if such action could safeguard the lives of diplomats. While he agreed that States must unfortunately bow to necessity in such cases, he thought that the Vienna Convention on Diplomatic Relations already gave sufficiently precise guidance on that point. However, he saw no objection to reminding States of that obligation in the draft.

32. The duty of neutrality incumbent on diplomats was also adequately brought out in the Vienna Convention on Diplomatic Relations. The purpose of the draft was to ensure international co-operation with a view to putting a stop to acts of violence against diplomats. To that end, third States must refrain from encouraging the preparation of such acts in their territory for commission in the receiving State. Furthermore, when the suspected perpetrator of a crime fled to a third State, he must not be allowed to remain there unpunished on the strength of a claim that he had acted for political motives. The right of asylum of any political prisoners released as a result of such an act of violence was of course in no way questioned. Only the perpetrator of the crime himself must be denied asylum.

33. The reason why the Working Group had not submitted alternatives was because the issues dealt with in the draft did not lend themselves to more than one solution. In the case of the motive of the crime, for example, there could be no question of protecting diplomats solely against non-political acts of violence.

34. The same applied to extradition. Those who considered that the possibility of extraditing the offenders specified in the draft should not be deemed to be included in all existing extradition treaties based their case on respect for internal law. It was, however, evident that most systems of criminal law excluded political offences from the grounds for extradition. In that connexion, it should also be noted that, if article 7 of the draft were retained in its present form, it would hardly ever lead to extradition.

35. Although a distinction between universal and non-universal international organizations might be justified in other draft conventions, it was not appropriate in provisions designed to protect individuals. To restrict protection to officials of universal international organizations would be to expose those of non-universal organizations to an even greater risk of acts of violence. Similarly, unless the officials of international organizations, whether universal or not, were also protected, they would be at a disadvantage compared with diplomats.

36. Lastly, he regretted that the procedure for the settlement of disputes provided for in article 12 was less effective than that laid down in the 1970 Hague Convention.  

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5 Ibid.
37. Mr. RUDA said he agreed with Mr. Reuter that the Commission's mandate required it to deal with the present topic from a strictly technical and juridical standpoint. Yet it was obvious that there were no juridical standards for determining whether an offence was a common crime or a political crime. Moreover, a political crime might be defined by reference either to an objective or to a subjective criterion. In the former case, it might be a crime against the security of the State, such as an armed rebellion. In the latter case, it would be necessary to take motivation into account or, in other words, to determine whether the crime had been committed for purely political motives.

38. Unfortunately, no standards existed, either in doctrine or in practice, for the application of those two criteria. The Commission, therefore, should be very cautious in framing the draft articles, since they dealt with criminal law, which generally provided certain guarantees of personal liberty. If the draft articles were couched in ambiguous language, the Commission would not be fulfilling its duty to ensure the protection of diplomats.

39. He fully agreed with paragraph 9 of the comments of the United Kingdom Government (A/CN.4/253), which stated: “Fourthly, the offence covered and the persons protected by the convention should be sufficiently and satisfactorily defined”, and with paragraph 4 of the French Government's comments (A/CN.4/253/Add.3) that there could be “no question of referring, without further particulars, to international law or to the duty of States to give special protection to important persons who are not expressly mentioned”. In his opinion, therefore, article 1, which referred only to “internationally protected persons”, should be amended to state clearly who those persons were, so that the matter would not be left to “general international law or an international agreement”.

40. With regard to article 2, he agreed completely with the statement by the French Government in the same paragraph of its comments that “In addition, the Commission should take particular care in defining the acts to which the convention would apply. In the opinion of the French Government, no attempt should be made to define a new offence. Kidnapping, murder and illegal restraint are... perfectly well known to national law, and States might be reluctant to accept a text which created special categories for such crimes according to the status of the victim”.

41. He shared Mr. Alcivar's objections to article 9, which provided that there should be “no statutory limitation as to the time within which prosecution might be instituted for the crimes set forth in article 2”.

42. The CHAIRMAN, summing up the discussion on article 1, said that the Commission appeared to be in general agreement with the approach adopted by the Working Group with respect to that article, which attempted to provide a relatively brief definition of the persons covered by it.

43. Some members had admittedly raised objections of a drafting nature, while others had questioned whether the word “official” was necessary before the words “functions on behalf of his Government or international organization” in paragraph 1(b). Doubts had also been expressed as to the need to include a reference in that paragraph to “general international law or an international agreement” or to “members of his family forming part of his household”.

44. On the other hand, the Commission seemed to be substantially in agreement that, if protection was to be provided for officials of international organizations, it should be extended to those of all such organizations and not merely to those of a universal character.

45. In the circumstances, it seemed to him that the best course was for the Commission to refer article 1 back to the Working Group for further consideration in the light of the discussion.

46. Mr. TSURUOKA, speaking as Chairman of the Working Group, said that the procedure suggested by the Chairman was completely acceptable to the Working Group.

47. The CHAIRMAN asked whether any members had further specific comments to make on article 2.

48. Mr. REUTER said that article 2, in its present French version, clearly covered acts which it should not cover, such as for example, car accidents in which an acte de violence was committed without criminal intent. As he understood it, the aim of the article was to provide for the punishment of offences committed with criminal intent but not of every offence which took the form of an acte de violence. As at present drafted, the article was too broad. To exclude offences such as crimes of passion or car accidents, a sentence referring to criminal intent or premeditation would need to be added. The Commission included experts in criminal law better qualified than himself to propose an appropriate wording.

49. With regard to Mr. Ruda's remarks, he thought that, despite the observations submitted by the French Government (A/CN.4/253/Add.3), the best solution would be to propose a definition of the crimes in question for incorporation in internal law. As the definitions of crimes varied greatly from country to country, the Commission would find itself in difficulties if it did not give an independent definition of the crimes covered by the present draft. It would therefore be better to make the definition more precise.

50. Mr. USTOR thought that Mr. Ruda had confronted the Working Group with an impossible task if he expected it to produce specific definitions of crimes and offences which were very differently defined in the criminal laws of all the countries of the world. In his own opinion, what was needed was a general, neutral definition such as that contained in the present text, although the latter might be open to improvement.

51. Mr. SETTE CÂMARA, referring to the observations of Mr. Reuter and Mr. Ruda, said that the Working Group had been mindful of the need to be as clear-cut as possible in its draft, while not including categories of crimes which were not recognized by the internal laws of some countries, such as conspiracy and assault.

52. He suggested that Mr. Reuter's difficulty might be met by using the words of article 1, paragraph 1, of the
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971,\(^7\) which stated: “Any person commits an offence if he un lawfully and intentionally...”. The list of the acts in question would then follow.

53. The CHAIRMAN said that the difficulty appeared to be due to the fact that the French term “acte de violence” did not entirely correspond to the English term “violent attack”. The element of intention implicit in the term “violent attack”, as used in English law, was perhaps not present in the French term “acte de violence”.

54. Mr. REUTER said he had an insufficient knowledge of the criminal law of the common law countries to give a firm opinion on the point, which was one which should be settled by the Drafting Committee. It seemed to him, however, that the acts covered by the draft might imply something more than intention, possibly an element of premeditation.

55. Mr. SETTE CAMARA said he agreed with Mr. Reuter that the idea of intention should be included, but not premeditation, since not all the acts in question implied premeditation.

The meeting rose at 1 p.m.

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1. The CHAIRMAN invited the Commission to continue consideration of articles 1 and 2 of the draft submitted by the Working Group (A/CN.4/L.186).

2. Mr. BEDJOAUI asked whether the words “under its internal law” in article 2 were to be construed as meaning that States would have to adapt their law or merely take it into consideration.

3. The CHAIRMAN said that the problem mentioned by Mr. Bedjaoui arose mainly in connexion with the concluding clause of the article: “whether the commission of the crime occurs within or outside of its territory”. He believed it was true to say that, in nearly all countries, special legislation would be required to confer jurisdiction on the domestic courts to try an offence committed abroad by an alien against an alien. Jurisdiction over offences committed abroad by a national or by an alien against a national, was, of course, known to many legal systems. In the present draft, as in such existing international treaties as the 1961 Single Convention on Narcotic Drugs \(^2\) and the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft \(^3\) provision was in fact made for the prosecution in a State Party of certain offences, even if committed abroad by an alien against an alien. Some kind of legislation would therefore have to be enacted in almost every State to extend its jurisdiction to cover such cases. As far as the actual offences were concerned, each State would have to consider whether any new legislation would be required to bring the substantive provisions of its internal criminal law into line with the requirements of the draft articles.

4. Mr. BILGE asked whether the violent attack referred to in sub-paragraph (a) of article 2 was in itself of a particularly grave nature justifying a severe penalty, as seemed to be suggested by the words “which take into account the aggravated nature of the offence”, or whether the attack had to be committed with intent, as Mr. Reuter maintained.

5. Mr. USHAKOV said that the gravity of the attack did not change, but the fact that it was directed against a person enjoying international protection was an aggravating circumstance for the purposes of determining the penalty. The words “à raison de la gravité particulière de l’acte” in the French text would have to be amended to give clearer expression to that idea, which was better conveyed by the English text.

6. The translation of the expression “violent attack” raised problems in both Russian and French; it might perhaps be better to alter the English text and replace the word “attack” by “act”. Apart from those drafting points article 2 was perfectly acceptable.

7. The CHAIRMAN said that replacement of the word “attack” by the word “act” in the English text might have the effect of bringing an unintentional act, such as the causing of a traffic accident, within the scope of the draft.

8. Mr. SETTE CAMARA agreed with Mr. Ushakov that the part of the French text dealing with the aggravated nature of the offence would have to be amended to bring it more closely into line with the English. The intention was clearly to indicate that the fact of the victim...
being a diplomat or other protected person would be regarded as an aggravating circumstance for purposes of determining the penalty.

9. Mr. REUTER said he could not express an opinion on problems of drafting, which were very difficult because what the Commission was drafting was the international definition of an offence. In some countries an offence could perhaps be created direct by an international instrument, whereas in others it would be necessary to enact legislation applying it, even in respect of the definition. But all countries would obviously have to enact legislation in respect of the penalties, since they were not laid down by the Commission.

10. It was also obvious that the draft convention required States to apply two different standards to one and the same offence, the severity of the penalty varying according to the status of the person against whom the act, or rather the misdeed, had been directed. For according to the English text it was the penalties, not the offences, which were differentiated according to whether the victim was or was not a diplomat. Such a provision was reminiscent of the Salic law and the Middle Ages. While he appreciated the significance of the draft convention, he doubted whether parliaments would agree to introduce such discrimination into their national law.

11. The CHAIRMAN, speaking as a member of the Commission, pointed out that the criminal law of many countries already drew distinctions based on the functions exercised by the victim of an offence. In most countries, the murder of a policeman in the performance of his duties attracted a heavier penalty than the murder of another person, the underlying principle being that of upholding the public authority. Similarly, in the draft at present under discussion, an attempt was being made to protect persons who exercised some form of international authority.

12. Mr. RAMANGASOAVINA said that article 2 was too imprecise to be acceptable. First, the term “acte de violence” in the French text did not exactly correspond to the English expression it was intended to translate. The Working Group had wished to use a fairly broad term to cover all kinds of violence, but there were degrees of violence. Secondly, the intention was that the offences listed in sub-paragraphs (a), (b), (c) and (d) should all be regarded as constituting crimes punishable by severe penalties, irrespective of their gravity. In criminal law, however, there were different kinds of attack upon the person, with different degrees of gravity. Lastly, it was not clear from the article whether the aggravated nature of the offence derived from the attack itself or from the status of the victim.

13. Mr. USHAKOV explained that the Working Group’s idea had been that the penalty imposed would have to be the maximum penalty, the fact that the victim was a diplomat being an aggravating circumstance. Perhaps that idea could be expressed more clearly by redrafting the article and giving explanations in the commentary.

14. Mr. ALCIVAR said that the Spanish rendering of the expression “violent attack”—“atentado violento”—was perfectly satisfactory.

15. Internal criminal law generally specified maximum and minimum penalties for each offence; that was certainly true for all serious offences in most countries. Thus, the actual penalty imposed by a court in a specific case varied according to whether the court found that extenuating or aggravating circumstances had attended the commission of the offence.

16. The purpose of the provision under discussion was therefore to specify that the fact that the victim was a diplomat or other protected person would constitute an aggravating circumstance. The language used, however, did not convey that idea sufficiently clearly and should be improved.

17. Mr. TSURUOKA (Chairman of the Working Group), replying to the last point made by Mr. Ramangasoavina, said that, as the Working Group saw it, the aggravating element lay in the nature of the attack rather than in the status of the victim. The proposed text left the authorities of the country concerned free to take all the circumstances into account. Some consideration could therefore be given to the rank of the person to be protected or the degree of danger to which he was exposed in order to ensure proper functioning of the diplomatic machinery.

18. Mr. BARTOS said he interpreted the provision as meaning that States must either create a special offence to cover the case of a criminal act directed against a person enjoying international protection, or invoke aggravating circumstances. In French law, for example, the murder of a police officer in the performance of his duties was a special offence, and even if it were not, the status of the victim and the fact that he had been attacked in his official capacity would add to the gravity of the offence. The same applied to diplomats and persons assimilated to them. There were many countries in which a physical attack on certain classes of person constituted a special offence. In the United States of America, for example, attacks on the President, the Vice-President or a candidate in a presidential election were excluded from the jurisdiction of state courts and came under that of the federal courts. As drafted, article 2 gave States the choice of creating a special offence or invoking aggravating circumstances. He therefore found the article acceptable.

19. Mr. REUTER said he wished to emphasize that national parliaments, which would have to take a decision on the text of the convention, were hostile to privileges, which should therefore be reduced to the minimum. All attacks which might be made on a diplomat were not necessarily directed against him because of the nature of his duties, and there was no justification for asking for the maximum penalty in all cases. A form of words such as “violent attack directed against a person because of his official position” might perhaps overcome that objection.

20. Mr. BEDJAOUI said that he understood Mr. Reuter’s concern, but the wording he had proposed would conflict with the provisions of article 1, paragraph 1 (a) of which referred to a Head of State and a Head of Government, whenever they were in a foreign State, even when not performing official functions.
21. He did not share Mr. Reuter's fear that, because of the inclusion of the words "regardless of motive", even manslaughter resulting from a road accident might come within the scope of article 2. In such cases, if there was no intention, there was no motive. Since the Working Group had in fact intended to cover all possible motives—political, vile and other—the idea could perhaps be better conveyed if the words "The Commission, regardless of motive" were replaced by "The deliberate commission".

22. Mr. TSURUOKA (Chairman of the Working Group) said he agreed that the Working Group would have to amend the drafting of article 2, but he wished to point out that, to determine what offences did or did not come within the scope of the draft, it was sufficient to consider the object and purpose of the future convention.

23. Mr. QUENTIN-BAXTER said that article 2 raised three major issues which were largely interconnected. The first was the definitions of the acts covered by the draft articles, the second was the aggravated nature of the offence, and the third was the use of the expression "regardless of motive".

24. As to the first of those issues, the neutral wording of the definitions in article 2 seemed to him to be satisfactory. In extradition treaties, particularly those signed between two States having different legal systems, it was quite common to give a neutral description of the content of an offence, rather than a technical definition which could raise difficulties because of the non-concordance of national definitions. The present text would cover the well-known concepts of murder, kidnapping and bodily assault, which were crimes under the laws of virtually all the countries of the world.

25. States subscribing to the international instrument that would emerge from the draft would thus not be asked to create new crimes. The purpose of the instrument would be to require them to assume jurisdiction in the case of certain crimes even when not committed in their own territory. The problem which arose was that diplomats, precisely because of the special protection due to them, might become the target of politically-motivated crimes. It was not that countries failed to treat certain acts of violence as serious offences, but simply that diplomats constituted a special risk.

26. On the question of the aggravated nature of the offence, he shared some of the doubts expressed by other speakers. In many countries, including his own, there was no special law concerning attacks on foreign diplomats or indeed on Ministers of the Crown or even the Prime Minister. That being so, many countries would find it difficult to assume an obligation to make new special offences of such attacks, or to legislate for heavier penalties against certain existing crimes if committed against a particular class of persons. Moreover, so far as he knew, the question was not one of any practical importance. The real problem was not that of imposing heavier penalties, but simply of ensuring that the authors of certain offences were brought to justice. The inclusion of a reference to the aggravated nature of the offence would be politically and psychologically counter-productive. In many countries, it would be very difficult to persuade parliament that crimes which were in any case regarded as very serious should be treated in a special way because the victims belonged to a privileged class of persons.

27. The expression "regardless of motive" was unsatisfactory because it would have the effect of bringing within the scope of the draft the normal risks of life at any place and time—risks which affected diplomats no more than anyone else. The wording of the provision made it clear that there must be a motive for the offence, but did not make it at all clear that the criminal must be aware of the victim's status as a diplomat or other protected person. The machinery of the convention might thus be brought into play in respect of an offence of which a diplomat or other protected person was a purely accidental victim. At the very least the text should be amended to make it clear that the alleged offender must have been aware of the status of his victim. Ideally, as Mr. Reuter had suggested, the offences defined in the article should be related to a knowledge of the victim's official position.

28. In conclusion, he stressed the need to re-word the article so as to make it clear to parliaments that they were not asked to create new offences or to set up a special category of persons comprising diplomats and other protected persons, but merely to extend the jurisdiction of their national judicial authorities to the acts mentioned in the draft.

29. Mr. HAMBRO said he agreed that care should be taken to avoid giving the impression that a new, specially privileged class of persons was being established. It was necessary to bear in mind the need to obtain a sufficient number of ratifications for the international instrument that would emerge from the draft articles, if that instrument was to serve a useful purpose. That was particularly important, since the class of protected persons would be a very large one: by virtue of the provisions of article 1, not only broad categories of officials, but also all members of their families, would be entitled to special protection.

30. He believed that it would be easier to obtain ratifications if the unduly blunt formula "regardless of motive" was dropped from article 2. He also suggested that, in sub-paragraph (a) the words "as such" (in French "comme telle") should be inserted after the words "protected person", in order to convey the idea that the act must be an attack committed against a protected person in that person's capacity as Head of State or Government or as an official of a foreign government or international organization.

31. He was not at all shocked at the suggestion that an offence should be deemed to be of an aggravated nature because of the class of persons to which the victim belonged. As had already been pointed out, under United States law an attack on the President or Vice-President, or even on a presidential candidate, was treated as a special kind of offence of a particularly grave character and came under the jurisdiction of the federal, not of the state courts.

32. Mr. ALCIVAR said that the more he considered article 2, the more difficulties it appeared to present.
33. Under international law, diplomats enjoyed special protection; and the internal law of States also contained the necessary provisions to deal with any attack against them. In the draft under discussion, however, an attempt was being made to combat politically motivated attacks against diplomats or other protected persons. But that attempt would lead to serious difficulties in internal law. To take one example from the criminal law of his own country, manslaughter (homicidio simple) in Ecuador was punishable by a maximum penalty of 12 years' imprisonment. Murder (asesinato) was legally defined as homicide with aggravating circumstances and was punishable by the heaviest penalty known to Ecuadorean law, namely, the most rigorous form of imprisonment (reclusión mayor) for a term of 16 years. No murderer could be sentenced to a term of imprisonment exceeding 16 years under any circumstances; it would therefore be impossible for Ecuador to apply a provision of an international instrument requiring it to regard the murder of a diplomat as an aggravated case of murder.

34. Mr. RAMANGASOAVINA said that the phrase "regardless of motive", which was meant to cover political motives, went further than the authors had intended by making punishable by severe penalties acts committed without intent against protected persons. He therefore proposed that, in order to bring out the idea of intent and to make it clear that the offender must have been fully aware of the victim's status, the words "The commission, regardless of motive", at the beginning of article 2 should be replaced by the words "The commission, knowingly". Thus the commission of a violent attack upon a diplomat, because he was a diplomat, would be an aggravated offence.

35. Mr. USHAKOV said he found it difficult to believe that any country would agree to introduce into its criminal law a provision under which, irrespective of the circumstances, the status of a person enjoying international protection aggravated the nature of any offence which might be committed against him. The offender would not even be able to plead ignorance, since no one was presumed to be ignorant of the law. The courts would therefore have to impose the maximum penalties in all cases. That requirement was excessive and went beyond the Commission's competence. It was a matter for each country to decide "under its internal law", as specified in article 2.

36. Mr. USTOR said that in drafting a convention, it was always necessary to strike a balance between two extremes. It was necessary, on the one hand, to avoid making the rules in the draft too rigid, because rigidity would deter States from ratifying the future instrument; and on the other, to avoid watering down the rules to such an extent that the instrument became ineffective. He thought that, in the present instance, it was desirable to submit the draft in such a form that it would be left to a future conference of plenipotentiaries to strike that balance, if need be by watering down some of the proposed provisions. That being said, he was opposed to the suggestion that the words "regardless of motive" be deleted from the opening sentence of article 2; those words constituted an important element of the whole article.

37. Mr. ELIAS said he agreed with Mr. Ustor that the Commission should be careful not to water down the draft articles to such an extent that they would become virtually ineffective. The rules should not be formulated merely with a view to securing the approval of national parliaments. Many of the conventions prepared by the Commission in the past had contained elements which had represented progressive development of international law and which had been accepted by governments; the Commission should not be afraid to lay down a new standard of international behaviour. Governments would have an opportunity of commenting on the draft articles and the final decision would be taken by them at an international conference.

38. The definition of an "internationally protected person" in article 1 included two categories of person. With regard to the first category, defined in paragraph 1 (a), in many cases a Head of State and a Head of Government were one and the same person. That paragraph should, therefore, begin with the words "a Head of State or a Head of Government" rather than "a Head of State and a Head of Government". He fully agreed that the phrase in square brackets in paragraph 1 (b) should be deleted. There was no justification for distinguishing between officials of international organizations of a universal character and officials of other international organizations. By referring to the performance of official functions, the definition in paragraph 1 (b) supported the point made by Mr. Quentin-Baxter that the offender should be aware that the victim was a diplomat or an official of an international organization.

39. Article 2 was concerned with three areas of jurisdiction relating, first, to the persons who would be brought before the courts; secondly, to the type of offence committed; and thirdly, to the extension of the territorial jurisdiction of the national courts. In all those areas, the provisions in article 2 involved some degree of innovation.

40. Under that article, each State party to the convention was required to make such modifications as might be necessary in its internal law. He found that provision perfectly normal, since, in the course of time, conventions of the type drawn up by the Commission generally led to a modification of existing national law, even where such conventions, once ratified, did not automatically become part of the law of the State, as they did in the United States of America. Moreover, in the present case, there was nothing in the language of article 2 to suggest that a new crime was being created, since in almost all countries the offences listed were already punishable by law. The purpose of the article was to make such offences aggravated offences under the internal law of countries, when they were committed against the persons specified in article 1. He did not think that the provisions of article 2 would become more acceptable to governments if some other word were substituted for "aggravated".

41. Some members of the Commission were perhaps reading too much into the phrase "punishable by severe penalties", which might be interpreted as signifying double punishment. It would perhaps be preferable to say "a crime under its internal law that is punishable by a severe penalty", even though the offender might be liable to a
fine or imprisonment, or both. All that was being asked of States was that they should impose the severest penalties provided for in their internal law on anyone who committed an offence listed in article 2 against one of the persons specified in article 1.

42. The last clause of article 2 required each State party to take such measures as might be necessary to establish its jurisdiction over the crimes listed in paragraph 1. That provision would normally entail an extension of national jurisdiction, since in most countries the courts had jurisdiction only over offences committed within the national territory or partly within the territory and partly outside it.

43. In his view, the problems raised by the phrase "regardless of motive", in paragraph 1, were closely linked with the question of extradition and extraditable and non-extraditable offences, dealt with in articles 6 and 7. While he had some sympathy with Mr. Bedjaoui's suggestion that the phrase should be deleted, since the idea had already been covered in article 1, he would suggest that it should be retained until the Commission had considered articles 6 and 7, and that articles 1 and 2 should be referred back to the Working Group, which could take account of the criticisms and suggestions made for their improvement.

44. Mr. SETTE CÂMARA said he thought it important to retain the expression "regardless of motive" in article 2. In recent years there had been many examples of the crimes dealt with in the draft articles, and in most cases the authors of those crimes had remained untired and unpunished because their motives had been political. Mr. Alcivar had said that the individuals who committed such acts very rarely sought refuge in a foreign country, but such cases had occurred; most of those responsible for kidnapping the three ambassadors in Brazil, for example, had sought asylum in other countries and had not been tried or imprisoned. One of the main innovations introduced in the draft articles was that in such cases political motivation would no longer be accepted as a reason for not bringing the offenders to trial and punishing them. If the words "regardless of motive" were dropped, as Mr. Bedjaoui had suggested, the article was likely to be given a more restricted interpretation.

45. For that reason, he fully agreed with the view expressed by Mr. Ustor: the words should be retained and it should be left to a future conference of plenipotentiaries to strike the necessary balance, if need be by watering down some of the proposed provisions.

46. Mr. REUTER said he disagreed with Mr. Ustor and Mr. Sette Câmara. He had originally hoped that the text would contain enough variants for States to choose those they preferred. The Commission now appeared to be headed towards such extreme solutions that he was obliged to re-state his reservations on the whole draft.

47. The CHAIRMAN, speaking as a member of the Commission, said that the insertion of the words "as such" after the words "protected person", or the use of any other wording that would require a knowledge by the alleged offender of his prospective victim's special status, would place an undesirable burden on the enforcement authorities.

48. An example would illustrate that point. In New York City, one of the permanent missions to the United Nations had recently been subjected to long-distance high-power rifle fire. Fortunately no one had been injured. If someone had been killed, however, and the offender had escaped and been found in a third State, the existence of a provision of the kind proposed would mean that, before that State could punish or extradite the offender, it would be necessary to establish, as part of the case for bringing the provisions of the convention into effect, that he knew that the windows at which he was firing from a great distance were the windows of the foreign mission concerned. It would be placing an extremely heavy burden on any prosecutor to require proof of such knowledge, because it would mean proving something that was really known only to the offender himself. If the offender remained silent, probably all that could be established would be the fact that he had fired the shot and that the shot had gone through the window of a particular mission. So far as knowledge on the part of the offender was concerned, possibly all that could be done would be to draw some inference from the fact that he belonged to an organization opposed to the policies of the country represented by the mission.

49. Mr. YASSEEN observed that the rules of evidence were much less strict in criminal law than in civil law. In criminal law, circumstantial evidence might determine the judge's conclusions. In the matter referred to by the Chairman, it would not, for example, be possible to call witnesses, but other evidence would be admissible. It was therefore essential to specify that the violent attacks must be intentional and knowingly directed against diplomats or other persons assimilated to them.

50. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 1 and 2 back to the Working Group for review in the light of the discussion.

It was so agreed.

ARTICLE 3

51. Article 3

States Party shall co-operate in the prevention of the crimes set forth in article 2 by, in accordance with their internal law:

(a) taking measures to prevent the preparation in their respective territories of the crimes set forth in article 2 when they are to be carried out in the territory of another State;

(b) exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

52. The CHAIRMAN, speaking as a member of the Commission, said that only a brief explanation of article 3 was required. The text was based on two sources. The first was article 8 of the 1971 OAS Convention to

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*See previous meeting, para. 13.

*For resumption of the discussion, see 1191st meeting, para. 1.
53. Sub-paragraph (a) related solely to the prevention by States of the preparation in their territories of the crimes specified in article 2, when such crimes were to be carried out in the territory of another State. The suggestion had been made in the Working Group that States parties should also be required to take all the necessary measures to prevent any of the crimes in question taking place in their own territories. That suggestion had not been followed up, mainly because States were already under such an obligation by virtue of existing general international law and in particular of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

54. Mr. SETTE CAMARA said he nevertheless thought that sub-paragraph (a), as at present worded, gave the impression that States were not required to take preventive measures where the crimes in question were to be committed in their own territory. In his view, the text should be amended to clarify that point.

55. Mr. USTOR said that he too had misgivings about the wording of sub-paragraph (a). The present wording seemed to restrict the obligation to co-operate to States other than the one in whose territory the crime was to be carried out. What was clearly intended was that whenever a State received information that certain persons in its territory were planning to carry out such crimes in the territory of another State, it was obliged to co-operate with that State and to pass on the information. The obligation to co-operate should, however, be reciprocal, and the second State should also be obliged to co-operate with the first. In his view, the sub-paragraph could stand without the phrase “when they are to be carried out in the territory of another State” and perhaps even without the words “in their respective territories”.

56. Sub-paragraph (b) ended with the words “those crimes”: it was not clear whether the reference was to the crimes specified in article 2 in general, or only to those crimes when they were to be carried out in the territory of another State. That point, too, should be clarified.

57. Lastly, he questioned whether the phrase “in accordance with their internal law”, in the first sentence of the article, was really necessary. That phrase had been used in other conventions and, in his experience, its interpretation could give rise to difficulties. It went without saying that States should act in accordance with their internal law and the inclusion of the phrase seemed to imply some limitation of the obligation to co-operate.

58. Mr. TSURUOKA (Chairman of the Working Group) referring to Mr. Ustor’s suggestion on sub-paragraph (a), said it had been the Group’s intention to cover both cases, in other words, to lay down an obligation for States to co-operate in their own territory and in that of the other State. The Working Group would perhaps be able to improve the wording of the provision.

59. The CHAIRMAN, speaking as a member of the Commission, said there had been no intention to limit the obligation of the State in which the preparations were taking place to mere notification of the other State. The first State was also obliged, if any of the preparations in question constituted unlawful acts under its own internal law, to prosecute the persons involved at that stage in order to break up the preparations.

60. Mr. TABIBI said he thought the introductory statement in article 3 was broad enough to cover all the points contained in sub-paragraphs (a) and (b). The two sub-paragraphs seemed, in effect, to weaken the rule stated at the beginning of the article. It appeared from sub-paragraph (a) that preventive measures need be taken only when the crime was to take place in the territory of another State, and sub-paragraph (b) seemed to limit the measures to administrative measures only. It would be much better merely to say that States should cooperate in the prevention of the crimes set forth in article 2, in accordance with their internal law.

61. Mr. RAMANGASOAVINA said it would have been preferable to use the verb “empêcher” rather than “prévenir” in the French text of sub-paragraph (a). But since even with that change certain points would remain obscure, he suggested that the sub-paragraph be entirely redrafted on the following lines: “taking measures to prevent the use of their territory for the preparation of the crimes set forth in article 2”.

62. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 3 back to the Working Group for review in the light of the discussion.

It was so agreed.

The meeting rose at 6 p.m.

* For resumption of the discussion, see 1191st meeting, para. 59.

1186th MEETING

Friday, 23 June 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasonaiva, Mr. Reuter, Mr. Ruda, Mr. Sette Cámara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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* Ibid., number 6, November 1971, p. 1151.
Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law
(A/CN.4/253 and Add.1 to 5; A/CN.4/L.182 and L.186)

[Item 5 of the agenda]

(continued) .

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLE 4

1. The CHAIRMAN invited the Commission to consider the text of article 4 of the draft submitted by the Working Group (A/CN.4/L.186), which read:

   Article 4

   The State Party in which one or more of the crimes set forth in article 2 have been committed shall, if it has reason to believe an alleged offender has fled from its territory, communicate to all other States Party all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

2. There was no parallel principle to article 4 in either the Montreal, The Hague or the OAS Conventions, but the Working Group had thought it would be desirable to specify that a State party, if it had reason to believe an alleged offender had fled from its territory, should communicate to all other States parties all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender. The Working Group had not specified any particular means of communication, since the appropriate means would necessarily vary from case to case. The article was of a purely technical character and he did not think it raised any special problems. He therefore suggested that the Commission should approve it.

   It was so agreed.

ARTICLE 5

3. The CHAIRMAN invited the Commission to consider the text of article 5 submitted by the Working Group, which read:

   Article 5

   1. A State Party in whose territory the alleged offender is found shall take the appropriate measures under its internal law so as to ensure his presence for prosecution or extradition. Such measures shall be immediately notified to all other States Party.

   2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national and to be visited by a representative of that State.

   3. Article 5 was based primarily on article 6, paragraphs 1 and 3, of the Montreal Convention, subject to certain minor modifications. In particular, the Working Group had deleted the second sentence in article 6, paragraph 1, of the Montreal Convention, which read: "The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted", because it considered that that provision was unnecessarily confusing. The requirement in article 5 that "Such measures shall be immediately notified to all other States Party" seemed reasonable in cases where the State in question had already begun to gather evidence and to consider whether it wished to apply for extradition.

4. Article 5 was based primarily on article 6, paragraph 1, of the Montreal Convention, which read: "Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". That provision was a standard clause in almost all consular agreements.

5. Paragraph 2 of article 5 was based on article 6, paragraph 3 of the Montreal Convention, which read: "Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". That provision was a standard clause in almost all consular agreements.

6. Mr. TAMMES suggested that a sentence should be added to paragraph 2 of article 5, stating that persons having no effective nationality should be entitled to communicate with the appropriate officer of the United Nations High Commissioner for Refugees.

7. Mr. USHAKOV pointed out that article 6, paragraph 1, of the Montreal Convention referred to "the offender or the alleged offender", whereas the Working Group's article 5 referred only to "the alleged offender".

8. The CHAIRMAN said that the Working Group had decided to use the term "alleged offender", since the person in question could not properly be considered an offender until he had been tried and convicted.

9. Mr. RAMANGASOAVINA said he was afraid that the use of both the phrases "to communicate immediately" and "to be visited by a representative of that State" in paragraph 2 might lead to confusion, since communication generally took place during a visit by a representative of the State of which the alleged offender was a national.

10. The CHAIRMAN said that he believed that normally either the police notified the consular officer or the individual in question was allowed to do so himself by telephone. To the best of his knowledge, the wording of paragraph 2 was the wording customarily used in consular conventions, but the point would be checked.

11. Mr. YASSEEN said he saw no good reason for the notifications provided for in the last sentence of paragraph 1, which seemed excessive. It would be sufficient to notify only the States concerned.

12. Mr. TSURUOKA (Chairman of the Working Group) said the sentence was based on the idea that there must be the fullest co-operation between all the States parties to the Convention.

13. The CHAIRMAN said that there were some practical reasons for the procedure proposed. It might, for instance, be necessary for the police of all other States parties to be informed that further search for a particular individual was unnecessary.

14. Mr. YASSEEN pointed out that in the case covered by article 5 the alleged offender was no longer a fugitive, but had already been arrested. At that stage there was

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no need for general measures applicable to all the States of the world.

15. Mr. RAMANGASOAVINA said that he too thought it would be sufficient to notify the States concerned.

16. Mr. REUTER asked what degree of police collaboration the authors of the text expected from States during the stage between preventive measures taken under article 3, that was to say before the commission of an offence, and mutual assistance with criminal proceedings given under article 10 after the commission of an offence, but before identification of the criminal.

17. Mr. USHAKOV replied that the draft did not provide for general police collaboration. Article 3 covered the special case of prevention in one country of the preparation of crimes to be committed in the territory of another country, and provided for the exchange of information between the two countries and the co-ordination of their administrative measures to prevent the commission of such crimes.

18. Mr. AGO said he saw no lacuna in the system provided for. Article 3 dealt with the case in which no crime had yet been committed and placed an obligation on States to collaborate in preventing the commission of crimes. Its text was in accord with the old rule of international law that every State must ensure that its territory was not used for subversive activities against a neighbouring State. Then came the case in which the crime had already been committed, and the two stages covered by articles 5 and 10. In the first stage the offender had to be found, and if he was "found" abroad—not arrested, since measures other than arrest might be taken to keep him in the country, for example, confiscation of his passport—article 5 placed an obligation on the State concerned to take appropriate measures to prevent him from escaping, pending a decision on whether he was to be extradited or prosecuted. Then came the stage of criminal proceedings and of the mutual assistance in connexion with them provided for in article 10, which required States to supply the evidence and other information at their disposal to the State in which the prosecution was conducted. He did not see what further obligation could be imposed on States.

19. Mr. REUTER agreed that there was no lacuna if article 3 was broadly interpreted, as he himself interpreted it. Such an interpretation placed very heavy obligations on States, for article 3 concerned prevention, not of the commission, but of the preparation of crimes. That was going very far and would require constant police vigilance. There would then be no break in continuity, since, under article 5, if an assassination was committed by an unknown person, the police forces of all the States parties to the Convention, and not only of the State in which the crime had been committed, would have to take action to find the offender. The application of the conventions on illicit'drug traffic showed that there could be no effective prevention and punishment without very thorough police work. The Commission could say that article 3 was open to various interpretations, but it would be wrong to ignore the issue. The article must be interpreted broadly if it was to produce results.

20. Mr. AGO said he interpreted article 3 in the same way as Mr. Reuter, but he thought the future convention should mainly lay down general principles and that it would provide a framework for any particular agreements that might be concluded on closer police collaboration between individual States.

21. Mr. REUTER said that the conclusion of such agreements was not just a possibility, but a necessity.

22. Mr. USHAKOV observed that illicit drug traffic was a continuing problem requiring constant police collaboration, but that the same did not apply to the protection of diplomats. His interpretation of article 3 was therefore more realistic.

23. The CHAIRMAN suggested that article 5 should be referred back to the Working Group, which should consider whether some more specific provision was necessary with respect to police co-operation and similar matters.

It was so agreed.:

ARTICLE 6

24. The CHAIRMAN invited the Commission to consider the text of article 6 submitted by the Working Group, which read:

Article 6

The State Party in whose territory the alleged offender is found shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution.

25. The origins of article 6 were to be found in a number of international conventions, in particular article 7 of the Montreal Convention and article 7 of the Hague Convention. Article 7 of the Montreal Convention provided that "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution ..." There were no substantial differences between that text and draft article 6. The Working Group had, however, added the words "without undue delay", which were similar to the language used in the OAS Convention. It had also omitted the phrase "whether or not the offence was committed in its territory", because that idea had been incorporated in draft article 2.

26. Mr. TAMMES said that the principle laid down in article 6 was that the State party should either extradite or prosecute the alleged offender. To his mind, however, the question was whether priority should be given to article 6 or to article 7. The last sentence of article 7,

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1 For resumption of the discussion, see 1191st meeting, para. 66.
3 Ibid., number 2, p. 255.
paragraph 2, read “Extradition shall be subject to the other conditions provided for by the law of the requested State”. What, however, was the meaning of the words “the other conditions”? Did those conditions refer to the problems of dual nationality or to the principle of non-refoulement of political offenders as adopted in the Latin American countries, in Africa and in certain extradition treaties concluded in Europe?

27. It seemed to him that some doubt had been cast on the generally accepted principle of non-refoulement by the use of the words “regardless of motive” in article 2. The Commission should therefore consider whether the words “it shall consider”, in article 7, paragraph 2, might not be replaced by the words “it may at its option consider”, in order to bring the article into line with the Conventions of The Hague and Montreal. In any case, there was such a close connexion between articles 6 and 7 that he did not believe they could be examined separately.

28. Mr. HAMBRO said he agreed with Mr. Tammes that there was a close connexion between articles 6 and 7 and that it was important not to jeopardize the principle of non-refoulement of political offenders. Some members, however, seemed to fear that the present articles were directed against revolutionary and liberation movements, and to hold the view that it was necessary to tolerate acts of terrorism if they were committed with a political motive. In his opinion, that would be an extremely dangerous position for the Commission to adopt. It had to be borne in mind that the Commission was dealing not with trifling contraventions of law, but with extremely grave and dangerous crimes, some of which involved the murder of innocent people or their detention as hostages. As a result of long efforts to improve the rules governing warfare and armed conflict, such acts were illegal even in wartime. There could therefore be still less doubt of their illegality as a means of political warfare. It was accordingly reasonable that the international community should insist on the extradition or prosecution of alleged offenders. If the proposed convention did not do that, he feared that it would be of very little international importance.

29. Mr. AGO said he agreed with Mr. Hambro that no lacuna must be left in the draft if the system was to function as intended; one was apparent, however, if the draft was compared with the Montreal Convention.

30. The Commission should concern itself with two problems: the substantive criminal law and the rules relating to criminal procedure. The obligation of States to enact substantive criminal legislation was laid down in article 3 of the Montreal Convention and also, more or less clearly, in article 2 of the Commission’s draft—which would have to be made more precise. Article 5 of the Montreal Convention also placed an obligation on States to take such measures as might be necessary to establish their jurisdiction over the offences covered by the Convention, that was to say an obligation to have adequate rules of criminal procedure, which the Commission’s draft did not provide for. It was not enough to say that the State must submit the case to its competent authorities for the purpose of prosecution; the need for competent authorities must first be specified. That was the lacuna which needed to be filled.

31. Mr. USTOR said he agreed with the point made by Mr. Ago. He also agreed with Mr. Hambro on the need to avoid jeopardizing the principle of non-refoulement, although he did not think that that principle would cover any crimes or offences which were committed in violation of the purposes and principles of the United Nations Charter.

32. Mr. REUTER said he wished to draw attention to the very important fact that the differences between article 6 and the corresponding provisions in the Montreal and Hague Conventions were not merely points of drafting. For the States which had requested the insertion of those provisions in the two Conventions there was a radical difference. The Commission’s text might perhaps be technically superior, but the States which had been able to accept the provisions of the two Conventions owing to the sentence which had been deleted from the Commission’s draft would obviously not accept the convention the Commission was preparing, because of the present wording of article 6. For States had interpreted that sentence in article 7 of the Montreal and Hague Conventions, now deleted from the Commission’s draft, as a safeguard clause qualifying the obligation to extradite or prosecute, since by virtue of it the competent authorities were entitled to decide that there were no grounds for prosecution. Such a clause did not eliminate the main obligation, but it provided a loophole which had enabled many governments wishing to observe the Montreal and Hague Conventions faithfully to deal with embarrassing situations without having recourse to extradition or prosecution. The issue was therefore crucial since, if the Commission retained the present text, many States would be unable to accept it.

33. Mr. ELIAS said that article 6 was the most important provision in the draft. He did not think the draft should be weakened by making provision for alternatives or loopholes to the rule embodied in that article.

34. Article 6 simply gave States the choice between agreeing to extradite the alleged offender and prosecuting him. He did not believe it would be asking too much of a State to require it to take one or the other of those courses. If any other possibility were left open, States would be encouraged to give asylum to individuals who had kidnapped diplomats or murdered them in cold blood.

35. It was important that the remedy to be provided should be clear and unequivocal. Persons who were sent abroad to serve their governments or the international community should not be made the victims of attacks, whatever the motive might be.

36. He saw no reason for concern with regard to national liberation movements. Those movements should fight their wars of liberation in a more conventional manner than by killing Heads of State, diplomats or officials of international organizations. Such killings would not make any contribution towards achieving the aims of national liberation.
37. Article 6 related to the acts enumerated in article 2 and its purpose was to discourage violent attacks against diplomats or other persons serving the needs of the international community. He urged that the provisions of article 6 should be retained without change.

38. Mr. RAMANGASOAVINA agreed with Mr. Elias. If the Commission wished to help prevent and punish acts of violence against diplomats, the only solution was that proposed in article 6, namely, the obligation either to extradite or to prosecute. That solution ought to be accepted, although it was a considerable departure from ordinary law.

39. As other speakers had pointed out, article 6 was closely connected with article 7. The latter article contained an innovation, in that it stipulated that where extradition was not provided for in existing treaties, a legal basis for it was to be found in the draft articles.

40. As far as the drafting was concerned, he was not sure that the expression "without exception whatsoever" in article 6 was justified. It might be interpreted as applying to procedural exceptions, whereas the idea had been that the State in question must submit to its judicial authorities all cases covered by the draft articles, whatever their nature.

41. With regard to the word "priority" in article 7, paragraph 4, it must mean that the State in question had to deal with any request for extradition as a matter of urgency. The word "priority", used with reference to a request for extradition, in fact implied that where extradition had been made. He noted that under the same paragraph a request would have priority if it was received within six months after the communication required under article 5, paragraph 1. Once that period had elapsed, it would seem not to have priority any longer, especially as according to article 9 there was to be no time-limit for prosecution.

42. Mr. USHAKOV pointed out that the expression "without exception whatsoever" was also used in the Hague and Montreal Conventions and that the idea behind it was to avoid any express mention of political crimes.

43. With regard to Mr. Ago's suggestion that a clause similar to article 5 of the Montreal Convention should be included in the draft, it should be noted that that Convention related to offences which were of an entirely special nature as to the place where they were committed. To introduce the idea of extraterritorial jurisdiction into the Convention it had been necessary to adopt a particularly complex provision. In the draft articles, that idea had been introduced at the end of article 2, by a simple reference to the fact that the offence could have been committed either "within or outside" the territory of the State concerned.

44. Mr. BILGE said he approved of the substance of article 6. He considered, however, that the words "regardless of motive", at the beginning of article 2, made the words "without exception whatsoever", in article 6, unnecessary. Since the system adopted in the draft articles was not the same as that of the Hague and Montreal Conventions, there was no reason to retain these words.
50. Where international criminal law was concerned, he would draw attention to the signature of the European Convention on the Transfer of Criminal Proceedings. That Convention completed the system of penal cooperation set up under the Council of Europe, which was based both on the traditional procedures for extradition and mutual assistance in judicial matters, and on more advanced procedures such as the transfer of criminal proceedings from one country to another and the recognition and enforcement of foreign judgements in criminal cases.

51. He also drew attention to the first implementation of article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by judgements of the European Court of Human Rights. Under that provision, the Court had power to give just satisfaction to the injured party if the violation of the Convention could not be remedied completely under the internal law of the State concerned. Only the previous day, 22 June 1972, the European Court had given a judgement based on that provision awarding compensation of 20,000 DM to a private person who had been detained pending trial for a period exceeding that permitted under the Convention. That judgement might be of interest even beyond the European Convention on Human Rights, because provisions similar to those of its article 50 were to be found in other international treaties such as the General Act of Geneva.\(^5\)

52. Finally, the European Convention on Establishment provided for periodic reports giving information on the subject-matter of the Convention. The first report had now been published and was available.

53. It was customary for the observer for the European Committee to review the subjects being studied by the Commission which were of particular interest to the Committee. He had referred the previous year to the reservations expressed by certain States members of the Council of Europe to the draft convention on relations between States and international organizations. In their view, the draft convention extended privileges and immunities to an excessive degree and did not pay enough regard to the functional criterion. Meanwhile the Commission had added two provisions to its draft, one providing for consultations between the sending State, the host State and the organization (article 81) and the other for conciliation machinery (article 82).\(^6\) He thought that the insertion of those two provisions might favourably influence the final attitude of the member States of the Council of Europe towards the draft convention. As to the further procedure for examining it, there was a clear preference among member States of the Council for a diplomatic conference.

54. In that connexion he wished to draw attention to a new development: the practice of convening specialized ministerial conferences. Such conferences were not covered either by the draft convention on relations between States and international organizations, since they were not convened under the auspices of an organization, or by the Convention on Special Missions, as was clear from the commentary to article 2 of that Convention.\(^7\) It was to be expected, however, that such conferences would become more and more frequent, not only within the framework of the Council of Europe, but on a wider basis.

55. The question of the protection of diplomats against acts of violence was of particular concern to the member States of the Council of Europe. Some of them had, at first, questioned the desirability of drawing up a convention on the subject and had considered that it was essential to have the support of the main body of the international community. At all events, they would probably attach some importance to the escape clause now being considered for addition to the text of article 6.

56. On the problem of treaties between international organizations or between an international organization and a State, the European Committee had practically no experience to offer.

57. With reference to General Assembly resolution 2099 (XX) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law, the Council of Europe had undertaken to put the texts of the conventions drawn up under its auspices on computer tape, so as to provide information more rapidly on the concordance of expressions and legal notions. That was an experiment which might also be of interest to States outside the Council.

58. He had announced in 1971 that, in pursuance of the same resolution, lawyers from developing countries would be able to spend periods working with the European Committee.\(^8\) Through the kind assistance of Chief Justice Elias, a young and very able Nigerian lawyer had made a study visit to the Council of Europe and thus inaugurated the new scheme.

59. He wished likewise to draw attention to the publication of a first collection containing not only the texts of the conventions and agreements concluded under the auspices of the Council of Europe, but also the statements and reservations relating to them.

60. In conclusion, he stressed that the work of the European Committee was not in conflict with that of the Commission. It was only when a universal codification of legal rules proved impossible that the Committee set out to draw up provisions applicable at the regional level to States which had established ties of international co-operation with each other.

61. Noting that the Commission would not be able to be represented at the European Committee's next meeting, which was to be held the following week, he expressed the hope that a representative would be sent to the subsequent meeting to be held in November.

62. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his

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most enlightening report on the Committee's activities and for his kind invitation. He hoped to attend one of the Committee's forthcoming meetings.

63. Sir Humphrey WALDOCK expressed his appreciation of the statement just made on the valuable activities of the European Committee on Legal Co-operation, which showed the vigour of the Legal Department headed by Mr. Golsong.

64. Mr. BILGE thanked the observer for the European Committee for his kind words and congratulated him on his excellent statement.

65. Mr. ELIAS expressed his appreciation of the award to a young Nigerian jurist of the first fellowship given to a national of a developing country to study the work of the Council of Europe. There was a real need for developing countries to understand the Council's work and he hoped that the experiment would continue.

66. Mr. TAMMES, speaking also on behalf of Mr. REUTER, thanked the observer for the European Committee on Legal Co-operation for his interesting report. The work undertaken by the Committee on the legal aspects of ecological problems should inspire the Commission in dealing with that topic at some future time.

67. Mr. SETTE CÂMARA, speaking also on behalf of the other Latin American members of the Commission, expressed appreciation of the lucid and succinct statement made by the observer for the European Committee on Legal Co-operation. It was gratifying to find that the Committee was engaged in a study of the complex legal issues underlying the problem of pollution, which the Commission itself would certainly have to study before long.

68. The presence at the Commission's meetings of the observers for the Inter-American Juridical Committee and the European Committee on Legal Co-operation provided welcome evidence of the progressive universalization of international law.

69. Mr. USTOR expressed his admiration of the legal work of the Council of Europe and of the energy displayed by Mr. Golsong and the legal department which he directed.

70. Mr. USHAKOV associated himself with the tributes paid to the observer for the European Committee.

71. Mr. BARTOŠ congratulated Mr. Golsong on his outstanding statement and expressed his admiration for the work of the European Committee, which had duly sent its legal publications to members of the Commission.

72. He hoped that the European Committee would make it possible for European States not belonging to the Council of Europe to accede to the conventions it drew up.

73. Mr. RAMANGASOAVINA, speaking also on behalf of Mr. Yasseen, associated himself with the tributes paid to the observer for the European Committee on Legal Co-operation for his clear and interesting statement.

74. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation and the observer for the Inter-American Juridical Committee, who would be leaving Geneva shortly, for their attendance at the session.

The meeting rose at 1.10 p.m.

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1187th MEETING

Monday, 26 June 1972, at 3.10 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Cámara, Mr. Tabbibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Usakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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Succession of States in respect of treaties

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 1 (quinquies)

1. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 1 (quinquies):

Article 1 (quinquies)

Limitation of the present articles to lawful situations

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.

2. Article 1 (quinquies) belonged in Part I (General provisions). It dealt with the limitation of the draft articles to lawful situations, a matter which had been raised by several members, in particular during the Commission's consideration of the two texts for draft article 2 submitted by the Drafting Committee on first and second readings. The text now proposed by the Committee was short and self-explanatory. It was the result of a delicate compromise achieved after lengthy discussions and he hoped the Commission would approve it—on a provisional basis, of course, like all the other articles under consideration at that stage.

3. Mr. TABBIBI said he supported article 1 (quinquies).

4. Mr. USHAKOV said he had some doubts about the title, particularly in its French version. The wording seemed much too vague.

5. Mr. SETTE CÂMARA agreed that the title was not satisfactory. It seemed strange for the Commission to
state specifically that the draft dealt with lawful and not with unlawful situations. Perhaps the best course was to use a shorter title, which would simply refer to the limitation of the scope of the draft articles.

6. Sir Humphrey WALDOCK (Special Rapporteur) pointed out that there was already an article on the scope of the draft. He suggested that the criticism of the title might be met by amending it to read “Cases of succession of States covered by the present articles”.

7. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 1 (quinquies) with the title amended as suggested by the Special Rapporteur.

It was so agreed.

ARTICLE 8 (bis)

8. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 8 (bis):

Article 8 (bis)

Ratification, acceptance or approval of a treaty signed by the predecessor State

1. If before the date of the succession of States, the predecessor State signed a multilateral treaty subject to ratification and the signature had reference to the territory to which the succession of States relates, the successor State may ratify the treaty and thereby establish its status:

(a) As a party, subject to the provisions of article 7, paragraphs 2 and 3;

(b) As a contracting State, subject to the provisions of article 8, paragraphs 2, 3 and 4.

2. A successor State may establish its status as a party or, as the case may be, contracting State to a multilateral treaty by acceptance or approval under conditions similar to those which apply to ratification.

9. Article 8 (bis) belonged in Part III (Newly independent States). The Commission had already approved three articles in that part, namely, articles 6, 7 and 8. The Drafting Committee had reached the conclusion that those articles, as well as articles 8 (bis) and 9 to 11 (A/CN.4/L.183/Add.3) which it was now proposing to the Commission, should be grouped in a section 1 to be entitled “Multilateral treaties”. In view of that decision, the Committee considered it unnecessary to repeat the word “multilateral” in the titles of each of the articles and accordingly proposed that that word should be deleted from the titles of articles 7 and 8 which the Commission had already approved.

10. With regard to the text of article 8 (bis), when he had introduced article 8 (A/CN.4/L.183/Add.2) he had drawn the Commission’s attention to paragraph 1 (b) of the original text of that article as submitted by the Special Rapporteur in his third report; that paragraph specified that a new State could, on its own behalf, establish its consent to be bound by a multilateral treaty not in force at the date of succession if the predecessor State had, before that date, signed the treaty subject to ratification, acceptance or approval. The Drafting Committee had taken the view that the case envisaged in paragraph 1 (b), although it had become of marginal importance since the adoption of a procedure for new accessions to the League of Nations closed treaties, was worth providing for in the draft articles.

11. In its discussion of the text of article 8 the Commission had observed, however, that the question of a successor State’s ratifying a treaty on the basis of its predecessor’s signature arose with respect to all multilateral treaties, whether in force or not. The Drafting Committee had therefore agreed to remove paragraph 1 (b) from article 8 and propose a new article 8 (bis) dealing with multilateral treaties in force and multilateral treaties not in force: it was that article which was now before the Commission.

12. Paragraph 1 (a) of the proposed text covered the case of treaties already in force, as shown by the use of the term “party”. Paragraph 1 (b) covered the case of treaties not yet in force, as shown by the use of the term “contracting State”. The expression “under conditions similar to those which apply to ratification”, in paragraph 2, had been taken from article 14, paragraph 2, of the Vienna Convention on the Law of Treaties.

13. The Drafting Committee was fully aware that several members of the Commission held that the successor State derived no right from the mere fact that the predecessor State had signed a treaty subject to ratification or approval. The Committee believed, nevertheless, that article 8 (bis) should be included in the draft in order to enable governments to express their views on the matter.

14. Mr. USHAKOV, supported by Mr. REUTER, said that the words “et que la signature concernait le territoire” were an inadequate rendering into French of the phrase “and the signature had reference to the territory” in the opening sentence of paragraph 1.

15. The CHAIRMAN said he was not altogether satisfied with the English text either. The underlying idea was very difficult to express.

16. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the passage in question be replaced by the words “and by the signature intended that the treaty should extend to the territory”. That wording would give more explicit expression to the idea that the real intention of the signature was to extend the treaty to the territory.

17. Mr. REUTER said he reserved his position with regard to the French translation of that passage. He thought it would be better to refer to the intention shown by the predecessor State than to the physical act of signature. He also pointed out that, under the Vienna Conven-

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1. Article 0, approved at the 1176th meeting; see paras. 21 et seq.
2. See 1181st meeting, paras. 58 et seq.
3. Ibid., para. 76.
tion, initialling was equivalent to signature for expressing consent to be bound.  

18. The CHAIRMAN said that, if there were no further comments, he would take it that the Committee agreed to adopt the change of wording in paragraph 1 proposed by the Special Rapporteur.

   It was so agreed.

19. Mr. REUTER said he doubted whether the expression “peut établir sa qualité” in the French text of paragraphs 1 and 2 was satisfactory. It implied that the successor State could prove its status as a party independently of article 2, whereas the idea was that it could “acquire” the status of a party.

20. Sir Humphrey WALDOCK (Special Rapporteur) pointed out that the word “establish” was used in a number of articles of the Vienna Convention, in particular, article 16. It had already been used in articles 7 and 8 of the present draft in connexion with the action taken by a newly independent State to avail itself of its right to become a party or a contracting State to a treaty. It was true that the English verb “to establish”, as well as the French verb “établir”, also meant “to prove”, but that was not the sense in which it was being used in the present context or in the articles of the Vienna Convention to which he had referred.

21. Mr. USTOR (Chairman of the Drafting Committee) pointed out that if the French expression “peut établir sa qualité”, which had been criticized by Mr. Reuter, was altered in article 8 (bis), a similar change might be necessary in articles 7 and 8, which had already been approved by the Commission.

22. Sir Humphrey WALDOCK (Special Rapporteur) said it was important that no change should be made in either the English or the French text of articles 7 and 8 as already approved. Those articles had been deliberately couched in language which avoided any suggestion that the State concerned was becoming a new party to the treaty.

23. Mr. YASSEEN observed that the term “establish” had acquired a special sense in the Vienna Convention and had already given rise to long discussions in the Commission. In the case under consideration, the successor State did, to a certain extent, prove its status by ratifying the treaty, so that the word “establish” could well be retained.

24. Sir Humphrey WALDOCK (Special Rapporteur) urged that the expression “establish its status” be retained in both paragraphs of article 8 (bis).

25. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 8 (bis), with the amendment to paragraph 1 already adopted. He would also take it that the Commission approved the consequential change in the titles of articles 7 and 8, namely, the deletion of the word “multilateral” from those titles.

   It was so agreed.

26. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 9:

   Article 9

   Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States unless:

   (a) In notifying its succession to the treaty, it expresses a contrary intention or formulates a new reservation which relates to the same subject-matter and is incompatible with the said reservation; or

   (b) The said reservation must be considered as applicable only in relation to the predecessor State.

2. When establishing its status as a party or a contracting State to a multilateral treaty under article 7 or 8, a newly independent State may formulate a new reservation unless:

   (a) the reservation is prohibited by the treaty;

   (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

   (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3. (a) When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4 of the Vienna Convention on the Law of Treaties apply.

   (b) However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

27. During the Commission’s discussion of the Special Rapporteur’s reports, several members had expressed their opposition to the method of drafting by reference. In deference to their views, the Drafting Committee had dropped some of the references to specific provisions of the Vienna Convention contained in the previous text of article 9 as submitted in the Special Rapporteur’s third report (A/CN.4/224). The Committee had eliminated the reference to article 19 of the Vienna Convention by reproducing the relevant provisions of that article in paragraph 2, sub-paragraphs (a), (b) and (c) of the text now under discussion. The majority of the Committee had considered, however, that the references to articles 20, 21 and 22, and to article 23, paragraphs 1 and 4, of the Vienna Convention should be retained. The reproduction of all those provisions would have made the text of article 9 unduly long and cumbersome; moreover, the inclusion of some references in article 9 would give governments a reason to express their views on the whole question of drafting by reference.

28. In paragraph 1 of the article, the Committee had considered it unnecessary to include the phrase “made in conformity with article 11” after the words “by a notifi-

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1 For previous discussion see 1166th meeting, paras. 84 et seq. and 1167th meeting.

cation of succession”; it was obvious that the notification would be in conformity with article 11, since that was, precisely, the article which dealt with notification of succession. The Committee accordingly suggested that the Commission should delete that phrase from paragraph 1 of articles 7 and 8, as approved at the 1181st meeting.

29. Paragraph 1 (a) of the Special Rapporteur’s original text of article 9 provided that the successor State would not be considered as maintaining any previous reservations applicable in respect of the territory if it formulated different reservations. Several members had expressed the view that the test of compatibility between the two sets of reservations was preferable. The Drafting Committee had accordingly used the wording “or formulates a new reservation which relates to the same subject-matter and is incompatible with the said reservation”. The words “the said reservation” were intended to refer to the previous reservation.

30. In paragraph 3 (a), the Committee had included the words “on the Law of Treaties” after the words “the Vienna Convention”. Since the draft would contain only a few references to the Vienna Convention, the Committee had considered that it was unnecessary to define that expression in article 1; hence the full title would have to be given each time the Vienna Convention was mentioned in the draft.

31. Mr. USHAKOV observed that the French text of paragraph 1 would be closer to the English if the expression “applicable à l’égard de son territoire” were replaced by “applicable à l’égard du territoire en question”.

32. As to the references to the Vienna Convention, he had no objection to including them in paragraph 3, but the Commission might find itself obliged, when it came to the second reading, to replace them by a text reproducing the relevant provisions of that Convention.

Article 9 was approved.

ARTICLE 10*

33. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 10:

Article 10

Consent to be bound by part of a treaty and choice between differing provisions

1. Except as provided in paragraphs 2 and 3, when a newly independent State establishes its status as a party or contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining the predecessor State’s:

(a) consent, in conformity with the treaty, to be bound only by part of its provisions; or

(b) choice, in conformity with the treaty, between differing provisions.

2. When so establishing its status as a party or contracting State, a newly independent State may, however, declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

3. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any such choice.

34. The Committee had shortened the title by deleting the opening words “Succession in respect of”. It had made only a few changes in the text of the article, most of them in order to bring it into line with articles already approved by the Commission. In paragraph 1 (a) and in the title, the Committee had replaced the words “an election to be bound” by the words “consent to be bound”, the formula used in the corresponding provisions of article 17 of the Vienna Convention on the Law of Treaties.

35. Mr. USHAKOV asked whether it would not be better to replace the word “qualité” by “statut” in the French text of paragraphs 1 and 2.

36. Mr. REUTER said that while “qualité” was unsatisfactory, “statut” was worse.

37. Sir Humphrey WALDOCK (Special Rapporteur) said that, in the Drafting Committee, Mr. Ago and some other members had expressed the view that the term “qualité” was the closest French word to the English “status”.

Article 10 was approved.

ARTICLE 11*

38. Mr. USTOR (Chairman of the Drafting Committee) said the Committee proposed the following title and text for article 11:

Article 11

Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 7 or 8 must be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State making it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(a) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

39. The Drafting Committee had shortened the original title, “Procedure for notifying succession in respect of a multilateral treaty”, to “Notification of succession”. The Committee had also rearranged the provisions of the article in the interests of clarity. It had added paragraph 3 (b), relating to the receipt of the notification of succession by the State concerned or by the depositary, and paragraph 3 (c) relating to communication of the notification by the depositary to the State concerned. The Committee wished to emphasize that the provisions

* For previous discussion see 1168th meeting.

* For previous discussion see 1168th meeting, paras. 38 et seq.
of those paragraphs related to the date at which the notifi-
cation was considered as having been made and not
to the legal effects of notification. Those legal effects
would form the subject-matter of another article.

40. Mr. USHAKOV, supported by Mr. REUTER,
maintained that paragraph 2 referred to the action of the
State's representative, not the action of the State itself,
and suggested that the word “making” be replaced by a
word such as “communicating” or “transmitting”.

41. The CHAIRMAN, speaking as a member of the
Commission, said that in the case of a treaty that was not
of great importance, the procedure might well be for a
First Secretary to bring the instrument of notification
together with his Ambassador's full powers. Perhaps the
difficulty could be overcome by saying that the represen-
tative who signed the notification had to produce the
full powers.

42. Mr. THIAM pointed out that, according to para-
graph 2, if the notification was not signed by the Head
of State, Head of Government or Minister for Foreign
Affairs, it was made, that was to say “communicated”,
by a representative of the State. He would have to pro-
duce full powers for that purpose, because the notifica-
tion would not have been signed by any of the three
persons covered by the first alternative.

43. Mr. RAMANGASOAVINA said that he agreed
with Mr. Thiam, but would accept the text proposed by
the Drafting Committee.

44. Sir Humphrey WALDOCK (Special Rapporteur)
said that the purpose of the provision was to deal with
the frequent case in which the instrument of notification
was not signed by the Head of State, the Head of Govern-
ment or Minister for Foreign Affairs and was delivered
by an ambassador or permanent representative. The am-
bassador or permanent representative then had to pro-
duce his full powers, if called upon to do so.

45. He suggested that the words “the representative
of the State making it may be called upon…” should be
replaced by some formula modelled on the last sentence
of article 67, paragraph 2 of the Vienna Convention on
the Law of Treaties, such as: “the representative of the
State communicating the notification may be called
upon…”.

46. The CHAIRMAN said that, if there were no further
comments, he would take it that the Commission agreed
to approve article 11 with the amendment to paragraph 2
proposed by the Special Rapporteur.

*It was so agreed.*

**Draft articles submitted by the Special Rapporteur**

(continued)

**ARTICLE 21**

47. *Other dismemberments of a State into two or more States*

1. When part of a State, which is not a Union of States, becomes
another State either by separating from it or as a result of the
division of that State, the rules in paragraphs 2 and 3 govern the
effects of that succession of States on treaties which at the date of
the separation or division were in force in respect of that part.

2. The obligations and rights of the successor State and of other
States parties under any such treaty shall be determined by application
of the relevant provisions of articles 7 to 17 of the present
articles.

3. In the case of a separation, any such treaty remains in force
as between the predecessor State and other States parties in relation
to the remaining territory of the predecessor State unless it appears
from the provisions or from the object and purpose of the treaty
that:

- (a) It was intended to relate only to the part which has separated
  from the predecessor State;

- (b) The effect of the separation is radically to transform the
  obligations and rights provided for in the treaty; or

- (c) It is otherwise agreed.

48. The CHAIRMAN invited the Special Rapporteur
to introduce article 21 of his draft (A/CN.4/256/Add.3).

49. Sir Humphrey WALDOCK (Special Rapporteur)
said that, in his fairly long commentary to article 21,
he had examined such practice and views as existed on
the question of dismemberment. His research had led to
the conclusion that there was not much evidence of a
special category of State succession in cases of dismember-
ment other than the dissolution of a Union.

50. Nor was there any evidence of a special category
of “division” of a State in those cases where the process
of dissolution resulted in the complete extinction of the
previously existing State. In practice, that was an ex-
tremely rare phenomenon. For historical and political
reasons, one or other of the territories usually claimed
that it continued the old State. Cases of that kind conse-
quently presented themselves as the emergence of one or
more new States by way of separation from the old
State.

51. In the concluding paragraphs of the commentary
he had examined the modern examples of what had some-
times been called the two Germanies, the two Koreas
and the two Viet-Nams. So many special factors were
involved in those cases, however, that it was not easy
to discern any particular category, and they were com-
plicated by the issue of non-recognition. The ultimate
implications of those examples in terms of State succe-
sion had not yet become clear.

52. The result of his research was expressed in the pro-
visions of article 21, namely, that the rules relating to
newly independent States should be applied where the
separated States were concerned. Some qualification
of the rules was necessary, however, with respect to the
part that was regarded as the continuation of the previous
State; for the truncation of its territory might seriously
affect some of the treaties previously in force with resp-
tect to the whole territory. Hence the provisions of para-
graph 3.

53. Mr. USHAKOV said that there appeared to be
some inconsistency between the title and the text of article 21. The title referred to the dismemberment of a
State “into two or more” States, whereas the text did not
refer to cases in which a State broke up into more than
two parts.

54. Sir Humphrey WALDOCK (Special Rapporteur)
said that the possibility of more than one part of a State
breaking away from it was implicit in paragraphs 1
and 3. The words “When part of a State . . . becomes another State. . .” could refer to more than one territory which broke away from the main body of the State.

55. Mr. TABIBI said he fully agreed that new States resulting from the dismemberment of a State should be covered by articles 7 to 17 and that the predecessor State, which continued its existence, should continue to be bound by its treaty obligations. Past and present practice and theory generally supported those provisions.

56. It was not clear from paragraph 3 (a), however, whether a treaty that related only to the part which had separated from the predecessor State remained in force for that part, or whether it lapsed altogether. If it was intended that the treaty should remain in force, paragraph 3 (a) weakened the whole article, was contrary to the “clean slate” principle, and prejudged the rules on territorial treaties that would be discussed by the Commission under article 22.

57. He suggested that the word “other” should be deleted from the title, because it gave the impression that dismemberments of a State had been dealt with in earlier articles.

58. Lastly, he wished to comment on the inclusion of Bangladesh as an example of a dismemberment in paragraph (14) of the commentary. As he had already stated during the discussion of article 20, because of the historical background and geographical situation of East Bengal, the case of Bangladesh should be considered as a dissolution of a Union of States rather than as a case of dismemberment. The Moslem League leaders, in the Lahore resolution of 1940, had supported the creation of a Pakistan consisting of four component parts, each having a separate administration, namely, the North-West Frontier Province, Sind, Punjab and East Bengal. That resolution had been adopted because the peoples of the four units had separate racial, linguistic and cultural heritages. When the military régime had taken over in 1955 and abolished the independence of the western units, the people of all four units had resisted and the autonomy of the western provinces had finally been recognized. Even now, the Punjab, Sind and the North-West Frontier each had their own legislative assembly and their own separate government and administration. He wished to make it clear, however, that Afghanistan did not recognize the North-West Frontier as part of Pakistan. Bangladesh had separated from Pakistan because it had aspired to full internal freedom, while wishing to maintain loose links with West Pakistan. For those reasons, he maintained that it should be considered as a case of dissolution of a Union of States, and not as a case of dismemberment.

59. Sir Humphrey WALDOCK (Special Rapporteur) said there seemed to be some misunderstanding. Paragraph 3 (a) dealt only with the predecessor State, that was to say the State which continued to exist as an international personality and whose treaties consequently continued to attach to it. The only question was the possible effect of the separation on certain treaties.

60. So far as Bangladesh was concerned, although Pakistan as originally constituted had had two recognizable halves, it was not a Union of States as defined in the draft articles. In order, therefore, to maintain the logic of the draft articles, the case of Bangladesh must, in that context, be viewed as a dismemberment.

61. Mr. TAMMES said that draft article 21 and the commentary reflected the practice of abrupt changes, since most of the secessions and dismemberments described had been the result of wars, violence, revolutionary movements or outside interference. It was understandable that, in such cases of rupture of constitutional ties, the seceding State would not be particularly favourably disposed towards continuation of treaties entered into by the predecessor State. Article 21 respected that position and proposed the “clean slate” rule, which adequately reflected the political realities of such cases.

62. There were, however, cases in which dismemberment had been the result of a peaceful and evolutionary process, but which would still be covered by the definition in paragraph 1. Examples of such dismemberment were the separation of Norway and Sweden, the attainment of independence by Iceland, and the attainment of independence by Egypt and the former British Dominions from the United Kingdom and by Brazil from Portugal. All those were cases of friendly separation, in which continuity of treaty relationships used to be the rule. There might indeed be cases of secession covered by article 20 in which there would be little reason to apply the principle of ipso jure continuity, and cases of secession covered by article 21 in which there would be little reason to apply the “clean slate” rule.

63. He did not wish to propose that there should be another rule covering cases of dismemberment of a peaceful and evolutionary nature, but he would suggest that the Commission should leave it to the newly independent State to determine for itself whether or not it wished succession to be governed by articles 7 to 17.

64. Mr. USHAKOV said that article 21 covered the case in which a State, one part of which had separated off to form another State, continued to exist as a subject of international law, becoming the predecessor State. But it did not cover the possibility of a State’s breaking up into two or more new States without the original State subsisting. Since the article provided that, following such a separation, part of the territory of a unitary State became a newly independent State, which would then be covered by draft articles 7 to 17, its purpose could only be to establish the situation of the predecessor State. The key paragraph was paragraph 3, which dealt with that situation. However, the case in which the original State no longer existed, and there was consequently no predecessor State, was not covered by article 21.

65. As to the drafting, it was hard to see why the Special Rapporteur had mentioned both separation and division in paragraph 1, since the article covered only separation. When a division took place, there was no longer an original State. Moreover, since the original State had been a unitary State, treaties existing before the separation of part of its territory had been in force in respect of the whole territory and not only “in respect of that part”, as stated in paragraph 1. In paragraph 3, it was ambiguous to speak in the same sentence of the “predecessor State” and the “remaining territory of the
predecessor State”. It might be better to call the predecessor State something else.

66. Sir Humphrey WALDOCK (Special Rapporteur) said that the problem might be solved by referring in paragraph 1 to the “division and extinction of that State”, and then in paragraph 2 to the “rights of a successor State”, because paragraph 2 was meant to cover extinction as well as division. In the case of extinction there was more than one successor State and no continuation of the predecessor State. There were several ways of looking at the situation, but the only conclusion that could be drawn from practice was that there was a tendency for one entity to cling to the personality of the former State and thus to be regarded as a predecessor State for the purposes of the law.

67. Mr. BILGE asked the Special Rapporteur whether he had used the expression “in force in respect of that part” in a sense different from that of the expression “in respect of the territory” used in all the other articles, or whether it was merely a drafting point.

68. Sir Humphrey WALDOCK (Special Rapporteur) said that the phrase “treaties ... in force in respect of that part” in paragraph 1 referred to treaties in force in respect of the original State. It might perhaps be more correct to say “in respect of that part of the territory”.

69. Mr. USHAKOV said that in the case of a unitary State, only localized treaties applied to one part of the territory alone. The expression “in force in respect of that part” was therefore not appropriate. If, as the Special Rapporteur said, paragraph 2 covered both the case of separation, in which the original State subsisted and the case of complete division, in which it did not subsist, it would be difficult to accept the “clean slate” principle in the latter case, because under some treaties—commercial treaties, for example—obligations which were sometimes of a very concrete nature continued to exist between the various States resulting from the division and third States.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that the “clean slate” principle was a very inexact expression. The rules in articles 7 to 17, while they imposed no obligation, provided a basis for the continuity of both multilateral and bilateral treaties. If there was a complete split, with extinction of the original State, both parts would be placed in a completely different situation. It would be difficult to require the new States to take over the obligations of the previous State despite the radical change in their situation. Fortunately, such cases did not arise in practice.

71. The CHAIRMAN asked whether there was any way of objectively defining extinction. It would be hard to apply the purely subjective rule that whenever a division of a State occurred the status of any treaties in force depended on whether one or another of the resultant States asserted its claim to be a continuation of the original State.

72. Sir Humphrey WALDOCK (Special Rapporteur) said two factors were involved—the assertion of a claim by the new entity and recognition by the international community. It might be argued that, in the case of Bangladesh for example, where there was a major division of territory, it ought to be irrelevant whether one of the resultant States chose to call itself by the former name or not, since the effects of division were so radical that the whole situation was transformed.

73. The CHAIRMAN asked whether that meant that States which had treaties with Pakistan were free to say that those treaties had ceased to apply.

74. Sir Humphrey WALDOCK (Special Rapporteur) said that the attitude taken by the World Health Organization and the International Labour Organization could be taken as a pointer to how to deal with that situation. What had formerly been West Pakistan was being treated as Pakistan, and the other half of the country as a new State.

75. The CHAIRMAN observed that if the article referred to division and extinction of the former State without defining extinction, the question whether the former State continued to exist or not would be open to dispute.

76. Mr. USHAKOV said he agreed with the view Mr. Ustor had expressed on previous occasions that it was necessary to take into account cases in which the division took place by mutual consent, obligations towards third States being shared among the States resulting from the division by means of a devolution treaty. In the absence of such consent there was not a division, but a separation.

77. Sir Humphrey WALDOCK (Special Rapporteur) said that, under the rules established by the law of treaties, a devolution treaty could not by itself create a sufficient legal nexus for continuity. The expression of consent to be bound was required for that purpose. In cases of the kind Mr. Usakov had in mind, there was usually some kind of settlement, also involving third States.

78. Mr. USHAKOV said that although there might be some doubt about succession in respect of treaties, in respect of matters other than treaties third States retained certain obligations towards new States, for example, with regard to debts to be shared out among several successor States. It was perhaps worth considering whether the same did not apply to treaties.

The meeting rose at 6.5 p.m.

1188th MEETING

Tuesday, 27 June 1972, at 9.40 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tamames, Mr. Thiam, Mr. Tsuruoka, Mr. Usakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 5; A/CN.4/L.182 and L.186)

[Item 5 of the agenda]
(resumed from the 1186th meeting)

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLE 6 (continued) 1 and ARTICLE 7

1. The CHAIRMAN invited the Commission to continue consideration of article 6 of the draft submitted by the Working Group (A/CN.4/L.186), in conjunction with article 7, which read:

   Article 7

1. The crimes set forth in article 2 shall be deemed to have been included as extraditable crimes in any extradition treaty existing between Parties. Parties undertake to include those crimes as extraditable crimes in every future extradition treaty to be concluded between them.

2. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it shall consider the present draft articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the other conditions provided for by the law of the requested State.

3. Parties which do not make extradition conditional on the existence of a treaty shall recognize the crimes as extraditable crimes between themselves subject to the conditions provided for by the law of the requested State.

4. An extradition request from the State in which crimes were committed shall have priority if received by the State in whose territory the alleged offender has been found within six months after the communication required under paragraph 1 of article 5 has been made.

2. The provisions of article 7 were based on the relevant provisions of the Montreal and the Hague Conventions. 2 There was a substantial change in paragraph 2 in that the Working Group had decided to use the stronger formula "it shall consider", rather than the formula "it may at its option consider", used in the earlier Conventions. Paragraph 4 of article 8 of the Montreal Convention was an expression of a legal position already covered in article 2 of the present draft, so it was not necessary to repeat it.

3. Paragraph 4 of the present draft introduced the question of the procedure for dealing with requests for extradition from more than one State. The Working Group had thought it best to give priority to the State in which the crime had been committed, because prosecution was greatly simplified if the trial took place in that State and it was that State which had an obligation to protect the person or persons injured. If a request was received from the State in which the crime had been committed within six months of its being notified that the alleged offender had been found, that State would be given priority. Although that might delay the trial, it had been decided that such a period should be allowed, because of the rather complicated procedures governing extradition requests.

4. Mr. QUENTIN-BAXTER said he was prepared to accept the wording of article 6, because it corresponded to that of article 7 of the Montreal and the Hague Conventions. He thought, however, that the second sentence of article 7 of the earlier Conventions, which slightly softened the peremptory nature of the first sentence, should also be included in the draft.

5. There was an obvious difference between article 7 of the draft and the corresponding articles of the Montreal and the Hague Conventions. In those two Conventions it was clearly a question of adding new offences to the calendar of crimes, but the offences listed in article 2 of the draft were confined to serious offences against the person, all of which came into the category of common crimes. Thus, while the first sentence of article 7 was essential in the earlier Conventions, it was not so in the present draft, because States would normally include those offences in their extradition treaties. He therefore suggested that the first sentence of article 7, paragraph 1 might be redrafted to read: "If any of the crimes set forth in article 2 are not included as extraditable offences in extradition treaties, then they shall be deemed to be so included." That wording would make it clear to States that they were not being asked to introduce any new crimes, but simply to extend the scope of their jurisdiction. He had deliberately used the term "extraditable offences" instead of the term "extraditable crimes" used in the draft, because the former term had been universally used in the past and there seemed to be no good reason for the innovation.

6. He was surprised that, in paragraph 2 of article 7, the Working Group had not followed the precedents it had followed so closely earlier in the draft, but had used the compulsory rather than the optional formula. It was difficult to imagine that the Montreal and the Hague Conventions would have received the same support if that formula had not been used. If support was to be mustered for the draft convention, it was important that it should adhere as closely as possible to the precedents where they were applicable.

7. Mr. REUTER said it was his understanding that article 6 would be supplemented by a fundamental principle of international law already given expression in the Hague and Montreal Conventions, namely, discretion regarding the expediency of prosecution. In France, that principle was applied even in the case of an attempt on the life of a Head of State. If the State in whose territory the alleged offender was found decided that, for political reasons, in particular, it was not expedient to prosecute, it should not on that account be regarded as under an obligation to extradite, since it would have taken the alternative course provided for in article 6.

8. If that was so, article 7 called for two comments. First, the obligation to extradite under existing or future

1. For text see 1186th meeting, para. 24.
treaties, laid down in paragraph 1, must be understood in the light of the alternative provided for in article 6. As it stood, that provision of article 7 was much stricter than article 6.

9. His second comment could be illustrated by a purely hypothetical case. Suppose that a Cuban national belonging to an insurgent movement had fled to France after having murdered a Cuban ambassador in the United States of America, and that his accomplices had subsequently seized power in Cuba: on the basis of the text before the Commission, the United States Government might give France the choice between the two alternatives laid down in article 6. France would be in a very embarrassing position if the Cuban Government then informed it that the extradition or prosecution of its national would cause serious deterioration in relations between the two countries. Moreover, under article 7, paragraph 4, an extradition request from the State in which the crime had been committed would have priority. In order to avoid situations of that kind, he proposed the insertion in article 7 of a provision under which the State in whose territory the offender had been found might consider itself relieved of the obligation to extradite or prosecute when the State presenting it with that choice was the State in which the crime had been committed, not the State of which the victim was a national.

10. He would not press for the inclusion of such a provision, but wished to point out that unless article 7 was amended on those lines, States would probably reserve the right not to prosecute, on the strength of the principle of expediency.

11. Mr. USHAKOV said that not only the draft articles relating to extradition, but many others might be difficult to apply in certain exceptional situations with which any State might be faced. It should be borne in mind, however, that the Commission's duty was to prepare articles calculated not only to protect diplomats and assimilated persons, but also to preserve friendly relations between States. It should therefore confine itself to the situations most likely to arise. Moreover, States could be expected to be wise enough not to request extradition where it might lead to a deterioration of the political situation. He therefore considered articles 6 and 7, as proposed by the Working Group, acceptable.

12. In article 7, paragraph 2, the option provided for in the corresponding provision of the Montreal Convention had been converted into an obligation to extradite, if the State in question decided not to prosecute the alleged offender. The option clause was a strange one, since it did not offer a choice between extradition and prosecution, but rather expressed the faculty of the State concerned not to extradite the offender and to grant him asylum. For two stages had to be distinguished. First, the State must decide whether prosecution was expedient. If its decision was negative, there was obviously no question of either extraditing or punishing the alleged offender, who could then only be granted asylum. It was only in the opposite case that there was a choice between extradition and prosecution.

13. Mr. AGO, referring to Mr. Reuter's statement, said that article 7 might give the impression of laying down an obligation to extradite. In fact, under that article States remained entirely free to extradite or not to extradite. Article 7, as drafted, was only intended to ensure that extradition was not rendered impossible by the existence of a treaty or of internal laws excluding political crimes from the list of extraditable offences. Once those obstacles had been removed the State nevertheless remained free to decide whether it wished to extradite or whether it preferred to prosecute the alleged offender itself. The only obligation it could not evade was to choose one course or the other. That system seemed logical, but it was essential to formulate it clearly.

14. Unlike Mr. Reuter, he did not think the last sentence of article 7 of the Montreal Convention should be regarded as a saving clause. That sentence read: "Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." It did not seem that a State could use that provision as a pretext for neither extraditing nor prosecuting the alleged offender. He considered the sentence ambiguous and doubted, in any case, whether a loophole was needed to cover the case in which the perpetrators of a violent attack seized power. Their crime remained reprehensible whatever the situation, and such a case had no place in the articles under consideration. Perhaps the clause he had quoted from the Montreal Convention could be inserted in the draft between square brackets, so that governments could give their views on the question.

15. Mr. RAMANGASOVINA said that the purpose of article 7, paragraph 1, was to provide a legal basis for all cases of extradition, whether there was an extradition treaty between the States concerned or not. To attain that end, a clause extending the scope of existing treaties had first been included, but he thought it would have been better to emphasize agreement between the parties than to provide for compulsory extension of their extradition treaties. The provision might then be drafted on the following model: "The Parties agree [undertake] to treat the crimes set forth in article 2 as extraditable under any extradition treaty." It would not be necessary to add the words "existing between Parties", since the rule would be formulated in general terms. That drafting change was important, for it would make it possible to view the problem from a totally different angle.

16. Mr. REUTER, referring to Mr. Ago's statement, said that article 5 of the 1971 OAS Convention was drafted in clear terms: "the requested State . . . is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory". That was the sole obligation of the State with regard to prosecution. If the national authorities took a negative decision, the obligation to extradite was not revived. It should be noted that in most countries it was a judicial authority that decided whether prosecution was expedient having regard to the facts of the case. True, a State should not exert pressure on its judicial authorities, but it might well decide that there would be no prosecution in a particular case. That prerogative
was reduced in the Montreal Convention, however, and was to be entirely eliminated in the draft under consideration. He could not agree that a State which did not punish the alleged offender when its judicial authorities had decided against prosecution, must extradite him. Once again, he must express his opposition to the “maximum” solutions adopted in the draft. There was certainly no need to fear that States would abuse the principle of the expediency of prosecution in order to avoid instituting proceedings in the case of an outrageous murder. Unlike Mr. Ushakov, who relied on the wisdom of States, he thought that political considerations might lead many States to demand the full application of the text.

17. Although the definition of a violent attack was very wide, which was in itself to be welcomed, States must nevertheless be left free to apply the principle of the expediency of prosecution—a fundamental principle of criminal procedure which most of them were not prepared to abandon.

18. Mr. YASSEEN said he seriously doubted whether States would accept the articles on extradition. Those articles not only confronted them with a difficult choice between extradition and prosecution, but went so far as to modify extradition treaties concluded on the basis of concepts to which some States were strongly attached. Moreover, it was obvious that the questions raised in that part of the draft were highly political and that their settlement was in practice based on considerations of expediency rather than of legality. And the draft excluded ab initio the régime of asylum, to which many States attached great importance.

19. The crimes covered by the draft should, if possible, be the subject of prosecution, but the nature of international relations and of the international legal order must be taken into account. The attitudes of States to those crimes varied widely, and they should not be obliged to act in ways that were clearly incompatible with their political convictions.

20. The alternative in article 6 should therefore be interpreted as allowing the national authorities to decide, in accordance with internal law, not to prosecute the alleged offender, which would relieve the State concerned of its obligation to extradite.

21. In view of political realities and the need to make the Commission’s work effective, he thought the provisions in articles 6 and 7 were too rigid: they unduly reduced the freedom of States to use their own judgment, which was often based on political considerations. In any case, it was difficult to regard those articles as reflecting positive international law.

22. Mr. SETTE CÂMARA said he was in favour of retaining draft articles 6 and 7 as they stood. The system envisaged by the Working Group was based on the alternatives of extradition and prosecution. If another possibility was introduced—the faculty of a State to decide whether or not it was expedient to prosecute—the present situation would remain unchanged and the draft convention would serve no purpose. If, in referring to the decision whether or not to prosecute, Mr. Reuter had in mind the stage in criminal proceedings when the judge, on the basis of the preliminary investigation, made a decision on whether further proceedings should be taken, his position was perfectly acceptable. If, on the other hand, he meant that the government itself had another option and could decide neither to extradite nor to prosecute, that would defeat the purpose of the convention.

23. He agreed with Mr. Ago’s suggestion that the last sentence of article 7 of the Montreal Convention should be included between square brackets, because he, too, found the wording ambiguous.

24. Mr. AGO observed that the discussion turned on a question of criminal procedure. The State concerned did not have to choose between extradition and punishment, but between extradition and prosecution. In the event of prosecution, it was not obliged to punish; for the examining magistrate might find that there were no grounds for prosecution or the court might find the accused not guilty. Substantive criminal law would have to be amended only to ensure that the acts covered by the draft, if their authors were prosecuted in the country and found guilty by the court, would be punished with special severity; in addition, criminal procedure would have to be so amended that, if extradition were refused, a State could not invoke the principle of territoriality to claim that it had no jurisdiction.

25. Thus article 6 did not lay down an obligation to punish, but an obligation to examine the case for the purpose of prosecution, and the form of words used in the OAS Convention might perhaps be preferable because it was more explicit. Members had therefore been wrong in thinking they saw “maximum” solutions in the text, the provisions of which were essentially the same as those of the conventions on which the articles under consideration were based. Hence he saw no reason why the draft should not be more closely modelled on the existing Conventions, particularly if that would increase its chances of acceptance.

26. Mr. ELIAS said it was his understanding that the purpose of the draft convention was to create a new situation, ruling out the possibility of asylum being granted where there was proof that one of the offences listed in article 2 had been committed. Several members of the Commission had warned that if the obligation to prosecute or extradite was set against the right to give asylum in absolute terms, it would be difficult to secure support for the draft convention. There was considerable force in that argument. The problem lay in the fact that, under article 6, the State in whose territory the alleged offender was found was allowed only two possibilities: prosecution or extradition. If, however, the term “prosecution” was interpreted to mean that the State in question should apply its normal internal machinery, including the procedure to establish the prima facie liability of the alleged offender to punishment, he did not think there was any cause for concern. The article did not say that the alleged offender must be punished in every case, since States could clearly not be asked to presume his guilt. In his view, it would be contrary to the normal rules of interpretation to place any other construction on the article. If the State would ultimately be able to decide whether or not to punish the offender, even if he was found guilty, the present
situation would remain unchanged and there would be no point in preparing the draft convention.

27. Mr. Reuter had said that, whereas article 6 laid down the choice between prosecution and extradition, article 7 dealt entirely with problems of extradition, and the link between the two articles was not clear. To meet that point, a phrase such as “Subject to the provisions of article 6” might be inserted at the beginning of article 7, thus indicating that article 7 should be interpreted in the light of article 6.

28. Mr. Quentin-Baxter had argued that, unlike the Montreal and Hague Conventions, the present draft was not concerned with a new kind of offence. It was, however, attempting to create a new situation whereby offences against diplomats would no longer be tolerated and States would not be given too wide discretion once guilt had been established. The new ideas put forward in the draft convention should be submitted to governments and to the General Assembly for their consideration. While there might be room for improvement in the drafting of articles 6 and 7 along the lines he had indicated, the substance of those provisions was fully acceptable.

29. Mr. Ushakov said that the words “aux fins de poursuites” at the end of the French text of article 6 should be replaced by the words “pour l’exercice de l’action pénale”, as in article 7 of the Hague and Montreal Conventions. Article 6 of the draft followed the first sentence of article 7 of those Conventions almost word for word, except that the phrase “and whether or not the offence was committed in its territory” had been deleted, the Working Group having considered it superfluous because extraterritorial jurisdiction was provided for in article 2 of the draft. In addition, the phrase “and without undue delay” had been added. Thus there was not, as Mr. Reuter thought, such a great difference between article 6 of the draft and article 7 of the previous Conventions.

30. The Working Group had thought it preferable to replace the last sentence of article 7 of the Hague and Montreal Conventions by article 8 of the draft, which was stronger. He would have no objection to restoring that sentence to article 6 of the draft, but he preferred article 8.

31. It could thus be seen that the draft articles followed the previous Conventions quite closely, and if the provisions of those Conventions had been accepted, there was no reason why article 6 should not.

32. Mr. Tsuruoka (Chairman of the Working Group) said he agreed with the views expressed by Mr. Ago and Mr. Ushakov. The draft as a whole, and articles 6 and 7 in particular, was conceived on the same lines as the previous Conventions. It was based, first, on the idea that States parties should make the crimes specified in article 2 punishable under their internal law by severer penalties than similar crimes against persons not enjoying international protection; and secondly, on the idea that States parties must recognize extraterritorial jurisdiction over such crimes.

33. The draft also specified how States parties were to collaborate in dealing with terrorism against interna-
be required, possibly in the commentary, regarding the operation of the six months' time-limit. Where a request was made after the expiry of that time-limit, the question arose whether it would in any way affect proceedings initiated in the State where the alleged offender had been found.

39. The CHAIRMAN, speaking as a member of the Commission, said that the Working Group's intention in drafting paragraph 4 of article 7 had been that an extradition request made by the State in which the crime had been committed should have priority over any other extradition request. The State in whose territory the alleged offender had been found could always prosecute the offender and, of course, could do so before the expiry of the six-month period mentioned in the paragraph.

40. Mr. QUENTIN-BAXTER said that, in view of the comments made by other members, he wished to amplify two points he had made in his earlier statement.

41. In the first place, his remarks on the difference between the present draft and the Hague and Montreal Conventions related solely to the nature of the offences. The 1971 Montreal Convention covered a number of offences against air navigation, such as damage to an aircraft or to air navigation facilities and the spreading of false information, which endangered the safety of aircraft in flight. The Hague Convention likewise covered certain specified acts against aircraft. The main ingredients in many of those offences were not adequately reflected in the lists of extraditable offences embodied in normal extradition treaties. It had therefore been found necessary to include in both of those Conventions a clause, the effect of which was to extend the catalogue of extraditable crimes, such as: "The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States".

42. The position was quite different with regard to the present draft, which dealt solely with serious crimes against the person. Those crimes were normally at the head of the list included in all existing extradition treaties. In that respect, therefore, the draft asked for much less than the Hague and Montreal Conventions. It would be only in very rare cases that the list embodied in article 2 of the draft would add anything to the lists of extraditable offences in existing extradition treaties.

43. For those reasons, he had suggested that it would be more accurate if an additional proviso were inserted at the beginning of article 7, paragraph 1, on the following lines: "If any of the crimes set forth in article 2 are not included as extraditable offences in any extradition treaty between Parties, then they shall be deemed to be so included."

44. The second point he wished to amplify related to the words "at its option" which appeared in article 8, paragraph 2, of the Montreal Convention, but which did not appear in the present draft. It was one thing to invite governments to regard the new multilateral instrument as an extradition treaty; it was quite another to require them to do so. In many countries such an obligation would, if accepted, entail a radical revision of the legislation governing extradition, and the abandonment of the principle that extradition was essentially a bilateral matter. Thus, the omission of the phrase "at its option" could constitute a major obstacle to the acceptance of the proposed convention.

45. Mr. REUTER said that when governments were not in agreement on some point, an ambiguous text, which each could interpret in its own way, could be convenient, but in the Commission clarity was essential. He therefore wished to make his position clear.

46. Some members of the Commission seemed to think that if the Commission did not fully accept their views it would have done nothing to change the existing situation. He did not agree. The Commission had been given a certain task, which it had discharged very honourably, and even if it were to accept his own interpretation, it would be changing a great deal. First, there would no longer be any right of political asylum. Secondly, States would be obliged to amend their laws to give themselves jurisdiction to punish crimes committed abroad against the public order of a foreign country; in other words they would deprive themselves of the easy pretext for not prosecuting, that they had no jurisdiction. Thirdly, if the prosecution did not result in the desired severe punishment, the draft nevertheless placed a government under the formidable obligation to explain its conduct, at the risk of finding itself in a very delicate situation if repudiated by the other parties. Even according to his own interpretation of it, therefore, the draft would have important consequences; and many Governments which were prepared to commit themselves to a certain extent would not accept a categorical text.

47. The point on which there was a difference of opinion in the Commission was the exact meaning to be given to the term "prosecute" or the words "submit for the purpose of prosecution" or, as Mr. Agó had said, "examine the case for the purpose of prosecution". That was what had to be decided. He himself had made the mistake of talking about punishment. It was quite clear that the Working Group's text did not involve an obligation to punish. Under all legal systems it was, in fact, the judge who punished, and a government could not make a commitment on behalf of its judge. Hence even if the word "prosecute" were interpreted in the strictest sense, there would be acquittals. In many countries it was not professional judges who made the final decision, but jurors, that was to say ordinary citizens, who were often swayed by the prevailing atmosphere and lawyers' arguments.

48. He wished to make it quite clear what the obligation to prosecute meant. Where prosecutions were concerned, criminal procedure comprised various stages. Under the future convention, the first stage would involve intergovernmental relations, and all members of the Commission were agreed in recognizing that it was not the government as such which decided whether or not to prosecute. If it were, the "obligation" would derive from a purely voluntary clause. The government could not decide whether or not to prosecute, but it was obliged to transmit the request to a judicial authority, which, whether it was the Attorney-General in common law countries or the ministère public in continental countries, decided, after examining the case, whether criminal
proceedings were justified or not. If so, it set the criminal procedure in motion by referring the case to a judge —in common law countries—or an examining magistrate —in continental countries—who in turn duly decided whether charges should be brought or not; in other words, he decided on the desirability of prosecution. In his own view, as soon as the government referred the case to the first judicial authority, it had wholly fulfilled its obligation to prosecute. Even if the ministère public subsequently decided that criminal proceedings should not be instituted, the government would nevertheless have fulfilled its obligation under the convention. That was the central issue on which the members of the Commission were not in agreement.

49. The judicial authority might decide not to prosecute, either because it could see at once that there was not sufficient evidence, or because the circumstances were such that the guilt—person—who was none the less a criminal—had the support of public opinion, so that to prosecute would be to run the risk of an improper trial. But however that might be, the government would have fulfilled the obligation to prosecute and there could be no question of extradition. Even if it were called upon to justify itself, the government could shelter behind the decision of its judicial authority. It was a very small loophole that was left open, but it was essential, and without it many governments would not accept the draft. Some people believed that it was always possible to find a compromise for exceptional cases. He himself thought that, on the contrary, it was the exceptional cases which aroused public opinion. A public prosecutor could not be asked to lose a case: that would have exactly the opposite of the desired result, which was to punish the criminal. The Hague Convention was quite clear on that point. The Montreal Convention was less so, which no doubt explained why it had received fewer signatures. The Commission's draft left many points in doubt and he would not vote for a doubtful text, because he did not wish the Commission's authority to be invoked in a discussion in an international forum. That was why he would have preferred to leave it to governments to choose between different versions.

50. Mr. SETTE CÂMARA said that, under draft articles 6 and 7, as under the corresponding provisions of the Hague and Montreal Conventions, once a State had submitted the case to its competent authorities for the purpose of prosecution, it had performed its international duty. Clearly, it would be for those competent authorities to decide whether, in their judgement, there was a basis for initiating criminal proceedings or not. The powers of decision which belonged, under many legal systems, to the Director of Public Prosecutions or the Attorney-General, depending on the country, would be left intact by the proposed provisions. For those reasons, he was convinced that the draft as it stood met the points raised by Mr. Reuter.

51. Mr. AGO said he did not think there was any difference of opinion among members of the Commission on the substance of the matter. The essential purpose of the draft articles was to oblige States to amend their laws so as to make either prosecution or extradition possible. As he had already pointed out, a first reform would have to be made in substantive criminal law, and a second in the rules on jurisdiction. It was true, as Mr. Reuter had said, that the government could only hand the alleged offender over to the judicial authorities for them to apply the law, but the substantive law would, precisely, have been changed. It was also true that the desirability of prosecutions was left to the discretion of the ministère public and the examining magistrate, but there, again, reasonable limits should be observed. While not calling the normal application of the criminal law in question, he did not believe the convention would be implemented if a judicial authority dismissed the charge or gave an improper acquittal. If members of the Commission were agreed on that fundamental point, it only remained to find satisfactory wording. Perhaps the last sentence of article 7 of the Hague Convention should be reproduced, or it might be provided, for example, that the State was obliged to hand over the alleged offender to the competent judicial authorities.

52. Mr. USHAKOV said that if the alleged offender was acquitted, there could obviously be no further question of punishment or extradition. If he had understood Mr. Reuter aright, it was the second sentence of article 7 of the Hague and Montreal Conventions which gave governments a loophole. He saw no particular objection to including that sentence in the draft, but it was unnecessary, because the obligation to refer the case to the competent authorities for the purpose of prosecution was already provided for. In addition, the phrase “in the case of any ordinary offence” raised problems for some countries. The second sentence of article 7 of the previous Conventions thus had advantages and disadvantages, depending on the country concerned. He therefore considered that it would be better not to change the draft.

53. The CHAIRMAN, speaking as a member of the Commission, said he would not object to article 6 being amended purely to make it clear that the normal procedures and the normal legislation of the country concerned applied. He would, however, oppose any wording which might open the door to decisions regarding prosecution being based on political instead of legal considerations.

54. After hearing the discussion, he had become convinced that the words “it may at its option consider this Convention as the legal basis for extradition”, which were used in the Montreal Convention, did not have any different effect from the wording used in paragraph 2 of article 7: “it shall consider the present draft articles as the legal basis for extradition”. The fact of the matter was that the State concerned would have an option to extradite, if it decided not to submit the case to its competent authorities for the purpose of prosecution.

55. Mr. TAMMES said that he had previously raised the question of the relationship between articles 6 and 7. That relationship was not the same as the one between the corresponding articles of the Hague and Montreal Conventions, because of the Working Group's decision to replace the Montreal wording “it may at its option” by the words “it shall”. He had also explained his views on the strict obligation to extradite, which was thereby

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1 See 1186th meeting, paras. 26 and 27.
created. As he saw it, the purpose of including the words “at its option” in the Hague and Montreal Conventions had been to release the State concerned from the obligation to extradite in the case of political offences.

56. The CHAIRMAN, speaking as a member of the Commission, said that there was an obligation to extradite if the State decided not to submit the case to its competent authorities for the purpose of prosecution. The State had, in fact, an option between the two courses.

57. Mr. USHAKOV pointed out that paragraphs 1 and 3 of article 7 were modelled on the corresponding provisions of the Hague and Montreal Conventions. Hence it could not be claimed that the relationship between article 6 and those two paragraphs was different from the relationship between the corresponding provisions of the two existing Conventions; and whether paragraph 2 differed from the corresponding provision in those Conventions or not, the relationship between the two articles was the same. In any case, he could not accept the interpretation given to the words “at its option”.

58. Mr. TAMMES said that, if he had understood the two previous speakers correctly, it was claimed that article 6 had priority over article 7.

59. The CHAIRMAN, speaking as a member of the Commission, said that that was precisely the basis of the whole draft.

Articles 6 and 7 were referred back to the Working Group for reconsideration in the light of the discussion.5

The meeting rose at 1.10 p.m.

5 For resumption of the discussion see 1191st meeting, para. 74 and 1192nd meeting.

1189th MEETING
Tuesday, 27 June 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsurooka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 5; A/CN.4/L.182 and L.186)

[Item 5 of the agenda]

(continued)

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

1. The CHAIRMAN invited the Commission to consider the text of article 8 of the draft submitted by the Working Group (A/CN.4/L.186), which read:

ARTICLE 8

Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed a fair trial at all stages of the proceedings.

2. The provisions of article 8 were somewhat similar to those of article 4 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. They were in the nature of a guarantee of due process. The Working Group had adopted the formula “a fair trial at all stages of the proceedings”, which would cover every action taken throughout the proceedings against the alleged offender, from the time of his arrest. Government comments indicated that, in their view, a clause of that kind constituted a fundamental element of any draft on the prevention and punishment of crimes against diplomats and other protected persons.

3. Mr. BILGE pointed out that article 13 of the draft articles in the Chairman’s working paper (A/CN.4/L.182) guaranteed accused persons “fair and impartial administration of justice”. When that article had been discussed by the Commission, he had suggested introducing the notion of an independent tribunal. He therefore wished to know whether the formula adopted by the Working Group would fully meet his concern that the accused should enjoy all the necessary safeguards. If so, he would be content with an explanatory statement to that effect in the commentary; otherwise, the present wording of article 8 would have to be improved.

4. Mr. USHAKOV said that the French translation did not reflect the idea, clearly expressed in the English text, that the persons concerned should receive fair treatment at all stages of the criminal proceedings, including judgment.

5. Mr. TSUROOKA supported that view.

6. Mr. SETTE CÂMARA said he fully agreed with Mr. Bilge. There was general agreement on the substance of the matter, but the introduction of a reference to “an independent tribunal” might not be acceptable to States, because of the possible inference that there were courts which were not independent.

7. He also agreed on the need to adjust the French text.

8. Mr. ELIAS suggested that the words “fair trial” should be replaced by “fair treatment”. That wording would better convey the intention, which was to guarantee to the alleged offender not only that he would have a fair trial at the hearing in court, but also that he would be properly treated during earlier stages of the proceedings.

9. It was interesting to note, in that connexion, that the constitutions of the fourteen African States which were former United Kingdom dependencies stated the right of accused persons to be tried before a court which had been established by law and whose independence and impartiality were guaranteed.

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2 See 1153rd meeting, para. 17.
10. The CHAIRMAN, speaking as a member of the Commission, said that he too was inclined to favour the replacement of the term “trial” by a more suitable term.

11. Mr. BARTOS said he thought the question raised by Mr. Bilge deserved careful consideration. French wording must be found to convey the idea expressed in the original English text that the persons concerned should be guaranteed fair treatment throughout the proceedings and a fair trial by an independent court. The concept of an independent court was important because the courts set up to deal with political cases were not always independent.

12. Mr. USTOR said that the basic purpose was clear in everyone’s mind, but suitable language had to be found in both English and French to express the idea not only of a fair hearing at the trial, but also of equitable treatment in all proceedings.

13. Mr. YASSEEN said that he, too, thought the French text needed improvement.

14. He also wished to point out that the provision in article 8 might lead to a form of discrimination. For in cases where internal law gave persons charged with a criminal offence guarantees that were above the international standard, the question would arise which standard—national or international—should be applied. The solution would be to require that persons covered by the article should enjoy the safeguards generally accorded by the law of all countries to every accused person. It was not intended to make the persons covered by article 8 into a special category of accused persons; they should be neither favoured nor penalized. But the application of an abstract standard such as that laid down in article 8 might lead to discrimination of that kind.

15. Mr. SETTE CÂMARA said that the concept of a “fair trial” for accused persons had already been present in the Charter of the Nürnberg Tribunal. The International Law Commission had embodied that concept in its formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, which it had adopted in 1950, as Principle V which read: “Any person charged with a crime under international law has the right to a fair trial on the facts and law”.

16. Mr. ELIAS suggested that, since the Commission was in general agreement on the intended meaning, it should leave it to the Working Group to find the most suitable language. The point raised by Mr. Bilge should be covered by including in the commentary a reference to the guarantee of a trial by an independent and impartial court, as well as to fair and equitable treatment from the time of arrest until judgement.

17. Mr. BILGE explained that his remarks were not confined to the French version of the article. What he was asking for was that a reference to safeguards should be introduced into article 8. Since article 2 required each State party to make the offences covered by the draft crimes under its internal law that were punishable by severe penalties, it was quite natural also to provide that the alleged offenders should enjoy certain safeguards, supplementary ones, if need be. There was no question of discrimination.

18. The CHAIRMAN, speaking as a member of the Commission, said it would be necessary to use fairly general language in order to allow for the great differences, between countries, in systems of criminal justice and safeguards for accused persons.

19. Mr. YASSEEN said he still believed that there could be discrimination in cases where the internal law of a State gave all accused persons safeguards superior to those required under international law. If an international standard was to be formulated, it should serve to remedy any gaps or inadequacies in internal law, not to deprive an accused person of any superior safeguards which that law might grant him, by giving a State a pretext to apply safeguards inferior to those granted to every accused person under its internal law. The alleged offenders covered by article 8 should not receive treatment different from that of other persons accused under the ordinary law. It was in that respect that there might be discrimination. The article should specify that accused persons must be given all the normal safeguards laid down by the internal law of the State concerned, provided that those safeguards were not below the recognized international standard.

20. Mr. USTOR suggested that the matter should be dealt with in accordance with the appropriate provisions of the International Covenant on Civil and Political Rights adopted by the General Assembly in its resolution 2200 (XXI).

21. Mr. YASSEEN said that the standard laid down by the Universal Declaration of Human Rights was the minimum demanded by the international community, and there was nothing to prevent a State from going beyond it. But the concept of “fair treatment” was an abstract and imprecise criterion. It would be better to require the same treatment as was enjoyed by every accused person under the ordinary law.

22. Mr. BARTOS said that the point at issue was the observance of a rule of general international law laid down in the Universal Declaration of Human Rights and regarded as binding on all States, whether or not they formally accepted the clause in which that rule was embodied. The clause was a standard one, to be found with varying wording not only in the Universal Declaration of Human Rights, but also in such regional human rights conventions as the European Convention for the Protection of Human Rights and Fundamental Freedoms and in such instruments as the Charters of the Nürnberg and Tokyo Military Tribunals, and the International Covenant on Civil and Political Rights. The essential need, therefore, was to find a general formula to express the idea of the standard clause, and that had certainly been the Working Group’s intention. Even if

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4 General Assembly resolution 217 (III).

better wording could not be found, the provisions of article 8 should be interpreted as the expression of a rule of general international law.

23. Mr. ELIAS said it was undesirable to make any sweeping changes in the wording of article 8. Any attempt to introduce a detailed description of the rule of law could only give rise to the same problems as the rule on the exhaustion of local remedies. The language used in article 8 should be sufficiently general to express ideas that were common to all legal systems.

24. Mr. HAMBRO said it was important to bear in mind that all the progress achieved in the international protection of human rights had been made by refusing to accept any purely national standard. At the same time, the draft articles should not attempt to interfere too much with national judicial systems.

25. Mr. BILGE said that his proposal had been based on article 14 of the International Covenant on Civil and Political Rights. If it was explained in the commentary that the expression “fair trial” covered all the elements mentioned in article 14 of that Covenant, he would not press for amendment of the wording of article 8.

26. Mr. YASSEEN urged that the article should not specify minimum safeguards, but should ensure that a country providing safeguards above the international standard would not penalize the category of accused persons covered by the draft by granting them only the safeguards it prescribed. That was the danger of discrimination it was necessary to guard against, not only by laying down an international standard, but also by requiring that the national standard should be applied if it was higher.

27. Mr. BARTOŠ said he thought that Mr. Yasseen’s misgivings were justified and that the Commission should settle the point. As a lawyer, he was convinced that States were not under any general obligation to give aliens more favourable treatment than that enjoyed by their own nationals. In other words, a State must apply to the aliens covered by the draft articles the rules normally applied in the country, provided that they did not fall below the international standard recognized as a United Nations standard; otherwise, the latter would apply. That had always been the position in private international law, and the Commission should therefore state clearly, as Mr. Yasseen asked, that any person charged with one of the offences covered by the draft had the right to enjoy both the safeguards provided by the internal law of the country where the proceedings took place, and safeguards conforming to the international standard, where that standard was higher.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 8 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.6

ARTICLE 9

29. Article 9

There shall be no statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2.

30. The CHAIRMAN said that none of the three conventions which had served as models contained any provision on the lines of article 9. The issue of statutory limitation had been discussed extensively in the Working Group and there had been a very close division of opinion on the sweeping provision of article 9. One suggestion made during the discussion had been that, instead of excluding any time limitation, article 9 should specify that the period of limitation for the crimes set forth in article 2 should be that fixed for the most serious crimes in each State party.

31. Mr. YASSEEN said he could not accept article 9, which went too far. Without going into all the arguments in favour of statutory limitation for criminal proceedings, he wished to stress that such limitation existed in most systems of internal law, not for the benefit of offenders, but for general reasons of public policy. The Commission would remember the efforts which had been needed to secure the adoption by the United Nations of a resolution excluding statutory limitations for the prosecution of war crimes.7 Certainly, crimes against diplomats were abominable and they must be protected, but not at the cost of upsetting nearly all the world’s systems of criminal law.

32. Mr. HAMBRO said he fully agreed that the provisions of article 9 went too far. He did not believe that a provision on the subject of time limitation was really necessary in the draft but, if other members wished to retain it, he would suggest a compromise formula on the following lines:

“The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2 shall be, in each State Party, that fixed for the most serious crimes under its internal law”.

33. The purpose of statutory time limitation, or “prescription”, was not to protect the criminal; it was based on a general rule of policy and was intended to protect innocent people from accusations which would be difficult to refute because they related to events that had taken place in a remote past.

34. In order to make the whole draft acceptable to States, it was necessary to avoid the difficulties that would be created by retaining the categorical provisions of article 9 in its present form.

35. Mr. BARTOŠ, referring to Mr. Yasseen’s remarks, said it was true that the object of prescription was to maintain the general public order and that it was not a measure of clemency towards offenders. But since periods of prescription and the very concept of statutory limitation itself varied widely from one country to another, it had been decided that war crimes should not be subject to the rules of time limitation, in order to prevent pro-

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6 For resumption of the discussion see 1192nd meeting, para. 8.

7 General Assembly resolution 2391 (XXIII).
sections for them from becoming statute-barred after a comparatively short period in certain countries.

36. In the case of crimes against diplomats, the operation of time-limits might give rise to discrimination as between accused persons who were aliens and those who were nationals of the country where the proceedings took place. Under the provisions of the draft, the future convention would not apply to crimes committed by nationals of a country against other nationals of the same country; but no provision was made for the case in which a national who committed a crime against a foreign diplomat would be in a better position than an alien committing the same offence. That was a gap in the draft which should be filled.

37. A distinction should be made between the period of limitation for instituting proceedings and the period for granting a pardon. A pardon was sometimes granted automatically after a certain period so that it was in fact a disguised amnesty or a form of statutory limitation. There again, the practice varied from one country to another and a uniform rule should be laid down under international law. The Working Group should therefore study that point. The purpose of article 9 should be to ensure equal punishment for all who committed crimes against diplomats or other crimes of an international character.

38. Mr. BILGE said he was opposed to article 9 and could not accept a compromise solution. The question of statutory limitation was highly controversial and in some countries it was governed by the constitution. That was why Turkey had not accepted the principle of no statutory limitation, even for war crimes.

39. Article 9 was not necessary, since it was already stipulated in article 2 that the crimes covered by the draft should be made "punishable by severe penalties" and the period of limitation for crimes so punishable was usually quite long. Furthermore, the draft provided elsewhere for inter-State co-operation in the prevention and punishment of those crimes.

40. Mr. ELIAS urged that article 9 with its highly controversial provisions should be dropped from the draft altogether.

41. Mr. Hambro's suggestion that the longest period allowed by internal law should be adopted as a yardstick raised the problem of those legal systems which had no limitation at all; separate provision would have to be made for that sort of situation. He therefore appealed to Mr. Hambro to withdraw his suggestion and to agree to the deletion of article 9.

42. The main purpose of the proposed convention would be more than served by the provisions of articles 2, 6, 7 and 8; the only other important procedural provision was that in article 12. If the Commission agreed to drop article 9, it would not only be saving itself considerable difficulty, but would also be making it easier for those who had doubts about articles 6 and 7 to accept the final draft.

43. Mr. SETTE CÂMARA said he was in favour of retaining article 9 as it stood. The problem had to be considered in the light of both principle and practice.

44. From the standpoint of principle, he recognized that there were some grounds for doubt about the article, because it constituted a departure from one of the most highly respected principles of criminal law. The Commission had, however, already departed from some of those principles in its draft. It had set aside the principle of territorial jurisdiction for crimes as well as that of the unilateral legal characterization of crimes in cases of extradition. It was now called upon to decide whether to set aside one more principle, that of the so-called "prescription" of crimes.

45. If the criminal law of any country was examined, it would be found that there was an article which gave a definition of each crime and specified the penalty for it, thereby determining the period of limitation that was applicable. The draft now under discussion did not cover only the gravest offences; its scope ranged from the killing of a Head of State to some minor attack against the private accommodation of a protected person. For some of the offences covered, the period of statutory limitation could be very short, perhaps 6 months or even less. It would therefore be very easy for a country to defeat the whole purpose of the future convention simply by postponing the initiation of proceedings against the criminals.

46. From the practical point of view, a serious loophole would be left in the draft if the Commission decided to drop article 9. From the remarks made on the subject of war crimes during the discussion, it was clear that it was not the first time that the possibility of setting aside statutory limitations for crimes was being considered.

47. He realized, however, that the wording of article 9 was too categorical and he was prepared to agree that the Working Group should be asked to consider suggestions such as that made by Mr. Hambro. At the same time, he wished to place on record his support for the retention of the article as it stood.

48. Mr. QUENTIN-BAXTER said he could not agree with the previous speaker. His own country's legal system did not know any statute of limitations for criminal offences, so he thought his views could not be regarded as biased. He had, however, attended many meetings at which the question of the so-called "imprescriptibility" of war crimes had been discussed, and he therefore appreciated how deep-seated the difficulties were. The inclusion in the draft of the principle stated in article 9 would unquestionably make it more difficult for States to ratify the future convention. He believed the Commission would be justified in not adopting that principle, because it had chosen the course of inviting States, in article 2, to make the offences in question crimes under their own internal law, rather than the other, more general course of attempting to promote an international criminal law.

49. With regard to principles, his own view was that the draft departed from only one fundamental principle, namely, the principle of territorial jurisdiction. For that departure, however, there were good precedents, dating back as much as a century, in the statutes against the slave trade. He believed that the best chance of persuading the world to support the proposed convention was to show, not that the draft had departed from a large number of fundamental principles, but rather that it embodied only one innovation and that a very honourable one.
50. Mr. TSURUOKA said he was in favour of deleting article 9, mainly for the reasons given by Mr. Bilge, Mr. Elias and Mr. Quentin-Baxter. In practice, the provision would do nothing to further the purpose of the draft, which was to protect diplomats against acts of terrorism.

51. Mr. HAMBRO said he would be prepared to accept the deletion of article 9.

52. Mr. USHAKOV said he agreed with Mr. Sette Câmara that article 9 should be retained. The concept of imprescriptibility could be introduced into the draft in the same way as that of extraterritorial jurisdiction. If article 9 as it stood was not acceptable to the majority of the Commission, the Working Group should try to find a compromise solution. But it was essential that the draft should contain a provision to prevent offenders from escaping prosecution simply because the period of limitation was short, as it was in certain countries. Lastly, he wished to stress that article 9 related to prescription with respect to prosecution, not with respect to punishment.

53. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 9 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.9

ARTICLE 10

54. Article 10

1. States Party shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes, in particular by supplying all evidence at their disposal necessary for the prosecution.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual assistance in criminal matters embodied in any other treaty.

55. The CHAIRMAN explained that the provisions of article 10 were based on those of article 11 of the 1971 Montreal Convention. The last clause of paragraph 1 had been added to overcome the difficulties which the State concerned would have in proving the case against the offender if it did not receive the evidence which other States had at their disposal.

56. Mr. BILGE pointed out that the expression "entraide judiciaire", used in the French text of paragraph 1, normally covered such matters as notification of a writ, but not the transmission of evidence, which was more a matter of administrative or police co-operation. The wording of the final clause of paragraph 1 should therefore be reconsidered.

57. Mr. YASSEEN stressed the need to make provision for judicial co-operation in the draft and expressed his full support for article 10. He nevertheless shared Mr. Bilge's doubts about the wording of the final clause of paragraph 1.

58. Mr. ELIAS said that on the whole article 10 was satisfactory, but the Working Group should consider improving the wording in some respects. He suggested that the last clause of paragraph 1 should begin with the words "including the supply of all evidence...".

59. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 10 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.9

ARTICLE 11

60. Article 11

The final outcome of the judicial proceedings regarding the alleged offender shall be communicated by the State where the proceedings are conducted to the Secretary-General of the United Nations, who shall transmit the information to the other States Party.

61. The CHAIRMAN said that article 11 was modelled on article 13 of the 1971 Montreal Convention, but the reference to reporting to the Council of the International Civil Aviation Organization had been replaced by a reference to communication to the Secretary-General of the United Nations. Article 11 of the draft was less elaborately worded than article 13 of the Montreal Convention, but it made provision for similar procedures.

62. Mr. QUENTIN-BAXTER said that the question arose of determining which cases had to be reported.

63. The CHAIRMAN, speaking as a member of the Commission, suggested the deletion of the word "judicial" before the word "proceedings". All legal proceedings, even if not in court, should be the subject of a communication. For example, even where a case did not go beyond the office of the Director of Public Prosecutions, it should still be reported.

64. Speaking as Chairman, he said that if there were no further comments he would take it that the Commission agreed to refer article 11 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.10

ARTICLE 12

65. Article 12

1. Any dispute between the Parties arising out of the application or interpretation of the present articles that is not settled through negotiation may be brought by any State Party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States Party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

For resumption of the discussion see 1192nd meeting, para. 26.

10 For resumption of the discussion see 1192nd meeting, para. 33.
3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State Party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present Convention.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months' time-limit may be extended by decision of the Commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

66. The CHAIRMAN said that article 12 made provision for a conciliation procedure on the lines of article 82 of the Commission's 1971 draft articles on the representation of States in their relations with international organizations. A few changes had been made to take account of the fact that the present draft dealt with somewhat different cases.

67. Unlike article 82 of that 1971 draft, the article now under discussion did not provide for the involvement of an international organization in the dispute, even though the present draft provided for the protection of officials of international organizations. The reason was that the disputes which could arise with regard to an offence committed against an international official were likely to involve only States, namely, the States of which the victim and the criminal were nationals, and the States in whose territory the offence had been committed.

68. Like the corresponding provision of the 1969 Vienna Convention on the Law of Treaties, article 12 designated the Secretary-General of the United Nations as the appointing authority in the event of the failure of one of the parties to appoint its member to the conciliation commission.

69. The Working Group had discussed the possibility of allowing the conciliation commission to request an advisory opinion from the International Court of Justice. It had decided that there was no objection in principle and had therefore included the provision in paragraph 5, under which the conciliation commission would be competent to ask any organ that was authorized by, or in accordance with, the Charter of the United Nations to request an advisory opinion, to make such a request.

70. Mr. YASSEEN observed that the Working Group had followed the 1969 Vienna Convention on the Law of Treaties and the 1971 draft articles on the representation of States in their relations with international organizations. It should be noted, however, that conciliation was normally resorted to for disputes that were less directly legal in character than those referred to in article 12.

71. It was true that that method of settling disputes had certain advantages. In particular, States agreed to accept the recommendation of a conciliation commission, which were not mandatory, more readily than they would undertake in advance to comply with a mandatory award. However, the functions of the conciliation commission, as set out in paragraph 6, in particular, should be adapted to the case in question. It should be clearly specified that the conciliation commission would express its opinion on the interpretation of the convention, thus giving a ruling on a point of law.

72. As to the faculty of requesting an advisory opinion from the International Court of Justice, as provided for in paragraph 5, he was all in favour of encouraging that practice. The wording of the provision could, however, be improved in the light of the text of the Charter, so as to remove certain obscurities.

73. The CHAIRMAN said that article 14 of the 1971 Montreal Convention provided for the settlement of disputes by arbitration, or by a decision of the International Court of Justice if, within six months from the date of the request for arbitration, the parties were unable to agree on the organization of the arbitration. The Working Group, however, had thought that a conciliation procedure might be more acceptable in the present case.

74. Mr. BILGE said he had always been in favour of extending the jurisdiction of the International Court of Justice, which was the principal judicial organ of the United Nations.

75. Mr. HAMBRO said that he shared that view. A conciliation procedure did not really lead to a settlement of the dispute, so that the proposed text of article 12 represented a retrograde step. In particular, paragraph 7 did not provide an answer to the problem with which it purported to deal, since it could be maintained that the provisions of article 12 would, with respect to the cases covered by the draft articles, supersede any previous agreement on the settlement of disputes. It could also be argued that the provisions of article 12 constituted lex specialis and, as such, cut through any pre-existing general agreements on the settlement of disputes.

76. In order to overcome those difficulties, he had suggested in the Working Group that the substance of paragraph 7 should be incorporated in the opening words of paragraph 1, so as to confine the scope of the whole paragraph to cases in which there was no agreement between the parties on the settlement of disputes.

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would thus be made clear that there was no intention of imposing upon States any new obligation to submit cases to arbitration or to judicial settlement; at the same time, there would be no risk of weakening existing clauses which provided for compulsory arbitration or for the jurisdiction of the International Court of Justice.

77. Mr. USHAKOV said that, for his part, he would prefer the draft not to provide for any procedure for the settlement of disputes. It was difficult to see what disputes could arise between States parties on the interpretation of the draft articles, since the articles merely gave States a choice between prosecuting and extraditing offenders. However, if the majority of the Commission considered a provision on the subject essential, article 82 of the 1971 draft on the representation of States in their relations with international organizations should be reproduced verbatim. If the Commission were to depart from the text previously adopted, it would be disowning its own work. The suggestion made by Mr. Hambro did not seem justified, in view of the explanations given by the Commission in its commentary to the corresponding provision of the 1971 draft.

78. Mr. AGO said he shared Mr. Yasseen's view that conciliation procedure was not suitable in all cases. Where a dispute related to a claim for the termination of a treaty, for example, by reason of a fundamental change of circumstances, a conciliation commission could be very useful in settling questions of fact or dealing with political problems. Conciliation procedure was therefore appropriate in the 1971 draft. But it might be doubted whether that system should be introduced into the present draft, because the disputes that might arise over its interpretation would be essentially legal in character.

79. He welcomed the reference to the International Court of Justice in paragraph 5, though he doubted that it would have much practical significance. It was difficult to see how a conciliation commission could ask the General Assembly, for example, to request an advisory opinion from the International Court of Justice.

80. In conclusion, he thought that the system provided for in article 14 of the 1971 Montreal Convention would be more suitable for inclusion in the draft, even though some States might find it necessary to make reservations.

81. The CHAIRMAN, speaking as a member of the Commission, said that one type of dispute which might arise would concern the question whether a State had carried out its obligations under the future convention in good faith; that question could be a highly political one, for example, in the case of refusal to extradite an offender.

82. Mr. YASSEEN reiterated his view that the traditional method of conciliation was not suitable for the settlement of disputes relating to the interpretation of the draft. The interpretation must be objective and strictly legal in character. The conciliation system provided for in article 12 thus presented new features, in that the proposed conciliation commission was to give its opinion on a legal and technical dispute, without that opinion being binding on the parties.

83. Mr. USHAKOV said he could see no difference between the interpretation of one convention and that of another. If a conciliation commission could deal with disputes on the interpretation of the 1969 Vienna Convention on the Law of Treaties, there was no valid reason why a similar commission should not settle disputes on the interpretation of another international instrument. However, an interpretation given by a conciliation commission was never mandatory, whereas one given in an advisory opinion by the International Court of Justice was binding on the parties which had requested it. In principle, there were several valid procedures which could be adopted for the settlement of disputes; it was a matter of choosing the one best suited to a particular convention.

84. Mr. YASSEEN pointed out that the International Law Commission itself had never proposed a conciliation procedure. That mode of settlement had emerged from the work of the United Nations Conference on the Law of Treaties, where it had been accepted as a compromise to save the Conference from failure. That being so, the Commission should not hesitate to improve the text adopted at Vienna in 1969, taking into account the legal and technical problems which the interpretation of the future convention might raise.

85. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 12 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.

The meeting rose at 6.05 p.m.

18 For resumption of the discussion see 1192nd meeting, para. 35.

1190th MEETING

Wednesday, 28 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tanmes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256 and Add.1 to 3; A/CN.4/L.183 and Add.1 to 3; A/CN.4/L.184 and L.185)

[Item 1 (a) of the agenda]

(resumed from the 1187th meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 21 (Other dismemberments of a State into two or more States) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 21 submitted by the

1 For text see 1187th meeting, para. 47.
Special Rapporteur in his fifth report on succession in respect of treaties (A/CN.4/256/Add.3).

2. Mr. YASSEEN said that no two cases of secession, separation or division were alike and that, since circumstances varied so much, the question should be treated with the greatest caution and flexibility. The Special Rapporteur had rightly shown caution in proposing that, if all possible cases were to be covered in a single article, the régime applicable to newly independent States should be adopted, that was to say that there should be no succession ipso jure.

3. It was reasonable to lay down, as in paragraph 2, that there could be no succession save by notification, applying the system established by articles 7 to 17 for newly independent States. The part which had separated from the rest of the territory remained perfectly free to succeed or not to succeed to any treaty, multilateral or bilateral, under the conditions laid down in those articles.

4. There was nevertheless an element of continuity in the case contemplated in article 21, namely the continued existence of an original State, or more precisely, of a State recognized as the continuation of the former State, but with diminished territory. That was a controversial question and the Commission could not settle it at the present stage. It would therefore be wise to accept the solution proposed by the Special Rapporteur, namely, that the loss of part of its territory neither released a State from its treaty obligations nor deprived it of its treaty rights; it remained a party to the treaties it had concluded. It was, of course, necessary to provide for cases in which it might be right and proper to opt for non-continuity of treaties concluded by the predecessor State; that was what the Special Rapporteur had done in paragraph 3, sub-paragraphs (a), (b) and (c), which were perfectly acceptable.

5. He could therefore accept the substance of article 21. The drafting of the French text could be improved, however, by avoiding the undue repetition of the word "Etat", in paragraph 1, and by replacing the words "du reste du territoire", in paragraph 3, by the words "ce qui reste du territoire" or some other appropriate phrase.

6. Mr. USTOR observed that the essential purport of paragraph 2 was that, in the case of newly independent States formed through a dismemberment other than that covered by article 20, the provisions of articles 7 to 17 applied. The novel feature of article 21 was paragraph 3, which defined the position of the remaining territory of the predecessor State after a part of the original State had become independent. He could accept the substance of the provisions of that paragraph, but he thought that a more logical place could be found for them in a concluding section of Part III, of the draft articles dealing with newly independent States.²

7. The question would then arise whether, in the case of a separation or secession—that was to say a dismemberment other than that covered by article 20—there was room for a provision parallel to article 20. The Special Rapporteur's commentary to article 21 indicated that there were few if any cases of dissolution, into parts equal in status, of a State whose subdivisions had no separate identity; the distinguishing feature of the cases covered by article 20 was that the constituent parts did have separate identity. Perhaps the Special Rapporteur might consider the possibility of formulating a provision to deal with that admittedly rare case.

8. Mr. SETTE CAMARA agreed that a more logical place should be found for the provisions of article 21; the Drafting Committee should consider that problem. For paragraph 2, which made the rules of articles 7 to 17 applicable, the best place was probably Part III, on newly independent States. The provisions of paragraph 3 could either be included in Part III as an exception to the general rule, or placed elsewhere in the draft.

9. He fully agreed with the Special Rapporteur that there could be no question of adopting, for the cases covered by article 21, a rule of ipso jure continuity. The whole rationale of adopting that rule, as embodied in article 20, alternative A (A/CN.4/256/Add.2), in the case of dissolution of a union of States was based on the previous existence, as sovereign States, of the constituent political divisions, and the need to ensure the continuity of international commitments in the interests both of the parties and of the international community as a whole.

10. He suggested that the Drafting Committee should seek a better term than “division” to use in paragraph 1 of article 21. The “other dismemberments” referred to in the title of the article could be of two kinds: the first was separation or secession, which could be called partial dismemberment; the second was total dismemberment, in which none of the parts could be regarded as “the remaining territory of the predecessor State”. The term “division” was inadequate to describe such a situation.

11. Mr. USHAKOV saw no fundamental difference between the dissolution of a union of States, dealt with in article 20, and the dismemberment of a State which was not a union of States, dealt with in article 21. Seen from the outside, that was to say from the standpoint of international law, a State, whether unitary or composite, was a State. When part of it separated from the rest, there was necessarily some basis for the separation: political, economic, social, cultural or other. For it was inconceivable that an area of territory should separate arbitrarily from the rest of the State; it was only because it already had at least an embryo of separate personality that separation could take place. Thus the distinction between articles 20 and 21 was artificial, and since the situation was substantially the same, the Commission could not adopt a different solution for each case: ipso jure continuity in article 20 and a “clean slate” in article 21. An acceptable solution would be to provide that, irrespective of the State’s internal organization, separation would produce a newly independent State to which the “clean slate” principle would apply, subject to certain reservations, while division, which produced two or more States on an equal footing, would entail ipso jure continuity of treaties, those States remaining bound by their treaty obligations to third States and vice versa.

12. Mr. REUTER said that he shared Mr. Ushakov’s doubts about the substance of the matter. Leaving aside

² For final arrangement of articles in the draft see document A/8710/Rev.1, chapter II, section C, reproduced in volume II of this Yearbook.
cases of decolonization, which were entirely special cases, the difficulties in article 21 arose from its connexion with article 20 and from the comparison between what the Commission decided when it considered the problems from the formal standpoint of treaties and what it might decide when it came to consider Mr. Bedjaoui’s report on succession in respect of matters other than treaties.

13. When articles 20 and 21 were compared, the essential difficulty lay in the definition of the term “union of States”, on which several members of the Commission had already expressed doubts. A union of States was a State; hence it was solely considerations of internal law, that was to say purely unilateral considerations, which determined the choice between two radically different solutions. There were admittedly cases in which internal law made it possible to identify in advance the units that were going to separate from each other. But if that was where the difference lay, the question nevertheless arose whether, in the case of certain treaties, in particular economic treaties, such identification justified the adoption, in the case covered by article 21, of a less rigorous solution than was provided for in that article. That necessarily raised the question of localization, on which the Commission had not yet taken a position. A single case of localization was covered by the exceptions in paragraph 3, but he wondered whether it could not be said of any treaty previously applicable to the whole of a State that it retained some effect which could be localized in the States born of a dismemberment or division. In the case of division the matter was not in doubt, because the new States unilaterally recognized themselves as continuations of the previous State. But even in cases of disintegration—leaving aside decolonization—it was possible that for certain economic treaties there could be an economic analysis which would leave the treaties concluded some meaning. The problem was thus extremely complex.

14. He had no radical objection to a proposal based on the idea of personality of the State; that was a consequence of the initial choice which the Commission had made and which it had imposed on the Special Rapporteurs on State succession, namely, that the question of treaties should be dealt with separately from situations created by treaties. But even so the situations created by economic treaties must be taken into account.

15. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself had long hesitated over articles 20 and 21 and over the distinction to be drawn between the two categories of cases covered by those articles. The vital point to remember was that article 20 dealt with a “union of States”. An examination of the practice showed evidence for a possible ipso jure continuity rule with respect to the dissolution of a union of States. It also provided, however, some evidence of continuity by agreement, express or tacit. For article 20 he had accordingly submitted alternative texts based respectively on ipso jure continuity and on consent.

16. If the Commission had chosen alternative B for article 20, it would have been an easy matter to frame a rule common to the cases covered by article 20 and those covered by article 21. But the Commission had favoured alternative A. That had made it necessary to prepare a separate article on dismemberment of States otherwise than by dissolution of a union of States because, in such cases of dismemberment, there was no support at all under the existing law for any ipso jure continuity rule; practice pointed clearly to the rule of consent in those cases.

17. The essential reason for adopting a different rule for the cases covered by article 20 was that the constituent political divisions of a union of States were, or had been international persons that had had their own treaties in the past. Contrary to what had been suggested by the last speaker, the rule in the matter appeared to derive not from localization, but from the separate international identity of the constituent political divisions. Questions of internal constitutional identity were irrelevant so far as international law was concerned, unless accompanied by recognition of some measure of international identity.

18. Another point to be considered was the case of total disintegration: in other words, of a situation in which none of the parts of the predecessor State was recognized as a continuation of that State. It had been suggested that ipso jure continuity of treaties should apply to each part. But a disintegration of that kind was likely to have a more radical effect than another form of dismemberment, and there did not seem to be any grounds, either of logic or of practice, for an ipso jure continuity rule in such a case.

19. The separation of Singapore from the Federation of Malaysia in 1965, referred to in paragraph 12 of the commentary to article 21, had been treated as a case of a newly independent State: continuance of Federation treaties in force had been regarded as a matter of mutual consent. That was so even though in the twilight period prior to its decolonization and adherence to the Federation in 1963, Singapore had already come close to possessing separate international identity, so that the case might perhaps have been viewed rather as one of a union of States.

20. It had been suggested that economic treaties were in some way localized so that, after a total dismemberment, they would continue in force for the territory of the political subdivision concerned. However, he saw no evidence in State practice that would justify treating economic treaties differently from other treaties.

21. Mr. QUENTIN-BAXTER said that he agreed to some extent with the views expressed by Mr. Ushakov and Mr. Reuter.

22. All would agree that a residual article on the lines of article 21 was needed in the draft. The problem was to determine the scope of application of the rule laid down in that article. What he liked most about article 21 was that it did not attempt to lay down an absolute rule distinguishing cases of separation from cases of division. In the former cases there would be a residual predecessor State with continuity of treaty rights and obligations; in the latter there would only be new States not bound by a rule of ipso jure continuity. There must often be a margin of appreciation in deciding whether a particular case was one of separation or of division, and it was right the the Commission should not attempt to eliminate that margin.
23. By way of contrast, the proposed definition of a "union of States" would lay down a hard-and-fast rule distinguishing the dissolution of a union from any other kind of separation or division. A new State arising from the dissolution of a union would be bound by a rule of ipso jure continuity; a new State arising from other forms of separation or division would not. In that context, there would be no scope for any margin of appreciation. Under the proposed definition, the dissolution rule in article 20 could apply only if the predecessor State had originally been formed by the uniting of two sovereign States. All other cases were of necessity referred to the rule in article 21.

24. He did not, however, believe that such an absolute distinction in terms of origin could be sustained. The State practice on which the distinction was based was too scanty to provide a statistical sample, and it mainly referred to unions which had not long survived. Yet there was in principle no reason why a process of devolution, occurring over a long period of time within a unitary State, should not produce a situation analogous to the dissolution of a union of States.

25. The way in which the State was originally formed might well be a relevant factor, but it need not be the decisive factor. In the case of Bangladesh, the dominant consideration was the way in which the rupture had come about, not the fact that the predecessor State happened to be outside the definition of a "union of States".

26. There was no way of escaping the need for margins of appreciation. They were necessary because of an interplay of constitutional—or internal—and international considerations. In fact, to borrow a dictum from another branch of the law, one could think of the emergence of a new State as a unilateral act which must always have an international aspect.

27. Of course, in cases of decolonization United Nations doctrine could be regarded as creating a conclusive presumption in favour of tabula rasa, but in other cases the appropriate rule must be selected by interpreting constitutional facts. That was why he had placed some emphasis on the post-colonial situation of a self-governing associated State. Such an associated State—and there were likely to be more of them in future, because many of the remaining colonies were very small, isolated communities which might shrink from full independence—might come to have a position comparable with that of Iceland during the period of the Danish-Icelandic Union.

28. Mr. ELIAS said he was impressed by the full commentary, which set forth the up-to-date practice in the matter, but he was not altogether satisfied with the provisions of article 21 itself.

29. Paragraph 3 covered fairly satisfactorily the point which should be dealt with in an article of that kind. Paragraph 2 did not add very much to what was already covered by the draft articles. Most of the difficulties arising during the discussion, however, had been due to the provisions of paragraph 1.

30. The title "Other dismemberments" made it clear from the outset that article 21 covered cases of dismemberment other than those of dissolution of a union of States, dealt with in the previous article. Paragraph 1 of article 21 endeavoured to draw a distinction between cases of "separation" and cases of "division"; he suggested that an attempt should be made to simplify the cumbersome language of the paragraph and to draw a clearer distinction between a separation, which brought into play the provisions of paragraph 3, and a so-called "division".

31. He welcomed the explanations given by the Special Rapporteur in reply to Mr. Ushakov and Mr. Reuter, but he thought the real problem was not a matter of the origin of a composite State. The problem was that once a State—whether a federal union or not—was created, it was necessary to determine the legal effects of a separation. The Commission need not be unduly impressed either by considerations deriving from the personality of the component units or by the differences between States with a federal structure and other States.

32. The essential provision of article 21 was paragraph 3, which dealt with the fate of treaties in relation to what might be called the cardinal unit, namely "the remaining territory of the predecessor State". That unit must be recognized as the "predecessor State" if the element of continuity was to be maintained in accordance with the main rule laid down in the opening sentence of paragraph 3.

33. There was little to be gained by exploring what would happen in a case of complete dismemberment in which none of the parts of the divided State could be described as a predecessor State. There were very few, if any, such cases. Should such a case arise, however, some agreement between the States concerned would undoubtedly be needed, in order to organize the responsibilities attaching to the separate units.

34. In any case, the provisions of paragraph 3 were the only real justification for including article 21 in the draft. Those provisions could either be treated as a complement to article 20, alternative A, or be placed elsewhere in the draft as suggested by Mr. Ustor and Mr. Sette Câmara. The Drafting Committee should consider the possibility of placing them at the end of Part III.

35. Mr. USHAKOV drew attention to the definition of the term "union of States" preceding article 19 and to the examples of constitutional unions of States given in the commentary to that article. Whatever name might be given to the entities making up a State—state, province, department or anything else—a State was always a State in international law. Thus international law made no distinction between the United States of America and France. The internal organization of States was no guide to the solution of problems of international law. Hence there was no difference between the situations contemplated in articles 20 and 21. In view of the complexity of the problem it would be advisable to go into it more deeply and perhaps to draft several articles dealing with the different situations.

36. Mr. ALCÍVAR said that, while there were perhaps a few drafting points that could be dealt with by the
Drafting Committee, he fully supported the basic approach adopted by the Special Rapporteur in article 21. He appreciated the difficulties mentioned by Mr. Ushakov and Mr. Reuter, but thought they could easily be resolved within the limits of the article.

37. On the question of the separate international personality of federal States, he reminded the Commission that it had submitted to the United Nations Conference on the Law of Treaties a draft article providing that States members of a federal union might possess a capacity to conclude treaties. That provision had been rejected by the Conference and had not been included in the Vienna Convention on the Law of Treaties.5

38. He agreed with the Special Rapporteur’s general practice of applying the law of treaties to succession of States.

39. The CHAIRMAN, speaking as a member of the Commission, said that he, too, had a number of difficulties with article 21 and the commentary. It was not clear what, if anything, the practice cited in the commentary proved. He also thought that it would be very difficult indeed to draft an adequate definition of a union of States. Originally, for example, the United States of America had clearly been a union of States, but the country’s subsequent history might have changed the situation somewhat. The United States was clearly not in the same position as France, because individual states could enter into international agreements with the approval of Congress; but he doubted whether it could be easily decided whether the United States was still a union of States. Furthermore, the fact that a state member of a federal union could enter into a treaty did not necessarily mean that it had a separate international personality.

40. There were some cases of separation of States in which there was no particular reason to adopt the “clean slate” principle. If, for example, the predecessor State had entered into an agreement with the consent and in accordance with the free will of the population of the whole territory, there was no reason to reject that free will because one part of the territory had separated from the other. Earlier in the draft articles, the Commission had adopted the “clean slate” principle for former colonies and territories which had been under the dominion of other Powers. A major basis for that decision was the fact that they had not participated in or accepted the treaties concluded by the predecessor State. He doubted whether that underlying reason held good for the cases of separation envisaged in article 21 although, where there was a violent disruption of the State, the situation of the separated State might well be akin to that of a former colony. There were many factors involved that needed careful study, and he was not sure that the present draft of article 21 proposed the best solution and took account of all those factors. He would, however, propose that the Commission should proceed generally along the lines of the proposed article and submit it to governments for their comments.

41. Mr. BARTÓS said that a distinction should be made, in the commentary to article 21, between two different situations which could have identical results. On the one hand, a composite State might be composed of entities having a certain status in international law; on the other hand, part of the territory of a unitary State might enjoy a special status without possessing the capacity to conclude treaties. In the latter case, such an area was represented internationally by the central authorities. If it had been the subject of international treaties and then separated from the unitary State, it raised particular problems of State succession in respect of treaties.

42. For example, the free zone of the pays de Gex was an area of French territory granted a special status which had consequences in international law. Not only Customs reasons, but also questions of neutrality or political considerations might account for such a situation. Mount Athos, in Greece, was an autonomous territory for internal purposes and enjoyed certain international guarantees. The special régime of the right bank of the Danube, near Serbia, before the First World War, had constituted a kind of servitude in favour of Hungary. Modern examples included the Suez Canal, the Firth of Tay and a strait in Turkey.

43. It would be enough to mention those situations in the commentary to article 21; otherwise the article was satisfactory.

44. Mr. HAMBRO said that the question under consideration was extremely complicated and confused. Some of the doubts he had felt on first reading the commentary to article 21 had not been dispelled by the discussion in the Commission; in the circumstances, however, he thought the text proposed by the Special Rapporteur was the best basis for further consideration.

45. Sir Humphrey WALDOCK (Special Rapporteur) said that he had deliberately tried to exclude from the draft articles provisions whose application would depend on the question of free will. Such factors were not really susceptible of codification, despite their relevance as underlying considerations. However, it was very unlikely that separation of States would come about except as a result of political tension. Indeed, the very cause of separation was frequently the sense of being in a minority position in a State and dissatisfaction at inadequate representation and an inadequate say in the State’s affairs. When discussing articles 19 and 20, the Commission had considered that in the case of a union or fusion of States, and in the case of the dissolution of such a union, the principle of ipso jure continuity had to apply. It would, however, be much more difficult to introduce that principle in article 21, since in such cases there was no element of separate personality, and practice was solidly in favour of the “clean slate” principle. What he had tried to do generally in the draft articles was to reflect the majority practice. The Drafting Committee should

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look at articles 19, 20 and 21, as a whole since they were closely interrelated.

46. Until comparatively recently the concept of a union of States had been reasonably clear, the key element being the question of separate international personality, but it had been somewhat obscured by recent events such as the formation of the United Arab Republic. Although that had appeared to be a clear case of a union of two quite separate entities, the constitution of the United Arab Republic had in fact been as much like that of a unitary State as it could be. The Constitution had specified that the Union legislature in Cairo should be the legislature of the whole territory of the Union and had not provided for any separate legislature in Syria at all. Because of the existence of such a precedent and the application of the principle of ipso jure continuity on the grounds that Egypt and Syria were separate entities, what had once been a clear line of division had become blurred. Once the dividing line was no longer the actual retention of separate international personality, the difficulty of defining a union of States was considerable.

47. The concept he had tried to put forward in the draft articles was not fully expressed in the definition of a union of States, because that definition was concerned primarily with the formation of such unions. In practice there was either a union of States because the component parts were States before the union was formed, or a union of territories in which the territories achieved international personality, as in the case of Norway-Sweden and Iceland-Denmark. The main question was whether the Commission was going to make a category of unions of States that would necessarily depend on recognition of some element of separate personality. In his view the United States of America, for example, was a union of States, because a certain element of separate international personality remained, whereas the United Kingdom, which had originally been a union of States, was no longer, because no such element of separateness remained.

48. The CHAIRMAN suggested that draft article 21 should be referred to the Drafting Committee.

It was so agreed.6

The meeting rose at 1 p.m.

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For resumption of the discussion see 1196th meeting, para. 59.

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SECOND REPORT OF THE WORKING GROUP: DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALY PROTECTED PERSONS

ARTICLE 1

1. The CHAIRMAN invited the Commission to consider the revised text of article 1 submitted by the Working Group in its second report (A/CN.4/L.188 and Add.1) which read:

Article 1

For the purposes of the present articles:

1. “Internationally protected person” means:

(a) A Head of State or a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

(b) Any official of either a State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organization, as well as members of his family who are likewise entitled to special protection.

2. “Alleged offender” means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in article 2.

3. “International organization” means an intergovernmental organization.

2. Paragraph 1 (b) had been substantially changed to take account of the various objections and suggestions made during the Commission’s discussion of the first draft.1 It had been argued that the expression “foreign government” caused some confusion, particularly as the word “State” was used elsewhere in the paragraph, so the Working Group had decided to substitute the word “State”. There had been general agreement in the Commission that the words “of universal character”, included in square brackets in the first draft, should be deleted. Doubts had been expressed concerning the meaning of the phrase “whenever he is in a State”. The Working Group had decided that the basic test was whether a person was entitled to special protection at the time when the offence occurred; it had therefore deleted that phrase and had rearranged the whole paragraph to make the point clear. The Working Group had also decided that the same test should apply to members of the family. The word “official” before the word “functions” had been deleted because it was considered to be superfluous. In his view, the new version of paragraph 1 (b) was considerably simpler and easier to understand.

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1 See 1182nd to 1185th meetings and document A/CN.4/L.186.
3. No change had been made in paragraph 2. Because of the deletion of the words “of universal character” in paragraph 1 (b), a new paragraph 3 had been added, giving the definition of an international organization contained in the Vienna Convention on the Law of Treaties.²

4. Mr. YASSEEN pointed out that the scope of paragraph 1 (a) was more or less the same in the revised text: it covered only Heads of State and Heads of Government. Hence it could not apply in the case of a collegial presidency. Since the draft articles were concerned with matters of criminal law, their provisions could not be extended by analogy.

5. The expression “members of his family who are likewise entitled to special protection”, at the end of paragraph 1 (b), should be clarified, because it might be taken to mean that the right to special protection derived from the draft itself. It should be made clear that, as in the case of the officials referred to at the beginning of paragraph 1 (b), the right to such protection must derive from international law or an international agreement.

6. Mr. BARTOŠ said he agreed with Mr. Yasseen’s last remark. He also wished to point out that paragraph 1 (b) did not specify the circumstances in which members of the family were entitled to special protection. It was not, of course, the intention of the Working Group or of the Commission that such persons should be entitled to special protection when they were not accompanying the head of the family, particularly when they travelled to another country for their own purposes. Hence they should not enjoy individual protection, but protection linked with that of the head of the family.

7. Because the text was not clear on those points, he would be obliged to vote against article 1.

8. The CHAIRMAN, speaking as a member of the Commission, said that, so far as special protection for members of the family was concerned, the same test was applied whether the right to protection was derived from the official or whether members of the family were entitled to it on a personal basis. It would perhaps be clearer to repeat the phrase “pursuant to general international law or an agreement” at the end of paragraph 1 (b). There had been some discussion of the problem of a collegial presidency but, because of the lack of precedents, the Working Group had decided to retain the standard formula used in a number of conventions.

9. Mr. ELIAS said that to repeat the phrase “pursuant to general international law or an international agreement” at the end of paragraph 1 (b) would make the text somewhat unwieldy. He suggested that the reference to members of the family should be placed earlier in the sentence and that paragraph 1 (b) should end with the words “international organization”. So far as the problem of the collegiate system was concerned, it might be useful to add the words “or a member of a collegial presidency” in paragraph 1 (a).

10. Mr. BARTOŠ said that it was not unusual for diplomat’s wives, or even their children, to claim the right to special protection when they were travelling as tourists. It was therefore essential to specify the circumstances in which members of the family would be covered by the draft articles, especially as provision was made for more severe penalties.

11. Mr. USTOR said that, in his view, article 1 had been greatly improved by the Working Group. He was quite satisfied with the text of paragraph 1 (b) as it stood. The article was concerned with definitions, and paragraph 1 (b) could hardly be interpreted as conferring the right to special protection on anyone. The normal interpretation would be that the persons referred to were already entitled to special protection pursuant to general international law or an international agreement. Similarly, it was extremely unlikely that any State which introduced changes in its internal law on the basis of the draft convention would exclude any person or persons who performed the functions of a Head of State in a State having a collegial presidency. The Commission could make a specific reference to that case, as suggested by Mr. Elias, but even if it did not, the members of the college would be entitled to protection.

12. Mr. USHAKOV said that he wished to raise some drafting points relating to the French text. In paragraph 1 (b), the words “any official” had been translated into French by the words “toute personnalité officielle ou tout fonctionnaire”, which applied both to States and to international organizations. There could be no doubt, however, that the scope of the provision would be restricted if it referred to “personnalités officielles” of States. In the same sub-paragraph, the word “entitled” should be translated by an expression which would indicate, better than the words “a droit”, that the person did not in himself have a right to special protection, but that it had been accorded to him. Lastly, he did not think that “égalemant” was equivalent to the English word “likewise”.

13. Mr. QUENTIN-BAXTER said that the definition of an international organization in paragraph 3 would not cover the International Committee of the Red Cross (ICRC), which had specific duties to perform under the Geneva Conventions. The ICRC was in a very special position and was in need of the kind of protection afforded by the draft far more than certain other international organizations which would be covered by the definition.

14. The CHAIRMAN, speaking as a member of the Commission, said it was very difficult to draw a line, but if the ICRC was included, many other non-governmental organizations would claim to have an equal right. He doubted whether, under general international law, ICRC representatives would be entitled to special protection.

15. Mr. HAMBRO said he entirely agreed with Mr. Quentin-Baxter that the ICRC had a very special status, though unfortunately he did not see how it could be included in the present draft convention. He could not, however, accept any suggestion that the ICRC was on a par with other non-governmental organizations.

16. The CHAIRMAN, speaking as a member of the Commission, said that the reference to members of the family in paragraph 1 (b) could not be placed earlier in the sentence, as Mr. Elias had suggested, because of the subsequent reference to the performance of functions. He agreed with Mr. Ustor that the text was quite satisfactory as it stood, but he saw no great harm in repeating the phrase “pursuant to general international law or an international agreement”.

17. Mr. ELIAS said it would be better to leave paragraph 1 (b) as it stood and give further explanations in the commentary.

18. The CHAIRMAN, speaking as a member of the Commission, agreed. He suggested that paragraph 1 (a) should also be left in its present form and that its application to a collegiate presidency should likewise be explained in the commentary.

19. Mr. YASSEEN said it should be recorded in the commentary that some members of the Commission considered that, given the way in which the articles should be interpreted, paragraph 1 (a) could apply only to Heads of State and Heads of Government, whereas other members had taken a contrary view.

20. Mr. BARTOŠ said that such a statement would have no practical effect. The commentaries to the articles had only a theoretical value, because they were not adopted by States. Even when they expressed the unanimous view of the Commission, they had no binding force.

21. Mr. USTOR said he agreed with Mr. Bartoš that the commentary did not have any real standing in law. However, as there were differences of opinion among members of the Commission and the draft would subsequently be considered by the General Assembly or at a conference, it would be useful to explain those differences of opinion in the commentary.

22. Mr. USHAKOV suggested that paragraph 1 (a) should refer to “a Head of State, a Head of Government or other personality of high rank”.

23. The CHAIRMAN, speaking as a member of the Commission, said that the Commission had already considered the use of such a phrase in its work on special missions and relations between States and international organizations, but had decided against it because its meaning was not sufficiently precise.

24. Mr. USTOR said he thought the best solution would be to accept the suggestion made by Mr. Ushakov; failing that, the matter should be explained in the commentary.

25. Mr. HAMBRO said he was opposed to including the phrase suggested by Mr. Ushakov. The Commission had discussed its use on several occasions and had always agreed not to adopt it.

26. The CHAIRMAN suggested that the Commission should approve draft article 1 provisionally, on the understanding that the different views on paragraphs 1 (a) and 1 (b) would be explained in the commentary.

It was so agreed.

ARTICLE 2 *

27. The CHAIRMAN invited the Commission to consider the revised text of article 2 submitted by the Working Group, which read:

Article 2

1. The intentional commission, regardless of motive, of:
   (a) A violent attack upon the person or liberty of an internationally protected person;
   (b) A violent attack upon the official premises or the private accommodation of an internationally protected person likely to endanger his person or liberty;
   (c) An attempt to commit any such attack; and
   (d) Participation as an accomplice in any such attack, shall be made by each State Party a crime under its internal law, whether the commission of the crime occurs within or outside of its territory.

2. Each State Party shall make these crimes punishable by severe penalties which take into account the aggravated nature of the offence.

3. Each State Party shall take such measures as may be necessary to establish its jurisdiction over these crimes.

28. The first major change made by the Working Group was the insertion of the word “intentional” before the word “commission” in paragraph 1. It had been argued in the Commission that, in view of the phrase “regardless of motive”, paragraph 1 might be interpreted as applying, for example, to a manslaughter charge resulting from an automobile accident. The Working Group had therefore decide to include the word “intentional” in order to preclude that interpretation.

29. To simplify the drafting, the reference to “severe penalties which take into account the aggravated nature of the offence” had been put in a new paragraph 2. The Working Group had decided to retain the word “aggravated”, because it had concluded that the acts in question were being treated as aggravated offences and that it was for that reason that States were required to make them punishable by severe penalties. A new paragraph 3 had also been added to meet the criticism that the draft did not specifically provide for the establishment of jurisdiction over the crimes with which it was concerned. The Working Group had thought that the phrase “within or outside of its territory”, in paragraph 1, was sufficient for the purpose, but had included paragraph 3 to be on the safe side.

30. Mr. REUTER observed that the Working Group had not made it clear in article 2 that the crimes referred to must have been committed because of the victim’s functions. Since he had always attached importance to that point, he would have to vote against article 2. He would also have to take the same position on article 6, since there, too, his remarks had not been taken into account.

31. The French text of article 2 called for two comments. The first was that the expression “attaque violente”, in paragraph 1, was modelled on the English term, although the latter had a very special meaning in common law.

* For previous discussion see 1182nd to 1185th meetings.
The French text of paragraph 1 (a) should perhaps be completely reworded on the following lines: “d’attaquer l’intégrité physique ou la liberté d’une personne jouissant d’une protection internationale, en recourant à la violence”.

32. Even then, the text of paragraph 1 would not be completely satisfactory, because it did not cover threats. An attempt, which was the subject of paragraph 1 (c), implied a beginning of commission, but terrorists might confine themselves to making threats. It was important to take account of that case, which was a characteristic example of the offences with which the Commission was concerned. Threats against persons of the kind protected by the draft always related to the State or organization those persons represented. He would therefore suggest adding the following phrase to the text he had proposed for paragraph 1 (a): “ou en menaçant de le faire” (or the threat of such attack).

33. His second comment on the French text related to paragraph 2. It was essential that there should be a reference to the nature of the offence, and he would therefore suggest that the French version of the last phrase should be more closely modelled on the English version and read: “qui prennent en considération la nature aggravée de l’infract.ion”. In particular, the word “infrac.ion” should be substituted for “acte”.

34. Paragraph 3 was essential and must certainly be retained. It contained one of the most valuable innovations in the draft.

35. Mr. ELIAS said he found little to criticize in the new text of article 2. He was not sure, however, that the addition of the word “intentional” in paragraph 1 was the best solution to the problem. In his view, there was some slight contradiction in terms, particularly when the introductory phrase was linked with sub-paragraph (c), for example. It might perhaps be preferable to delete the word “intentional”.

36. Mr. BARTOS said that he accepted the content of article 2 in principle, but must point out that it did not cover preparation for the crimes referred to. Under article 3, States had to take measures to prevent preparation for those crimes. Preparation must be distinguished from an attempt, which was already a beginning of commission, and from complicity.

37. He would like to know whether the Working Group had deliberately omitted the case of preparation, which had earlier been excluded from the Convention on Genocide, at the request of the common-law countries. In those countries the conditions constituting a criminal offence were held not to exist until an attempt had been made.

38. Mr. RAMANGASOAVINA said he approved of the wording of the introductory sentence of paragraph 1. The word “intentional” was not superfluous, because it defined the exact scope of article 2, which, as had already been said, should not apply to a mere traffic accident. The expression “regardless of motive” helped to establish the nature of the crime; it showed that all the circumstances which might give rise to the situations dealt with in the draft were covered.

39. The expression “attaque violente” in the French text was not entirely adequate, because the idea of violence covered a whole range of offences from assault and wounding to murder. The wording proposed by Mr. Reuter would therefore be a considerable improvement. He did not, however, support the suggestion that the words “or the threat of such attack” should be added, since that would raise thorny problems. In particular, it would be hard to judge what constituted a threat not followed by commission, in view of the fact that an attempt not, followed by a beginning of commission was not generally punishable.

40. As far as paragraph 2 was concerned, it should be noted that a more severe penalty was justified not only by the special status of the victims, but also by the very nature of the acts committed against them. Perhaps the Working Group could find more suitable wording.

41. Mr. BILGE said that he would have to vote against article 2 if it did not cover threats, as he had expressed the hope that it would. He believed that attempts on the liberty of diplomats were nearly always preceded by threats. It was only if the person concerned offered some degree of resistance that an act of violence was committed.

42. Mr. THIAM, referring to the expression “violent attack” said that it would be preferable to omit the idea of violence because it limited the scope of paragraph 1 (a). As to threats, they were sometimes a means of blackmail and should be covered by the draft articles in the same way as preparations.

43. Mr. SETTE CÂMARA said he agreed entirely with Mr. Reuter, Mr. Thiam and Mr. Bilge that the article should not exclude the notion of “threat”. The threat to commit a crime, which had nothing to do with the attempt to commit a crime, could cause very severe moral and material damage, and in many modern penal codes was treated as a crime in itself.

44. Mr. USHAKOV said that threats were sometimes more serious than acts of violence themselves. He therefore considered they should be covered by the article.

45. Referring to the last phrase of paragraph 1, he pointed out that the word “crime” in the English text did not correspond to the word “attaque” in the French.

46. Mr. RAMANGASOAVINA said he wished to clarify his views on the question of threats. He knew what a serious matter threats could be, particularly where they took the form of blackmail. The reason why it was difficult to include the idea in the draft was that the gravity of threats was hard to assess. It depended not only on the strength of the criminals, but also on the victim’s ability to defend himself. It could even happen that courts assessed the gravity of threats according to the sex of the victim. To cover the case, the words “ou morale” might possibly be inserted after the words “l’intégrité physique” in the French text of paragraph 1 (a), since an attack upon a person’s intégrité morale often took the form of threats.

47. Mr. REUTER said he could imagine a case in which, contrary to what Mr. Bilge had said, threats were not followed by the commission of an act of violence. If

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terrorists threatened to attack the diplomatic representative of a State unless it released a certain number of prisoners, other States Parties had a duty to take preventive measures under article 3. And if the persons making the threat were subsequently identified, it was obvious that they should be severely punished. Such acts complicated the preventive task of States and considerably disturbed relations between them. In such cases the threats constituted a means of terrorism and created a situation of precisely the kind that the Commission was seeking to prevent.

48. Mr. QUENTIN-BAXTER said he had not yet formed a definite opinion on the desirability of including a reference to threats. He agreed that threats could be extremely serious, but a reference to them in article 2 would involve difficulties in regard to proof; there was also a danger of the procedure being abused. Very careful consideration would therefore have to be given to the form of words to be used.

49. He agreed with Mr. Elias that the phrase “intentional commission” in paragraph 1 had a strange ring, consideration would therefore have to be given to the

50. He was a little disappointed by the retention of the reference to the aggravated nature of the offence in paragraph 2, since it would give rise to difficulties in interpreting the obligations imposed on States. Under the proposed text, it would not be enough for a State to extend its jurisdiction to crimes committed abroad; it would also have to enact legislation providing for specially severe penalties for the offences. He believed that many Ministers of Justice would be deterred from accepting the draft if that idea were retained in it.

51. He welcomed the inclusion of paragraph 3. Personally, he would have preferred the whole of article 2 to be framed in terms of an extension of criminal jurisdiction, not of a definition of crimes.

52. Mr. ELIAS said he wished to make it clear that he did not object to the substance of the opening phrase of paragraph 1. He had simply wished to suggest that the language might be improved, particularly with regard to the use of the word “intentional”. But if the majority of the members wished to retain that term, he would not oppose the approval of the article.

53. Mr. AGO said he thought the idea of threats should be included, provided that it was qualified in such a way as to make it clear that only serious threats were meant and not threats made without any real intention of carrying them out. A formula such as “serious and deliberate threat” might be used.

54. Mr. HAMBRO strongly urged that the word “inten-
tional” should be retained in the opening sentence of paragraph 1.

55. He had been convinced by the arguments put forward during the discussion that it was desirable to include provisions covering not only threats, but also preparation for crimes. That could be done either by amending paragraph 1(c) or by adding a new sub-paragraph to paragraph 1.

56. The CHAIRMAN noted that there was a substantial majority in favour of including a reference to threats in article 2. Clearly, it would not be to every form of threat, nor would it be enough to speak of a “serious” threat. The purpose should be to deal only with such threats as would bring into play the government’s machinery for the protection of diplomats. That machinery would not be used, for example, in the case of a threatening letter written by an unbalanced individual who obviously had no intention of carrying out his threats. One method of dealing with the difficulty would be to link the question of threats with that of attempts to extort a sum of money or to obtain some particular form of government action.

57. There also appeared to be general support for the idea of covering preparation for crimes. That would introduce into article 2 a type of offence akin to conspiracy, with all its attendant difficulties.

58. He suggested that the Working Group should be invited to re-examine the text of article 2 with a view to covering threats and preparation; it could at the same time consider the drafting problem involved in the use of the expression “intentional commission”. Because of the shortage of time, the text it produced would have to be included in the set of draft articles submitted to the Commission for final approval. If there were no further comments, he would take it that that suggestion was acceptable to the Commission.

It was so agreed.6

ARTICLE 37

59. The CHAIRMAN invited the Commission to consider the revised text of article 3 submitted by the Working Group, which read:

Article 3

States Party shall cooperate in the prevention of the crimes set forth in article 2 by:

(a) Taking measures to prevent the preparation in their respective territories for the commission of those crimes either in their own or other territories;

(b) Exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

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6 For resumption of the discussion see 1193rd meeting.
7 For previous discussion see 1185th meeting, paras. 51 et seq.
60. The main change made to the previous text (A/CN.4/L.186) was the omission of the words “in accordance with their internal law” from the opening sentence. Those words had been considered redundant because the State concerned would always act in accordance with its internal law.

61. The text of sub-paragraph (a) had been made shorter and clearer.

62. Mr. BARTOS said that he had no objection to the new text of article 3.

63. Mr. ELIAS said he accepted article 3, but wished to suggest that the concluding words of sub-paragraph (a) “in their own or other territories” should be corrected to read: “in their own or in other territories”.

Article 3 was approved with that amendment.

ARTICLE 4*

64. The CHAIRMAN invited the Commission to consider the revised text of article 4 submitted by the Working Group, which read:

Article 4

The State Party in which one or more of the crimes set forth in article 2 have been committed shall, if it has reason to believe an alleged offender has fled from its territory, communicate to all other States Party all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

65. He pointed out that no change had been made in the previous text (A/CN.4/L.186).

Article 4 was approved.

ARTICLE 5*

66. The CHAIRMAN invited the Commission to consider the revised text of article 5 submitted by the Working Group, which read:

Article 5

1. A State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for prosecution or extradition. Such measures shall be immediately notified to the State where the crime was committed, the State of which the alleged offender is a national, the State of which the internationally protected person concerned is a national and all interested States Party.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national and to be visited by a representative of that State.

67. A few changes had been made in the previous text of paragraph 1 (A/CN.4/L.186). In the first sentence the words “is found” after “alleged offender” had been replaced by the words “is present”. The second sentence, which had required immediate notification of the measures in question “to all other States Party”, had been expanded by mentioning specifically the three States which were particularly concerned: the State where the crime had been committed, the State of which the alleged offender was a national and the State of which the protected person concerned was a national. The intention had been to ensure that those three specially interested States, whether parties or not, were immediately advised; in view of the urgency, it was necessary to avoid the delays which might occur if a large number of States were placed on the same footing for purposes of notification. Of course, the requirement of notification of “all interested States Party” remained.

68. No change had been made in paragraph 2.

69. Mr. BARTOS said that in order to allow for dual nationality, which was now a recognized institution, the phrase “the State of which the alleged offender is a national”, in the second sentence of paragraph 1, should be amended to read “the States of which...”.

70. Mr. USTOR proposed that the concluding words of paragraph 1 “all interested States Party” should be replaced by the words “all other interested States”. It was quite possible that a State not a party, other than one of the three States specifically mentioned in the revised version of the second sentence, might also be very much concerned. One such State would be the State of permanent residence of the alleged offender; even if that State was not a party, it should be notified.

71. The problem of dual nationality could be covered by saying “the State or States of which the alleged offender is a national”. The words that followed should be amended in the same way to cover cases in which the protected person had dual nationality.

72. Mr. BARTOS said he could agree that in the case of stateless persons it was the State in which the person concerned was resident or whose protection he enjoyed that must be considered, though it was not necessary to say so explicitly in the text, because the idea was covered by the expression “all interested States Party”. On the other hand, for those who had a nationality, the only possible wording was “the States of which the alleged offender is a national”.

73. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 5 with the amendments proposed by Mr. Ustor. Mr. Bartoš’ remarks would be taken into account in the commentary.

It was so agreed.

ARTICLE 6*

74. The CHAIRMAN invited the Commission to consider the revised text of article 6 submitted by the Working Group, which read:

Article 6

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

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For previous discussion see 1186th meeting.

For previous discussion see 1186th meeting, paras. 3 et seq.

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For previous discussion see 1186th meeting, paras. 24 et seq.
75. An important change had been made in the previous text (A/CN.4/L.186), in that the words “through proceedings in accordance with the laws of that State” had been added at the end of the article to indicate that, once a decision had been made to submit the case to the competent authorities for the purpose of prosecution, all further proceedings would be in accordance with the laws of the State in whose territory the alleged offender was present. The Working Group had thus taken into account one of the reasons put forward in favour of introducing into article 6 the sentence. “Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State”, which appeared in the corresponding articles of the Hague and Montreal Conventions.\(^{11}\)

76. It should be clearly understood, however, that neither the words added to article 6 nor the corresponding sentence in the Hague and Montreal Conventions could be interpreted as constituting an escape clause that might enable a government to take a decision on the question of prosecution without due regard to legal considerations.

77. Mr. RAMANGASOAVINA said he did not think the Working Group had been justified in replacing the expression “aux fins de poursuites” in the French text of the article by “aux fins de l’action pénale”. “Action pénale” did not necessarily lead to a penalty any more than “poursuites”. There was thus no difference in meaning. It would be better to go back to the phrase “aux fins de poursuites”, which was closer to the English term “prosecution”.

78. Mr. USHAKOV explained that the Working Group had wished to reproduce the term used in the official translation of the Hague and Montreal Conventions, which was “pour l’exercice de l’action pénale”. The phrase “s’il décide de ne pas extrader ce dernier” should read “s’il n’extrade pas ce dernier”, because the Working Group had reverted at the last minute to its original idea, which had been restored in the English text but not in the French. The phrase “selon une procédure conforme à la législation de cet État” should be amended to correspond more closely to the English text.

79. Mr. RAMANGASOAVINA said that the phrase “aux fins de l’action pénale” was restrictive. There was no reason to assume that only criminal proceedings would be taken; there might also be civil proceedings. The phrase “aux fins de poursuites” would cover both.

80. Mr. THIAM said he shared that view. Referring to the last comment made by Mr. Ushakov, he proposed that the phrase “selon une procédure conforme à la législation de cet État” should be replaced by “selon la procédure prévue par la législation de cet État”.

81. Mr. REUTER said he maintained the position he had stated when the Commission had previously considered article 6.\(^{12}\)

82. Mr. ELIAS urged that the text of article 6 proposed by the Working Group should be retained.

83. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve the text of article 6, on the understanding that an attempt would be made to improve the French version.

It was so agreed.

The meeting rose at 12.55 p.m.

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**1192nd MEETING**

**Friday, 30 June 1972, at 9.30 a.m.**

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Camara, Mr. Tabibi, Mr. Tamases, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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**Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law**

(A/CN.4/253 and Add.1 to 5; A/CN.4/L.182, L.186 and L.188 and Add.1)

[Item 5 of the agenda]

(continued)

**SECOND REPORT OF THE WORKING GROUP: DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS (continued)**

**ARTICLE 7**

1. The CHAIRMAN invited the Commission to consider the revised text of article 7 submitted by the Working Group in its second report (A/CN.4/L.188/Add.1), which read:

   **Article 7**

   1. To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between Parties they shall be deemed to have been included as such therein. Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

   2. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may, if it decides to extradite, consider the present articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the procedural provisions of the law of the requested State.

   3. Parties which do not make extradition conditional on the existence of a treaty shall recognize the crimes as extraditable.

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\(^{11}\) See *International Legal Materials*, vol. X, 1971, number 1, pp. 134-135, article 7 and number 6, p. 1154, article 7.

\(^{12}\) See 1186th meeting, para. 32 and 1188th meeting, para. 7.

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\(^{1}\) For previous discussion see 1188th meeting.
offences between themselves subject to the procedural provisions of
the law of the requested State.

4. An extradition request from the State in which the crimes were
committed shall have priority over other such requests if received
by the State in whose territory the alleged offender has been found
within six months after the communication required under para-
graph 1 of article 5 has been made.

2. The first sentence of paragraph 1 had been reworded
because the text in the Working Group’s first report (A/
CN.4/L.186) failed to take account of the fact that many
of the crimes described in article 2 would already be
covered in existing extradition treaties by the standard
article listing extraditable offences. Hence the use in the
revised text of the word “listed”, which made it clear
that the reference was to such standard clauses and not
to any other provisions of extradition treaties which might
set conditions for, or limitations on, extradition.

3. In paragraphs 1 and 3, the expression “extraditable
crimes” had been replaced by “extraditable offences”,
which was the expression customarily used in extradition
treaties.

4. In response to the remarks made by Mr. Tammes
and Mr. Elias, paragraph 2 had been reworded so as to
clarify the relationship between the provisions of articles 6
and 7. The language now used made it clear that the
requested State had the exclusive right to decide whether
to extradite the alleged offender or to prosecute him.

5. In both paragraphs 2 and 3, the reference to the
“conditions provided for by the law of the requested
State” had been replaced by a reference to the “proce-
dural provisions” of that law. The intention had, in fact,
been to refer to the procedure that would be put into
effect in the absence of treaty provisions on extradition.

6. Lastly, in paragraph 4, the words “over other such
requests” had been inserted after the words “shall have
priority”, in order to make it clear that the priority
operated only as between two or more States requesting
extradition.

7. Mr. QUENTIN-BAXTER thanked the Working
Group for having taken a wide variety of suggestions into
account and having introduced improvements that made
the text more generally acceptable.

Article 7 was approved.

ARTICLE 8 *

8. The CHAIRMAN invited the Commission to con-
sider the revised text of article 8 submitted by the Working
Group, which read:

Article 8

Any person regarding whom proceedings are being carried out
in connexion with any of the crimes set forth in article 2 shall be
guaranteed fair treatment at all stages of the proceedings.

9. The only change made in the earlier text (A/CN.4/
L.186) had been to replace the words “fair trial” by the
words “fair treatment”. That broad expression was

* See 1186th meeting, para. 26 and 1188th meeting, para. 27.

intended to cover such matters as humane treatment for
the alleged offender while under arrest and the fair con-
duct of all legal proceedings.

Article 8 was approved.

ARTICLE 9 *

10. The CHAIRMAN invited the Commission to con-
consider the revised text of article 9 submitted by the Working
Group, which read:

Article 9

The statutory limitation as to the time within which prosecution
may be instituted for the crimes set forth in article 2 shall be, in
each State Party, that fixed for the most serious crimes under its
internal law.

11. The Working Group had taken into account the
objections raised in the Commission to the idea of elim-
inating statutory limitations altogether, as provided in the
original text of article 9 (A/CN.4/L.186). It had there-
fore decided to drop that idea and to substitute the for-
mula put forward by Mr. Hambro. Accordingly, the text
of article 9 now specified that the period of statutory
limitation for the crimes set forth in article 2 would be
that fixed for the most serious crimes under internal law.

12. It had been considered that the draft should include
some provision on statutory limitation in order to ensure
that prosecution was not prevented in countries where the
period of limitation for some of the offences coming
under article 2 was short. The crimes set forth in article 2
were usually committed by persons who operated under-
ground and were difficult to trace, and in view of the
serious implications of those crimes for the international
community, national law enforcement authorities should
be allowed as long as possible to search for the criminals.

13. Mr. ELIAS said he was not in favour of including
a provision on statutory limitation in the draft, so he
could not support article 9.

14. Mr. USTOR pointed out that criminal law drew a
distinction between the period of statutory limitation for
the prosecution of an offence and the period of statutory
limitation for the execution of a sentence.

15. The CHAIRMAN said that the scope of article 9
was confined to the institution of legal proceedings. No
attempt had been made to enter into the complex question
of the periods of limitation which existed in many
countries for the execution of sentences.

16. Mr. RAMANGASOAVINA reminded the Com-
misson that, during the consideration of article 6 at the
previous meeting, he had pointed out that the replacement of
the word “poursuites” by the words “action pénale” in
the French text was not justified, since the latter expression
excluded civil proceedings. The use of the words “action
pénale” would be admissible in article 9, since the refer-
ce to internal law covered civil proceedings, but in the
interests of concordance with the English text, it would
be better to revert to the word “poursuites”.

* For previous discussion see 1189th meeting, paras. 29 et seq.
* See 1195th meeting, paras. 32.
* See previous meeting, paras. 77 and 79.
17. Mr. REUTER said that in the French text it would be more elegant to replace the words “en matière de” by “relative au”.

18. With regard to the substance, if article 9 was to achieve its purpose in all cases, the Commission should fix the period of limitation, which would then be the same for all States, rather than leave it to each State’s internal law. That would eliminate the possibility that there might be neither extradition nor prosecution if a State which decided to prosecute and not to extradite, as it was entitled to do—and which thereby met its obligation under the treaty—was precluded from prosecuting because the period of limitation had expired. He could have accepted the absence of statutory limitation if the offences covered by the draft articles had been more strictly defined. But since that was not the case, the formula proposed in article 9 was probably the only one on which the Commission could agree.

19. Mr. TSURUOKA said that he could accept article 9 as now proposed, but only as a compromise. The meaning was not clear. It was hard to decide whether “the most serious crimes” meant those specified in the State’s internal law or those set forth in article 2, paragraph 1 (b), and whether the statutory limitation applied to the former or the latter. He acknowledged, however, that the Commission did not have time to prepare a new text and he would therefore be willing to accept the one proposed, on condition that the meaning was explained in a commentary.

20. Mr. HAMBRO said that the problems involved were perhaps not as complicated as some of the remarks made during the discussion might suggest. In most countries, the criminal law divided criminal offences into various categories, classified according to the penalties applicable. The purpose of article 9, in its present form, was simply to ensure that the crimes set forth in article 2 should be classified in the category of the most serious crimes for purposes of the application of the provisions of internal law relating to statutory limitations.

21. The rule stated in article 9 had an important corollary. Where the internal law of a country specified that there was no statutory limitation for the prosecution of the most serious category of crimes, it followed that, in the case of that country, there would also be no statutory limitation for the prosecution of the crimes set forth in article 2.

22. At the same time, the present text of article 9 provided a safeguard for those States which believed strongly that, for reasons of general policy, there must be a statutory limitation on the prosecution of all crimes. A provision on the lines of article 9 would permit such States to accept the draft without making any reservations.

23. He proposed that a full explanation of all those points should be included in the commentary.

24. Mr. SETTE CÂMARA said he fully agreed with the remarks of the previous speaker.

25. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed to approve article 9 on the understanding that its purpose would be explained in the commentary as suggested by Mr. Hambro.

It was so agreed.

ARTICLE 10

26. The CHAIRMAN invited the Commission to consider the revised text of article 10 submitted by the Working Group, which read:

Article 10

1. States Party shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes, including the supply of all evidence at their disposal necessary for the prosecution.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual assistance in criminal matters embodied in any other treaty.

27. The only change made in the previous text (A/CN.4/L.186) had been to replace the words “in particular by supplying all evidence...”, in paragraph 1, by the words “including the supply of all evidence...”. That amendment had been made to clarify the meaning; no change of substance was involved.

28. Mr. USTOR suggested that the word “crimes” in paragraph 1 should be replaced by the phrase “crimes set forth in article 2”, to bring the wording of article 10 into line with that of articles 7, 8 and 9.

29. Mr. REUTER suggested that, in the French text, the words “y compris” should be replaced by the word “notamment”.

30. In paragraph 2, he proposed that the words “in criminal matters” be deleted. Since the idea of judicial assistance covered more than purely criminal proceedings he would prefer more general wording.

31. Mr. USHAKOV supported that proposal and pointed out that the English text should be amended to read “mutual judicial assistance”.

32. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 10 with the amendments proposed by Mr. Ustor, Mr. Reuter and Mr. Ushakov.

It was so agreed.

ARTICLE 11

33. The CHAIRMAN invited the Commission to consider the revised text of article 11 submitted by the Working Group, which read:

Article 11

The final outcome of the legal proceedings regarding the alleged offender shall be communicated by the State where the proceedings are conducted to the Secretary-General of the United Nations, who shall transmit the information to the other States Party.

34. The only change made in the earlier text (A/CN.4/L.186) had been the replacement of the words “judicial proceedings” by “legal proceedings”, so as to cover not only court proceedings, but the preliminary hearing or investigation as well.

Article 11 was approved.

7 For previous discussion see 1189th meeting, paras. 54 et seq.
8 For previous discussion see 1189th meeting, paras. 60 et seq.
ARTICLE 12

35. The CHAIRMAN invited the Commission to consider the alternative texts for article 12 submitted by the Working Group, which read:

Article 12

Alternative A

1. Any dispute between the Parties arising out of the application or interpretation of the present articles that is not settled through negotiation may be brought by any State Party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States Party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present articles.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission’s conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months’ time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

Alternative B

1. Any dispute between two or more Parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each Party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Parties shall not be bound by the preceding paragraph with respect to any Parties having made such a reservation.

3. Any Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

36. The Working Group had decided to submit two alternative texts for article 12 to the Commission. Alternative A was based on the conciliation method and corresponded to article 12 in the draft contained in the Working Group’s first report (A/CN.4/L.186); an article of that kind had been included in both the Hague and the Montreal Conventions. Alternative B was based on the system of arbitration and judicial settlement. It would be for the Commission to decide which of those texts it wished to submit to the General Assembly. It could, of course, decide to submit both and leave it to governments to choose between them.

37. Mr. YASSEEN said that acceptance of compulsory jurisdiction was a highly political matter, which depended on the circumstances of the case and on the attitude of States towards international jurisdiction. Alternatives A and B should both be submitted to governments, since the Commission could not choose for them.

38. The development of conciliation as a method of settling disputes was worth noting. At first essentially optional, conciliation was acquiring a compulsory character without thereby becoming unacceptable to States, because its conclusions always remained recommendations. Although the recommendations were not binding, they carried a moral authority which put pressure on States to reach a solution. Because of the new function assigned to it—the settlement of purely legal matters relating to treaties—conciliation was becoming a procedure similar to expertise, whereby a body specially set up for the purpose was asked to give a ruling on a legal problem. That new trend in conciliation should be clearly brought out in the article.

39. Mr. HAMBRO agreed with Mr. Yasseen that it would be wiser to submit both alternatives to governments. He personally was in favour of the International Court of Justice having jurisdiction, or, if that was not accepted, the solution proposed in alternative B, because conciliation, as provided for in alternative A, resulted only in recommendations and not in final solutions.

40. Mr. REUTER said that he too was in favour of submitting both alternatives to governments. He had always urged the Commission, whose role was essentially a technical one, to propose alternative texts and he regretted that it had done so only in the case of article 12.

41. With regard to the substance of the article, he had some comments to make on the two versions proposed. As to alternative A, it would be better to say in paragraph 3 that the third member should be appointed by the Secretary-General, “or failing him, by the President of the International Court of Justice”. Where conciliation commissions were concerned, it had been the practice, since the United Nations Conference on the Law of

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* For previous discussion see 1189th meeting, paras. 65 et seq.

Treaties, to give the Secretary-General a role instead of the President of the International Court. He had as much confidence in the Secretary-General as in the President of the International Court, but he had already drawn attention, in vain, when the Commission had been preparing the draft articles on relations between States and international organizations, to a very important point, namely, that the Secretary-General could not be both a judge and a party. Since the present draft articles were intended to protect representatives of international organizations, who might be officials, agents or representatives of the United Nations, there could be many situations in which the Secretary-General might well prefer, for reasons of natural discretion which were quite understandable, that the appointment should be made by the President of the International Court of Justice.

42. As to alternative B, the text could be further elaborated. The tradition that what had been done in the past should be respected, even in the case of conventions of secondary importance such as the Montreal Convention, was not always a good one. For arbitration, a more flexible procedure should have been proposed, leaving it to the parties to choose between arbitration and, if they agreed, recourse to the International Court of Justice, and machinery should have been provided for to make good the failure of one party to play its part in appointing the arbitral tribunal. States might be willing to accept arbitration, but not the International Court of Justice. That was a fact. Whether they were right or wrong was not for the Commission to decide. In any event, a more fully perfected solution would do credit to the Commission, which was above all a technical body.

43. Mr. YASSEEN said he agreed that the Secretary-General should not be responsible for appointing the third member of the conciliation commission. That was more a matter for the President of the International Court of Justice, since one of the Court’s main tasks was the interpretation of treaties.

44. With regard to alternative B, the arbitration procedure provided for was not satisfactory, because there was no provision governing the appointment of arbitrators or the measures to be taken if one party did not appoint its arbitrator. If the Commission really wished to establish compulsory jurisdiction, the principle it should lay down was that of recourse to the International Court of Justice as the principal judicial organ of the United Nations, the possibility of resorting to arbitration being left open to the parties.

45. The CHAIRMAN said he fully agreed that alternative B was not an ideal draft clause on arbitration and judicial settlement. It had, however, been included in the Hague and Montreal Conventions and could be used at the present stage to elicit the views of governments. Once governments had decided which of the two methods of settlement of disputes they preferred, the Commission could embark on the difficult task of improving the text of alternative A or alternative B, as the case might be.

46. One suggestion which had been made during the present discussion might perhaps be embodied in alternative A, however, namely, that paragraph 3 should be amended so as to entrust the President of the International Court of Justice with the task of appointing members of the conciliation commission, as an alternative to, or in place of, their appointment by the Secretary-General.  

47. Mr. USHAKOV said he thought it was too late to try to amend a text which followed the wording of the corresponding provision in the draft articles drawn up by the Commission at its previous session. Besides, that would give the impression that the previous text was not satisfactory. If governments wished to amend it, they would propose the necessary changes.

48. With regard to Mr. Reuter’s comment on the role of the Secretary-General, it was of little importance in a dispute between States whether the person involved was an international official. The Secretary-General would only be called upon to act if the parties failed to do so. It would therefore be better not to change the text of alternative A.

49. Alternative B followed the Hague and Montreal Conventions and it would be too long and complicated a task for the Commission to draft a new text.

50. Mr. ELIAS proposed that alternatives A and B should be submitted unchanged to the General Assembly and to governments. It was undesirable for the Commission to try to introduce into those texts amendments which might hinder the acceptance of the whole draft. The experience of the United Nations Conference on the Law of Treaties had shown that issues relating to the settlement of disputes could deter States from accepting the otherwise useful substantive provisions of a draft. When governments had made their choice between the two texts, the Commission could attempt to improve on the one selected.

51. The commentary to article 12 should, however, mention the various suggestions made during the present discussion. In particular, in regard to alternative A, reference should be made to the proposal that the task of appointing members of the conciliation commission should be entrusted to the President of the International Court of Justice instead of the Secretary-General of the United Nations, or, as an alternative, that that task should be entrusted to the President of the Court if the Secretary-General declined to make the appointment.

52. Mr. HAMBRO said he fully supported Mr. Elias’ remarks.

53. Mr. YASSEEN said that while it was desirable to respect what had been done in the past, that was no reason for holding up progress if an improvement was possible. To entrust the President of the International Court of Justice with the task of appointing members of the conciliation commission would be to vest that power in someone who was in a position to exercise it, because it came within the scope of his main functions. He him-

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self would not hesitate to make that change in the text, especially as circumstances too had changed since the drafting of the Vienna Convention on the Law of Treaties.

54. Alternative B was not the solution adopted in the Vienna Convention. When the Vienna Conference had accepted compulsory jurisdiction, it had accepted, as a general principle, that of the International Court of Justice, leaving the parties free to reach agreement to resort to arbitration. That was the solution which, under the Vienna Convention, was applied to disputes concerning *jus cogens* \(^{13}\) and which should also be adopted in the present case if the parties were to be allowed a choice in the matter of recourse to compulsory jurisdiction.

55. Mr. REUTER said he agreed that at that stage the Commission could not start rewriting texts on the settlement of disputes. He could support Mr. Elias' proposal that certain questions should be dealt with in a commentary, on condition that the commentary stated frankly that it was not for the Commission to make proposals at the present stage on procedures for the settlement of disputes and that it could well have omitted article 12, but that in order to elicit comments from governments it had nevertheless reproduced the texts appearing in previous drafts. In that way the Commission would avoid sponsoring a text it had not drawn up itself—alternative B—or a text which was too recent to carry weight—alternative A.

56. He was sorry to have to disagree with Mr. Ushakov, but he could not believe that the Secretary-General would not disclaim competence if he was required to appoint a member to a conciliation commission called upon to settle a dispute between States arising out of a case in which an international official was the victim and in which, consequently, the interests of the Organization, and hence those of the Secretary-General, were involved. A formula such as "the Secretary-General, or, failing him, by the President of the International Court of Justice", would leave the Secretary-General free to avoid an obligation which it would be morally difficult for him to assume, since he could ask the President of the International Court of Justice to make the appointment in his place.

57. Mr. USHAKOV said it was equally conceivable that the President of the International Court of Justice might be concerned with a situation in which a member of the Court or its secretariat was involved. There was therefore no reason to provide for a choice between him and the Secretary-General. It would be better to leave the text as it was.

58. Mr. USTOR said that alternative A was based on article 82 of the Commission's 1971 draft on the representation of States in their relations with international organizations, a text which was likely to receive considerable support in the General Assembly. He would therefore favour including that text in the present draft and mentioning other alternatives, such as that embodied in alternative B, in the commentary for the consideration of governments.

59. Another possible course was not to include any provision on the settlement of disputes, which was a delicate political matter. In any case, a provision of that kind belonged to the final clauses and the Commission did not usually attach final clauses to its drafts.

60. Mr. QUENTIN-BAXTER said he supported the method of arbitration and judicial settlement embodied in alternative B. A conciliation procedure such as that embodied in alternative A was not suitable for dealing with disputes on the interpretation of a legal text.

61. That being said, he hoped that, if the Commission decided to submit alternatives A and B to governments, it would do so on a different basis from the rest of the draft. It would be generally agreed that neither of those texts measured up to the Commission's standards of drafting; they were adequate only for the purpose of determining the preference of governments for one or the other method of settling disputes.

62. The CHAIRMAN said that there appeared to be general support for the proposal by Mr. Elias that alternatives A and B should be submitted to the General Assembly with a suitable commentary which would state, among other things, that the Commission did not endorse either of those texts. The commentary would also mention the various suggestions for improvements, such as the inclusion of a reference to the President of the International Court of Justice in paragraph 3 of alternative A. If there were no further comments, he would take it that the Commission agreed to adopt that proposal.

*It was so agreed.*

**Programme of work for the twenty-fifth session**

63. The CHAIRMAN said that the group consisting of the officers of the Commission, special rapporteurs and former chairmen had discussed the programme of work for the next session and arrived at certain conclusions, on the assumption that the Commission would be able to complete its work on the draft articles on items 1 (a) and 5 of the agenda at the present session.

64. The first topic that would be taken up at the twenty-fifth session would be State responsibility, followed by succession of States in respect of matters other than treaties and the most-favoured-nation clause. It was hoped that the Commission would also be able to allocate a brief period to the discussion of the Special Rapporteur's report on the question of treaties concluded between States and international organizations or between two or more international organizations, and possibly to a discussion of the Commission's long-term programme of work.

65. Bearing in mind that the Commission had been requested, by General Assembly resolution 2780 (XXVI), to deal with the topic of the law of the non-navigational uses of international watercourses, it had also been agreed that the Secretariat should be requested to begin compiling relevant material, with specific reference to problems of pollution of such watercourses. It was

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desirable that the Commission should move ahead with the study of that aspect of the topic in view of the great importance being attached by the international community to environmental problems.

66. Mr. BARTOŠ said that the Commission should not give priority to the law of the non-navigational uses of international watercourses at the expense of other topics which were already high on its agenda, such as State responsibility and succession of States in matters other than treaties.

67. The CHAIRMAN assured Mr. Bartoš that there was no question of the Commission giving priority to the law of the non-navigational uses of international watercourses. The study of the relevant background material would take several years and the Commission could not begin to consider the topic before that preliminary work was done. For the time being, the only decision to be taken was the decision to request a Secretariat study.

68. Mr. BARTOŠ said that he was satisfied with that reply.

69. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to endorse the proposals on the programme for the next session, and to request the Secretariat to compile materials on the law of the non-navigational uses of international watercourses.

It was so agreed.

70. The CHAIRMAN said he had an announcement to make concerning the circulation of reports by Special Rapporteurs. Those reports would have to be submitted by 1 February 1973 in order to be circulated in all the official languages in time for the Commission's next session. If a report was submitted after that date, there was a risk that all the language versions might not be ready in time, because of the pressure of other work and the shortage of staff in the language services of the Secretariat resulting from the economy measures taken by the United Nations. As for sections of reports submitted during the session, the United Nations Office at Geneva, with the staff at its disposal, could not give any assurance that they could be translated in time for consideration by the Commission.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]
(resumed from the 1190th meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 22 and 22 (bis)

71. Succession of States in respect of boundary settlements

Alternative A

1. The continuance in force of a treaty which establishes a boundary is not affected by reason only of the occurrence of a succession of States in respect of a party.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State.

Alternative B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of a boundary settlement which has been established by a treaty.

2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary.

Article 22 (bis)

Succession in respect of certain treaties of a territorial character

Alternative A

1. The continuance in force of a treaty is not affected by reason only of the occurrence of a succession of States in respect of a party if the treaty creates obligations and rights relating to the user or enjoyment of territory of a party and it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(a) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality; or

(b) To be accorded to a group of States or to States generally.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, seabed or air space of the party in question.

Alternative B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of obligations or rights arising from a treaty and relating to the user or enjoyment of territory of a party if it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(a) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality; or

(b) To be accorded to a group of States or to States generally.

2. In such a case the obligations and rights in question are to be considered as subject to any provisions of the treaty relating to such obligations or rights.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, seabed or air space of the party in question.

72. The CHAIRMAN invited the Special Rapporteur to introduce articles 22 and 22 (bis) of his draft (A/CN.4/256/Add.4).

73. Sir Humphrey WALDOCK (Special Rapporteur) said that he had begun his commentary with an analysis of the literature on succession in respect of boundary settlements and other territorial treaties, in order to see if any clear guidelines could be derived from that source before considering the practice. Some modern writers did not recognize that there was any category of treaties
that constituted an exception to the "clean slate" principle and the "moving treaty-frontiers" rule, treating boundaries simply as a question of situations and asserting that the principle of self-determination equally required that localized treaties should not be succeeded to automatically any more than other treaties. There was, however, a general current of opinion that such categories did exist, even though writers gave no clear guidance as to the treaties which fell within them. He had then briefly examined the proceedings of international tribunals and some of the practice. He suspected that there were other cases where no question had arisen because the parties had simply assumed the continuance of treaties. As such cases were not normally included in the literature it was possible that there was further practice which would provide a stronger basis for developing some categories of treaties constituting an exception.

74. Although the two articles were closely related, he hoped the Commission would consider separately the two problems of boundary treaties and other territorial treaties. In his view, it was essential that the draft articles should contain some kind of provision on the question of boundaries. It would therefore be useful to know whether the Commission wished to include a provision along the lines of article 22 and, if so, whether, in its view, it was the situation or the treaty that constituted the exception. Similarly, in regard to article 22 (bis), he wished to know whether the Commission accepted that category of treaty, what it thought to be the nature of the treaties falling within it and whether it was the régime established by the treaty that was the exception or whether it was the treaty itself that continued in force.

75. Mr. TABIBI said that while he did not intend to comment on draft articles 22 and 22 (bis) in detail, he wished to state at the outset that neither of the alternatives dealing with the question of boundary settlements was acceptable to him and that he also had some reservations on article 22 (bis). He did not accept the permanency of boundary treaties and the succession of States in respect of such treaties if they were not lawful in the first place, and if their continuation was a source of tension and political instability. Nor did he believe that it was possible to lump other territorial treaties together and create a single rule that could be applied to all of them.

76. In that connexion, he favoured the more cautious approach adopted by Sir Gerald Fitzmaurice in regard to both multilateral and bilateral territorial treaties, quoted by the Special Rapporteur in paragraph (3) of his commentary. Modern international law did not give primacy to the real right attached to the territory as such, but to the right attached to the people of the territory. Obviously, where localized or territorial treaties had been legally concluded and were in the interests of a group of States, or of States generally, they should be respected; but the case of a bilateral treaty, which was subject to the tacit agreement of two States, was quite different. He fully supported the view of Professor Rousseau, referred to in paragraph (6) of the commentary, that, in the case of boundaries, succession occurred only through the tacit agreement of the neighbouring State. Where there was a lawful boundary settlement with the tacit agreement of the neighbouring States, no dispute occurred; but where that was not the case, it should not be for other nations to impose the treaty contrary to the wishes of the State concerned.

77. Moreover, when the International Law Association had adopted its 1968 resolutions on State succession, it had made no distinction between treaties of a territorial character and other kinds of treaties, and thus had not endorsed the doctrine that territorial treaties were binding ipso jure upon a successor State. The International Law Commission, too, should be extremely cautious and refrain from establishing rules that might create fresh problems.

78. Article 22 had been formulated by analogy with article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties, which excepted boundary treaties from the fundamental change of circumstances rule. He merely wished to remind the Commission that the Vienna Convention was concerned with the validity of treaties and the rights of third States. It had been made quite clear at the United Nations Conference on the Law of Treaties that the exception in article 62, paragraph 2 (a), in no way impeded the independent operation of the principle of self-determination, and the article had been accepted on the understanding that it dealt only with lawful boundary treaties. In his view, to apply that provision in a different context and in a different convention would create more problems than it would solve. Article 22 (bis) would be acceptable only if the Commission carefully differentiated between various categories of localized and territorial treaties, and included only those which had a real and permanent character and were in the interests of a group of States or of States generally.

79. The Special Rapporteur had referred, in paragraph (22) of his commentary, to the endorsement by the newly independent States of Africa, in article III, paragraph 3, of the Charter of the Organization of African Unity, of the principle of respect for established boundaries. That paragraph merely proclaimed a well-known principle of international law, "respect for the sovereignty and territorial integrity of each State", which was also embodied in the Charter of the United Nations. Moreover, the question of African boundaries was a special case, because they had been established to serve the interests of the colonial Powers and not on the basis of geographical, ethnic, racial, linguistic or historical factors. To alter African boundaries would shatter the whole fabric of the African States, but it was wrong to apply the case of Africa to the rest of the world. It was argued by some jurists that in Latin America the principle of uti possidetis was applied, but that was clearly not the case, since most boundary disputes there had been settled by arbitration. Moreover, many jurists believed that...
international boundaries concerned only the neighbouring countries and that any disputes should be settled by international adjudication or arbitration.

80. In paragraph (25) of his commentary, the Special Rapporteur referred to the Treaty of Kabul of 1921. That Treaty was not in fact a boundary treaty, but a treaty of friendship concluded after the third Anglo-Afghan war of 1919. It had been terminated in 1953, by one year's notice given under article XI, and it contained no provisions indicating that any part of it was intended to be permanent or dealing with the question of succession. The interpretation given by the United Kingdom was one-sided and even contrary to the provisions of the Indian Independence Act; it was also contrary to the various promises, written and unwritten, given to Afghanistan. The boundary in question was not a demarcation line, but a political boundary made for the purpose of safeguarding British India's security against possible invasion from the north. The area comprising the North-West Frontier Province and the Free Tribal Area, to which the Indian Independence Act referred, had not been a part of the Indian administration, because the Free Tribal Area had been independent at the time of British rule in India. Even today, although they were behind the so-called Durand line, the North-West Frontier Province and the Free Tribal Area were administered separately. The whole frontier to which the 1921 Treaty referred had not been demarcated by the Joint Commission as stipulated in the Durand Treaty, itself an unequal and colonial treaty.

81. The statement in the United Kingdom note in Materials on Succession of States, quoted in paragraph (25) of the commentary, that "the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and that it was hence still in force", was contrary to article XI of the Treaty, which clearly stated that the Treaty could be terminated by giving one year's notice. There were, however, other documents in the same publication which should also be included in paragraph (25) of the commentary in order to balance the views of the two countries. One was a letter from the Head of the British Mission, Sir Henry Dobbs, to the Afghan Foreign Minister in 1921, recognizing Afghanistan's interest in the question of the Indian boundary beyond the Durand line and recognizing that the frontier tribes were not citizens of India. Another was the Declaration of 3 June 1947 by the United Kingdom Government, which dealt with the special case of the North-West Frontier Province and the Free Tribal Area and did not accord with the note quoted by the Special Rapporteur in paragraph (25).

82. While he wished to express his deepest appreciation to the Special Rapporteur for his valuable research and commentary, he hoped that the Commission would give very careful consideration to the question whether boundary treaties really came within the scope of the present convention, and whether they were the same as, or quite different from, other territorial treaties. He also urged that, if a rule on other territorial treaties was formulated, it should distinguish between the different subjects of such treaties.

83. Sir Humphrey WALDOCK (Special Rapporteur) said that it was not his practice, in the commentary, to try to pronounce on the legal validity of any arguments in a controversy. He thought that, in paragraph (25) of the commentary, he had set out the views of both sides and that the presentation was a balanced one. He only wished to point out that the general reservation included, as article 4, in his first report fully protected the position of any State which had legal grounds for challenging the validity of a boundary. His intention was precisely the same in the proposed draft article 22; it was designed solely to exclude the idea that, by virtue of the "clean slate" principle of the "moving treaty-frontiers" rule, the mere occurrence of a succession could open the way to every kind of claim with regard to boundaries. In his view, to accept that idea would have disastrous consequences.

84. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether the provisions or article 22 (bis) would apply to an air transit agreement that was in effect prior to a succession.

85. Sir Humphrey WALDOCK (Special Rapporteur) replied that, in his view, air transport agreements were not localized treaties. He had included the reference to air space in article 22 (bis) because the possibility could not be excluded that air transport over a particular corridor might be the subject of a special agreement granting international air transit rights similar to the special rights of passage through the Dardanelles, for example.

The meeting rose at 12.55 p.m.

Draft articles submitted by the Special Rapporteur

ARTICLE 22 (Succession of States in respect of boundary settlements) (continued)

6. The CHAIRMAN invited the Commission to continue consideration of article 22 (A/CN.4/256/Add.4).

7. Mr. SETTE CAMARA, congratulating the Special Rapporteur on the outstanding quality of his work on articles 22 and 22 (bis), said it was regrettable that the Commission had insufficient time for a full and detailed discussion of his findings and proposals.

8. There was no doubt that certain treaties, commonly referred to as “treaties of a territorial character”, or as “dispositive”, “real” or “localized” treaties, constituted exceptions to the “clean slate” principle and the “moving treaty-frontiers” rule. The distinction between “real” and “personal” treaties was that the former were regarded as transmissible and the latter were not. It was also accepted, in theory and in practice, that “dispositive” treaties might also constitute an exception to the “moving treaty-frontiers” rule. The legal basis for the special treatment of those treaties was found by some writers in such principles as nemo dat quod non habet, nemo plus juris trans fine ipsum heter et res transit cum suo onere. Such treaties created real rights which impressed the territory with a status that was intended to have a certain degree of permanence. Real rights in international law had been defined as those which were attached to territory and which were in essence valid erga omnes.

9. The Special Rapporteur had quite rightly treated boundary settlements and other treaties of a territorial character separately, because a boundary treaty defining a frontier was instantly executed, whereas the others entailed repeated acts of continuous execution. There could be very little doubt that boundary settlements constituted an exception to the rule in article 6 of the draft articles. The general doctrine and the virtually unanimous practice of States favoured their continuity ipso jure. At no time in the history of decolonization had the validity of boundary treaties been questioned on the basis of the “clean slate” principle, and the member States of the Organization of African Unity had pledged themselves to respect the borders existing on their attainment of national independence. It was clearly in the interests of the international community that boundary treaties should continue in force; the alternative was chaos. The rule of continuity did not mean that boundary treaties were sacrosanct or that the injustices and errors of the past must be perpetuated. Such treaties could, and indeed had been, challenged, but on grounds other than the “clean slate” principle. One of the strongest
arguments in favour of adopting the solution proposed by the Special Rapporteur was the decision of the United Nations Conference on the Law of Treaties to except boundary treaties from the fundamental change of circumstances rule—a decision which showed that, in the interests of the international community, such treaties were regarded as having a special status.

10. Of the two alternatives proposed by the Special Rapporteur, he preferred alternative A. Since the continuation in force of boundary settlements was a very important rule, it should be stated in clear-cut terms, allowing the least possible margin for doubt. Alternative B raised the problem of the separability of transmissible and non-transmissible treaty provisions, which was fraught with serious logical and practical difficulties. It also ran counter to the rules of treaty interpretation, which presupposed the integrity of the treaty. To distinguish between succession in respect of the boundary and succession in respect of the treaty might prove to be very dangerous in practice. If the "clean slate" rule was accepted for the treaty, it would certainly introduce an element of doubt concerning the validity of the boundary settlement contained in the treaty. Moreover, paragraph 2 of alternative A excepted from the continuity rule "any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State". Provisions alien to the boundary settlement could be so considered and therefore excluded from the rule of continuity.

11. Mr. HAMBRO said that, while he wished to compliment the Special Rapporteur on his commentary on articles 22 and 22 (bis), he had come to the conclusion that article 22 did not really have a place in the draft. In his view, boundary questions should be dealt with in terms of the legal situation established by the treaty, rather than in terms of the treaty itself. It was quite clear that no case of succession, whether resulting from the creation of a new State or from the separation of part of a territory, could affect boundaries. If it was decided that an article along the lines of article 22 should be included in the draft, he would prefer alternative B since, unlike Mr. Sette Câmara, he considered it dangerous to equate boundaries with treaties. He would, however, prefer a somewhat simpler wording, such as "A treaty which establishes a boundary is not changed by a succession of States".

12. Mr. USHAKOV said that the question dealt with in article 22 related to boundaries in general and not only to treaties establishing or governing them, so that it did not fall within the topic of succession of States in respect of treaties or even within that of succession of States in general. It was generally accepted that questions of territory and population were pre-existent to the actual succession of States, because there had to be a State with a territory and a population before there could be any succession. He would therefore prefer alternatives A and B, which expressed the same idea in different terms, to be replaced by a general saving clause reproducing the idea put forward by the Special Rapporteur in his first report—in which such a reservation had been included as article 4—namely, that a succession of States was not to be understood as affecting a boundary settlement established by treaty prior to the occurrence of the succession. The clause might read: "Nothing in the present articles shall be understood as affecting an established boundary, in particular boundaries established by or in conformity with a treaty prior to a succession of States."

13. Mr. AGO said he agreed with the previous speakers that the question dealt with in article 2 did not really fall within the topic of succession of States in respect of treaties, for reasons relating to the nature and form of a transfer of territory from one sovereignty to another in international law. In civil law, a contract was equivalent to title, in other words, the deed of transfer of a piece of land established a real right. The same was not true in international law, in which the real right was only established by the surrender of the territory in execution of the "contract", that was to say the treaty. The treaty of cession was the source of a right and an obligation, but territorial sovereignty over the territory was established only when the treaty had been executed. Once it had been executed, the treaty was terminated, and was nothing more than evidence of the legitimacy of the transfer. What took place, therefore, was not succession in respect of treaties, but succession to a real right. For instance, if Italy, which had ceded territory to Yugoslavia after the Second World War in execution of a peace treaty, were to become part of a unified European State, that State would inherit only the territorial sovereignty that now belonged to Italy; it would not at the same time succeed to the treaty which had established the limits of that territorial sovereignty.

14. Like Mr. Ushakov, he was in favour of a general saving clause applying to the whole draft. Failing that, he would be in favour of alternative B, since alternative A was ambiguous and did not reflect the position in international law.

15. Mr. YASSEEN said it was unfortunate that the Commission did not have time to give the question all the attention it merited. Unlike the previous speakers, he considered that the question dealt with in article 22 did, to some extent, relate to succession of States in respect of treaties. In international law, boundaries were established in several ways, including by treaty. It was the execution of the boundary treaty that determined the line of the boundary. That was a de facto situation conforming to an objective rule. The boundary could not be questioned so long as the treaty was deemed to be in force. The treaty had produced its effects, but it retained all its importance as a title and as evidence of the establishment of the boundary. Hence it was difficult to examine the topic of succession in respect of treaties without settling the question of boundary treaties. The successor State must know to what extent it could rely on the title represented by the treaty to defend its frontiers if they...
were disputed by other States. A provision on the subject therefore had a place in the draft articles.

16. However, the question at issue was not boundary settlements as such, because boundaries could be settled by means other than treaties, but only treaties relating to boundaries. He was therefore in favour of alternative A. For a number of reasons based on the interests of the international community, of which stability in international relations was not the least, it was essential that a treaty establishing a boundary should continue in the event of a succession of States.

17. Paragraph 2 of alternative A could be made shorter. After the words “with the exception”, it would be better simply to say “of any provisions which relate only to the predecessor State”.

18. Mr. RAMANGASOAVINA said he agreed with Mr. Yasseen that although the subject-matter of article 22 did not quite come within the sphere of succession of States in respect of treaties, the principle stated was nevertheless worth laying down in an article following the set of articles already drafted. For any newly independent State tended to question everything that had been done before independence and there was no lack of examples of conflicts over disputed boundaries. An article such as article 22 would therefore be useful for the purpose of guaranteeing, in the interests of good-neighbourly relations between States, the continuity of a treaty or arbitral award delimiting a frontier. The Commission should therefore clearly state the principle that a succession of States did not affect treaties establishing boundaries which had already been executed. Such an article would be a logical sequel to article 62, paragraph 2, of the Vienna Convention on the Law of Treaties, which already provided that a fundamental change of circumstances could not be invoked as a ground for terminating a treaty if the treaty established a boundary.

19. He was in favour of alternative B, which was simpler and clearer. However, at the end of paragraph 1, the words “by a treaty” could be deleted.

20. Mr. THIAM said he agreed with those members who held that the topic of succession in respect of treaties could not be studied without taking treaties establishing boundaries into account, and that it would be preferable to have a separate article on them. Recent experience had shown that even where boundary questions had been settled by treaties, the treaties might be challenged by newly independent States, particularly if they had been concluded by the former colonial Powers. That was why the Organization of African Unity had considered it necessary to take a position on the matter and had decided in favour of the principle proposed by the Special Rapporteur in article 22, namely, the continuance of treaties establishing a boundary. He therefore believed that the Commission should state a firm and clear rule to that effect.

21. The title of article 22 should be “Succession of States in respect of treaties relating to boundary settlements”. Of the two versions proposed, he preferred alternative A, which referred more directly to treaties than alternative B. If the Commission adopted alternative B, however, the words “a treaty establishing” should be inserted before the words “a boundary settlement” in paragraph 1.

22. Mr. ELIAS said he wished to congratulate the Special Rapporteur on his full and lucid commentary on articles 22 and 22 (bis). The Special Rapporteur had presented both sides of the argument, thus inviting the Commission to make its choice or to put forward a different proposal on the basis of the material presented. The Commission had to decide whether the question dealt with in article 22 was of merely marginal importance or whether it was one of the key issues in succession of States in respect of treaties. In his view, the question was an important one, especially where newly independent States were concerned, and one which called for a clear and definitive article. Although he found neither of the alternative texts entirely adequate, the question was undoubtedly one that the Commission could not ignore.

23. Since the Commission was dealing with succession of States in respect of treaties, the title of article 22 should reflect that fact. He would suggest, therefore, that it should be amended to read “Succession of States in respect of treaties relating to boundary settlements” or “Succession of States in respect of treaties relating to boundaries”.

24. The Commission would have to decide whether to include a general reservation on the lines of the proposed article 4 in the Special Rapporteur’s first report or whether to base the provision on article 62 of the Vienna Convention on the Law of Treaties, in which boundary treaties were specifically excepted from the fundamental change of circumstances rule. When the Organization of African Unity had drafted its Charter, it had stressed the need to maintain the integrity of boundaries even though the existing boundaries might not necessarily be the best solution, because otherwise chaos would ensue. Many boundary disputes had arisen in Africa and were the cause of great concern; the establishment of a Commission of Mediation, Conciliation and Arbitration by Article XIX of the OAU Charter underlined the importance that the African States attached to that problem.

25. He favoured the inclusion of a general reservation along the lines already suggested by Mr. Ushakov, but did not reject out of hand the alternative texts proposed by the Special Rapporteur. Of the two, alternative A was much nearer to the heart of the matter. Alternative B raised the problem of defining a boundary settlement and the question whether it was the boundary settlement or the treaty that was transmitted. He would therefore prefer alternative A, but reworded in the form of a residual rule establishing the principle of continuity, except in respect of treaty provisions that applied only to the predecessor State.

26. Mr. TSURUOKA observed that the Special Rapporteur seemed to expect the Commission to express an opinion on whether it was desirable to include an article on boundary settlements, and if so, what its content should be. The texts the Special Rapporteur was pro-

posing to the Commission were, on the one hand, article 4 in his first report and, on the other, alternatives A and B of article 22 now under consideration. He himself was convinced of the need for a specific provision and favoured the saving clause proposed as article 4. In his view, the Commission could not avoid the extremely difficult and controversial question dealt with in that article.

27. If he had to choose between alternatives A and B for article 22, he would prefer alternative B, which was more realistic. It laid greater stress on the need to determine how a succession of States might influence the legal effects of treaties concluded prior to a succession. Moreover, alternative A might give the impression that treaties played the primary role in the settlement of boundary questions, whereas there were other factors that also had to be taken into consideration.

28. Mr. USHAKOV noted that some members did not seem to make any distinction between frontier disputes and territorial disputes. The former concerned the exact course of a boundary line, whereas the latter concerned the question whether a territory belonged to one State rather than another.

29. Territorial disputes obviously did not come within the topic of succession of States. However, if alternatives A and B for article 22 were compared, it would be seen that the first dealt with the case of "a treaty which establishes a boundary", whereas the second dealt with "a boundary settlement which has been established by a treaty". The latter expression, which was ambiguous, seemed to apply more to the settlement of a territorial dispute. That alternative was therefore unacceptable.

30. The very way in which alternative A was worded was an argument in favour of a general saving clause excluding not only territorial problems, but also boundary problems. Indeed, the use of the expression "by reason only of the occurrence of a succession of States" implied that other circumstances or principles could play a part: for example, the principle of self-determination and the principle of not using force for the settlement of boundary questions.

31. Sir Humphrey WALDOCK (Special Rapporteur) said that the question to be answered could be put in the following terms: was a treaty establishing a boundary to be considered as a treaty in force for the predecessor State at the date of succession? If so, it was necessary to decide what happened to that treaty and, in particular, whether it continued or not.

32. Mr. USHAKOV said that it was the boundary which was "in force"; the boundary treaty was simply the title or evidence on which the boundary line was based. It was the boundary that was in existence, and that fact could be attested either by a boundary treaty or in some other way.

33. Mr. USTOR said that, like Mr. Hambro, Mr. Ago and Mr. Ushakov, he believed that a boundary treaty had a constitutive effect; it was a "consummated" treaty. A boundary treaty established a factual and legal situation which had a separate and distinct existence from the treaty itself. It was that situation, rather than the treaty, which passed to the successor State.

34. Accordingly, the best solution would be to include in the draft an article on the lines of article 4 in the Special Rapporteur’s first report.

35. Mr. BARTOŠ said that there was often a great difference between de facto and de jure situations. That point could be illustrated by the case of a small island in the Danube, near Belgrade, which had long been the subject of a dispute between Austria-Hungary and Serbia. Serbia had claimed to have succeeded to a geographical situation which had existed under the Ottoman Empire, in other words to possession, whereas Austria-Hungary had based its claim on a protocol of demarcation. The dispute had continued for years and had not been finally settled until the dissolution of Austria-Hungary at the end of the First World War.

36. Mr. Ago had maintained that the Yugoslav-Italian frontier had been finally settled by a treaty of peace and raised no further problems. But no precise demarcation had yet been carried out in certain sectors of that frontier, which were still disputed. It was therefore necessary to distinguish, as Mr. Ushakov had pointed out, between the treaty or title and possession.

37. There were also boundary disputes in Latin America, where the boundaries of the former Spanish provinces had been retained as State boundaries. Some arbitral awards were even challenged. There again, some States claimed title, whereas others invoked the principle of uti possidetis.

38. Of the two versions proposed by the Special Rapporteur, alternative A seemed preferable. The General Assembly should, however, be given an opportunity of choosing between them.

39. Mr. EL-ERIAN said that the discussion had given him the impression that there was general agreement that boundaries should be treated in such a way as to enhance the stability of international relations.

40. He was convinced that it was necessary to include an article on the subject in the draft, but he had not formed a very definite opinion on some of the delicate issues which had arisen during the discussion. In particular, although he was attracted by the theory which regarded a boundary treaty as a consummated treaty that created an independent situation, he could not altogether reject the other view, which regarded problems of boundary treaties as treaty problems. In reality, a boundary treaty had a mixed character and could not be viewed exclusively from either of those two standpoints.

41. He found paragraph (27) of the Special Rapporteur’s valuable commentary particularly relevant in that connexion, because it clearly stated the limited scope of the rule in article 22. That rule related exclusively to the effect of a succession of States on the boundary settlement and left untouched any other ground for claiming the revision or setting aside of that settlement; it also left untouched any legal ground for defence of such a claim. The mere occurrence of a succession of States thus neither consecrated the existing boundary, if it was open to challenge, nor deprived it of its character as a legally-established boundary, if such it was at the date of the succession of States.
42. In conclusion, he thought that, for the purposes of a first draft to be submitted to the General Assembly as a basis for discussion and as a means of eliciting the views of governments, it would be useful to include article 22. If a choice had to be made between alternatives A and B, he would choose alternative B; if, however, he had to choose between alternative B and the Special Rapporteur’s original article 4 in his first report, he was not at all certain which of the two he would prefer.

43. Mr. RAMANGASOAVINA noted that most members of the Commission agreed that a treaty establishing a boundary should not be affected by a succession of States. As some members had pointed out, a State possessed “title” to a certain territory with well-defined boundaries. It was the same in private law, under which, when property was transferred, the change of ownership in no way affected the previously established boundaries.

44. The use of the expression “by reason only”, in both alternative A and alternative B for article 22, clearly indicated that the article was to be considered solely from the viewpoint of State succession. It followed that a treaty could be revised for some other reason, in particular on the basis of the principle of self-determination.

45. As to the distinction between treaties settling boundary questions and those settling territorial questions, he pointed out that the ownership of a territory by one State rather than another necessarily entailed a boundary demarcation. A boundary was a line intended to demarcate the territories of two neighbouring States. Moreover, it should be noted that disputes over boundaries arose from the fact that certain portions of territory were claimed by several States. A frontier fixed on the basis of both the crest line and the watershed might give rise to disputes if, as the result of a landslide or other geological disturbance in the mountains or mountain ranges, those lines completely ceased to coincide.

The meeting rose at 6 p.m.

1194th MEETING

Tuesday, 4 July 1972, at 9.35 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivár, Mr. Bartòk, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasovina, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Statement by the Secretary-General

1. The CHAIRMAN said he had great pleasure in welcoming the Secretary-General who, in the six months since he had assumed his high office, had made a wide variety of efforts to deal with difficult problems throughout the world and had endeavoured to do so through measures based on equitable and legal principles.

2. The Secretary-General’s devotion to legal principles was understandable, since he was a Doctor of Jurisprudence of Vienna University, which for centuries had been a centre for the study of international law. Austria was noted for the great contributions it had made to the development of international law; among its eminent scholars were Mr. Verdross, who had been for many years a highly esteemed member of the Commission, as well as Mr. Verostka and Mr. Zemanek, who were currently making important contributions in that field. The city of Vienna was, of course, very close to the Commission since three of its drafts had become conventions signed in that city in 1961, 1963 and 1969, and the series would probably continue.

3. The Secretary-General came to the Commission as a valued colleague, since he had contributed to the development of international law as a representative of his country, in particular as Chairman, from 1964 to 1968, of the Committee on the Peaceful Uses of Outer Space, which had broken new ground in international law by formulating a régime for the law of outer space.

4. His visit came at a time when the Commission was busily engaged on the production of two sets of draft articles, one on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, and the other on the complex problems of succession of States in respect of treaties. The Commission was doing its best with the limited time at its disposal and hoped to be able to submit those two sets of draft articles to the General Assembly at its forthcoming session.

5. He had pleasure in inviting the Secretary-General to address the Commission.

6. The SECRETARY-GENERAL thanked the Chairman for his kind words of welcome and said that, for a number of reasons, he was very glad to have an opportunity of addressing the Commission in such familiar surroundings. Many of its members had been his esteemed colleagues in various capacities, and on a previous occasion, as Foreign Minister of his own country, he had had the privilege of acting as host to many of them during the second session of the Vienna Conference on the Law of Treaties in 1969.

7. He had a very special appreciation of the work being done by the Commission, having personally participated in the codification and progressive development of international law in a new field of human activities, within the framework of the Committee on the Peaceful Uses of Outer Space, over which he had had the honour to preside for several years.

8. In November 1972, twenty-five years would have passed since the General Assembly, by resolution 174 (II) of 21 November 1947, had established the International Law Commission as a means of exercising one of the principal functions entrusted to the Assembly under Article 13, paragraph 1.a., of the Charter, namely, that of “encouraging the progressive development of international law and its codification”.

9. He need not say much about the importance of international law and its role in modern life as one of the principal means of regulating orderly relations between nations. It was obvious that without clear and widely recognized rules of international law, and without strict observance of such rules and of the basic principles and norms of international law embodied in the United Nations Charter, it would be impossible in the nuclear age to ensure the strengthening of international security and of fruitful international co-operation, to safeguard peace or to promote the general welfare of nations. States, large and small, had come increasingly to realize that there was no viable long-term alternative to a policy of peaceful coexistence within a framework of international law. Differences in ideologies and in social systems should not be allowed to constitute obstacles to the development of normal international relations based on legal principles such as those solemnly proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the General Assembly on the occasion of the twenty-fifth anniversary of the United Nations, on 24 October 1970.

10. Over a period of twenty-three years, the Commission had accomplished much valuable work in significant areas of international law, such as the law of the sea, diplomatic and consular law and the law of treaties. Most of that work had culminated in international codification conventions concluded under the auspices of the United Nations.

11. He was sure that all the members of the Commission were responsive to the dynamic changes that were rapidly being brought about by developments in political, economic and social life and by the revolution in science and technology. As a result of those changes, urgent demands were being made on all the means which man had devised to achieve and maintain international order, not least among them international law.

12. It was against that background that the Commission had taken the decision, endorsed by the General Assembly, to review its long-term programme of work which had first been adopted in 1949. That decision had great significance, since the new programme would determine the direction and effectiveness of the Commission's further work on the codification and progressive development of international law. He was certain that the Commission would be able to take advantage of that opportunity to enhance the role of international law in the United Nations system. It would no doubt need to consider all aspects, both substantive and procedural, in deciding how to proceed. He had already indicated why, in his view, the codification and progressive development of international law should proceed even more energetically in the future than in the past. The Commission's recommendations would, he felt sure, receive careful and favourable consideration by the General Assembly and by Member States. The high standards of the Commission's work in the past had gained for it a well-deserved reputation and had facilitated the adoption by States of the codification conventions which had come to form so large a part of the corpus of modern international law.

13. The agenda for the present session gave priority to the topic of succession of States in respect of treaties and the question of the protection of diplomatic agents and other persons entitled to special protection under international law. The Commission's efforts to draft concrete recommendations on those two items, which were of such practical and doctrinal importance, would certainly contribute to a further degree of understanding of the problems involved and of the steps which should be taken. He was confident that the Commission, in its report to the General Assembly, would once again fulfill the high expectations placed on its work, as it had always done in the past.

14. The CHAIRMAN thanked the Secretary-General for his valuable statement. With regard to the review of the Commission's long-term programme of work, which was on the agenda for the present session as item 6(a), he pointed out that the Commission had been so fully occupied with its current work at both its previous session and the present session that it had been unable to review the programme. Some thought would therefore have to be given, in connexion with that review, to devising suitable conditions and methods of work to enable the Commission to move forward more rapidly in its important task.

15. The Commission had so many topics on its agenda which demanded priority attention that it was impossible for it to deal with them all using its present resources and methods. If therefore the Commission were to make proposals in that connexion, he earnestly hoped that the Secretary-General would give them favourable consideration.

16. He thanked the Secretary-General on behalf of the members of the Commission for the interest he had taken in their work and for honouring them with his visit.

Co-operation with other bodies

[Item 8 of the agenda]

(resumed from the 1186th meeting)

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

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

18. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said he wished to convey the Committee's greetings to the Commission and to express admiration for its outstanding work.

19. For the past two years, the Committee had been engaged in preparations for the third Conference on the Law of the Sea, and it was keenly aware of the difficulty of formulating proposals for submission to a diplomatic conference on a subject relating to international law, without the benefit of the Commission's objective and meticulous studies in the form of draft articles.

20. The codification conferences held in 1958, 1961, 1963 and 1968/69, on the law of the sea, diplomatic relations, consular relations and the law of treaties respectively, owed their success mainly, if not wholly, to the work of the Commission in providing not only the frame-
work for the conventions, but also substantive proposals which were acceptable, by and large, to the world community as a whole.

21. The States of Asia and Africa which had emerged as independent nations in recent years owed a particular debt of gratitude to the Commission for having adequately reflected their views in its work on the codification and progressive development of international law. The member countries of the Committee therefore attached the highest importance to maintaining close relations with the Commission. The growth of co-operation between the two bodies was shown by the fact that both the President and the Vice-President of the Committee for 1972 were members and former chairmen of the Commission. Those close links were a source of pride to the Committee, which earnestly hoped that the fruitful co-operation between the two bodies would continue for the benefit not only of the Asian and African States, but of the world community as a whole.

22. In the past five years, the membership of the Committee had grown from seven to twenty-two. An attempt was being made to expand the African membership by removing the stumbling-block of language difficulties. The main working language of the Committee, for practical reasons, continued to be English, but a French translation unit had been established in the Committee’s secretariat and it had been possible to provide simultaneous interpretation into French at the thirteenth session held at Lagos in January 1972.

23. At that session, the Committee had been glad to welcome observers not only from fifteen non-member States of the region, but also from twelve other States including Australia, the United States, the Union of Soviet Socialist Republics, the United Kingdom and a number of Latin American States. Valuable contributions had been made by those observers to the Committee’s discussions on the law of the sea.

24. It was the Committee’s task to render assistance to its member States in connexion with all international legal problems. Its secretariat had provided member States with compilations on such topics as the law of treaties and the law of the sea. In response to requests made by some of them, it had extended its activities relating to international trade law and was maintaining close co-operation with the United Nations Commission on International Trade Law, the International Institute for the Unification of Private Law and other bodies working in that field.

25. In furtherance of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, the Committee had introduced a training scheme for young officers of the foreign offices of Asian and African countries.

26. A number of topics on the Commission’s agenda for the present session were of special interest to the Committee: succession of States, State responsibility, the question of the protection and inviolability of diplomatic agents, and the law of the non-navigational uses of international watercourses.

27. He had recently received communications from African countries which were not yet members of the Committee, urgently requesting that the principles concerning the rights and obligations of States arising out of State succession should be settled. Since the International Law Commission had been studying State succession for some time, the Committee considered that its own work on the subject should take a secondary place and that the best way it could assist would be by making suggestions and comments on the basis of the Commission’s drafts. The Committee was eagerly looking forward to studying the Commission’s work on succession of States.

28. Although the Committee had completed its work on the substantive rights and duties of aliens in 1961, it had postponed consideration of State responsibility until the International Law Commission submitted its final recommendations on the subject. The Committee had greatly valued the advice given by Mr. Ago, when he attended its Baghdad session as observer for the Commission, that the best way the Committee could assist in regard to topics under consideration by the Commission was to study the Commission’s work and make suggestions on it, rather than attempt to draw up an independent set of draft articles.

29. Although the question of the protection of diplomats had not been referred to the Committee by any member State, the Committee would be able to study it, by virtue of article 3 of its Statutes, as a matter arising out of the International Law Commission’s programme of work.

30. The Committee had been asked by two member States to study the law of the non-navigational uses of international watercourses and to make recommendations on that question, taking into account the agricultural uses of water and the peculiar problems of the Asian-African region. Proposals by the Governments of Iraq and Pakistan were being examined by a standing sub-committee, in preparation for their consideration by the Committee itself. He hoped that the International Law Commission would be able to take up the subject soon and believed that the Committee could be of some assistance on a topic of such vital interest to the Asian-African community.

31. As soon as a firm decision had been taken on the date and place of the Committee’s fourteenth session, he would inform the Commission’s secretariat. He hoped that the Chairman of the Commission would honour the Committee by attending the session in person, as his predecessors had done.

32. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his kind invitation; he hoped to be able to attend the Committee’s fourteenth session.

33. Mr. ELIAS said that, as Chairman of the Asian-African Legal Consultative Committee, he welcomed the opportunity to pay a tribute to the devoted work of Mr. Sen, its Secretary-General.

34. The Committee’s method of work was to examine subjects at the request of the governments of its member States. In doing so, it kept the work of the International Law Commission closely under review, in order to keep itself informed on the progress made in the study of the various topics. That method was a sound one because it
ensured that the Committee did not submit, on any given topic, a set of draft articles which differed from those prepared by the Commission. By organizing its work in that way, the Committee was better able to clarify its own thoughts and could also make some contribution to the Commission's work.

35. He hoped that it would be possible to increase the African membership of the Committee. It was true that African non-member States received the Committee's documents, but it was highly desirable that they should become full members.

36. Mr. YASSEEN, after noting the importance of the work done by the Asian-African Legal Consultative Committee and the organic link between the Committee and the Commission, drew attention to the Committee's contribution to the progressive development and codification of international law. Its main task was to harmonize the views of its member countries, and it had thus enabled them on several occasions to present a united front at codification conferences. The Committee's conclusions were widely accepted, even by non-member countries, because they were based on a thorough study of the circumstances of African and Asian countries and of developing countries in general.

37. He paid a tribute to the ability and devotion of Mr. Sen, which had led to his unanimous re-election for a new term as Secretary-General of the Asian-African Legal Consultative Committee.

38. Mr. EL-ERIAN said he was gratified by the growing number of African countries which were members of the Committee and hoped that their number would continue to increase.

39. He also appreciated the increasingly large place being given to international law in the work of the Committee, whose mandate covered legal co-operation generally.

40. He had two suggestions to make in connexion with the valuable oral report just made by the Observer. The first was that the Committee should consider appointing a sub-committee with the task of making its proceedings fully bilingual, so as to secure the participation of French-speaking African States. The second was that some means should be found of providing financial grants for one or two participants from Asia and Africa in the annual Seminar on International Law held at Geneva in conjunction with the Commission's annual session.

41. Mr. THIAM warmly thanked the Observer for the Asian-African Legal Consultative Committee for his statement, which had shown how the Committee's activities were growing. The Committee helped the Commission in its work by giving it a better understanding of the problems of the Afro-Asian world. Noting that French-speaking countries had sent a larger number of observers to the Committee's last session and that efforts had been made to solve the language problem, he expressed the hope that the observers would soon become members.

42. Mr. TSURUOKA said that the collaboration established between the Asian-African Legal Consultative Committee and the International Law Commission was beneficial not only to those two bodies themselves, but also to the whole world, since it helped to promote the progressive development and codification of international law. As an essentially regional body, the Committee concerned itself with the special problems of Asian and African countries, but its work was nevertheless of universal importance, because countries all over the world sent observers to its meetings and the range of subjects it studied covered problems which were world wide. It must therefore be acknowledged that the Committee's work was bound to help the cause of international law.

43. He hoped that the French-speaking countries would become members of the Committee and that it would receive increased financial aid from all concerned, including observers.

44. Mr. USHAKOV congratulated the Asian-African Legal Consultative Committee and its Secretary-General, Mr. Sen, on the growing importance and value of its work.

45. Mr. RAMANGASAVINA associated himself with the words of gratitude and appreciation addressed to the Observer for the Asian-African Legal Consultative Committee regarding the Committee's work. The role of the Committee was to stress the importance of local problems, which were often obscured by more general problems in world assemblies, by explaining its point of view and making suggestions. There was every reason to welcome the constant collaboration established between the Committee and the International Law Commission, which participated actively in the Committee's work through members who also sat on the Committee. The aims of the Commission and the Committee coincided in several respects. There could be no doubt that the Committee's contribution to the progressive development of international law would continue to increase, thanks to the increase in its membership, which should be facilitated by the elimination of language problems.

46. Mr. SETTE CÂMARA, speaking also on behalf of the other Latin American members of the Commission, thanked the Observer for his interesting oral report. The close co-operation which the Committee maintained with the Commission was an example of how two bodies dedicated to the same purpose should work together.

47. He welcomed the wide participation of observers from Latin American countries in the Committee's meetings. Those countries had common problems with the countries of Asia and Africa, and a common approach to those problems, so that it was natural for them to seek common solutions.

48. Sir Humphrey WALDOCK said he wished to stress the great interest taken in the Committee's work by lawyers outside Asia and Africa. He had been greatly impressed by the thoroughness and balance of the Committee's drafts on a number of subjects other than those which had been considered by the Commission.

49. Mr. USTOR associated himself with the tributes paid to the Observer for the Asian-African Legal Consultative Committee for his enlightening oral report and expressed his sincere wishes for the continued success of the Committee's work. He was confident that the fruitful co-operation between the Committee and the Commission...
would continue to grow. He hoped that it would be possible for the Committee to institutionalize its system of dealing with topics on the Commission's agenda, since such an arrangement would be of great assistance to the Commission, and particularly to its special rapporteurs.

50. Mr. AGO, speaking on behalf of the European members of the Commission, thanked the Observer for the Asian-African Legal Consultative Committee for his clear and comprehensive statement. He had been glad to hear that the few remarks and recommendations he had made when attending the session at Baghdad a few years previously had given the Committee food for thought and encouragement in its subsequent work. There was every reason to welcome the fact that the Committee and the Commission were collaborating more and more closely and that the Committee took the Commission's work as the central point of reference for its own activities. He hoped that the Committee would be able to revert to the topic of State responsibility when it had finished its work on the law of the sea.

51. Mr. QUENTIN-BAXTER said he wished to take the opportunity of thanking the Committee and its secretariat for its courtesy to New Zealand and in particular for making all its documents available to his country. New Zealand had very close associations with many countries of the region served by the Committee.

52. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his very interesting oral report on the Committee's activities. There was not time to comment on that report in detail, but he wished to draw attention to the common interest of the two bodies in the law of the non-navigational uses of international watercourses, a subject on which the Commission had requested the Secretariat to make certain studies, with special reference to pollution. The Committee's work on that subject would be of great assistance.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]
(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 22 (Succession of States in respect of boundary settlements) (continued)

53. The CHAIRMAN invited the Commission to resume consideration of article 22 in the Special Rapporteur's fifth report (A/CN.4/256/Add.4).

54. Mr. ALCIVAR said that, when the Commission had discussed the Special Rapporteur's second report at the twenty-second session, he had supported article 6, but had expressed the hope that an exception relating to boundary treaties would be included in the draft; he therefore welcomed article 22.

55. As to the rules to be embodied in the article, he was inclined to favour alternative A, which made it clearer that the exception related to the boundary treaty and not to the situation created by that treaty.

56. He did not, however, agree with the Special Rapporteur's explanation that the exception was derived from the rule stated in article 62 of the 1969 Vienna Convention on the Law of Treaties. Although that rule had been expressed in terms of a "fundamental change of circumstances", the article in fact embodied the *clausula rebus sic stantibus*. What had until then been considered as an implied clause in a treaty had been transformed by the Vienna Convention into an objective rule of the law of treaties. His country's delegation had strongly opposed the inclusion of the exception relating to boundary treaties, set out in article 62, paragraph 2(a) of that Convention. He himself still thought that the inclusion of that exception had been unfortunate, but it was, of course, now part of the Vienna Convention. The point he wished to make was that the provisions of article 62, paragraph 2(a) of the Vienna Convention did not constitute the basis of the rules embodied in article 22 and 22 (bis).

57. On the whole, he preferred alternative A for both those articles.

58. Mr. QUENTIN-BAXTER said he fully agreed that boundaries should not be subjected to any kind of uncertainty as a result of the operation of any instrument which might result from the draft articles under discussion. There was ample authority for the proposition, put forward during the Commission's 1970 discussions, that the duty of a State to respect boundaries was coincidental with its duty to respect the sovereignty of other States.

59. Questions of boundaries, as indeed all questions relating to territorial and objective régimes, were matters of status rather than of treaty law. It was therefore not surprising that at the United Nations Conference on the Law of Treaties, the majority of States had regarded objective régimes as not being primarily a matter of treaty law. It was significant that, in article 62 of the 1969 Vienna Convention, an exception had been made only in respect of boundary treaties and not in respect of treaties laying down other kinds of real obligations.

60. He himself was much attracted by the formula submitted by the Special Rapporteur as article 4 in his first report. He thought that the adoption of either alternative A or alternative B for article 22 would lead to serious difficulties. For example, the rule embodied in alternative A, that the continuance in force of a boundary treaty was not affected by reason only of the occurrence of a succession of States, could be regarded as a logical extension of the rule stated in article 62 of the Vienna Convention. A boundary treaty, however, could also contain a wide variety of other provisions and there was a danger that it might be used to entrench them. There

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was some analogy with the phenomenon, well known in domestic parliamentary practice, of extraneous provisions being introduced into a bill, such as a finance bill, which could not be rejected by a legislative body, because of its main purpose.

61. The Commission might perhaps find that the best solution to the problem of boundaries was to formulate the simplest possible rule on the lines of the original article 4. In any case, a provision such as article 22 (bis) was necessary in the draft.

62. Mr. HAMBRO asked the Special Rapporteur whether he would give some thought to the possibility of re-introducing a provision on the lines of article 4 in his first report.

63. Sir Humphrey WALDOCK (Special Rapporteur) said that if the Commission were to adopt for article 22 a provision on the lines of alternative B, which treated the matter more as a situation created by a treaty than as a treaty question, he could see the attraction of his original article 4. That negative formulation had been his first approach, but at the previous sessions of the Commission, when the topic had been discussed, much had been said about boundary treaties and other territorial treaties being an exception to the “moving treaty-frontiers” rule. It had therefore become necessary for him to approach the question in a more positive manner. The fact of the matter was that the so-called territorial regimes, which created such rights as transit rights and special rights connected with airports, were of a mixed character and partook of both treaty law and custom.

64. Mr. BILGE said that he had not yet come to a definite conclusion on article 22 and reserved his position.

65. The CHAIRMAN, speaking as a member of the Commission, said that he too found it very difficult to reach any final conclusion on article 22. He shared the basic approach adopted by all members of the Commission, namely, that it was desirable to adopt a formula that would avoid unsettling boundaries, or reopening or exacerbating boundary disputes.

66. He was inclined to favour either the original article 4 proposed by the Special Rapporteur in his first report or alternative B for article 22. There did not seem to be any very substantial difference between those two formulations with regard to approach, although there might be with regard to their effect. One advantage of alternative B was that it referred to a boundary settlement rather than to a boundary as such, because in many cases a boundary was not settled once and for all at the time when the treaty defining the boundary entered into force. For example, the Rio Grande river constituted the boundary between part of the state of Texas and Mexico, but it was a very uncertain boundary because the river had shifted its bed on many occasions and thus given rise to many disputes. It was therefore preferable to refer to a boundary settlement, which might be designed to maintain a boundary in effect, rather than to the boundary itself.

67. He found it difficult to understand the distinction drawn by Mr. Ushakov between a boundary settlement and a territorial settlement when referring to boundaries. It was true that it was possible to have a territorial settlement that did not affect boundaries, for example, in the case of islands; but where a boundary separated the territory of one State from that of another, boundary settlements were inevitably both boundary and territorial settlements. He was unable to see that the difference between the two types of settlement could have any bearing on the use of the term “boundary settlement” in the present case.

68. To sum up, he would prefer a general reservation on the lines of the article 4 proposed by the Special Rapporteur in his first report, using the term “boundary settlement” instead of “boundary”. He would also prefer a somewhat more positive wording and would suggest that the words “shall be understood as affecting” should be replaced by the words “shall affect”. He did not favour the clause proposed by Mr. Ushakov, since he would prefer as simple a formulation as possible in order to avoid problems of interpretation.

69. Mr. USHAKOV pointed out that the expression “treaty [which] establishes a boundary” was already to be found in article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties, whereas the expression “boundary settlement” was new. The Commission should avoid introducing a new expression, the meaning of which would have to be explained.

70. Mr. AGO said it would be simpler to speak of a “boundary established by treaty” than of a “boundary settlement”, although the latter expression was intended to reflect the fact that a treaty was not usually confined to establishing a demarcation line, but also laid down the procedure for applying the régime thus established. In that respect the expression “boundary settlement” might, indeed, be preferable, but it would require further explanation. The expression “a treaty which establishes a boundary” should not be used, because article 22 dealt with the consequences of a treaty and not with the treaty itself. It was the régime established by the treaty that was the object of the succession, not the rights and obligations stated in the treaty. For example, if one State concluded with another State a treaty ceding a frontier area of one of its colonial possessions, which became independent before the treaty entered into force, it was the existing boundary that would be inherited by the successor State, not the treaty and not the new boundary it provided for.

71. Sir Humphrey WALDOCK (Special Rapporteur) said it was clear that the Commission was somewhat divided in its approach. It was generally agreed that there must be some kind of article establishing that the mere occurrence of a succession of States would not reopen the question of boundaries because, in general, treaties were not binding on a successor State under the “moving treaty-frontiers” rule or the “clean slate” principle. The point to be determined was whether the rule should relate to the treaty or to the situation created by the treaty. Slightly more of the Commission’s members were in favour of the more negative version in the article 4 proposed in his first report, but several members took the opposite position.

* See previous meeting, para. 12.
72. Personally, he thought there was some artificiality in restricting the rule to the situation created by the treaty and he doubted whether States approached the problem in that way. After all, a boundary treaty constituted the title to the boundary situation and, if the validity of the treaty was challenged, the problem of the validity of the boundary situation inevitably arose. There was also the case of the possible termination of a treaty where the treaty contained a termination clause. He found it difficult to believe that, in practice, it was possible to depart altogether from the contractual aspect of the treaty.

73. The fact that the Vienna Convention on the Law of Treaties related the exception to the rule on fundamental change of circumstances to the treaty itself was not a conclusive argument, since in that case the rule had been formulated in respect of the termination and suspension of the operation of treaties and it was essential to relate the exception to the treaty itself. However, if it was argued that a boundary treaty had dispositive effects, there would be no need for concern about the exception to the rule, since the boundary would then be a legal effect that existed in its own right.

74. Where there seemed to be a slight majority in the Commission in favour of expressing the matter in terms of a boundary settlement, the evidence would justify either approach. In the circumstances, it would perhaps be best to refer article 22 to the Drafting Committee and see what emerged.

75. The CHAIRMAN suggested that article 22 should be referred to the Drafting Committee.

* It was so agreed.5

ARTICLE 22 (bis) (Succession in respect of certain treaties of a territorial character) (resumed from the 1192nd meeting)

76. The CHAIRMAN invited the Commission to resume consideration of article 22 (bis) in the Special Rapporteur's fifth report (A/CN.4/256/Add.4).

77. Sir Humphrey WALDOCK (Special Rapporteur) said he had had to base his commentary on the material in the Secretariat studies and on the literature on the subject, which tended to deal with cases that had raised problems or in which succession had been questioned. There were probably even more cases where no questions had been raised and where the continuance in force of the treaty had been taken for granted. There was a mass of other material on territorial treaties, especially in books devoted to so-called international servitudes, which did not deal with the question of succession, but was useful for illustrating the kind of problems that might arise. He had, however, confined himself in the commentary to the question of succession.

78. To revert to the question put by Mr. Hambro earlier in the meeting,6 the short answer was that it was possible to provide the same kind of solution for article 22 (bis), if a formulation to cover the kinds of situation involved could be found. It could be argued, certainly in regard to the so-called objective régimes, that it was really the dispositive effects of a treaty, combined with the establishment of the situation by custom, which created a legal situation that was independent of a treaty; he had referred to the case concerning Right of Passage over Indian Territory in paragraph (19) of the commentary to show that such an approach was possible. The special rights relating to fisheries could also be treated in the same way as a treaty régime. Whatever approach was adopted, the main difficulty lay in the formulation of the rule.

79. Mr. SETTE CAMARA said that, as with article 22, he had no hesitation in preferring alternative A. He did not see how the Commission could avoid relating the rule to the treaty itself, and he agreed with the Special Rapporteur that it was somewhat artificial to refer only to the situation created by the treaty. Nor did he see how the situation could survive without a legal basis if the treaty itself lapsed with a succession of States in accordance with the “clean slate” principle of the “moving treaty-frontiers” rule. Localized and dispositive treaties survived because they impressed the territory which was the object of succession. The validity of such treaties could be denounced and challenged, but always for reasons other than mere succession. Tanganyika, for example, had challenged the right of the former mandatory to grant a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma, on the basis of an ultra vires engagement, because the rights of the mandatory were of limited duration.

80. In his view, the rule in alternative A for article 22 (bis) concerning both treaties of a territorial character in general—paragraph 1 (a)—and treaties establishing the so-called “objective régime”—paragraph 1 (b)—was correctly formulated and deserved support. There were many details which required further consideration, such as the inclusion of the term “contiguous zone” in the definition of territory in paragraph 3, but the Commission did not really have sufficient time to go into them. What mattered was to determine the Commission's basic view on the kind of solution to be adopted. Once that had been done, the Drafting Committee could include some version of the article in the draft, so that the Commission could have the benefit of the Sixth Committee's comments for its second reading.

81. Mr. HAMBRO said that his reaction to article 22 (bis) was the same as to article 22. The important thing to bear in mind was that a certain status had been created, which had a binding effect on a certain territory, and it was because of that special status that an exception was being made to the general rules. If that interpretation was correct, it would be better to refer to the status than to the treaty. If the Commission did adopt the treaty approach, it was essential also to make a distinction between succession in the case of the separation of part of a territory and succession in the case of the creation of a new State. There was some point in keeping a treaty régime in force for part of the territory, but not for a new State.

82. Consequently, he would prefer not to include such an article in the draft. If the Commission decided to do

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5 For resumption of the discussion see 1197th meeting.
6 See para. 62 above.
so, he would prefer the approach adopted in article 4 in the Special Rapporteur’s first report. If that approach was rejected, he would prefer alternative B to alternative A, and would be prepared to accept alternative A only as a very last resort. Perhaps all three alternative formulations could be submitted to Governments for their comments.

83. He wished, in conclusion, to emphasize that the various kinds of treaty in question were so different from each other that, in his view, it would be impossible to cover them by a single rule, except for a very general reservation such as that contained in article 4 in the Special Rapporteur’s first report.

84. Mr. USHAKOV said that it appeared from the Commission’s discussions that the “clean slate” principle must apply to newly independent States and to States resulting from a separation, unless they expressed their consent to be bound by the treaty. In cases of unification or dissolution, on the other hand, it was the principle of ipso jure continuity that applied, subject to exceptions. Noting that article 22 (bis) would apply specifically to newly independent States and States resulting from a separation, he asked the Special Rapporteur what the effect of the article would be in the event of fusion or dissolution.

85. Mr. RAMANGASOAVINA said he had no difficulty in accepting the principle stated in article 22 (bis) and that he preferred alternative A. The principle on which the provision was based was the same as that of article 22: the occurrence of a succession of States did not ipso jure entail the disturbance of a previously existing situation resulting from a treaty. It was for the new State, and any State enjoying advantages or servitudes, to negotiate a new arrangement if they saw fit. It might happen, for example, that on the occurrence of a succession the new State could not accept certain servitudes with which the predecessor State had encumbered its territory.

86. The term “territory”, as defined in paragraph 3, included the contiguous zone. In his view, the contiguous zone was part of the high seas, and the coastal State only had jurisdiction over it in such matters as Customs and health control. It was thus hardly conceivable that one State could grant another advantages or servitudes in the contiguous zone or in its airspace. That was only possible with respect to the continental shelf, where coastal States might enjoy an exclusive right to exploit natural resources.

87. Mr. THIAM said that he accepted the principle of article 22 (bis) and favoured alternative A. However, he would like a reservation to the rule of ipso jure continuity to be introduced in favour of newly independent States; for sometimes a colonial Power had concluded treaties for the benefit of a newly independent State; and, in the latter case, whether a further distinction should be made, depending on whether or not the territory where the new State was itself a newly independent State.

88. Mr. ELIAS said he had a certain sympathy with the point made by Mr. Thiam. His own country, Nigeria, for example, had taken the unusual step of breaking off diplomatic relations with France in 1961, when France had insisted on carrying out atomic tests in the Sahara. Nigeria, together with other African countries, had protested, first through the United Kingdom before independence, and then directly to France after the attainment of independence. After relations had been broken off, Nigeria had forbidden French aircraft to land on Nigerian territory and French vessels to dock in Nigerian ports. France had then invoked a provision of a treaty concluded between France and Great Britain in 1923, by which Great Britain had given France the right in perpetuity to land aircraft on Nigerian territory and to use Nigerian ports. Nigeria had objected to the application of that treaty on the grounds of fundamental change of circumstances, non-representation in the treaty and non-consent, and had refused to be bound by it. That decision had been respected by France, although not necessarily for the legal reasons invoked. That kind of problem should be taken into account in the formation of article 22 (bis).

89. While he favoured the approach in alternative A, he was not altogether happy with the wording. Paragraph 1 should be made less ponderous and more concise, and the scope of the definition in paragraph 3 should be narrowed by excluding the reference to the contiguous zone and the seabed, since both those terms were still extremely controversial.

90. Mr. USTOR asked whether the Special Rapporteur had thought of making a distinction, in the case of a localized or dispositive treaty affecting a newly independent State, between the situation where the treaty was localized on the territory of the newly independent State, thus constituting a burden on that State, and the situation where the treaty was localized elsewhere and gave rights to the newly independent State; and, in the latter case, whether a further distinction should be made, depending on whether or not the territory where the treaty was localized was itself a newly independent State.

The meeting rose at 1 p.m.

1195th MEETING
Tuesday, 4 July 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

[Item 1 (a) of the agenda]

Draft articles submitted by the Special Rapporteur

ARTICLE 22 (bis) (Succession in respect of certain treaties of a territorial character) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 22 (bis) (A/CN.4/256/ Add.4).
2. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ushakov had asked whether the rule in article 22 (bis) would have any application in the case of a uniting of States or in that of the dissolution of a State. The articles dealing with such cases contained provisions establishing exceptions to the rule of *ipso jure* continuity where continuance of the treaty would be incompatible with its object and purpose and where the effect of the uniting of the States or the dissolution of the State was radically to change the conditions for the operation of the treaty. In regard to a localized treaty it might be argued that the conditions were so different that the continuity rule ought not to be applied. Thus there was a general context for the rule in article 22 (bis), even though its operation in the case of a uniting of States or the dissolution of a State might not be so wide as it would be in the other cases. It would therefore be necessary to have at least some kind of general reservation to cover such cases.

3. Several members of the Commission had raised the question whether former dependent territories should be bound by treaties of a territorial character concluded by the former administering Power. He had examined that question in the commentary in his discussion of the so-called Belbase Agreements of 1921 and 1951. The case where an agreement in perpetuity had been made by a State which itself had a limited tenure of the territory was something that had to be taken into account, although it was difficult to fit into the rule under consideration. Since newly independent States were not necessarily former dependent territories, it was by no means obvious that any special exception should be made for such States.

4. Several members had also questioned the inclusion in paragraph 3 of the references to the contiguous zone and the seabed. Admittedly, it was not very likely in practice that dispositive arrangements would be made in respect of either the contiguous zone or the seabed, but it was clear that the notion of territory could not be restricted to land. It all depended on whether or not, from a theoretical standpoint, it was desired to make the definition as complete as possible.

5. Mr. EL-ERIAN said there was every indication of recognition by customary law that certain treaties of a territorial character constituted exceptions to the "clean slate" principle and that the régimes attached to territory by such treaties continued to be binding. It would therefore be useful to include that rule in the draft articles. The régimes he had in mind were not arrangements made by a colonial Power at the expense of the administered territory, nor were they arrangements of a political character involving restrictions on its sovereignty or inherent rights; they were, rather, arrangements of a practical character relating to geographical situations. The scope of the rule should therefore be limited by the kind of criterion clearly stated in the note from the French Government quoted by the Special Rapporteur in paragraph (32) of his commentary.

6. He had no very strong views as to whether the Commission should relate the rule to the treaty itself or to the effects of the treaty, or whether it should adopt the "saving clause" approach. However, in accordance with the position he had taken on article 22, he had a slight preference for alternative B. He had originally thought that there was no need to define "territory", but in the light of what the Special Rapporteur had just said he thought that some definition would be useful; he suggested the formula "land, water and air space".

7. In paragraph (37) of his commentary, the Special Rapporteur had referred to the Nile Waters Agreement of 1929. The measures codified in that Agreement had already been in effect at the time of conclusion of the treaty; thus the treaty had merely confirmed existing practice. It had also, to some extent, been a codification of general international law, since it was generally accepted that no State had the right to take measures affecting an international river that would be prejudicial to the interests of the other riparian States. Friendly consultations had subsequently been held among the States of the Nile river basin, and in 1958 a further agreement had been concluded between Egypt and the Sudan.

8. In paragraph (44) of his commentary, the Special Rapporteur, referring to the Suez Canal Convention of 1888, had described Egypt as successor to the Ottoman Empire in the sovereignty of the territory. In fact, the Ottoman Empire had concluded the Convention on behalf of the Egyptian Government, so that Egypt could not be regarded as a successor. Egypt had been a vassal State at the time, but it had had international personality and treaty-making capacity, as was recognized in the London Treaty of 1841 and in a number of other international agreements concluded by Egypt in the nineteenth century.

9. Mr. TSURUOKA proposed that articles 22 and 22 (bis) should be replaced by a provision on the lines of article 4 in the Special Rapporteur's first report. Such a provision would cover all the cases envisaged in the two articles. There was, undoubtedly, a category of treaties which automatically bound the successor State, but the treaties falling within that category must be very precisely defined and the criteria proposed by the Special Rapporteur, although very learned, were not satisfactory. The application of the rules laid down in articles 22 and 22 (bis) might thus prove more confusing than enlightening. State practice showed no consistency and seemed to indicate that political considerations prevailed over purely legal considerations. The settlement of succession to boundary treaties and treaties of a territorial character had hitherto been left to the will of the parties and might be a matter which it would be wise to leave to their judgment and to the free play of customary law, rather than try to impose strict rules. The problems raised and views expressed in the Commission would form an excellent commentary for the future guidance of States.

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1 See previous meeting, para. 84.
2 See paras. (33) and (34).
3 See 1193rd meeting, para. 42.
4 League of Nations, Treaty Series, vol. XCIII, p. 44.
5 See British and Foreign State Papers, vol. LXXIX, p. 18.
10. Mr. USHAKOV said that article 22 (bis) raised many problems. The first was whether an article on localized treaties or treaties of a territorial character was really necessary. The general hypothesis adopted by the Commission was that the “clean slate” principle was applicable to newly independent States and in cases of separation, where the State emerging from the separation was in the position of a newly independent State as defined by the Drafting Committee in article 1, paragraph 1 (f) (A/CN.4/L.183/Add.5), and that the principle of ipso jure continuity was, with a few exceptions, applicable in cases of fusion and division. He doubted that there was any justification for excepting localized treaties or treaties of a territorial character from the “clean slate” principle, and thus forcing newly independent States to maintain a situation whose lawfulness was not proved and which had been created by treaties concluded by the former metropolitan State. He did not see why such an exception should be made in the case of newly independent States or States emerging from a separation, whereas in cases of fusion or division, the principle of ipso jure continuity was maintained, possibly with exceptions, even for those treaties. The Commission should consider whether it would not be better to allow the articles governing newly independent States and States emerging from a separation to stand, without adding any special provisions concerning localized treaties.

11. If the Commission nevertheless decided to draft such special provisions, it would have to settle a number of questions. It should first of all define the expressions “treaties of a territorial character”, “dispositive treaties” and “localized treaties”. He did not think it was sufficient to say, as the Special Rapporteur had done in paragraph 1 of alternative A, that such treaties created “obligations and rights relating to the user or enjoyment of territory of a party”—not to mention that the words “user” and “enjoyment” also needed defining. But it seemed practically impossible to define the treaties in question; there were too many factors to be taken into consideration at the same time and, in the words of the Commonwealth Relations Office, “international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be”.7

12. The French Government had expressed the view that conventions which were completely non-political in character constituted an important exception to the “moving treaty-frontiers” rule.8 In other words, whether or not that rule applied depended on whether or not the localized treaty was political in character. Political obligations could not be imposed on a successor State merely because they derived from a treaty which had been applicable to part of the predecessor State’s territory. Thus a successor State was not required to fulfil obligations deriving from localized treaties authorizing the presence in its territory of the foreign armed forces and military bases of a military and political alliance to which the predecessor State had belonged. That showed how difficult it would be to give a precise and comprehensive definition of localized treaties.

13. Another question arose concerning the nature of localized treaties. Hitherto the Commission had distinguished between general multilateral treaties, restricted multilateral treaties and bilateral treaties, but no such distinction was made in the provisions proposed for treaties of a territorial character. He wondered whether the Special Rapporteur regarded the definition of those treaties he had given in paragraph 1 of alternative A as applicable to all three types of treaty, and whether localized treaties were always bilateral or could be multilateral. Even the condition laid down in paragraph 1 (b) of alternative A, that the parties intended the rights “to be accorded to a group of States or to States generally”, did not indicate whether the treaty in question was multilateral or bilateral.

14. A further question was whether obligations such as the obligation of the riparian States on an international river, for example the Danube or the Rhine, to grant the right of free navigation to other riparian States, came under the rules on State succession or under general international law, treaty law or customary law. Such cases were not a mere question of succession to a localized treaty; the situations, which were genuinely international in character, were governed by the principles of general international law.

15. It was clear that neither of the alternative texts proposed by the Special Rapporteur for article 22 (bis), nor the proposals made by other members of the Commission, settled the many questions raised by succession to treaties of a territorial character. It would therefore be more prudent merely to say that the rules formulated for newly independent States and States emerging from a separation, as well as those formulated for cases of fusion and division, were also applicable to localized treaties.

16. There was an inconsistency in the Special Rapporteur’s alternative A. In paragraph 1, the words “The continuance in force of a treaty is not affected by reason only of the occurrence of a succession” implied that it could be affected by something else, but paragraph 2 did not provide for that possibility.

17. Mr. AGO said he thought the draft articles should include a clause on treaties of a territorial character, particularly if it was decided to retain a provision on boundary settlements. The drawing of a boundary between two countries was often accompanied by a whole series of provisions, in the treaty setting the boundary or in other treaties, which created special situations for certain territories. Once again, it was a matter of partial real rights, analogous, at the international level, to the right of way through an estate or a servitude, at the local level. The fundamental international real right was sovereignty. In cases of succession, it was the “clean slate” principle which generally applied to newly independent States, but it would be a mistake to infer that that principle admitted of no exceptions. To preclude that error, it was essential to specify the exceptions.

18. Alternative A was unacceptable for the following reasons. First, the opening phrase, “The continuance in

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7 See commentary, para. (31).
8 Ibid., para. (32).
force of a treaty", was inappropriate. The question was not whether a treaty continued in force, but whether there was State succession to a treaty. For example, if a boundary between Cameroon and Nigeria had been established by an agreement between France and the United Kingdom, the question arising when Cameroon and Nigeria had acceded to independence would not have been whether the agreement remained in force, but whether a new agreement with the same content came into effect between Nigeria and Cameroon. In reality the succession was not to treaties, but to the real situations created by their execution. Consequently, alternative B was preferable, subject to some revision in matters of detail. But it would be better to adopt for article 22 (bis) whatever criteria were adopted for article 22, so as to have two logically symmetrical articles.

19. The essential need, however, was to formulate a saving clause, which should be drafted as to be applicable to all cases of succession, not only to those involving the creation of a new State. He would illustrate that point by giving two examples, one of cession and the other of fusion.

20. The free zones of Upper Savoy and the District of Gex had been established, in the interests of the Republic of Geneva, by a treaty concluded between that Republic and the Kingdom of Sardinia. 8 When Sardinia had ceded those territories to France, the latter had not become a party to the treaty, but had inherited the régime established by it. In that case, territories of an existing State had been ceded to another existing State.

21. As an example of fusion, under the Lateran Treaties, certain buildings of the Vatican situated in the city of Rome had been placed under an extraterritorial régime; if the United States of Europe, embracing Italy, were established one day, they would inherit that régime.

22. Mr. YASSEEN said that localized treaties met a need based either on major principles of international law, such as freedom of navigation on a river, or on human considerations, such as free access to border territories for grazing purposes, on the basis of which the States concerned laid down the details of a particular régime. Hence the concern of the international community to safeguard the existence of such undeniable useful régimes, which were often essential for good neighbourly relations between two or more States, or were in the interests of all or part of the international community.

Hence also the need to formulate a general rule designed to safeguard situations which had been hard to establish. If a localized régime had been imposed by force or was incompatible with rules of jus cogens, its validity could be challenged, but generally speaking the mere occurrence of a succession of States should not unsettle a régime based on considerations of logic, utility and humanity. The interests of newly independent States were safeguarded by the words "by reason only of" used in both alternative texts.

23. The example given by Mr. Ago of two States succeeding two other States was an extreme case. Where only one State succeeded to another State, part of whose territory was the subject of a localized treaty, it was certainly a question of succession: was the new State bound to abide by the arrangement made by an agreement between the predecessor State and another State? The Commission should state the principles to be applied in such a case, the key expression being "by reason only of the occurrence of a succession", since the arrangements in question could be challenged by virtue of other basic principles of international law.

24. In his view article 22 (bis) was essential. Alternative A, which indicated more clearly the fate of a treaty establishing a localized régime, seemed preferable, but he agreed with Mr. Ago that for reasons of symmetry article 22 (bis) should follow whatever model was adopted for article 22.

25. Mr. ELIAS said that Cameroon had had a common boundary with Nigeria when the former was a German colony, and in 1913 a boundary treaty had been concluded between Germany, on the one hand, and the United Kingdom on behalf of Nigeria, on the other. 9 After the establishment of the mandate in 1922 and the division of the former German protectorate of Kamerun into two parts, a new boundary agreement had been concluded between France and the United Kingdom, the two mandates. 10 During the last twelve months consultations had been held between Nigeria and Cameroon, and both countries had signed a declaration maintaining the boundaries fixed in those two boundary treaties. The only part of the boundary not yet properly drawn was in the maritime area, and a joint commission had been set up to complete the task. The whole boundary issue had thus been settled on the basis of State succession.

26. Mr. QUENTIN-BAXTER pointed out that, if the Commission adopted the text proposed by the Drafting Committee for articles 19 to 21 (A/CN.4/L.183/Add.5), the principle of ipso jure continuity would be established for States which merged or united and for States which divided or separated. Thus the question of continuity of the dispositive element of treaties primarily concerned new States or States which seceded. In his view, however, the distinction between ipso jure continuity and the "clean slate" principle did not in itself provide any solution to the problem of dispositive treaties. Apart from the question of boundaries, there were plenty of instances of objective régimes whose maintenance was of vital importance to the international community and which, under one head or another, must be regarded as continuing to bind even new States, or seceding States to which the same rules applied. States should not be induced to believe that, on the grounds of succession, they could escape the burden of real obligations that would otherwise be binding on them.

27. Nor did he think it was sufficient to base the proposed rule on the predecessor State's intention. It was not enough to say that, in a treaty concluded by the predecessor State, it appeared that there was an intention to entrench the conditions and make them run with the

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8 Ibid., para. (14).

land, since that would give the predecessor State's intentions lasting control. The most satisfactory criteria seemed to be those reflected in previous judicial or arbitral decisions. In such decisions there was a sense that the situation either formed part of a general settlement which was in the interests of the international community, or that it was of such a fundamental nature as to give rise to a local custom which ran with the land. All those cases had at least a geographical element, but the geographical element in itself was not a criterion that helped to narrow the field.

28. It could be argued that those were very uncertain criteria, but in other parts of the draft the Commission had not hesitated to use criteria requiring a margin of appreciation. In practice there were many situations in which the parties neither conceded that there was an objective régime, nor denied that there was an objective element which needed somehow to be satisfied. General criteria of that kind left more room for manoeuvre, particularly in cases where treaties needed renegotiating because they were unequal and a new balance between rights and obligations was required.

29. He had no very strong views as to which approach the Commission should adopt in formulating the rule. There was clearly general agreement that in some situations real obligations had to be protected, and the rule could either relate to the treaty itself or to the obligations independently of the treaty. In the simplest and most general case—that of boundaries—he favoured the simplest possible rule, on the lines of article 4 in the Special Rapporteur's first report, which left no doubt that boundaries survived. Such a rule was possible, however, only if provision was made for such other real elements as a settlement might contain; and so simple a rule on boundaries implied the further rule laid down in article 22 (bis).

30. The Special Rapporteur had argued convincingly that States would find it artificial to divorce the obligation from the treaty in which it was enunciated. There were, moreover, certain precedents. Article 62 of the Vienna Convention did suggest that the treaty itself, and not merely the régime it established, had to be protected from the "fundamental change of circumstances" rule. The implication was surely that not to defend the régime might be to undermine the régime. Moreover, since in many situations of succession the rule of ipso jure continuity was applied, so that a governing instrument would continue in force, there was a certain logic in applying the same kind of régime to other cases.

31. Lastly, if the problem was not dealt with in the draft articles it would have to be dealt with elsewhere, and its omission might be misunderstood by governments. In the case of article 22 (bis), therefore, there seemed to be more reasons for favouring a solution framed in terms of treaty continuance than there were in the case of article 22.

32. Mr. BARTOS, referring to Mr. Ushakov's remarks, said that it was very important to distinguish between the general principles of international law and the treaty rules governing certain territories. The distinction was very difficult to draw, because the treaties were partly based on the general principles; it was therefore important to determine how far they departed from them. Rules deriving from general international law should not be affected by the occurrence of a succession of States. That applied, for example, to the general principles governing the right of free passage through certain straits.

33. There was, however, a link between general principles and treaty rules. If those rules were not contrary to general principles, they could be the object of a succession. In that case they did not derive from general international law, but supplemented it. They could nevertheless be of great importance. For instance, navigation on international rivers was governed by principles of general international law which had to be respected, but they were supplemented by important rules laying down navigation procedure which were embodied in treaties concluded by the riparian States.

34. It was essential that that distinction should be reflected in article 22 (bis), and for that reason he favoured alternative A. He accordingly shared the views of Mr. Ushakov and Mr. Ago as well as those of Mr. Yasseen, who had even maintained that a territorial régime based on general principles of international law could not be modified by treaties concluded between certain interested States if that régime was of world-wide importance: for instance, the régime applicable to the Suez Canal could not be modified by the riparian States alone.

35. He hoped that not only treaties as such, but also the general principles on which they were based, would be taken into consideration in article 22 (bis).

36. Mr. USTOR said he agreed with Mr. Ushakov that, since the draft articles applied the rule of ipso jure continuity in the case of the unifying of States and in that of the dissolution of a State, the problem of localized treaties did not really arise in those cases. That problem related mainly to newly independent States and cases of separation. It had been argued that, if no rule on localized treaties was laid down in the draft articles, the rules already adopted would provide a solution to the problem, because under those rules it was, essentially, for the newly independent State to decide whether or not it wished to continue its predecessor's treaties.

37. There were, however, two types of situations based on localized treaties. In the first, the successor State carried the burden; in the second the successor State was the beneficiary and would enjoy certain rights under its predecessor's treaty in the territory of another State. Those situations could be based on multilateral treaties, restricted multilateral treaties or bilateral treaties. Under the rules laid down in the draft articles, the successor State could itself decide to continue, by notification of succession, multilateral treaties concluded by its predecessor. The situations in question, however, derived mainly from restricted multilateral treaties and bilateral treaties, and in those cases the agreement of the other party or parties was necessary for continuance of the treaty. Consequently the other party had an opportunity of divesting itself of certain burdens or obligations which would give rights to the successor State.

38. Thus the mere application of the rules already adopted would not satisfy the requirements of a newly
independent State in cases where the situation gave it certain rights and the burden was carried by the other State party to the treaty. Some kind of express provision was needed. His preference would be for the kind of general saving clause proposed by Mr. Ago, on the lines of the Special Rapporteur’s original article 4. He was well aware that, because of its general nature, such a provision would not afford a fully satisfactory solution to the problem. However, it was impossible for the Commission to prepare an elaborate provision at the present stage, and the solution should be regarded as a provisional one to be submitted to governments for their consideration. A more elaborate rule on special situations based on localized or territorial treaties could be formulated at a later stage of the Commission’s work.

39. Mr. BILGE said he found it as difficult to take a final position on article 22 (bis) as on article 22. No consensus seemed to emerge either from the literature or from judicial decisions. It was obvious, however, that the question dealt with in article 22 (bis) could not be ignored.

40. The present discussion was really concerned with the formulation of a reservation rather than a rule, and article 22 (bis) could be regarded as a much more detailed reservation than that contained in article 4 in the Special Rapporteur’s first report. For that reason he preferred alternative A, which laid more stress on treaties than did the former article 4. The situations created by treaties were not immutable and could be changed by other treaties. The régime of the Turkish straits, for example, had first been established by the Lausanne Convention, then by the Montreux Convention. It was preferable to stress the treaties rather than the situations, since the draft articles dealt with succession of States in respect of treaties.

41. In his commentary, the Special Rapporteur had given some examples of demilitarized territories. Neither of the alternatives proposed appeared to cover cases of demilitarization, since they did not come under either “user” or “enjoyment” of territory; they implied, rather, a limitation of State sovereignty. The Drafting Committee should therefore decide whether or not it wished to include cases of demilitarization in article 22 (bis).

42. The CHAIRMAN, speaking as a member of the Commission, said that in considering specific examples of the kind of treaties that would be covered by paragraph 1, he had come to the conclusion that it would be highly undesirable for the “clean slate” principle to apply to the situations arising from such treaties, since a new State was just as likely to be injured as to be helped by the application of that principle. There was, for example, an agreement between the United States and Mexico under which the United States guaranteed Mexico 1.5 million acre-feet of water each year, for the purpose of irrigating a specific area. If that area ever separated from the rest of Mexico, it was hardly desirable that the United States should be permitted to cancel its obligation, because the entire economy of the area was dependent on the agreement, and without the water it would revert to desert.

43. It was admittedly difficult to formulate a precise definition of territorial régimes, but there were sufficient examples of such arrangements, and the definition given by the Special Rapporteur in article 22 (bis), paragraph 1, was fairly successful. Sub-paragraph (a) needed some clarification in order to convey explicitly the connexion between the effects of succession on the one party and its effects on the other party.

44. On the whole he thought it better to opt for a reservation, as suggested by Mr. Ago and others, than to leave situations of the type under consideration to be dealt with by the other rules in the draft articles, which were designed to take care of a different set of problems. Since many of the régimes in question were closely bound up with the continuing operation of the treaties establishing them, the rule needed to be tied more closely to treaties than in the case of boundary situations. He agreed that, at the present stage, the most that could be done was to draft a fairly clear statement of a rule that would show governments what the problems were. The rule could then be amplified and clarified in the light of their comments.

45. Sir Humphrey WALDOCK (Special Rapporteur) said that, during the discussion on article 22 (bis), he had been struck by the contrast between the views expressed and the rather confident statements made in the Commission two or three years earlier to the effect that localized treaties should be an exception to the “moving treaty-frontiers” rule as well as to the “clean slate” principle.

46. He had deliberately made articles 22 and 22 (bis) more positive than the article 4, dealing with boundaries, proposed in his first report, because he thought it essential that the Commission should come to grips with that difficult problem. There was clearly a general feeling that a very important range of treaties, or treaty situations, should be regarded as a special case. In the discussion on article 22 (bis) a majority of the members of the Commission had been in favour of relating the rule to the treaty rather than to the situations, whereas the converse had been true in the case of article 22. He had thought that the Commission should be consistent in its approach to the two cases.

47. He agreed with the last speaker that the Commission could not arrive at a full definition of the problem at the present session. Formulating even a general reservation would not, however, be an easy task, since it would be essential at least to outline what treaties were covered by the reservation. The best course would be to refer the article to the Drafting Committee, and he would produce new texts of both articles 22 and 22 (bis), as a basis for the Committee’s discussions.

48. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 22 (bis) to the Drafting Committee.

It was so agreed. The meeting rose at 6.15 p.m.

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15 For resumption of the discussion see 1197th meeting, para. 4.
1196th MEETING

Wednesday, 5 July 1972, at 9.55 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. El-Erian, Mr. Hambro, Mr. Quintin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(A/CN.4/L.183/Add.4 and Add.5)

ARTICLE X

1. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article X:

Article X

Cases of military occupation, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudge any question that may arise in regard to a treaty from the military occupation of a territory or from the international responsibility of a State or from the outbreak of hostilities between States.

2. When the Commission had approved article 2 on transfer of territory, it had been agreed that, in view of the reference in the introductory sentence of that article to a “territory under the administration of a State”, a saving clause on military occupation should be introduced into the draft.1 The provision proposed by the Drafting Committee was modelled on article 73 of the Vienna Convention on the Law of Treaties,2 except that it referred to military occupation of a territory but, for obvious reasons, did not refer to cases of State succession. The Committee believed that the new article should be placed at the end of the draft and it would indicate later the title of the Part to which it should belong.

Article X was approved.

ARTICLE 12

3. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 12:

Article 12

Effects of a notification of succession

1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 7 or 8 shall be considered a party or, as the case may be, contracting State to the treaty:

(a) On its receipt by the depositary; or

(b) If there is no depositary, on its receipt by the parties or, as the case may be, contracting States.

2. When under paragraph 1 a newly independent State is considered a party to a multilateral treaty which was in force at the date of the succession of States, the treaty is considered as being in force in respect of that State from the date of the succession of States unless:

(a) The treaty otherwise provides;

(b) In the case of a treaty which falls under article 7, paragraph 3, a later date is agreed by all the parties;

(c) In the case of other treaties, the notification of succession specifies a later date.

3. When under paragraph 1 a newly independent State is considered a contracting State to a multilateral treaty which was not in force at the date of the succession of States, the treaty enters into force in respect of that State on the date provided by the treaty for its entry into force.

4. The Drafting Committee had deleted the words “in respect of a multilateral treaty” from the title of the article as originally submitted by the Special Rapporteur (A/CN.4/224/Add.1), since the article was in a section of Part III entitled “Multilateral treaties”. Paragraph 1 dealt with the question of the date from which the successor State was bound, and concerned all treaties, whether or not they were in force at the date of the succession of States. Hence the use of the phrase “shall be considered a party or, as the case may be, contracting State”. Paragraphs 2 and 3 dealt with the question of the date from which the treaty was considered as being in force in respect of the successor State. Paragraph 2 concerned the case of a treaty which was in force at the date of the succession of States, and laid down the general rule that such a treaty was considered as being in force in respect of the successor State from the date of the succession, the three exceptions to that rule being contained in sub-paragraphs (a), (b) and (c). Paragraph 3 concerned the case of a treaty which was not in force at the date of the succession and stated the obvious rule that in such a case the treaty entered into force in respect of the successor State on the date provided by the treaty itself.

5. The CHAIRMAN, speaking as a member of the Commission, asked why the Drafting Committee had thought it necessary to refer specifically to a multilateral treaty in paragraphs 2 and 3, but not in paragraph 1.

6. Sir Humphrey WALDOCK (Special Rapporteur) suggested that the word “multilateral” should be deleted from paragraphs 2 and 3 and that, in the first line of paragraph 1, the words “the treaty” should be replaced by the words “a treaty”.

It was so agreed.

Article 12, as amended, was approved.

1 See 1181st meeting, paras. 45 et seq.


3 For previous discussion, see 1168th meeting, paras. 58 et seq., and 1169th meeting.
ARTICLE 13

7. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 13:

Article 13

Conditions under which a treaty is considered as being in force

1. A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party on the terms prescribed in the treaty when:

(a) They expressly so agree; or

(b) By reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the successor State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

8. Article 13 was the first article of the section of Part III dealing with bilateral treaties. The Drafting Committee had made a few changes to the text originally submitted by the Special Rapporteur (A/CN.4/249), but had recast the title, because it took the view that the word “consent” did not properly express the concept of mutual agreement underlying the article. It had deleted the word “bilateral”, as being superfluous, and replaced the words “continuing in force” by the words “being in force”, since the treaty had, in fact, never been in force between the successor State and the other State party. In paragraph 1, the words “on the terms prescribed in the treaty” had been introduced to make it clear that the article dealt with definitive and not provisional application.

9. Sir Humphrey WALDOCK (Special Rapporteur) replying to a question by the Chairman, explained that it was necessary to make it clear in the article that application of the treaty was not provisional. That was not easy to do without using the term “definitive”, which he had thought might not be readily understood. He had included an explanation in the commentary, but he suggested that, in order to make the meaning clearer, the phrase “in conformity with the provisions of the treaty” should be used in the article itself, instead of “on the terms prescribed in the treaty”.

It was so agreed.

Article 13, as amended, was approved.

ARTICLES 14 and 16

10. Mr. USTOR (Chairman of the Drafting Committee) said that the original articles 14 and 16 had disappeared from the draft because the provisions of those articles would be covered by the section dealing with provisional application.

ARTICLE 15

11. Mr. USTOR (Chairman of the Drafting Committee) said the Committee proposed the following title and text for article 15:

Article 15

The position as between the predecessor and the successor State

A treaty which under article 13 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as in force also in the relations between the predecessor and the successor State.

12. The Drafting Committee had made few changes in article 15. The purpose of most of those changes had been to bring the article into line with the articles already approved by the Commission.

Article 15 was approved.

ARTICLE 17

13. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 17:

Article 17

Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 13 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

(a) Does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party;

(b) Is not suspended in operation in the relations between them by reason only of the fact that it has subsequently been suspended in operation on the relations between the predecessor State and the other State party;

(c) Is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered as in force or, as the case may be, in operation between the successor State and the other State party if it is established in accordance with article 13 that they so agreed.

3. The fact that a treaty has been amended in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 13 in the relations between the successor State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

14. The Committee had taken the view that, in addition to termination and amendment of the treaty, article 17 should also cover the case of suspension of operation. The title and the structure of the article had been modified.

4 For previous discussion see 1170th meeting.
5 Part III, section 4 of the text adopted in the Commission’s report (A/8710/Rev.1).
6 For previous discussion see 1171st meeting, paras. 49 et seq.
7 For previous discussion see 1172nd meeting, paras. 69 et seq., and 1173rd meeting, paras. 13 et seq.
accordingly. Paragraph 1 dealt with cases in which the treaty was terminated, suspended in operation or amended after the newly independent State and the other State party had agreed to continue it. The Committee had introduced into that paragraph a new sub-paragraph (b) dealing with suspension of operation. Paragraphs 2 and 3 dealt with cases in which the treaty was terminated, suspended in operation or amended after the succession of States, but before the newly independent State and the other State party could be considered as having agreed on its continuance. Paragraph 2 dealt with termination of operation and paragraph 3 with amendment, but the rules laid down in the two paragraphs were parallel.

15. Mr. AGO said that the French text of paragraph 2 should be brought into line with the English text and that the phrase “suspended in operation” should be translated by the words “que son application a été suspendue” instead of by the words “qu’un traité a été suspendu”.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 17, subject to amendment of the French text.

*It was so agreed.*

**ARTICLE 17 (bis)**

17. Mr. USTOR (Chairman of the Drafting Committee) said that articles 17 (bis), 17 (ter) and 17 (quater) formed a new section entitled “provisional application”. The method of grouping in a separate section all the provisions of Part III relating to provisional application, rather than distributing them between the sections dealing with multilateral and bilateral treaties, had the advantage of avoiding repetition.

18. The Committee proposed the following title and text for article 17 (bis):

**Article 17 (bis)**

*Multilateral treaties*

1. A multilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and another State party to the treaty if the successor State notifies the parties or the depositary of its wish that the treaty should be so applied and if the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. However, in the case of a treaty which falls under article 7, paragraph 3, the consent of all the parties to such provisional application is required.

19. Article 17 (bis) dealt with the provisional application of multilateral treaties and contained the substance of paragraph 1 of the original article 16. Paragraph 1 of article 17 (bis) stated the general rule that a treaty would be considered as applying provisionally between the successor State and another State party if the successor State notified the parties or the depository of its wish that it should be so applied, and if the other State party expressly so agreed or by reason of its conduct was to be considered as having so agreed. Paragraph 2 dealt with the special case of treaties falling under article 7, paragraph 3, and laid down the usual rule concerning the consent of all the parties.

20. The CHAIRMAN, speaking as a member of the Commission, observed that it was not clear from paragraph 1 whether the successor State had to notify all the parties to the treaty if it wished to apply the treaty provisionally only as between itself and one of the parties.

21. Mr. USTOR (Chairman of the Drafting Committee) said that such a case was hardly likely to arise in practice, but that if it did, he would assume that the successor State was obliged to notify only the party in question.

22. Sir Humphrey WALDOCK (Special Rapporteur) said that what usually happened was that a newly independent State made a general declaration, referring not only to a particular treaty but to multilateral treaties in general, that it was prepared to apply such treaties provisionally as between itself and any individual State that so wished. That was, he believed, the correct approach, because it was not possible to notify participation in a multilateral treaty on a provisional basis, since the treaty itself made no provision for such a limited form of participation. In practice, newly independent States seemed never to have thought that they could ask for any such limited participation. The article was thus mainly intended to cover the possible putting into operation of a multilateral treaty on a provisional basis, between the successor State and such States parties as agreed to that arrangement.

23. Mr. USTOR (Chairman of the Drafting Committee), in reply to a question by Mr. Castañeda, explained that the procedure envisaged in paragraph 1 depended on the intention of the successor State. The successor State could, if it so wished, inform the other parties that it needed a period of reflection and intended to apply the treaty provisionally. The other parties could either make a specific reply or give their implicit consent.

*Article 17 (bis) was approved.*

**ARTICLE 17 (ter)**

24. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 17 (ter):

**Article 17 (ter)**

*Bilateral treaties*

A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State party if:

(a) They expressly so agree; or

(b) By reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

25. The text, which dealt with the provisional application of bilateral treaties, was modelled both on article 17 (bis) and on article 13, paragraph 1, concerning the definitive application of bilateral treaties; it was self-explanatory.

*Article 17 (ter) was approved.*
ARTICLE 17 (quater)

26. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 17 (quater):

Article 17 (quater)

Termination of provisional application

1. The provisional application of a multilateral treaty under article 17 (bis) terminates if:
   (a) The States provisionally applying the treaty so agree;
   (b) Either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or
   (c) In the case of a treaty which falls under article 7, paragraph 3, either the successor State or the parties give reasonable notice of such termination and the notice expires.

2. The provisional application of a bilateral treaty under article 17 (ter) terminates if:
   (a) The successor State and the other State party so agree; or
   (b) Either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

3. Reasonable notice of termination for the purpose of the present articles shall be:
   (a) Such period as may be agreed between the States concerned; or
   (b) In the absence of any agreement, twelve months' notice unless a shorter period is prescribed by the treaty for notice of its termination.

27. Article 17 (quater) replaced article 4, paragraphs 2 and 3, and article 14. Paragraph 1 dealt with multilateral treaties; the general rules were contained in subparagraphs (a) and (b) and the special case of treaties falling under article 7, paragraph 3, was dealt with in sub-paragraph (c). Paragraph 2 dealt with bilateral treaties and was modelled on paragraph 1, except of course for the omission of sub-paragraph (c). Paragraph 3 specified what was considered a reasonable period of notice for the purposes of the draft articles.

Article 17 (quater) was approved.

ARTICLE 1

28. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 1:

Article 1

Use of terms

1. For the purposes of the present articles:
   (a) “Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
   (b) “Succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
   (c) “Predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
   (d) “Successor State” means the State which has replaced another State on the occurrence of a succession of States;
   (e) “Date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;
   (f) “Newly independent State” means a State the territory of which immediately before the date of the succession of States was dependent territory for the international relations of which the predecessor State was responsible;
   (g) “Notification of succession” means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State to the parties or, as the case may be, contracting States or to the depositary expressing its consent to be considered as bound by the treaty;
   (h) “Full powers” means in relation to a notification of succession a document emanating from the competent authority of a State designating a person or persons to represent the State for making the notification;
   (i) “Ratification”, “acceptance” and “approval” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
   (j) “Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
   (k) “Contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;
   (l) “Party” means a State which has consented to be bound by the treaty and for which the treaty is in force;
   (m) “Other State party” means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;
   (n) “International organization” means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

29. Article 1 was to a large extent modelled on article 2 of the Vienna Convention on the Law of Treaties. Paragraph 1, sub-paragraphs (a), (j), (k), (l) and (m) and paragraph 2 required no explanation, since they were the same as the corresponding paragraphs in the Vienna Convention. With regard to paragraph 1 (b), the Drafting Committee had been in some doubt as to whether the word “responsibility” should be retained, but had decided that further explanations could be given in the commentary to avoid any misunderstanding. Paragraphs 1 (c) and 1 (d) were self-explanatory. Paragraph 1 (e) might have been drafted more concisely, on the lines of paragraphs 1 (c) and 1 (d), but the Committee had considered it necessary to be more specific in dealing with the determination of a date.

30. In paragraph 1 (f), the phrase “dependent territory” covered colonial territories, trust territories and mandated

* See 1160th meeting, para. 64.
** See 1171st meeting.
31. Paragraph 1 (g) was self-explanatory and he only wished to point out that the words "however phrased or named" had been included to take account of the fact that, in practice, the instrument by which a successor State expressed its consent to be bound by a treaty was not necessarily called a notification. Paragraph 1 (i) was an adaptation to the present context of the definition in article 2, paragraph 1 (e), of the Vienna Convention. Paragraph 1 (i) reproduced the terms of article 2, paragraph 1 (b) of the Vienna Convention except for the omission of the word "accession", which did not appear in the present draft articles. Paragraph 1 (m) was self-explanatory.

32. The CHAIRMAN, speaking as a member of the Commission, asked how the definition of "succession of States" in paragraph 1 (b) related to such cases as Liechtenstein, San Marino and Andorra, where the responsibility for international relations was divided.

33. After a brief discussion in which Mr. USHAKOV, Mr. AGO and Mr. BARTOS took part, Sir Humphrey WALDOCK (Special Rapporteur) said that a distinction must be made between the conduct of international relations and responsibility for international relations. The latter phrase had always been used in connexion with dependent territories in the past and was the best short definition possible. There would be some discussion of the question in the commentary to the article.

Article 1 was approved.

ARTICLE 17 (quinquies)

34. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 17 (quinquies):

Article 17 (quinquies)

Newly independent States formed from two or more territories

When the newly independent State has been formed from two or more territories in respect of which the treaties in force at the date of the succession of States were not identical, any treaty which is continued in force under articles 7 to 17 is considered as applying in respect of the entire territory of that State unless:

(a) It appears from the treaty or is otherwise established that the application of the treaty to the entire territory would be incompatible with its object and purpose or the effect of the combining of the territories is radically to change the conditions for the operation of the treaty;

(b) In the case of a multilateral treaty other than one referred to in article 7, paragraph 3, the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(c) In the case of a multilateral treaty of the kind referred to in article 7, paragraph 3, the successor State and the other States parties otherwise agree;

(d) In the case of a bilateral treaty, the successor State and the other States party otherwise agree.

35. Article 17 (quinquies) corresponded to the provision originally submitted to the Commission by the Special Rapporteur as Excursus A (A/CN.4/256/Add.1). The Drafting Committee proposed that it should constitute section 4 of Part III, and that both section 4 and article 17 (quinquies) should be entitled "Newly independent States formed from two or more territories".

36. Since the article dealt with a newly independent State, the rules applicable were naturally those contained in articles 7 to 17, as was stated in the opening paragraph. However, when the various territories forming the newly independent State were subject to different treaty régimes, a problem arose as to the geographical scope of each treaty. Article 17 (quinquies) provided that in such cases any treaty which was continued in force under articles 7 to 17 was considered as applying in respect of the entire territory of the State concerned. That provision was, however, a mere presumption, as appeared clearly from sub-paragraphs (a) to (d). The proviso on incompatibility, in the first part of sub-paragraph (a), had been included in other articles and did not require any explanation. The proviso in the second part of sub-paragraph (a) was derived from article 62 of the Vienna Convention and based on the idea that the radical changes resulting from the combining of the territories might entirely alter the situation for which the treaty had originally been concluded. Sub-paragraph (b) allowed the successor State to depart from the rule in article 17 (quinquies), with the proviso that in the case of restricted multilateral treaties and bilateral treaties the agreement of the other party or parties was required.

37. In reply to a question by the Chairman, he explained that the source of the incompatibility provision was article 7, paragraph 2 (A/CN.4/L.183/Add.2). The succession of a newly independent State to a multilateral treaty depended on a notification of succession by that State, and in the case of restricted multilateral treaties and bilateral treaties it depended on the agreement of the newly independent State and the other party or parties. There might be a case, although it was very unlikely, in which a multilateral treaty had a territorial character and applied to only one of the territories constituting the newly independent State, so that the notification of succession could be restricted to that territory. Then, under sub-paragraph (b) of article 17 (quinquies), the treaty would not be considered as applying in respect of the entire territory of that State.

Article 17 (quinquies) was approved.

ARTICLE 19

38. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 19:

Article 19

Uniting of States

1. On the uniting or two or more States in one State, any treaty in force at that date between any of those States and other States
parties to the treaty continues in force between the successor State and such other States parties unless:

(a) The application of the particular treaty after the uniting of the States would be incompatible with its object and purpose;

(b) The effect of the uniting of the States is radically to change the conditions for the operation of the treaty; or

(c) The successor State and the other States parties otherwise agree.

2. Any treaty continuing in force in conformity with paragraph 1 is binding only in relation to the area of the territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States unless:

(a) The successor State notifies the parties or the depositary that the treaty is to be considered as binding in relation to its entire territory;

(b) In the case of a multilateral treaty falling under article 7, paragraph 3, the successor State and all the parties otherwise agree; or

(c) In the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraphs 1 and 2 apply also when a successor State itself unites with another State.

39. Article 19, which was the first of the three articles constituting Part IV: Unitig, dissolution and separation, dealt with the uniting of two or more States into one State. The text proposed by the Drafting Committee made no distinction as to whether the constituent parts of the State which emerged from that process did or did not retain some separate identity.

40. Paragraph 1 laid down the rule of ipso jure continuity, but provided for three exceptions, contained in sub-paragraphs (a), (b) and (c). No comment was necessary on those exceptions, since they were similar to those appearing in article 17 (quinquies), which he had already introduced.

41. Paragraph 1 had to be read in conjunction with paragraph 2, which provided for an important limitation to the rule, namely, that a treaty continuing in force under paragraph 1 was binding only in relation to the area of the territory of the successor State in respect of which the treaty had been in force at the date of the uniting of the States.

42. The rule in paragraph 2 was itself not an absolute one, since the successor State was free to depart from it, as provided in sub-paragraph (a). But the freedom of the successor State was limited in the case of restricted multilateral and bilateral treaties by the requirement laid down in sub-paragraphs (b) and (c), that the agreement of the other party or parties must be obtained.

43. Mr. CASTAÑEDA proposed that the exception set out in paragraph 1 (c) should be moved up to become paragraph 1 (a). It would seem more logical to provide first for the possibility that the successor State and the other States parties might otherwise agree.

44. Sir Humphrey WALDOCK (Special Rapporteur) said that a case could equally well be made for leaving that exception in the third position, since the first two exceptions related to cases in which an agreement between the States concerned was not conceivable. Nevertheless, he would not oppose the proposal.

45. Mr. QUENTIN-BAXTER proposed that, for the sake of uniformity, the first two exceptions should be put into a single sub-paragraph, as in paragraph 2 of article 20 and paragraph 1 (a) of article 21.

46. The CHAIRMAN, speaking as a member of the Commission, said that the wording of paragraph 2 (a) needed some clarification.

47. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the words “of a multilateral treaty” should be inserted after the words “the parties or the depositary” in paragraph 2 (a), the provisions of which related exclusively to multilateral treaties. Paragraph 2 (b) referred to restricted multilateral treaties as defined in article 7, paragraph 3, and paragraph 2 (c) referred specifically to bilateral treaties.

48. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 19 with the changes proposed by Mr. Castañeda, Mr. Quințin-Baxter and the Special Rapporteur.

It was so agreed.

ARTICLE 20

49. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 20:

Article 20
Dissolution of a State

1. When a State is dissolved and parts of its territory become individual States:

(a) Any treaty concluded by the predecessor State in respect of its entire territory continues in force in respect of each State emerging from the dissolution;

(b) Any treaty concluded by the predecessor State in respect only of a particular part of its territory which has become an individual State continues in force in respect of this State alone;

(c) Any treaty binding upon the predecessor State under article 19 in relation to a particular part of the territory of the predecessor State which has become an individual State continues in force in respect of this State.

2. Sub-paragraphs (a) and (b) of paragraph 1 do not apply if the application of the treaty in question after the dissolution of the predecessor State would be incompatible with the object and purpose of the treaty or the effect of the dissolution is radically to change the conditions for the operation of the treaty.

50. Article 20 dealt with the case in which a State completely disappeared as the result of splitting up into two or more individual States. It made no distinction as to whether the parts of territory which emerged as individual States had or had not possessed a certain identity as constituent parts of the predecessor State. The article applied only to those parts of the predecessor State's territory which became States, since any parts of territory which would simply pass under the sovereignty of a pre-existing State would be governed by the “moving treaty-frontiers” rule.

51. Paragraph 1 (a) laid down the principle of ipso jure continuity for any treaty concluded by the predecessor State in respect of its entire territory. Paragraph 1 (b) contained a rule, parallel to the rule in article 19, that
any treaty concluded in respect of a part of the predecessor State’s territory which had become an individual State continued in force for that State alone. Paragraph 1 (c) dealt with the case of ephemeral unions. It provided that if a treaty had become binding upon the predecessor State as a result of a uniting of States in accordance with article 19, and if one or more of the States which had united subsequently regained the status of an independent State, the treaty in question would continue in force in respect of that State or States.

52. Paragraph 2 set out the exceptions to the rule in paragraph 1. He had already commented, in connexion with article 19, on the exceptions of incompatibility and radical change of conditions; he need only add that, for obvious reasons, those exceptions did not apply in the case envisaged in paragraph 1 (c).

53. Sir Humphrey WALDOCK (Special Rapporteur) said that the article might be said to represent progressive development in that, by contrast with the traditional text-book treatment of the dissolution of a State, its provisions were not solely applicable to unions of States. It would be necessary to explain in the commentary that, in view of the present great variety of constitutional arrangements, the Commission had not thought it possible to follow the traditional treatment in framing the rule in article 20.

54. Mr. RAMANGASOAVINA proposed that, in the French version of paragraphs 1 (b) and 1 (c), the words “d’une certaine partie” should be replaced by “d’une partie déterminée”.

55. Mr. HAMBRO said he saw no reason to limit the exception in paragraph 2 to sub-paragraphs (a) and (b) of paragraph 1.

56. Sir Humphrey WALDOCK (Special Rapporteur) said that he would have no objection to sub-paragraph (c) being covered as well, though he did not think it was strictly necessary.

57. In order also to introduce the idea of a contrary agreement into paragraph 2, he proposed that the opening phrase should be reworded to read:

2. Paragraph 1 does not apply if:
   (a) The States concerned otherwise agree; or
   (b) The application of the treaty in question...

58. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 20 with the changes proposed.

   It was so agreed.

ARTICLE 21

59. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 21:

   Article 21
   Separation of part of a State

1. If part of the territory of a State separates from it and becomes an individual State, any treaty which at the date of the separation was in force in respect of that State continues to bind it in relation to its remaining territory, unless:

   (a) It appears from the treaty or from its object and purpose that the treaty was intended to relate only to the territory which has separated from that State or the effect of the separation is radically to transform the obligations and rights provided for in the treaty; or
   (b) It is otherwise agreed.

2. In such a case, the individual State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty.

60. Article 21 dealt with the case in which part of the territory of a State became an individual State, but the predecessor State continued to exist. Paragraph 1 dealt with the position of the predecessor State; it provided that the predecessor State’s treaties continued to bind it in relation to its remaining territory. The rule of ipso jure continuity was subject to exceptions laid down in sub-paragraphs (a) and (b), which did not require any explanation.

61. Paragraph 2 dealt with the position of the new State emerging from the separation. It placed that State in the same position as a newly independent State in relation to the treaties which, at the date of the separation, had been in force in respect of the territory passing under its sovereignty.

62. The CHAIRMAN, speaking as a member of the Commission, said that he would not oppose the approval of article 21, but wished to place on record that he still had some doubts about the fundamental logic of the position taken in paragraph 2. He was not at all certain that the rules on newly independent States should invariably apply to all the States envisaged in article 21.

63. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the order of sub-paragraphs (a) and (b) should be reversed, in line with the presentation adopted for the two previous articles.

   It was so agreed.

   Article 21, as amended, was approved.

Draft report of the Commission on the work of its twenty-fourth session
(A/CN.4/L.187 and Add.1 to 16)

64. The CHAIRMAN invited the Commission to consider the draft report on the work of its twenty-fourth session, beginning with chapter II (A/CN.4/L.187).

Chapter II

Succession of States in respect of treaties

A. Introduction (paras. 1 to 23)

1. Summary of the Commission’s proceedings (paras. 1 to 11).

   Sub-section 1 was approved.
2. State practice as evidence of the law relating to succession in respect of treaties (paras. 12 to 14).

65. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the title of the sub-section should be shortened to read: “State practice”.

It was so agreed.

66. The CHAIRMAN suggested that the wording of the last sentence of paragraph 14 could be improved. The reference to “the development and the publication” of State and depositary practice was not altogether happy.

67. Sir Humphrey WALDOCK (Special Rapporteur) said that the intention was to refer to the publicity given to that practice. The difficulty of ascertaining the practice was well known. He would, however, try to improve the wording.

Sub-section 2 was approved on that understanding.

3. The concept of “succession of States” which emerged from the study of the topic (paras. 15 to 17).

68. The CHAIRMAN pointed out that the words “a certain legal nexus” in the last sentence of paragraph 16 appeared to introduce an element of doubt.

69. Sir Humphrey WALDOCK (Special Rapporteur) proposed the deletion of the word “certain”. He further proposed that the words “competence to conclude treaties” in the first sentence of the same paragraph should be replaced by the formula “responsibility for international relations”, which the Drafting Committee had decided to use in the definition of succession of States.

It was so agreed.

70. Mr. USHAKOV proposed that a similar change should be made in the second sentence of paragraph 17.

It was so agreed.

71. The CHAIRMAN proposed the deletion of the word “exclusively” after the word “ascertain” in the last sentence of paragraph 17. As it stood, the sentence seemed unduly categorical.

It was so agreed.

Sub-section 3, as amended, was approved.

4. Relationship between succession in respect of treaties and the general law of treaties (paras. 18 to 21).

72. Mr. AGO proposed the deletion of the words “of succession of States” from the first sentence of paragraph 18. It was sufficient to say that State practice afforded “no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution.”

It was so agreed.

73. Sir Humphrey WALDOCK (Special Rapporteur) proposed the deletion of the word “compelling” before the words “specific solutions” in the second sentence of paragraph 18.

It was so agreed.

74. Mr. AGO thought that an attempt should be made to improve the wording of the last clause of the first sentence of paragraph 19: “than of integrating treaties into any general law of succession”.

75. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the phrase should be replaced by the words “vice versa”.

76. He also proposed that the words “the essential framework” in the last sentence of paragraph 19 should be replaced by the words “an essential framework”, so as to indicate that the 1969 Vienna Convention was not the only source.

It was so agreed.

77. Sir Humphrey WALDOCK (Special Rapporteur) proposed that the words “the need of avoiding to delay” in the second sentence of paragraph 20 should be replaced by “the need not to delay”.

It was so agreed.

78. The CHAIRMAN suggested that the word “assume” in the first sentence of paragraph 21 should be replaced by a more suitable word.

79. Sir Humphrey WALDOCK (Special Rapporteur) said the intention was to indicate that, in preparing the draft articles, the Commission had worked on the basis of the provisions, wording and terminology of the Vienna Convention on the Law of Treaties.

80. Mr. SETTE CAMARA proposed that the word “assume” should be replaced by the word “presuppose”.

81. Sir Humphrey WALDOCK (Special Rapporteur) suggested that the term “presuppose” should be used unless a more satisfactory term could be found.

It was so agreed.

Sub-section 4 as amended, was approved.

5. The principle of self-determination and the law relating to succession in respect of treaties (paras. 22 and 23).

Paragraph 22

Paragraph 22 was approved.

Paragraph 23

82. Mr. HAMBRO proposed the deletion of the adjective “careful” before the word “study” in the first sentence of paragraph 23. He saw no reason why the Commission should indicate that its study of a certain matter had been “careful”. The same remark applied to the adjective “close” in the opening words of paragraph 18: “A close examination of State practice…”.

83. Sir Humphrey WALDOCK (Special Rapporteur) agreed that the word “careful” should be deleted from the first sentence of paragraph 23; it was not the Commission’s practice to use that adjective in relation to its study of any matter. He could not, however, agree with the criticism of the opening words of paragraph 18. There was some point in indicating that an examination of State practice, however close, afforded no convincing evidence of any general doctrine for the solution of the problems in question.

The proposal to delete the word “careful” from the first sentence of paragraph 23 was adopted.

84. Mr. AGO proposed that, in the fourth sentence of paragraph 23, the concluding words “relating to seceded
States”, which appeared to be difficult to render into French, should be replaced by the words “relating to cases of secession”.

It was so agreed.

85. Sir Humphrey WALDOCK (Special Rapporteur) suggested that the last two sentences of paragraph 23 should be dropped. In view of decisions taken by the Commission after they had been drafted, they were inaccurate.

It was so agreed.

Paragraph 23, as amended, was approved.

86. Sir Humphrey WALDOCK (Special Rapporteur) explained that the five sub-sections so far considered did not exhaust the contents of the introduction. A further document would be issued containing explanations of the form, scope and scheme of the draft articles as a whole.13

The meeting rose at 12.55 p.m.

13 Document A/CN.4/L.187/Add.20, discussed at the 1199th meeting, paras. 11 to 14.

1197th MEETING

Thursday, 6 July 1972, at 9.35 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Wallock, Mr. Yasseen.

Succession of States in respect of treaties


[Item 1 (a) of the agenda]

(resumed from the previous meeting)

Draft articles proposed by the Drafting Committee

(A/CN.4/L.183/Add.6)

ARTICLE 22

1. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 22:

Article 22

Boundary régimes

A succession of States shall not as such affect:

(a) A boundary established by a treaty; or
(b) Obligations and rights established by a treaty and relating to the régime of a boundary.

2. That article, together with article 22 (bis), would now form a separate Part V, entitled “Boundary régimes and other territorial régimes established by a treaty”.  

3. The Drafting Committee had considerably simplified the text of article 22 submitted by the Special Rapporteur in his fifth report (A/CN.4/256/Add.4). The text now proposed was a clear statement of the rule, namely, that a succession of States did not as such affect either a boundary established by a treaty, or treaty obligations and rights relating to a boundary régime. Those two ideas were expressed succinctly in sub-paragraphs (a) and (b). The purpose of the words “as such” in the opening sentence was to indicate that the article referred only to the rules of State succession, since other rules could come into play and affect boundaries or treaty rights and obligations relating to boundary régimes.

Article 22 was approved.

ARTICLE 22 (bis)

Other territorial régimes

4. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed the following title and text for article 22 (bis):

Article 22 (bis)

Other territorial régimes

1. A succession of States shall not as such affect:

(a) Obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a particular territory of a foreign State and considered as attaching to the territories in question;

(b) Rights established by a treaty specifically for the benefit of a particular territory and relating to the use, or to restrictions upon the use of a particular territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

(a) Obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) Rights established by a treaty specifically for the benefit of a group of States or of all States and relating to the use of a particular territory or to restrictions upon its use and considered as attaching to that territory.

5. Members would note that the words “and considered as attaching to that territory” had been added at the end of paragraph 2 (b) of the text in document A/CN.4/L.183/Add.6.

6. Paragraph 1 of the article dealt with treaty situations of a territorial character. Paragraph 2 dealt with a special kind of treaty situation, covering such matters as the use of international waterways. Each of the two paragraphs was subdivided into two sub-paragraphs, the first dealing with obligations and the second with rights. All four sub-paragraphs ended with a proviso to the effect that the obligations or rights were considered as attaching to the territories in question. The purpose of that proviso was to emphasize that the rights or obligations must have a certain connexion with the territory.

7. In reply to a question put by the Chairman, he said that the Committee had abandoned the idea of including in article 1 a proviso on the use of the term “territory”.

...
8. Sir Humphrey WALDOCK (Special Rapporteur) said he would prepare a passage on that point for inclusion in the commentary.

*Article 22 (bis) was approved.*

ADOPITION OF THE DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF TREATIES

9. The CHAIRMAN invited the Commission to adopt the text of the draft articles on succession of States in respect of treaties as approved during the session.

*Article 0 (Scope of the present articles) [1]*

*Article 0 was adopted unanimously.*

*Article 1 (Use of terms) [2]*

*Article 1 was adopted unanimously.*

*Article 1 (bis) (Cases not within the scope of the present articles) [3]*

*Article 1 (bis) was adopted unanimously.*

*Article 1 (ter) (Treaties constituting international organizations and treaties adopted within an international organization) [4]*

*Article 1 (ter) was adopted unanimously.*

*Article 1 (quater) (Obligations imposed by international law independently of a treaty) [5]*

*Article 1 (quater) was adopted unanimously.*

*Article 1 (quinquies) (Cases of succession of States covered by the present articles) [6]*

10. Mr. USHAKOV said that he wished to place on record his abstention from voting on article 1 (quinquies). He reserved his decision on that article until the second reading.

*Article 1 (quinquies) was adopted by 15 votes to none with 1 abstention.*

*Article 2 (Transfer of territory) [10]*

11. The CHAIRMAN invited the Commission to consider article 2 (Transfer of territory) (A/CN.4/L.185), as approved provisionally at the 1181st meeting.2

12. The Drafting Committee had approved the article on the understanding that the draft would include a saving clause concerning cases of military occupation, State responsibility and the outbreak of hostilities.

13. Mr. USHAKOV pointed out that paragraph 2 should refer not only to article 22 but also to article 22 (bis).

14. Sir Humphrey WALDOCK (Special Rapporteur) agreed that the rules in both articles would apply to any case of State succession.

15. If paragraph 2 were retained in article 2, it would be necessary to include a clause of the same kind in a number of other articles of the draft. He therefore proposed that the paragraph should be deleted. Article 2 would then consist of only one unnumbered paragraph.

*The Special Rapporteur’s proposal was adopted.*

16. Mr. BARTOS said that he would abstain from voting on article 2 because of his objection to the inclusion of the words “or administration” in the opening sentence, for the reasons he had explained during the previous discussion.3

*Article 2, as amended, was adopted by 15 votes to none, with 1 abstention.*

*Article 3 (Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State) [7]*

*Article 3 was adopted unanimously.*

*Article 4 (Successor State’s unilateral declaration regarding its predecessor State’s treaties) [8]*

*Article 4 was adopted unanimously.*

*Article 5 (Treaties providing for the participation of a successor State) [9]*

*Article 5 was adopted unanimously.*

17. Mr. USTOR (Chairman of the Drafting Committee) said that the Committee proposed that Part III of the draft (Newly independent States) should begin with a new section 1 entitled “General rule” and consisting only of article 6. In consequence, sections 1 to 4 of Part III would be renumbered sections 2 to 5.

*It was so agreed.*

*Article 6 (Position in respect of the predecessor State’s treaties) [11]*

*Article 6 was adopted unanimously.*

*Article 7 (Participation in treaties in force) [12]*

*Article 7 was adopted unanimously.*

*Article 8 (Participation in treaties not yet in force) [13]*

*Article 8 was adopted unanimously.*

*Article 8 (bis) (Ratification, acceptance or approval of a treaty signed by the predecessor State) [14]*

*Article 8 (bis) was adopted unanimously.*

*Article 9 (Reservations) [15]*

*Article 9 was adopted unanimously.*

*Article 10 (Consent to be bound by part of a treaty and choice between differing provisions) [16]*

*Article 10 was adopted unanimously.*

*Article 11 (Notification of succession) [17]*

*Article 11 was adopted unanimously.*

*Article 12 (Effects of a notification of succession) [18]*

*Article 12 was adopted unanimously.*

*Article 13 (Conditions under which a treaty is considered as being in force) [19]*

*Article 13 was adopted unanimously.*

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1 The numbers in square brackets are the numbers of the articles as they appear in the Commission’s report (A/8710/Rev.1), which is reproduced in volume II of this Yearbook.

2 See paras. 44 et seq.

3 See 1176th meeting, para. 98.
Article 15 (The position as between the predecessor and the successor State) [20]

Article 15 was adopted unanimously.

Article 17 (Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party) [21]

Article 17 was adopted unanimously.

Article 17 (bis) (Multilateral treaties) [22]

Article 17 (bis) was adopted unanimously.

Article 17 (ter) (Bilateral treaties) [23]

Article 17 (ter) was adopted unanimously.

Article 17 (quater) (Termination of provisional application) [24]

Article 17 (quater) was adopted unanimously.

Article 17 (quinquies) (Newly independent States formed from two or more territories) [25]

18. Mr. AGO, supported by Mr. ELIAS, proposed that the words “Newly independent” be deleted from the title of section 5 (Newly independent States formed from two or more territories).

It was so agreed.

Article 17 (quinquies) was adopted unanimously.

19. Mr. AGO proposed that the words “of States” be added at the end of the title of Part IV, which would then read: “Uniting, dissolution and separation of States”.

It was so agreed.

Article 19 (Uniting of States) [26]

Article 19 was adopted unanimously.

Article 20 (Dissolution of a State) [27]

Article 20 was adopted unanimously.

Article 21 (Separation of part of a State) [28]

20. Mr. USHAKOV said he would vote in favour of article 21, though he still had doubts regarding paragraph 2, which in his opinion went much too far. He suggested that a passage should be included in the commentary recording those doubts, which he understood to be shared by other members of the Commission.

21. Mr. USTOR and the CHAIRMAN, speaking as a member of the Commission, supported that suggestion.

22. Sir Humphrey WALDOCK (Special Rapporteur) said he would prepare a suitable passage for inclusion in the commentary.

Article 21 was adopted on that understanding.

Article 22 (Boundary régimes) [29]

Article 22 was adopted unanimously.

Article 22 (bis) (Other territorial régimes) [30]

Article 22 (bis) was adopted unanimously.

Article X (Cases of military occupation, State responsibility and outbreak of hostilities) [31]

Article X was adopted unanimously.

23. The CHAIRMAN invited the Commission to vote on the draft articles as a whole. A vote in favour would not imply the abandonment of members’ positions on specific articles, and, as usual, the adoption of the draft articles on first reading would in no way affect the position they might wish to adopt on second reading in the light of government comments.

The draft articles on succession of States in respect of treaties, as a whole, were adopted unanimously.

24. Mr. AGO moved a vote of congratulations and thanks to the Special Rapporteur on succession of States in respect of treaties.

The motion was carried by acclamation.

25. Mr. EL-ERIAN said that since, to his regret, he had been unable to be present when the Commission had voted on the draft articles as a whole, he wished to place his affirmative vote on record and to associate himself with the tribute paid to the Special Rapporteur.

Draft report of the Commission on the work of its twenty-fourth session

(A/CN.4/L.187 and Add.1 to 16)

(resumed from the previous meeting)

Chapter II

SUCCESSION OF STATES IN RESPECT OF TREATIES

B. Draft articles on succession of States in respect of treaties

Commentary to article 0 (Scope of the present articles) [1]

(A/CN.4/L.187/Add.2)

The commentary to article 0 was approved.

Commentary to article 1 (bis) (Cases not within the scope of the present articles) [3] (A/CN.4/L.187/Add.2)

The commentary to article 1 (bis) was approved.

Commentary to article 1 (ter) (Treaties constituting international organizations and treaties adopted within an international organization) [4] (A/CN.4/L.187/Add.2)

26. The CHAIRMAN, speaking as a member of the Commission, suggested that, in the seventh sentence of paragraph (10), the words “applies to treaties” should be replaced by the words “applies in the case of treaties”.

It was so agreed.

The commentary to article 1 (ter), as amended, was approved.

Commentary to article 1 (quater) (Obligations imposed by international law independently of a treaty) [5] (A/CN.4/L.187/Add.2)

The commentary to article 1 (quater) was approved.

Commentary to article 1 (quinquies) (Cases of succession of States covered by the present articles) [6] (A/CN.4/L.187/Add.12)

27. Mr. AGO said he thought the statement in the first sentence of paragraph (1) was too categorical. He also
thought that in the fourth sentence of that paragraph reference should perhaps be made to other cases of invalidity besides treaties procured by coercion.

28. Sir Humphrey WALDOCK (Special Rapporteur) suggested that, in order to meet the first point raised by Mr. Ago, the word “necessarily” in the first sentence of paragraph (1) should be replaced by the word “normally”, and that the word “normally” in the second sentence should be replaced by the words “as a rule”. He further suggested that the second point raised by Mr. Ago could be met by inserting the words “inter alia” after the word “included” in the fourth sentence of paragraph (1).

It was so agreed.

The commentary to article 1 (quinquies), as amended, was approved.

Commentary to article 2 (Transfer of territory) [10] (A/CN.4/L.187/Add.4)

29. Sir Humphrey WALDOCK (Special Rapporteur) in reply to a question by the Chairman regarding the pertinence of the precedents cited in paragraph 4 of the commentary, proposed that paragraph 4 should be deleted.

It was so agreed.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State) [7] (A/CN.4/L.187/Add.2)

30. The CHAIRMAN, speaking as a member of the Commission, said he thought the statement in the penultimate sentence of paragraph (5) of the commentary was rather too categorical, and suggested that the word “normally” be inserted before the word “admit”.

It was so agreed.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Successor State’s unilateral declaration regarding its predecessor State’s treaties) [8] (A/CN.4/L.187/Add.4)

The commentary to article 4 was approved.

Commentary to article 5 (Treaties providing for the participation of a successor State) [9] (A/CN.4/L.187/Add.3)

The commentary to article 5 was approved.

Commentary to article 6 (Position in respect of the predecessor State’s treaties) [11] (A/CN.4/L.187/Add.4)

The commentary to article 6 was approved.

Commentary to article 7 (Participation in treaties in force) [12] (A/CN.4/L.187/Add.5)

The commentary to article 7 was approved.

Commentary to article 8 (Participation in treaties not yet in force) [13] (A/CN.4/L.187/Add.5)

The commentary to article 8 was approved.

Commentary to article 8 (bis) (Ratification, acceptance or approval of a treaty signed by the predecessor State) [14] (A/CN.4/L.187/Add.5)

The commentary to article 8 (bis) was approved.

Commentary to article 9 (Reservations) [15] (A/CN.4/L.187/Add.6)

The commentary to article 9 was approved.

Commentary to article 10 (Consent to be bound by part of a treaty and choice between differing provisions) [16] (A/CN.4/L.187/Add.7)

The commentary to article 10 was approved.

Commentary to article 11 (Notification of succession) [17] (A/CN.4/L.187/Add.7)

The commentary to article 11 was approved.

Commentary to article 12 (Effects of a notification of succession) [18] (A/CN.4/L.187/Add.8)

The commentary to article 12 was approved.

Commentary to article 13 (Conditions under which a treaty is considered as being in force) [19] (A/CN.4/L.187/Add.9)

The commentary to article 13 was approved.

Commentary to article 15 (The position as between the predecessor and the successor State) [20] (A/CN.4/L.187/Add.10)

The commentary to article 15 was approved.

Commentary to article 17 (Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party) [21] (A/CN.4/L.187/Add.10)

The commentary to article 17 was approved.

Commentary to article 17 (quinquies) (Newly independent States formed from two or more territories) [25] (A/CN.4/L.187/Add.11)

The commentary to article 17 (quinquies) was approved.

Commentary to article 21 (Separation of part of a State) [28] (A/CN.4/L.187/Add.13)

31. The CHAIRMAN, speaking as a member of the Commission, said that he, Mr. Ushakov and Mr. Ustor had all expressed some concern about the scope and effect of paragraph 2 of article 21. He therefore suggested that, in paragraph 12 of the commentary, it should be stated that some members of the Commission had raised the question whether the provision contained in paragraph 2 should apply automatically and in all circumstances to cases of separation of part of the territory of a State.

It was so agreed.

The commentary to article 21 was approved, subject to the addition proposed by the Chairman.

Commentary to article X (Cases of military occupation, State responsibility and outbreak of hostilities) [31] (A/CN.4/L.187/Add.14)

The commentary to article X was approved.

The meeting rose at 12.55 p.m.
1198th MEETING

Thursday, 6 July 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartos, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-fourth session
(A/CN.4/L.190 and Add.1; A/CN.4/L.191)
(continued)

Chapter III

QUESTION OF THE PROTECTION AND INVIOALIBILITY OF DIPLOMATIC AGENTS AND OTHER PERSONS ENTITLED TO SPECIAL PROTECTION UNDER INTERNATIONAL LAW

B. Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons

1. The CHAIRMAN invited the Commission to consider chapter III, section B, of its draft report (A/CN.4/L.191), containing the draft articles, approved at previous meetings, on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, together with the commentaries to those articles. The commentaries, which had been prepared under great pressure in difficult conditions, were not yet in their final form, and any suggestions by members for additions and improvements could be incorporated in the final text.

2. He suggested that the Commission should begin with the adoption of the draft articles on first reading.

3. Mr. ALCIVAR said that the Commission would recall the statement he had made after the introduction of the Working Group’s report containing the first set of draft articles (A/CN.4/L.186), in which he had explained his reasons for disagreeing with the approach adopted and had reserved his position on the whole draft. In those circumstances, his participation in the discussion of each individual article would have served no useful purpose, since he objected to the whole framework in which the topic had been considered.

4. Following the discussions in the Commission, the Working Group, in its second and third reports (A/CN.4/L.188 and Add.1 and A/CN.4/L.189), had admittedly made some improvements in certain articles, particularly article 9, where the original provision excluding all statutory limitation for prosecution of the crimes set forth in article 2 had been replaced by a provision under which the limitation would be that fixed for the most serious crimes by the internal law of each State. Those changes had not, however, removed the obstacles in the way of his acceptance of the draft. Those obstacles could be summarized under nine heads.

5. First, it was the Commission’s specific function to formulate rules of general international law that could be adopted by States in general multilateral treaties. As far as the protection of diplomatic and consular agents and their families was concerned, the relevant rules of general international law were to be found in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

6. Secondly, the offences mentioned in article 2 of the draft were already defined as punishable offences in the criminal law of all countries. They were therefore offences under internal law and, as such, a matter for the competent authorities of each State.

7. Thirdly, the sole justification for considering those acts in terms of the international legal order was the kidnapping of diplomats and consuls for use as hostages in connexion with internal political struggles was becoming an increasingly serious problem.

8. Fourthly, to fulfill the mandate given to it in General Assembly resolution 2780 (XXVI), all the Commission had to do was to prepare a set of draft articles designed to strengthen the rules of general international law which placed a receiving State under an obligation to protect the life and property of persons entitled to special protection while those persons were in its territory.

9. Fifthly, that task would be essentially accomplished if the future convention established as a rule of general international law that, in the event of the kidnapping of a diplomatic or consular agent or of a member of his family, the Government of the receiving State had an absolute obligation to comply with the kidnapper’s demands in order to save the life of the protected person concerned, and should not be allowed to invoke any reasons of domestic or foreign policy as a pretext for evading that obligation.

10. Sixthly, since there were as yet no rules of general international law to protect the officials of international organizations, the draft articles should have provided for their protection in the same way as for that of diplomatic agents.

11. Seventhly, the draft articles sought to deal with the problem of the international protection of diplomats and other protected persons by means of international judicial co-operation, a method which offered only a doubtful and exceptional solution to that problem.

12. Eighthly, the terms in which that co-operation was defined in article 6 might have the effect of endangering the traditional institution of asylum. The article would oblige the State in whose territory the alleged offender was present either to extradite him or to prosecute him. That State would not even be allowed to exercise its sovereign right to decide the preliminary question whether...
paras. 3 et seq. depend on the comments submitted by governments.

13. Nithly, the unlawful seizure of aircraft, with which the 1970 Hague Convention 4 was concerned, was a new offence, until recently unknown to internal law, and an offence which was necessarily committed in the international sphere. Kidnapping or abduction, on the other hand, was a punishable offence long known to the internal law of all States. The fact that it was now being committed against diplomatic or consular agents did not mean that a new offence had emerged, but rather that the international legal order was being perturbed by the commission of crimes punishable under internal law. The problem could not be solved by means of international judicial cooperation, but only by strengthening the rules of general international law relating to the inescapable obligations of States towards persons to whom they owed special protection.

14. He wished to place it on record that for those reasons he would vote against the draft articles. He also wished to record his absolute rejection of the suggestion made in paragraph 8 of the introduction to chapter III of the draft report that the General Assembly “might consider it important” to extend the scope of the problem to be studied beyond the question specified in resolution 2780 (XXVI).

15. Mr. CASTAÑEDA said he wished to place it on record that he was opposed to the draft articles and would vote against their adoption for the reasons he had given on two previous occasions.6

16. The second version of the draft articles submitted by the Working Group was an improvement on the first, particularly with respect to article 9 on the question of statutory limitation, but his basic objections to the draft remained unaffected.

17. Mr. HAMBR0 said that, in order to save the Commission’s time, he would submit his observations on the draft articles in writing for inclusion in the commentary.

18. Mr. BARTOS said that he would vote in favour of the draft articles as a whole, subject to the observation that the protected persons covered by the articles had a duty under public international law to behave honourably towards the country and people of the State in whose territory they were; a person who provoked the local population could not demand special protection, though it was not for private persons to judge such behaviour.

19. Mr. YASSEEN said he thought that general international law already contained almost complete rules on the question of protected persons. Nevertheless, since the General Assembly had asked the Commission to study the question, he had collaborated in preparing a draft. The text which the Commission was about to adopt on first reading was, of course, provisional; he would vote in favour of its adoption as a whole, but would reserve his final position on all points. That position would depend on the comments submitted by governments.

20. Mr. ELIAS urged that the commentaries to the draft articles should be supplemented by an account of the reservations expressed by some members on such provisions as articles 2 and 9.

21. Mr. CASTAÑEDA supported that request. He hoped that all the views expressed during the discussion would be reflected in the commentary, including the important views put forward by Mr. Bedjaoui,9 who was absent.

22. The CHAIRMAN said that oral or written comments submitted by members on the various articles would be incorporated in the commentaries.

23. Mr. SETTE CÂMARA reiterated his view that the scope of the articles as a whole was too limited. He would, however, vote in favour of the draft on the understanding that it constituted a first step in the consideration of the wider problem of terrorism in general.

24. Mr. EL-ERIAN said that he had unfortunately been prevented from attending the meetings at which the draft articles on the protection of diplomats had been discussed. He did not intend at that stage to define his position on the issues which had been raised or on the solutions adopted in the draft articles. He merely wished to reserve his position and to stress the provisional character of the draft, which had not been prepared by the methods usually employed by the Commission.

25. He would not, however, vote against the draft articles, first, because of their provisional character and, secondly, because the Commission had wished to comply with the General Assembly’s request and had produced a draft with a view to eliciting government comments.

26. Mr. ALCIVAR pointed out that, according to paragraph 7 of the introduction to chapter III of the report, the draft articles were not entirely provisional, since at the end of that paragraph it was stated that they were submitted to the General Assembly “while leaving to the Assembly the decision whether, in view of the urgency of the matter, the articles should be submitted forthwith to an international conference for consideration or returned to the Commission for additional study in the light of governmental comments”. Clearly, the draft articles would become definitive if the General Assembly adopted the first course and submitted them forthwith to an international conference.

27. Mr. YASSEEN said that he had made his views on that point perfectly clear from the outset. He had agreed to item 5 of the agenda being dealt with in a manner which departed from the Commission’s usual procedure in that no special rapporteur had been appointed for the topic. But at the same time he had stressed the need to obtain government comments so that the Commission could take them into account in its second reading of the draft. He therefore took exception to the passage in paragraph 7 of the introduction to chapter III to which Mr. Alcivar had just referred. The General Assembly was, of course, entitled to take any decision it pleased, but the Commission, for its part, should not suggest any procedure involving abandonment of the

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5 See 1151st meeting, paras. 10 et seq. and 1183rd meeting, paras. 3 et seq.
6 See 1183rd meeting, paras. 23 et seq.
well-tried methods it usually followed in preparing carefully studied drafts.

28. Mr. ELIAS said that he, too, had understood that the Commission would undertake a second reading of the draft articles on the basis of government comments.

29. Mr. AGO suggested that the problem should be solved by deleting the passage quoted by Mr. Alcivar. The General Assembly would still remain free to choose whatever course it thought best.

30. Mr. THIAM said he agreed with Mr. Yasseen and Mr. Elias. In his view, the commentary should make it clear that the Commission awaited government comments.

31. Mr. USHAKOV said that the passage of the draft report which had been criticized merely stated the right, which the General Assembly possessed in any case, to decide whether to submit the draft articles forthwith to an international conference or to return them to the Commission for further study in the light of government comments. He could accept Mr. Ago’s proposal that the passage in question should be deleted, since that would not affect the General Assembly’s rights in the matter in any way.

32. Mr. USTOR said he could accept Mr. Ago’s proposal, but could also accept paragraph 7 as it stood. The matter was one of exceptional urgency, as was shown by the General Assembly’s appeal to the Commission.

33. Mr. RAMANGASOAVINA proposed that the passage under discussion should be replaced by some such phrase as “and at the same time, to communicate them to governments for their comments”.

34. Mr. SETTE CÂMARA said that he could accept Mr. Ago’s proposal on the understanding that the General Assembly would decide on the best course to be followed. He could, of course, also have accepted the original text of paragraph 7. It should not be forgotten that extensive observations had already been received from Member States. The Commission had, indeed, rarely embarked on a new topic with such a wealth of government comment at its disposal.

35. Mr. YASSEEN said he wished to dispel a possible misunderstanding. When the Commission had discussed the best method of dealing with item 5 of the agenda, two opposing views had been expressed. The first had been that the Commission should prepare a definitive set of draft articles and submit it to the General Assembly; the second had been that the Commission should follow its usual procedure and appoint a special rapporteur for the topic. He himself had then proposed the compromise solution that the Commission, while dispensing with the appointment of a special rapporteur, should only take its final decision on the draft articles on second reading, in the light of the comments submitted by governments.

36. Mr. USHAKOV said he would be glad to see the General Assembly adopt the draft articles as the basis for an international convention, as that would enhance the Commission’s prestige.

37. Mr. ALCÍVAR said that the General Assembly had never specified a time-limit for the formulation of the draft articles. In its resolution 2780 (XXVI), it had merely requested the Commission to study the question of the protection of diplomats “as soon as possible”. The logical course was therefore to adopt a provisional set of draft articles and submit it to the General Assembly and to governments for their comments, in accordance with the method the Commission had always followed in preparing its drafts.

38. After a brief discussion, in which Mr. USTOR, Mr. QUENTIN-BAXTER and Mr. ROSSIDES took part, the CHAIRMAN suggested that the last part of paragraph 7, beginning with the words: “while leaving to the Assembly”, should be replaced by the words “and to submit them to Governments for comment”.

It was so agreed.

Article 1

Article 1 was adopted unanimously.

Article 2

39. Mr. QUENTIN-BAXTER said that he would abstain from voting on article 2, but would vote in favour of the draft as a whole. He would submit a statement of his reasons in writing for inclusion in the commentary.

Article 2 was adopted by 15 votes to none, with 1 abstention.

Article 3

Article 3 was adopted unanimously.

Article 4

Article 4 was adopted unanimously.

Article 5

Article 5 was adopted unanimously.

Article 6

40. Mr. RAMANGASOAVINA pointed out that the words “action pénale” in the French text should be replaced by the word “poursuites”, as had already been done in the French text of article 5.

Article 6 was adopted unanimously, subject to that correction to the French text.

Article 7

Article 7 was adopted unanimously.

Article 8

Article 8 was adopted unanimously.

Article 9

Article 9 was adopted by 12 votes to none, with 4 abstentions.

41. Mr. TSURUOKA said that, although he had voted in favour of article 9, he wished to place it on record that he had serious misgivings about the content of that article.

Article 10

42. The CHAIRMAN, speaking as a member of the Commission, proposed that in paragraph 1 the conclud-
ing word, “prosecution”, should be replaced by the word “proceedings”, so as to require the transmission not only of evidence for the prosecution, but also of evidence that could serve for the defence of the accused person.

It was so agreed.

Article 10, as amended, was adopted unanimously.

Article 11

Article 11 was adopted unanimously.

Article 12 (alternatives A and B)

43. Mr. QUENTIN-BAXTER said that the commentary should make it clear that the Commission did not endorse either of the two alternatives. It should also stress that those texts did not have the same standing as articles 1 to 11.

44. Mr. BARTOS and Mr. USHAKOV said that they would abstain from voting on article 12.

Article 12 was adopted by 13 votes to none, with 3 abstentions.

45. Mr. ALCIVAR said he wished to place it on record that he had not participated in the voting on the individual articles, because he objected to the whole approach taken in the draft.

46. The CHAIRMAN invited the Commission to vote on the draft articles as a whole.

47. Mr. RAMANGASOAVINA said that the introduction should stress that the purpose of the draft was to ensure not only the punishment, but also the prevention of the crimes in question.

48. Mr. BARTOS said that he would vote in favour of the draft articles as a whole, but he wished to record his regret that the draft contained no rule stating that protected persons had a duty to behave honourably towards the country in which they were.

49. The CHAIRMAN said that the various views expressed would be reflected in the commentaries.

50. If there were no further comments, he would take it that the Commission agreed to adopt the draft articles as a whole, the contrary positions of Mr. Alcivar and Mr. Castañeda having been placed on record.

It was so agreed.

51. The CHAIRMAN invited the Commission to consider the commentaries to the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (A/CN.4/L.191).

Commentary to article 1

52. Mr. HAMBRO said the point had been made in the Commission that, in view of the definition of an internationally protected person, no protection was afforded to diplomats or other officials outside their duty station.

53. The CHAIRMAN suggested that, in order to cover that point, the commentary should state that some members had suggested that protection should be afforded to diplomats wherever they might be, but that other members had considered that, since the Commission was working within the framework of the Conventions in diplomatic and consular relations, it could not go beyond the scope of those Conventions.

It was so agreed.

54. Mr. QUENTIN-BAXTER suggested that the commentary should mention the observation by one member of the Commission that the draft articles would not cover officials of the International Committee of the Red Cross, for example.

It was so agreed.

The commentary to article 1 was approved, subject to the proposed additions.

Commentary to article 2

55. Mr. ELIAS suggested that it should be made clear, in paragraph (5) of the commentary, that some members of the Commission had considered that there was no need to include threats to commit an attack. The commentary should also mention the general reservations expressed by some members of the Commission about the drafting of article 2.

It was so agreed.

The commentary to article 2 was approved, subject to the proposed additions.

Commentary to article 3

56. Mr. ROSSIDES said that the draft articles as a whole laid much more stress on the punishment of offenders than on prevention of the crimes in question. The commentary should mention the importance of prevention and the need for practical measures to protect diplomats in places where they were particularly at risk.

57. The CHAIRMAN suggested that something might be added to the end of paragraph (3) to reflect the concern expressed by Mr. Rossides, while making it clear that such protective measures fell outside the scope of the present articles. If there were no further comments, he would take it that, on that understanding, the Commission approved the commentary to article 3.

It was so agreed.

Commentaries to articles 4 and 5

The commentaries to articles 4 and 5 were approved.

Commentary to article 6

58. Mr. ELIAS suggested that, in view of the controversial nature of article 6, the commentary should reflect more fully some of the doubts and concern expressed by certain members of the Commission, which had affected the final formulation of the article.

It was so agreed.

The commentary to article 6 was approved, subject to the proposed amplification.

Commentary to article 7

59. The CHAIRMAN suggested that the commentary to article 7, too, should be amplified to describe in detail some of the misgivings expressed in the Commission.

It was so agreed.

The commentary to article 7 was approved, subject to the proposed amplification.
Commentary to article 8

60. The CHAIRMAN suggested that the commentary to article 8 should also be amplified.

It was so agreed.

The commentary to article 8 was approved, subject to the proposed amplification.

Commentary to article 9

61. The CHAIRMAN suggested that the commentary to article 9 should be revised, in order to convey the concern expressed by several members of the Commission regarding the problem of statutory limitation.

It was so agreed.

The commentary to article 9 was approved, subject to the proposed revision.

Commentaries to articles 10 and 11

The commentaries to articles 10 and 11 were approved.

Commentary to article 12

62. The CHAIRMAN suggested that the commentary should mention the fact that some members of the Commission had expressed doubts about the need to include a provision on the settlement of disputes in the draft articles, on the grounds that such disputes were unlikely to arise and, even if they did, would not readily lend themselves to the application of settlement procedures. The commentary should also indicate the reasons given by members of the Commission for preferring alternative A or alternative B.

It was so agreed.

The commentary to article 12 was approved, subject to the proposed additions.

Section B of Chapter III as amended, was approved.

A. Introduction

63. The CHAIRMAN invited the Commission to consider the introduction to Chapter III, containing a summary of the Commission’s proceedings and a discussion of the scope, purpose and structure of the draft. A decision had already been taken to amend paragraph 7 and some suggestions had been made for amendment of the section dealing with the scope, purpose and structure of the draft. He suggested that a reference should be made in paragraph 6 to the fact that some members would have preferred to follow the Commission’s traditional method of dealing with a subject, but that the majority had agreed to the appointment of a special Working Group.

It was so agreed.

64. Mr. HAMBRO said he thought the report did not adequately reflect the doubts that many members of the Commission had expressed about the utility of the whole project. Many members of the Commission had agreed to the adoption of the draft articles only because the Commission had been specifically requested by the General Assembly to help, in its technical capacity, in the preparation of a draft.

65. The CHAIRMAN suggested that, to meet Mr. Hambro’s point the introduction should mention the fact some members of the Commission had considered that the net results of a convention of the kind proposed would not justify its adoption.

It was so agreed.

Section A, as amended, was approved.

Chapter III, as a whole, as amended, was approved.

Chapter IV

PROGRESS OF WORK ON OTHER TOPICS (A/CN.4/L.190)

66. Mr. USTOR proposed that the fifth sentence of paragraph 5 should be deleted as being unnecessarily detailed.

It was so agreed.

67. The CHAIRMAN suggested that the words “conventional stipulation” in the sixth sentence of paragraph 5 should be replaced by the words “treaty provision”.

It was so agreed.

Chapter IV, as amended, was approved.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION
(A/CN.4/L.190 and L.191/Add.1)

68. The CHAIRMAN suggested that the words “at a future session” in the second sentence of paragraph 1 should be deleted.

It was so agreed.

69. Mr. USTOR pointed out that, while the most-favoured-nation clause was mentioned in paragraph 2 as being on the Commission’s agenda for its next session, there was no mention of that subject in paragraph 3. He therefore suggested that the following words should be added at the end of the first sentence of paragraph 3: “and to devote some time to the study of the most-favoured-nation clause”.

It was so agreed.

70. Mr. ELIAS pointed out that the representative of the Asian-African Legal Consultative Committee had stated that the time and place of the Committee’s fourteenth session would be notified later. Paragraph 12 should be amended accordingly.

It was so agreed.

71. The CHAIRMAN, referring to paragraph 31, suggested that the dates for the Commission’s next session should be from 7 May 1973 to 13 July 1973.

It was so agreed.

72. Mr. HAMBRO suggested that, in paragraph 33, no reference should be made to the actual amount of the grant by the Brazilian Government for the first Gilberto Amado Memorial Lecture.

It was so agreed.

Chapter V, as amended, was approved.

The meeting rose at 6.20 p.m.
1199th MEETING
Friday, 7 July 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcivar, Mr. Bartosi, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-fourth session
(A/CN.4/L.187 and Add.1; A/CN.4/L.187/Add.15 to 20)

Chapter II
SUCCESSION OF STATES IN RESPECT OF TREATIES
(resumed from the 1197th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of chapter II of its draft report.

B. Draft articles on succession of States in respect of treaties (continued)

Commentary to article 20 (Dissolution of a State) [27] 1
(A/CN.4/L.187/Add.15)

The commentary to article 20 was approved.

Commentary to article 17 (bis) (Multilateral treaties) [22]
(A/CN.4/L.187/Add.16)

The commentary to article 17 (bis) was approved.

Commentary to article 17 (ter) (Bilateral treaties) [23]
(A/CN.4/L.187/Add.16)

The commentary to article 17 (ter) was approved.

Commentary to article 17 (quater) (Termination of provisional application) [24] (A/CN.4/L.187/Add.16)

The commentary to article 17 (quater) was approved.

Commentary to article 19 (Uniting of States) [26] (A/CN.4/L.187/Add.17)

The commentary to article 19 was approved.

Commentary to article 22 (Boundary régimes) [29] and article 22 (bis) (Other territorial régimes) [30] (A/CN.4/L.187/Add.18)

2. Sir Humphrey WALDOCK (Special Rapporteur) replying to a comment by the Chairman, suggested that, as article 22 referred to both a boundary and a boundary régime, the words “or a boundary régime” should be inserted after the word “boundary” in the last sentence of paragraph (16) of the commentary.

It was so agreed.

The commentary to articles 22 and 22 (bis), as amended, was approved.

Commentary to article 1 (Use of terms) [2] (A/CN.4/L.187/Add.19)

3. Mr. AGO said he thought the statement in the second sentence of paragraph (6) that the Commission had concluded that the characteristics of the various historical types of dependent territories did not justify differences in treatment from the standpoint of the general rules governing succession of States in respect of treaties, was rather sweeping, particularly where protectorates were concerned.

4. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself shared Mr. Ago’s view; but the Commission had decided not to include a special rule on protected States, and the only way to cover that point was to say that, in the context of the modern law, there was no justification for making any distinction in respect of dependent territories. He would suggest that Mr. Ago’s point might be met by adding a footnote to paragraph (6) explaining the Commission’s decision.

It was so agreed.

5. Mr. QUENTIN-BAXTER said he thought paragraph (6) of the commentary should also reflect the fact that the Commission had indicated its desire to follow the United Nations’ definition of non-self-governing territories. During the Commission’s discussions, he had pointed out that, in accordance with United Nations practice, a dependent territory might exercise its right of self-determination by choosing association with an existing State rather than full independence. That was an approved United Nations doctrine that had a direct bearing on the present commentary.

6. Sir Humphrey WALDOCK (Special Rapporteur) said that the United Nations’ category of non-self-governing territories was not very exact from the standpoint of the law of succession, and he had already stated elsewhere in the report that the Commission, in its approach, had taken account of the principles of the Charter of the United Nations.2 The question of associated States was extremely complex, because of the many different kinds of association.

7. Mr. ELIAS said he thought the question should not be introduced into paragraph (6) of the commentary and suggested that the point could perhaps be made in another footnote.

8. The CHAIRMAN suggested that Mr. Quentin-Baxter should submit a footnote covering the point he had raised.

It was so agreed.

9. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission ap-

1 The numbers in square brackets are the numbers of the articles as they appear in the Commission’s report (A/8710/Rev.1), which is reproduced in volume II of this Yearbook.

2 See chapter II, para. 35 of the report.
proved the commentary to article 1, subject to the addition of the two proposed footnotes.

It was so agreed.

Section B, as amended, was approved.

A. Introduction (resumed from the 1196th meeting)

5. The principle of self-determination and the law relating to succession in respect of treaties (paras. 24 and 25)

10. The CHAIRMAN invited the Commission to resume consideration of sub-section 5 of the introduction and to comment on paragraphs 24 and 25 (A/CN.4/L.187/Add.1).

Paragraphs 24 and 25 were approved.

Sub-section 5, as amended, was approved.

6. General features of the draft articles (A/CN.4/L.187/Add.1 and Add.20)

11. Mr. USTOR said he thought that reference should be made to the special characteristics of the codification of succession of States in respect of treaties. A convention on that subject would not be directly binding on successor States, but he thought the Commission should state in its report that it believed the adoption of such a convention was nevertheless desirable.

12. Sir Humphrey WALDOCK (Special Rapporteur) supported that suggestion. He thought it would be wise to stress to governments, at the present stage, the value of the work of consolidation as such, whether or not, technically speaking, new States would be bound by the convention that might eventually be adopted. He had previously written a note for the Drafting Committee on the question of non-retroactivity and he would suggest that a shortened version of that note should be included at an appropriate point in the introduction.

13. He also wished to suggest that some reference should be made to the fact that the Commission had discussed the question of a time-limit for notification of succession and had decided to review that matter in the light of the comments of governments.

14. The CHAIRMAN said that, if there were no further comments, he would take it that, subject to the additions proposed by the Special Rapporteur, the Commission approved sub-section 6.

It was so agreed.

Section A, as amended, was approved.

Chapter II, as amended, was approved.

RESOLUTION EXPRESSING APPRECIATION AND THANKS TO THE SPECIAL RAPPORTEUR

15. The CHAIRMAN suggested that the Commission should adopt the following resolution for inclusion in its report:

"The International Law Commission, "Having adopted provisionally the draft articles on succession of States in respect of treaties, "Desires to express its deep appreciation and thanks to the Special Rapporteur, Sir Humphrey Waldock. The draft articles on that subject and the commentaries thereto illustrate the invaluable contribution of wisdom, learning and devoted effort that Sir Humphrey Waldock has made to the development of the law of treaties."

The resolution was adopted by acclamation.

The draft report of the Commission on the work of its twenty-fourth session, as amended, was adopted.

Closure of the Session

16. The CHAIRMAN said he wished to thank all members for their co-operation and their devoted work in accomplishing the difficult task of preparing two sets of draft articles at a single session. He also wished to express appreciation of the work of the Secretary to the Commission, the staff of the Codification Division, the Senior Legal Officer in charge of the International Law Seminar and the other members of the Secretariat who had assisted the Commission in its work.

17. He was very grateful for the support he had received from the First Vice-Chairman, who had so ably presided over the Drafting Committee, from the other officers of the Commission and from Mr. Tsuruoka, the Chairman of the Working Group on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons. Last, but by no means least, he wished to pay a warm tribute to Sir Humphrey Waldock, the Special Rapporteur on succession of States in respect of treaties, who had done such outstanding work during the present session; among contemporary jurists, Sir Humphrey had made a truly unique contribution to the codification and progressive development of international law.

18. Mr. AGO associated himself with the Chairman's expression of congratulations and thanks. In his turn, he wished to pay a tribute to the skill with which the Chairman had conducted the Commission's work, thus enabling it to adopt two sets of draft articles, one on succession of States in respect of treaties and the other on the protection of diplomats. The Commission had seldom ended a session with so many texts for submission to the General Assembly.

19. The formulation of the draft articles on the protection of diplomats had, of course, been facilitated by the draft prepared by the Chairman, by the existence of other similar conventions which had served as models and by the fact that the subject was a new one and consequently did not require long research into the practice of States, precedent and doctrine. The draft on succession in respect of treaties had had the benefit of the wide knowledge and extraordinary capacity for work of the Special Rapporteur, Sir Humphrey Waldock.

20. Gratifying though the results of the present session were, it should be remembered that they had been
achieved at the cost of exceptional effort. He therefore appealed to the Chairman, who would be the Commission’s spokesman in the General Assembly, to stress that the Commission had often had to work too fast at the present session and that the codification and progressive development of international law was necessarily a slow and difficult task. If the Commission did not have more time to do its work in future, it would be obliged to adopt a slower pace than in 1972. It was not always possible to work both fast and well.

21. Mr. USHAKOV associated himself with the tributes paid by other speakers. In his opinion, the two drafts the Commission had prepared at the present session constituted an important achievement, of which it could be proud.

22. Mr. YASSEEN, Mr. CASTANEDA, Mr. ELIAS and Mr. THIAM associated themselves with the tributes paid to the Chairman and other officers of the Commission, to Sir Humphrey Waldock and to the Secretariat.

23. Mr. SETTE CAMARA also associated himself with those tributes and said he strongly supported the views expressed by Mr. Ago regarding the time the Commission needed for its work.

24. Mr. BARTOS associated himself with all the tributes paid by previous speakers. He emphasized the importance of the two drafts completed at the present session and observed that the Commission had made an innovation in its methods of work, for without any loss of homogeneity, it had divided itself into two subsidiary bodies: the Drafting Committee, which had dealt with the draft on succession in respect of treaties, and a Working Group, which had dealt with the question of the protection of diplomats.

25. That innovation should, however, be considered as an experiment. As Mr. Ago had said, the Chairman should draw the General Assembly’s attention to the need to ensure that, in future, the Commission had enough time and resources to do its work satisfactorily.

26. Mr. HAMBRO, Mr. ROSSIDES, Mr. BILGE and Mr. QUENTIN-BAXTER also associated themselves with the tributes paid by previous speakers. As new members, they had been struck by the excellent atmosphere that prevailed in the Commission, which had made it a pleasure to participate in its work.

27. Mr. USTOR, First Vice-Chairman, Mr. RAMANGASOAVINA, Second Vice-Chairman, and Mr. ALCI-VAR, Rapporteur, thanked the Chairman and the other members for their kind words and associated themselves with the sentiments expressed by other members.

28. Mr. TSURUOKA thanked the Chairman and the other members of the Commission who had referred so kindly to the Working Group over which he had had the honour to preside. It was he who had to thank the members of the Working Group for their co-operation. He associated himself with the tributes paid to the Chairman and other officers, to Sir Humphrey Waldock and to the Secretariat.

29. Sir Humphrey WALDOCK said he was very grateful to the Chairman and to all the members for their kind and generous words. He owed a debt of gratitude to the First Vice-Chairman, in his capacity of Chairman of the Drafting Committee, to the Secretary to the Commission, to the staff of the Codification Division and to the translation services for all the valuable assistance he had received from them as Special Rapporteur for the topic of succession in respect of treaties.

30. To one who had served for many years on the Commission, the main impression it left was that of its solidarity as a body. The codification of international law was essentially a joint effort by the Commission as a whole. A Special Rapporteur normally felt some anxiety about a draft at the beginning of the work on his topic, but that anxiety was dispelled when the Commission, after discussing and criticizing the draft, made it its own. That corporate spirit of solidarity had been a major factor in the success of the Commission’s work.

31. Members of the Commission had the advantage of being expressly required to take due notice of the progressive development of international law and that fact had helped to make the Commission’s work a major factor in the consolidation of international law.

32. The CHAIRMAN declared the twenty-fourth session of the International Law Commission closed.

The meeting rose at 1.10 p.m.
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