

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1976

Volume I

*Summary records
of the twenty-eighth session
3 May-23 July 1976*

UNITED NATIONS



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New York, 1977



INTRODUCTORY NOTE

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

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

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

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<i>Rapporteur:</i>	Mr. Senjin TSURUOKA

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 1360th meeting, held on 3 May 1976:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. State responsibility
3. Succession of States in respect of matters other than treaties
4. Most-favoured-nation clause
5. Question of treaties concluded between States and international organizations or between two or more international organizations
6. The law of the non-navigational uses of international watercourses
7. Long-term programme of work
8. Organization of future work
9. Co-operation with other bodies
10. Date and place of the twenty-ninth session
11. Other business

ABBREVIATIONS

BIRPI	United International Bureaux for the Protection of Industrial Property
ECAFE	Economic Commission for Asia and the Far East
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
IMF	International Monetary Fund
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J.</i> , Series A/B	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J.</i> , Series C	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>
OAS	Organization of American States
OPEC	Organization of Petroleum Exporting Countries
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
World Bank	International Bank for Reconstruction and Development

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-EIGHTH SESSION

Held at Geneva from 3 May to 23 July 1976

1360th MEETING

Monday, 3 May 1976 at 3.30 p.m.

Chairman: Mr. Abdul Hakim TABIBI

later: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Opening of the session

1. The CHAIRMAN declared open the twenty-eighth session of the International Law Commission.

Statement by the outgoing Chairman

2. The CHAIRMAN said that, since the end of the previous session, he had been called upon, in accordance with the Commission's decision, to represent it at the thirtieth Session of the General Assembly and at meetings of the regional legal bodies. The meeting of the European Committee on Legal Co-operation had unfortunately coincided with the session of the General Assembly, so he had been unable to attend that meeting. The meeting of the Asian-African Legal Consultative Committee had been postponed until June-July 1976 and he would endeavour to attend that. He had attended the meeting of the Inter-American Juridical Committee at Rio de Janeiro, where he had been received with warm hospitality, and he proposed to submit a report to the Commission on the subject under item 9 of the provisional agenda (Co-operation with other bodies).

3. At the thirtieth session of the General Assembly, the Sixth Committee had as usual received with great interest the report of the International Law Commission (A/10010/Rev.1)¹ and representatives had praised the valuable work being performed by the Commission and its Special Rapporteurs.

4. He had made a statement on the opening day of the discussion of the Commission's report in the Sixth Committee² and a concluding statement to summarize the trend of the debate and to answer points raised by members of the Committee.³

5. During the discussion, members had expressed their satisfaction with the progress made by the Commission on various topics in accordance with the decision of the General Assembly in resolution 3315 (XXIX). Their satisfaction was reflected in resolution 3495 (XXX) of the General Assembly, which expressed confidence in and support for the International Law Commission and appreciation of its work and that of the Special Rapporteurs.

6. A number of useful suggestions had been made in the Sixth Committee for the further improvement of the methods of work of the Commission. Members had welcomed the establishment by the Commission of a planning group for further rationalizing its methods of work in accordance with paragraph 6 of General Assembly resolution 3315 (XXIX).

7. Useful comments had been made on chapter II of the report, dealing with State responsibility. Several members had approved the plan of work for the draft articles in preparation, which would cover the responsibility of States for the breach of any international obligation. Generally speaking, the provisions embodied in the articles adopted by the Commission at its twenty-seventh session had received the warm support of many delegations, although a number of improvements had been suggested; different views had also been expressed on some of the saving clauses. He himself had pointed out that, on the basis of the case-law and State practice mentioned in the commentaries, draft articles 12, 13 and 14 provided that the conduct of an organ of another State, of an international organization or of an insurrectional movement was not considered an act of the territorial State because the organs in question were not under the control of the latter State. The principle underlying those three articles, as well as that underlying articles 10 and 11, appeared to have been considered basically sound by most of those who commented on them.

8. Article 15 of the draft on State responsibility had led to a lively discussion. The article dealt with the attribution of conduct to the State when an insurrectional movement had triumphed or when the structure of an insurrectional movement became that of a new State constituted by secession or decolonization. Reference was made during the discussion to the non-attribution of responsibility for the acts of a people struggling for liberation or of a third State supporting a liberation movement.

9. He himself had emphasized, and the members of the Sixth Committee had recognized, the outstanding contribution made to the codification of State responsibility by the Special Rapporteur for that topic. Some members

¹ *Yearbook... 1975*, vol. II, pp. 47 *et seq.*

² See *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1534th meeting, paras. 2 *et seq.*

³ *Ibid.*, 1550th meeting, paras. 16-39.

had expressed uneasiness at what they considered to be the slow pace of the Commission on that vital topic but he had emphasized to them that the success of any work of codification could not be measured in terms of the number of articles adopted at a session; the essential point was that each step forward taken by the Commission must be fully understood in all its implications and receive the general support of Member States. A topic could only be codified if a realistic assessment was made of the difficulties involved and of the time required to overcome them. Indeed, the goal and policy established by the Commission and the Special Rapporteur on the subject of State responsibility had been fully accepted by the General Assembly.

10. With regard to the topic of succession of States in matters other than treaties (chapter III of the report), appreciation was expressed of the valuable work done by the Special Rapporteur and useful comments were made on draft article 9 (General principle of the passing of State property). On draft article X (Absence of effect of a succession of States on third State property) the division of opinion in the Sixth Committee had been similar to that in the Commission itself. It would therefore seem useful if the Commission were to make a careful study of article X in the light of the observations made in the Sixth Committee.

11. With respect to the most-favoured-nation clause (chapter IV of the report), general support was expressed by many members of the Sixth Committee for the fourteen additional draft articles prepared by the Commission at its twenty-seventh session. On the relationship between the most-favoured-nation clause and the national treatment clause, some speakers had supported the Special Rapporteur's approach of dealing with the national treatment clause as well, because of the interaction between its operation and that of the most-favoured-nation clause. Some delegations, however, had made their support conditional on such a study not preventing the conclusion of the first reading of the draft during the present session of the Commission. Others had felt that the subject was outside the terms of reference of the Commission.

12. With respect to draft article 21, a great many delegations had urged that the rule it embodied should be further expanded by the Commission in order to cover the interests of the economically weaker nations, in line with the Charter of the Economic Rights and Duties of States adopted and proclaimed by the General Assembly in its resolution 3281 (XXIX). Most members, including all the representatives of third-world States, had urged that the rules contained in that Charter, in the relevant resolutions adopted at the thirtieth session of the General Assembly and in the decisions of GATT and UNCTAD, should be explored by the International Law Commission at the present session in order to include appropriate provisions in the future draft convention.

13. Representatives had also expressed support for such saving clauses as that inserted at the beginning of draft article 16, which underlined the residual character of the rules embodied in the draft. Strong objections were put forward by the supporters of customs or economic unions and by the spokesman for EEC who insisted that the trend towards such unions and the consequent

trade expansion should not be curtailed.⁴ The supporters of article 15, however, had pointed out that there was no rule recognizing customs unions and free-trade areas as an exception. Representatives of third-world States had urged that to apply the most-favoured-nation clause to all countries regardless of their levels of economic development would amount by implication to discrimination against those countries, and would have the undoubted effect of widening the gap between the rich and the poor countries.

14. During the discussion on draft article 14, all the representatives of land-locked States who spoke had supported its contents in the light of paragraphs 8 to 10 of the commentary to that article.

15. On the question of treaties concluded between States and international organizations or between two or more international organizations (chapter V of the report), members of the Sixth Committee had approved the Special Rapporteur's approach and the Commission's decision that the draft should reflect to the fullest appropriate extent the provisions of the 1969 Vienna Convention on the Law of Treaties, at the same time taking into account the specific characteristics of those treaties.

16. On the question of the law of the non-navigational uses of international watercourses, some delegations had expressed the hope that the Commission would speed up its work and report to the Assembly as soon as possible. Others, however, had urged that the pattern of priorities which had already been approved by the General Assembly in resolution 3315 (XXIX) should not be disturbed.

17. On the question of co-operation with other bodies, there had been unanimous support for the exchange of observers between the Commission and the regional legal bodies.

18. Several representatives had commented on the high standard of the third Gilberto Amado Memorial Lecture and expressed appreciation of the handsome gift of the Brazilian Government. There had also been warm support for the continuation of the annual International Law Seminar and a number of generous contributions towards that programme had been announced by the representatives of donor countries. He himself had supported the suggestion made in the Sixth Committee by the Swedish representative that the time had come to include that programme in the regular budget of the United Nations, and thus provide help for training jurists in the developing world.

19. In introducing the report, he had also mentioned the need to strengthen the role of the Office of Legal Affairs so that it could participate fully and actively in such vitally important areas of contemporary international relations as the preparation and formalization of normative documents relating to the new international economic order.

20. Many representatives had spoken during the debate on the methods of work of the Commission and concern

⁴ *Ibid.*, 1544th meeting, paras. 37-45.

had been expressed, not for the first time, at the length of the Commission's report and the lateness with which it was circulated. In answering criticisms of the Commission's methods of work, he had pointed out that the Commission could not apply a general uniform criterion to the preparation of the various chapters of its report. Each had to be prepared taking into account such factors as the nature of the topic and the stage reached in its consideration. It was obvious, for instance, that a chapter dealing with treaties concluded between States and international organizations or between international organizations, prepared after the conclusion of the 1969 Vienna Convention on the Law of Treaties, did not need the same amount of detailed comment as a chapter dealing with State responsibility for internationally wrongful acts on a basis never previously attempted. Drafts based on well-established principles or rules did not need the same treatment as those based on an analysis of State practice, sometimes very modern State practice, such as that on the most-favoured-nation clause. Furthermore, in some fields, international law was very rich in relevant precedents while in others such precedents were lacking or were not so abundant. Even within a specific topic, some sectors required much lengthier treatment than others.

21. He had also urged critics to bear in mind that the codification of international law in the 1970s was a very different matter from what it had been in the 1950s when the majority of the States Members of the United Nations were old States that had had a part in the cases recorded in the history of international law. Those States possessed a rich documentation on such cases. The same, however, could not be said of the newly independent States which were now so numerous that they constituted two thirds of the membership of the United Nations. For those States, express references to relevant precedents were very helpful for the preparation of their written and oral comments. Moreover, the reports of the Special Rapporteurs were often, for a variety of reasons, not available to those who had to prepare such comments.

22. Reference to precedents in some of the drafts was also advisable for reasons connected with sound codification policy. The addressees of the codification drafts—the States—did not form as homogeneous an international society as in the past. All States, including newly independent States, were entitled to know fully the legal background of the rules proposed by the Commission. Only when support was accompanied by knowledge could real progress be achieved and rules be codified on a basis that could lead to their effective implementation in international relations.

23. Some members had drawn attention during the debate to the conciseness of the commentaries attached by the Commission to its 1956 draft articles on the law of the sea. His reply to them had been that less than fifteen years after the conclusion of the 1958 Geneva Conventions on the Law of the Sea, States had had to undertake a full revision of that law and that the documentation for the Third United Nations Conference on the Law of the Sea and its Preparatory Committee could certainly not be described as concise, a fact which was perhaps the main reason for the delay in achieving a successful instrument on the subject. He had also mentioned the continual

pressure to make codification more concrete, with the result that drafts became longer as their contents became more precise. As a result, much more elaborate commentaries were needed in order to avoid misunderstandings concerning the situations intended to be covered by the different provisions.

24. Lastly, he had pointed out that the Commission had been working on several important topics simultaneously, not just on one or two as had been generally the case in the past. He had been obliged to remind the Committee that the present situation had not been due to any initiative of the Commission itself but rather to the recommendations adopted by the General Assembly. For instance, during the preparation of the draft articles on the law of treaties, the Commission had decided to put aside the question of the most-favoured-nation clause and that of treaties concluded between States and international organizations or between two or more international organizations, but the General Assembly had then recommended the Commission to take up the study of those two topics. It was also on the Assembly's recommendation that the law of non-navigational uses of international watercourses had been included in the Commission's programme and a Special Rapporteur appointed for the topic. A few years previously, the Assembly had recommended that the Commission's work on State responsibility should continue on a high priority basis, and that recommendation had been repeated in General Assembly resolution 3495 (XXX) of 15 December 1975, but at the same time the Assembly had asked the Commission to proceed with the preparation of the draft articles on succession of States in respect of matters other than treaties on a priority basis.

25. Clearly, States were eager to make progress in different areas, but not all of them were interested in giving priority to the same topics. The inevitable consequence was that the Commission had no alternative but to divide its available time among several topics. He had pointed out that, if it were considered advisable to limit the number of topics under active consideration, it would be for the Sixth Committee to recommend to the Assembly the necessary choices in the matter, since it was a question of codification policy; in that case, the decision should be taken by the Sixth Committee, which was the diplomatic body in control of the codification process.

26. As to the suggestions that the Commission's session should be shortened or the opening date changed, he had made it clear that, because of the duties of the members of the Commission, particularly those with academic and professional commitments, it was impossible for the Commission to change the opening date of its sessions.

27. With regard to the preparation of the Commission's report, he had pointed out that the typescript was always ready by the end of July or early August but that it was difficult to complete the translation and reproduction of such a highly technical and scientific document by the end of August for submission to Member States; the only solution was for the Sixth Committee to consider the Commission's report at a somewhat later stage in its work so as to give representatives more time to study the content of the report.

28. He had drawn the attention of the Sixth Committee to the underestimation of the work of the Commission by the Fifth Committee and certain other organs of the United Nations. He had emphasized that administrative and budgetary arrangements could not be made without taking fully into account the letter and the spirit of the Commission's Statute, which had been prepared by the Sixth Committee and approved by the General Assembly.

29. He had thanked the Sixth Committee for its support for the position taken by the Commission with regard to the questions raised in the report of the Joint Inspection Unit on the pattern of conferences of the United Nations and the possibility for more rational economic use of its conference resources,⁵ which had been prepared without consulting the International Law Commission.

30. Finally, he had written to the Chairman of the Fifth Committee urging the adoption of the Secretary-General's recommendation to increase the honoraria of Special Rapporteurs and members of the Commission. For political and administrative reasons, consideration of that question had been postponed until the next session of the General Assembly.

31. In conclusion, he would like to mention once again that great appreciation had been shown in the General Assembly of the high standard of the work performed by the Commission, as was demonstrated by the terms of the resolution unanimously adopted by the Assembly.

32. Mr. AGO said that he wished to refer to two points on which the Chairman had admirably defended the Commission's cause before the Sixth Committee. First, the Chairman had had to reply to those who insisted, year after year, on the need to improve the methods of work of the Commission. They complained that the Commission produced too little. But the problem of the codification of international law could not be compared with the problem of industrial productivity. The criterion of successful codification was not quantity but quality.

33. Secondly, the Chairman had had to answer those who felt the Commission's reports were too long; he had pointed out that many States would have difficulty in procuring all the documents necessary for judging the texts proposed by the Commission if the texts were not accompanied by detailed commentaries. Moreover, experience had shown that conventions such as the 1969 Convention on the Law of Treaties, the preparation of which had covered a period of some 20 years, were even now far from constituting universally accepted treaty law, although it was generally admitted that most of its provisions were an expression of the general customary law at present in force. The Commission's commentaries on the subject of treaty law were accordingly especially important as evidence of customary law on that matter. The preparatory work, and particularly the commentaries to the articles, were almost as important as the actual wording of the convention. Apart from this, it would be dangerous for the Commission to content itself with a

hasty effort and to dispense with thorough preliminary research. If it did so, it might be able to agree on rules which would seem acceptable at the time but which, inasmuch as they took no account of the past and possibly foreseeable future development of international law as a whole, would rapidly become obsolete.

34. Mr. ROSSIDES said he wished to thank the Chairman for the manner in which he had represented the Commission in the Sixth Committee debates. With regard to the Commission's drafts, he fully agreed that the emphasis should be more on the quality of the work than on the quantity of production.

35. As to the pace of the Commission's work, it should be remembered that the present world was one of continued and rapid change. It was therefore important to adjust the rules of international law to the compelling needs of the times. It was noteworthy that the provisions of Article 13, paragraph 1 a of the Charter of the United Nations called upon the General Assembly to "make recommendations for the purpose of ... encouraging the progressive development of international law and its codification". That essential provision, on the basis of which the Assembly had established the International Law Commission in 1947, mentioned "the progressive development of international law" before "its codification", a circumstance which clearly indicated the priorities in the matter. From his long experience of work in United Nations bodies, he could bear witness to the speed with which conditions were changing in the world. Now more than ever, the progressive development of international law stood out as the primary duty of the Commission, in preference to the codification of rules which were being rendered obsolete by the passage of time.

36. Mr. HAMBRO said that he had attended part of the debate in the Sixth Committee and wished to join the previous speakers in thanking the Chairman for his presentation of the Commission's work. He fully endorsed Mr. Ago's appeal to the Commission to maintain the high standard of its work. He noted with appreciation the courtesy shown to the Commission during the debates in the Sixth Committee.

Election of officers

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

38. Mr. AGO proposed Mr. El-Erian, one of the longest standing and most eminent members of the Commission, and a man of great personal and intellectual qualities. Mr. El-Erian's considerable contribution to the work of the Commission had resulted in particular in the Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character which had been adopted in 1975.

39. Mr. KEARNEY, Mr. YASSEEN, Mr. USHAKOV, Mr. USTOR and Mr. CALLE y CALLE seconded the proposal.

40. The CHAIRMAN said he also wished to support the nomination of Mr. El-Erian, an eminent diplomat,

⁵ A/9795.

professor and jurist, who through his work had contributed to the codification and the progressive development of international law.

Mr. El-Erian was unanimously elected Chairman and took the Chair.

41. The CHAIRMAN thanked the members of the Commission for the honour they had done his Country and himself in electing him Chairman and assured them that he would do his best to justify the confidence they had placed in him and to live up to the standards of objectivity and impartiality established by the previous Chairmen of the Commission. He also thanked those who had proposed or supported his nomination for their kind words. He also expressed appreciation to the outgoing Chairman for the way in which he had presented the views and defended the interests of the Commission before the General Assembly. In his opinion, the results achieved by the Commission were distinguished not only by their quality, as Mr. Ago had said, but also by their quantity, as could be seen from the work the Commission had completed during the past four years.

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

43. Mr. QUENTIN-BAXTER proposed Mr. Reuter.

44. Mr. MARTÍNEZ-MORENO and Mr. USTOR seconded the proposal.

Mr. Reuter was unanimously elected first Vice-Chairman.

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

46. Mr. SETTE CÂMARA congratulated the Chairman on his election and emphasized the role he had played in the adoption of the Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character. He proposed Mr. Calle y Calle for the office of second Vice-Chairman.

47. Mr. USHAKOV and Mr. HAMBRO seconded the proposal.

Mr. Calle y Calle was unanimously elected second Vice-Chairman.

48. Mr. CALLE Y CALLE thanked the members of the Commission for electing him.

49. The CHAIRMAN called for proposals for the office of Chairman of the Drafting Committee.

50. Mr. USHAKOV proposed Mr. Šahović.

51. Mr. HAMBRO and Mr. AGO seconded the proposal.

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

52. Mr. ŠAHOVIĆ thanked the members of the Commission for electing him and congratulated the Chairman on his election.

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

54. Mr. YASSEEN proposed Mr. Tsuruoka.

55. Mr. TABIBI seconded the proposal.

Mr. Tsuruoka was unanimously elected Rapporteur.

56. Mr. RYBAKOV (Representing the Secretary-General, Director, Codification Division), congratulated the Chairman and the officers on their election and conveyed to the Commission the best wishes of the Secretary-General and the Legal Counsel for a fruitful session. He hoped that most of the members would be re-elected by the General Assembly at its thirty-first session and would thus be enabled to continue to make a great contribution to the task of progressively developing and codifying international law.

57. The present session afforded an opportunity for the Commission to make that contribution still more tangible by substantially advancing the preparation of draft articles on State responsibility, succession of States in respect of matters other than treaties and treaties of international organizations, by continuing the preliminary work on the law of non-navigational uses of international watercourses, and by completing the first reading of the draft articles on the most-favoured-nation clause for submission to the Assembly at its thirty-first session. The latter goal, in particular, lay within the Commission's reach, as the Planning Group of the Enlarged Bureau had suggested and the Assembly had recommended.

58. In considering questions pending in respect of the most-favoured-nation clause, the Commission had in mind the fact that the completion of a new draft instrument—which was especially important at a time when the refreshing ideas expressed at the Helsinki Conference on Co-operation and Security in Europe and the positive trends towards *détente* were determining, although not without difficulties, the development of international relations among States with different social systems—would enhance the Commission's prestige, and further demonstrate its awareness of the realities of the world of today and its readiness to help give concrete form to the principles of the United Nations set forth in the Charter. In that way, the Commission would yet again confirm that it was the most suitable mechanism, within the United Nations system, for the preparation of legal instruments designed to regulate the fundamental aspects of contemporary international relations.

59. That matter should be one of particular concern to the Commission, not only because of repeated calls for the urgent creation or improvement of norms of universal application in international economic relations but also because of certain suggestions that had been made, such as those of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, more particularly for the establishment of *ad hoc* committees for the codification of international law in specific areas. It would be remembered that the General Assembly had taken note of a draft resolution on the consolidation and progressive evolution of the norms and principles of international economic development law⁶ and had decided to include the question as a separate item in the pro-

⁶ *Official Records of the General Assembly, Thirtieth Session, Supplement No. 34 (A/10034), p. 78.*

visional agenda of its thirty-first session, in the hope that it would be allocated to the Sixth Committee.

60. The Codification Division always sought to meet promptly the requirements of the Commission and of the Special Rapporteurs and, to that end, had undertaken research on all of the topics currently under consideration by the Commission. In the matter of State responsibility, for example, the Division was preparing a Survey of State practice, treaties, international judicial decisions and doctrine on "*force majeure*" as a circumstance excluding wrongfulness, and was conducting research on other such circumstances relating to "*état de nécessité*", "self-defence", "sanctions" and "consent".

61. It had embarked on research into all aspects of the topic of succession of States in respect of matters other than treaties and had collected material having a bearing on succession to public property and to public debts, with particular reference to cases arising after the Second World War.

62. With regard to the most-favoured-nation clause, it was in the process of completing its research on relevant clauses in treaties published in the United Nations *Treaty Series* and had collected material on the question of the operation of the clause among States with different levels of economic development. Research requirements in connexion with the topic of treaties of international organizations were obviously fewer, but the Division had none the less prepared a number of documents, including an historical survey,⁷ a selected bibliography⁸ and a study of the possibilities of participation by the United Nations in international agreements on behalf of a territory.⁹

63. Lastly, for the law of the non-navigational uses of international watercourses, in addition to the two existing reports of 1963¹⁰ and 1974¹¹ and volume 12 of the *Legislative Series*, appropriate material was now being gathered from United Nations bodies, including the specialized agencies and the regional commissions. The bibliographies contained in the two reports in question were being brought up to date, and a list was being prepared of treaties on the uses of such watercourses covering both navigational and non-navigational uses.

64. The Division, despite the smallness of its staff, was continuously engaged in research activity which adapted itself to the needs and priorities of the Commission as well as discharging other responsibilities entrusted to it by the General Assembly. In 1975, for instance, it had been requested to prepare documents on the protection of human rights in armed conflicts and on diplomatic asylum, as well as papers for the Conference on the Representation of States in their Relations with International Organizations and for the *Ad Hoc* Committee on the Charter of the United Nations. It also participated actively in the work of various bodies, which in 1977 would include three plenipotentiary con-

ferences, namely, those on territorial asylum, on succession of States to treaties and on human rights in armed conflicts.

65. There was little he could add to the outgoing Chairman's comprehensive account of the views of the General Assembly on the work and organization of the Commission. The report of the Secretary-General on honoraria payable to members of organs and subsidiary organs of the United Nations, a matter included as an item on the provisional agenda of the thirty-first session of the Assembly, had not been finalized, but a copy of the draft would be submitted to the Legal Counsel by the Budget Division at a later stage. Similarly, the report requested from the Secretary-General on the optimum utilization of office space by organizations and services of the United Nations, with a view to the inclusion of Vienna in the pattern of conferences, was now being prepared. An assurance had been given that the records of the meetings of the Commission would not be noticeably affected by General Assembly resolution 3415 (XXX).

66. The Sixth Committee had taken a favourable view of the establishment of a Planning Group, which could become a permanent feature in the organization of the Commission. The Group's suggestions would not only serve the interests of the Commission—they would also provide guidance to representatives of States on the time factor in carrying out the Commission's programme of work.

67. In conclusion, he wished to assure the Commission of the greatest possible co-operation from its secretariat in the successful completion of the Commission's tasks at the present session.

Adoption of the agenda (A/CN.4/288)

68. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to adopt the provisional agenda, as set out in document A/CN.4/288.

It was so agreed.

The meeting rose at 5.25 p.m.

1361st MEETING

Tuesday, 4 May 1976 at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Organization of work

1. The CHAIRMAN observed that, in accordance with the Commission's usual practice, it might be advisable

⁷ A/CN.4/L.161 and Add.1-2.

⁸ *Yearbook...* 1974, vol. II (Part Two), p. 3, document A/CN.4/277.

⁹ *Ibid.*, p. 8, document A/CN.4/281.

¹⁰ *Ibid.*, p. 33, document A/5409.

¹¹ *Ibid.*, p. 265, document A/CN.4/274.

to postpone consideration of item 1 of the agenda, (Filling of casual vacancies in the Commission (Article 11 of the Statute)) for about a week or two, when all the members would be present and could engage in consultations and seek any information they required.

2. By its resolution 3495 (XXX), the General Assembly had recommended that the Commission should continue on a high priority basis its work on State responsibility, which was item 2 of the agenda, and proceed with the preparation on a priority basis of draft articles on succession of States in respect of matters other than treaties (item 3). The Assembly had also recommended that the Commission should complete the first reading of draft articles on the most-favoured-nation clause (item 4) at the present session, proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations (item 5) and continue the study of the law of the non-navigational uses of international watercourses (item 6).

3. He suggested that the Commission should first consider item 2 (State responsibility), setting aside some three weeks of the session for that purpose. Later, with the help of information from the secretariat concerning the issue of documents, it would be possible to discuss, in consultation with the Special Rapporteurs, the order in which the other items would be examined. If there was no objection, he would take it that the Commission agreed to that course.

It was so decided.

State responsibility (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

CHAPTER III: PRELIMINARY CONSIDERATIONS

4. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on State responsibility (A/CN.4/291 and Add.1-2).

5. Mr. AGO (Special Rapporteur) said that his fifth report raised some very difficult questions and that he would like the members of the Commission first of all to give him their advice on some preliminary considerations. In 1974 and 1975 the Commission had studied chapter II of the draft (The "act of the State" according to international law), which dealt with questions concerning the attribution to the State of certain conduct, in other words, with the subjective element of the internationally wrongful act. It was now time to take up the question of the objective element, that was to say, to see what distinguished the internationally wrongful act from the other acts of the State.

6. There were many acts of the State to which international law attached legal consequences, but obviously they did not all constitute wrongful acts. The Commission had taken the view that the objective element in question consisted in the fact that the conduct attributed to the State constituted a failure by that State to comply with

an international obligation incumbent upon it. In fact, what characterized the internationally wrongful act, as a source of international responsibility, was the conflict between the State's actual conduct and the conduct required of it under a particular international obligation. The Commission had also noted that the link between the breach of an international obligation and the new legal situation engendered thereby demonstrated the complementary nature of the rules relating to international responsibility. The obligations and other legal situations embraced by the concept of responsibility existed only in relation to the primary obligations which States might fail to fulfil.

7. It was those considerations which had led the Commission to adopt a draft of article 3¹ in which it had identified two elements that were essential for the existence of an internationally wrongful act, the first being conduct consisting of an action or omission attributable to the State under international law, and the second, the fact that such conduct constituted a breach of an international obligation of the State. The Commission, which had been unanimous in adopting draft article 3, had stated in its commentary thereto that such a definition of the objective element was in conformity with State practice, international jurisprudence and doctrine. It had also pointed out that in internal law, the breach of an obligation did not always entail infringement of a subjective right of another, whereas in international law, the breach of an obligation by the State committing an internationally wrongful act always entailed infringement of a subjective right of one or more other States.² The Commission had refrained from stating an opinion on the question whether there existed a rule of international law prohibiting the abusive exercise of their rights by States. For the general definition of the objective element would admit of no exception, whether or not there was any such rule. If there was no such rule, there could be no question of its giving rise to exceptions. If on the other hand, there was such a rule, and supposing that the State exercised its rights in an abusive manner, it would thereby breach an international obligation incumbent upon it, which merely confirmed the general principle that the distinguishing feature of the internationally unlawful act was that it consisted of a breach by a State of an international obligation. Finally, the Commission had preferred to speak of the breach of an "international obligation", rather than of an "international rule" or a "norm of international law". The existence selected was the one most commonly used in international judicial decisions and State practice. Indeed, an international obligation might not flow from a rule, but from a particular legal instrument or a decision of a judicial or arbitral tribunal; moreover, a rule was the objective expression of the law, whereas an obligation was linked with the subjective situation of the State—whether the State complied with or breached the obligation. Thus the State did not by

¹ For the text of the articles adopted by the Commission at previous sessions, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. II, sect. B.

² See *Yearbook... 1973*, vol. II, p. 179 *et seq.*, document A/9010/Rev.1, chap. II, sect. B, commentary to article 3.

its act or omission fail to comply with a norm or a rule, but with the obligation imposed on it by such a rule.

8. It was now time to consider analytically the notion of the breach of an international obligation. The Commission would have to determine in what circumstances and on what conditions it must be concluded that a State had committed such a breach, and also whether, and on what bases, it must be admitted that there was a distinction between different breaches of that nature. In considering the question of the attribution of certain conduct to the State, the Commission had had first to overcome certain theoretical difficulties due more especially to the fact that one school of thought affirmed the need to refer to internal law as the basis for the attribution of conduct to the State, while another school insisted on the need to refer to international law for that purpose. Those differences of opinion arose from confusion between the problem properly so called of the attribution or imputation of an act to the State, which could only be governed by international law, and that of determining the organization of the State, which was of necessity governed by internal law. It seemed that that the determination of the objective element would not come up against difficulties of that kind, but others would be encountered. The problem likely to arise was essentially one of "boundaries".

9. In studying the chapter on the breach of an international obligation, the Commission would have to take care not to try to define such "primary" obligations at any stage of the proceedings. First of all, the formal aspects of international obligations would raise certain problems. For example, the Commission would have to consider whether a breach of an obligation appeared in a different light according to whether it had a customary, conventional or other source, without, however, getting involved in the elaboration of a theory of the sources of international law. The Commission should confine itself to studying State responsibility arising from the breach of international obligations whatever their origin, without stopping to discuss the matter of whether certain procedures were sources of international obligations. The Commission should also, when it came to consider the incidence on international responsibility of the content of the obligations breached, avoid undertaking the task of defining the content of the various obligations. It would, of course, be necessary to distinguish between internationally wrongful acts by referring for that purpose to the content of the obligations breached, but it would be dangerous for the Commission to allow itself to be drawn into defining the terms of the different international obligations which, in one sphere or another, were incumbent upon States. The reason why the attempt made in 1930 to codify the rules governing international responsibility for damage to the person or property of foreigners had failed, was, precisely, that it had at the same time aimed at determining the content of the objective primary rules relating to the treatment of foreigners. If the Commission now entered on the same course, it would have to define the content of all international obligations of which the breach constituted an internationally wrongful act—which would mean defining the whole of international law.

10. That being so, he would like to obtain the Commission's agreement to the method of work he proposed. His suggestion was accordingly that the possible incidence on international responsibility of the formal aspects of international obligations should be considered first. As to distinguishing between the sources of obligations, there would be observed a tendency to assimilate international law rather too closely to internal law, and to transpose into the former distinctions which belonged to the latter—that tendency should in his opinion be avoided. Furthermore, although it might seem obvious that, for there to be any real breach of an international obligation, it must have been in force at the time of the breach, a whole series of problems might arise in that connexion. The question was in fact linked with that of the retroactivity of international obligations. When at a later stage, the Commission came to examine the question of the objective element of the content of the international obligations breached, not from the formal viewpoint, but as to substance, it would have to deal with the most important questions.

11. In dealing with those problems, it could *inter alia* be considered either that there was only one category of internationally wrongful acts, whatever the content of the obligations breached, or that there were several categories corresponding to the importance of the obligations to the international community. In the second case, different consequences could ensue for the State which had committed the wrongful act. For the breach of an international obligation need not always give rise solely to an obligation to make reparation; in serious cases, it might justify the imposition of sanctions, quite apart from any preliminary attempt to obtain reparation. It was also possible that the breach of certain international obligations might infringe the subjective rights of more than one State or that the content of the obligation concerned might be so important that its breach injured the interests of all States members of the international community and provoked reactions from subjects other than States directly injured.

12. The Commission would subsequently have to make yet further distinctions. In international law, just as in internal law, many different categories of obligations might be distinguished on the basis of the conduct required of various State organs. Under some international obligations, States had to adopt pre-determined conduct: they had, for example, to repeal a law, adopt a law having specific content, or quash a judgment. The mere fact of not adopting the conduct indicated constituted a breach of such obligations, which might be defined as obligations of conduct. But there was another quite different category of obligations, particularly in connexion with the treatment of foreigners, which were not simply obligations of conduct but obligations of result, the State being required merely to ensure that a certain result was obtained, but being free to choose the means of obtaining it. In such cases, it was more difficult to determine at what moment a breach of the obligation concerned occurred. In that connexion, he recalled that he had once said that the justification for the rule of prior exhaustion of local remedies lay precisely in the fact that where the treatment of foreigners was concerned, it

was chiefly obligations of result, not of conduct that were incumbent on States, which meant that the desired result might not be finally unobtainable so long as there was the possibility that it might be obtained through organs other than those which had originally taken action in a given case. In his view, however, that did not mean that the Commission ought at the present time to settle the question of the prior exhaustion of local remedies. That question, like many others, should be settled later within the context of the implementation (*mise en œuvre*) of international responsibility. All that he wanted to emphasize at present was that the origin of that rule was the distinction between the breach of obligations of conduct and that of obligations of result.

13. Referring to the comments made by Mr. Rossides the previous day, he said he did not intend to abandon the inductive method in studying the objective element of the internationally wrongful act. The Commission's primary task was codification, so it must analyse in the first place State practice and international jurisprudence and, incidentally, doctrine. But too much reliance should not be placed on that. In regard to some questions, such as that of attribution to the State of the conduct of organs acting outside their competence, for example, the Commission had found more numerous precedents than it would find in regard to the others relating to the objective element. In addition, while it might be unnecessary in some cases to depart from the rules sanctioned by State practice and international jurisprudence, and confirmed by doctrine, it might be necessary in others to try to meet the expectations of the international community. In other words, whereas, in regard to the attribution of certain conduct to the State, the Commission had been able to confine itself to reaffirming existing rules, in dealing with breach it might find that it would have to contribute to the progressive development of international law and to interpret the trends emerging in the international community. That would make its task all the more difficult and delicate.

14. Mr. ROSSIDES said that the fifth report on State responsibility exemplified what he had meant when expressing his agreement with the Special Rapporteur at the previous meeting: it was essential for the Commission to keep in touch with the times in its task of codification and progressive development of international law. For example, in article 18 the Special Rapporteur had ably reconciled the classical and the modern, progressive aspects of international law. Paragraph 3 of that article stated that the serious breach by a State of an international obligation established by a norm of general international law accepted by the international community as a whole and having as its purpose . . . the conservation and the free enjoyment for everyone of a resource common to all mankind was also an "international crime". The article thus established a new idea which had not even existed at the time of the adoption of the Charter of the United Nations, and introduced questions of the law of the sea, such as the exploitation of the resources of the sea-bed, which were new in international law.

15. He wished to express his deep satisfaction at the election as Chairman of a jurist from a country with

an ancient culture and a long tradition in international law, especially as Mr. El-Erian had amply demonstrated his great personal dedication to the work of the Commission and the codification and progressive development of international law.

16. Mr. USHAKOV congratulated the Special Rapporteur on the excellent work he had done in a very difficult and entirely new field, and expressed support for the preliminary considerations he had put forward. He wondered, however, whether it was possible to introduce the idea of the source of an international obligation into the draft, without defining it in the article on the use of terms. It was not necessary to define the concept of an obligation, which was a concept not only of international law, but also of law in general. The notion of a source, on the other hand, which appeared in article 16, did need to be defined. But the Special Rapporteur himself had said that, if the Commission went into the notion of a source of international law, it would encounter great difficulties; for the sources of international law were multifarious, and included customary law, treaty law, United Nations resolutions, etc. The term "régime of responsibility", which appeared in article 16, paragraph 2, should also be defined, for Governments might be uncertain of its meaning. That definition, too, was likely to raise problems. Hence, while agreeing in theory with the ideas put forward by the Special Rapporteur, he was concerned about the difficulties the new draft articles might raise in practice.

17. Mr. CALLE Y CALLE said that, in response to the request the Special Rapporteur had made to the members of the Commission in his introductory statement, he would make a few brief comments on the preliminary considerations relating to chapter III of the draft. Those considerations were prompted by the essential need for coherence in the formulation of the draft articles as a whole. In adopting article 3, the Commission had accepted the two elements of the internationally wrongful act set out in subparagraphs (a) and (b) of that article. And having incorporated those two elements in article 3, the Commission was now called upon to define conduct which constituted a breach of an international obligation of the State. It was therefore logical to include in the draft a rule of law governing the characterization of such conduct and specifying the conditions under which it generated international responsibility of the State.

18. The rule proposed by the Special Rapporteur in draft article 16 was that the international responsibility of a State was engaged whenever there was a breach, by that State, of an international obligation incumbent upon it. There was no reason to mention, in that context, the various sources of the international obligations of States; it was sufficient to indicate clearly that, in all cases and whatever the ends in view, a breach by a State of an international obligation incumbent upon it was a source of responsibility.

19. There would undoubtedly be other provisions, later in the draft, dealing with the different types of breach of international obligations; it might perhaps be advisable for those provisions to distinguish between the different kinds of obligation. That point, however, should be taken

up only in relation to the provisions in question. At the present stage, it was essential not to go beyond the limits set by the terms of article 3, as adopted by the Commission. The Commission would thus be taking due heed of the warning given by the Special Rapporteur in his introductory statement concerning the limits of the subject under consideration.

The meeting rose at 12.30 p.m.

1362nd MEETING

Wednesday, 5 May 1976 at 10.20 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

CHAPTER III. PRELIMINARY CONSIDERATIONS (*continued*)

1. Mr. YASSEEN congratulated the Special Rapporteur on his outstanding introductory statement. Like the Special Rapporteur, he was convinced that the Commission should not yield to the temptation of formulating substantive rules by defining the obligations whose breach could engage the responsibility of States. That was an approach which had already been decided. The Commission had chosen the expression "breach of an international obligation" in preference to breach of an "international rule" or "international norm". The choice was justified, for the expression was sanctioned by practice and made it clearer that the reference was to subjective legal situations. On the other hand, he did not agree with the Special Rapporteur that that choice was justifiable because an international obligation could derive, not only from an international rule, but also from a legal instrument, a decision of an international organization, a judgment of a court or an arbitral award. The fact that an obligation might have been created by a decision of an international organization, a judgment or an arbitral award did not mean that the decision, judgment or award was not itself based on a rule of international law. Consequently, the breach of an obligation was, in the last analysis, a breach of the rule from which the decision or judgment derived its binding force. Hence, it was not the decision or judgment as such that was the source of the obligation, but the rule of international law which gave it its mandatory character.

2. Before concluding that there had been a breach of an international obligation, it had to be determined whether the obligation had been in force at the time the

act had been committed. He did not think it possible to accept the retroactivity of international obligations as a general rule and to hold that a State had breached an international obligation which had not existed, as such, at the time of its action.

3. A further question was whether the source of an international obligation could affect responsibility. For his part, he believed that, once there was an obligation under international law, the question of its source should not be considered, for whatever that source might be (customary law, treaty law, general principles of law, etc.), the obligation none the less existed. In his view, the source had no effect on the importance of the obligation. It was, after all, impossible to establish a hierarchy of the rules of international law based on their sources: a treaty rule, for example, was not necessarily more important than a customary rule, which might contain elements of *jus cogens*.

4. While the importance of an obligation did not depend on its source, it could, on the other hand, depend on its content. Thus, if an obligation was essential for the international community, it might be thought that its breach would give rise to a heavier responsibility than the breach of an obligation which was not of capital importance for the international legal order. The degree of importance of an international obligation might justify a different régime or a different form of responsibility. International responsibility could therefore vary according to the content of the obligation and probably also according to the seriousness of the breach.

5. With regard to the method of work to be adopted, he thought that, for the formulation of an integrated system of rules on international responsibility, the Commission could not rely solely on the jurisprudence and practice of States, for their solutions had been devised as the chances of international life required and left many points unsettled. It would therefore be necessary to fill the gaps by formulating the rules necessary for a coherent system.

6. Moreover, the Commission must not forget that the international community was in the process of change: it must take account of the evolution of international life. It should take advantage of the contributions of jurisprudence and State practice, but should not hesitate to modify the present rules or to formulate new rules if the reality of contemporary international life so required.

7. Mr. BEDJAOUI congratulated the Special Rapporteur on having identified, in a statement of exceptional clarity and precision, the real problems posed by the adaptation of international law to the new needs of the international community. He reminded the Commission that in 1969, when it had taken up the topic of international responsibility, it had decided, at the request of the Special Rapporteur, to confine the study to State responsibility for internationally wrongful acts.¹ A clear distinction must be made between the task of ascertaining the principles governing such responsibility of States and

¹ *Yearbook... 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 80.

that of defining the rules imposing on States obligations whose violation could be a source of responsibility. The Special Rapporteur had followed with complete rigour and constancy the course set by the Commission from the beginning of his work. He had accordingly warned the Commission, in regard to chapter III, on the breach of an international obligation, against the temptation to venture on a definition of the rules imposing international obligations on States. For the problem of responsibility presupposed the solution of the problem of determining the rules which were the source of the international obligations of States. Hence, by eliminating that initial difficulty, the Special Rapporteur had correctly delimited the subject.

8. To determine whether there had been a breach of an international obligation generating the responsibility of the State it was not necessary to seek the origin of the obligation—that was to say, to know whether the obligation had its source in an agreement concluded by the State, in custom, or in the general principles of law. In that connexion, he was also grateful to the Special Rapporteur for having saved the Commission from digressing into a search for the very sources of international law, which might have involved it in vain controversies. The fact was that an obligation did not change, either in nature or in degree according to whether its source was a custom or a convention: for the purposes of responsibility, as for all other purposes, an obligation retained the same binding force and its breach had the same wrongful character. Hence, the responsibility to which the breach gave rise could not depend on the customary or conventional nature of the obligation breached. Chapter III of the draft articles was thus concerned with the problem of establishing the existence of a wrongful act, irrespective of the particular sector of public international law to which the rule broken by the wrongful act belonged, and of the source or origin of the obligation which had been breached.

9. None the less, while there was no logical reason for the Commission to concern itself with either the nature of the obligation—which could derive from the substantive rules of any sector of international law—or its source—which could, for example, be customary or conventional—the Commission could not remain indifferent to the objective content of the obligation. Of course, an obligation was always an obligation and a breach of it was always a breach, but, as in internal criminal law, some violations were more serious than others. Just as larceny was not murder, there were, at the present stage of development of the universal conscience, some derelictions of duty by States which were felt to be more serious than others. In the case of a fundamental obligation, the breach of which was, *ipso facto*, particularly serious, it was therefore necessary to establish the responsibility of the delinquent State not only towards the injured State, but also towards all the States of the international community. In the case of the third-world or non-aligned countries, for example, threats made against the independence, territorial integrity or régime of one of those countries were felt by all the others. Still less could the community of States overlook the breach of an international obligation, the content of which was

recognized as fundamental by the whole international community and expressed the contemporary ethic of nations. In such a case, it was not only the question of reparation that arose, but also the question of sanctions. Rules of *jus cogens* were involved, which the International Law Commission and, after it, the United Nations Conference on the Law of Treaties had had the courage to take up in the context of the law of treaties. He hoped that the Special Rapporteur and the Commission would continue courageously to explore that field in the context of State responsibility. For the Commission should not forget that the purpose of the draft articles under consideration was to promote the observance of the international obligations incumbent on States, especially those relating to the maintenance of international peace and security, the sovereignty and independence of States, and the protection of human rights. The Commission should therefore attach capital importance to the process of constant adaptation of international law to the contemporary world, for law was not an end in itself, but should fulfil a modern social function.

10. The new States had brought to international law new centres of interest and new aspirations; and all States, whether they were new or not, aspired to an ever more demanding ethic of international relations. That being so, the progressive development of international law could be seen to be a necessity; for international law must evolve in step with the world's new needs if it was to fulfil its social function, gain acceptance by all countries, and contribute to the maintenance of international peace and security.

11. At its twenty-second session, the Commission had expressed its intention of taking the needs of the international community into account in its long-term programme of work.² It now had an opportunity of doing so in chapter III of the draft articles on State responsibility, which lent itself more readily to the progressive development of international law than chapter II, dealing with the attribution of a wrongful act to the State. In 1974, the General Assembly had already asked the Commission to take due account of the seriousness of the internationally wrongful act, in view of the importance which the international community attached to the fulfilment of certain international obligations.³ If it confined itself to stating that a breach of an international obligation was a wrongful act which engaged the responsibility of the State committing it, the Commission would not be meeting the expectations of the international community. It should go further, and distinguish clearly between the different kinds of breach of international obligations. That distinction was necessary in order to determine the legal consequences which should attach to the wrongful act, for the breach of an international obligation could entail not only reparation, but also sanctions. That should be the case where obligations affected the maintenance of international peace and security or were intended to

² See *Yearbook... 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

³ *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, para. 109.

prevent the use of armed force in violation of the Charter of the United Nations. The occupation of the territory of a State by armed force, genocide and acts infringing fundamental human rights, racial discrimination and *apartheid*, and acts committed against dependant peoples, particularly turning their territories into theatres of war or nuclear testing grounds and plundering their natural resources, were, in his opinion, acts which engaged the responsibility of the delinquent State more gravely than others, not only towards the injured State but also towards the international community. It was therefore necessary to determine the degree of seriousness of an internationally wrongful act by comparison with other such acts.

12. In the context of the topic of State responsibility, as it had been delimited by the Special Rapporteur and the Commission, it was not necessary to identify all the different obligations incumbent on a State; it was sufficient to show that some of them were more important than others for the international community. Consequently, with regard to chapter III of the draft articles, he was in favour of the progressive development of international law and the inclusion of an appropriate reference to *jus cogens*.

13. Finally, in view of the new needs of the international community, the Commission should not lose sight of the fact that, after its study on responsibility for internationally wrongful acts, it was expected to make a study of responsibility for activities which lay half-way between the licit and the illicit—activities which were expanding considerably at the present time and exposed mankind to serious risks. At the Caracas and New York Sessions of the Third United Nations Conference on the Law of the Sea, speakers had raised the problem of liability for damage resulting from activities which were not yet prohibited by international law.

14. Mr. HAMBRO said that the Special Rapporteur had once again succeeded in producing, on so difficult a subject as State responsibility, a learned and comprehensive report which was remarkable for its clarity and simplicity—a simplicity which showed that the writer had mastered the difficulties involved.

15. With regard to the preliminary questions put to the Commission by the Special Rapporteur, all the members approved of his inductive method of dealing with the topic. He commended the Special Rapporteur for his remarkable analysis of relevant cases and of the opinions of learned writers, and for his digest of the League of Nations efforts to codify State responsibility. He wished to express his unqualified support for the manner in which the Special Rapporteur had struck a balance between general and special international law. Obviously, the draft under consideration could not deal with all concrete cases of responsibility. He also approved of the Special Rapporteur's approach to the question of the sources of international obligations. Care should be taken to avoid entering into that question in the draft articles, though the Special Rapporteur has been right to comment on it in his report. He also fully concurred with the Special Rapporteur's warning in regard to intertemporal international law (A/CN.4/291 and Add.1-2,

para. 8)—a very difficult and complicated question which had been examined two years previously by the Institute of International Law on the basis of a report by Professor Sørensen.⁴ Lastly, he fully recognized the need to maintain a proper balance in the draft between progressive development and codification of international law. It was the Commission's duty to look forward and to formulate the rules of international law in the light of the needs of an expanding international society. A draft which failed to meet the needs of the contemporary international community would not be worth preparing.

16. That being said, he wished to dwell on a particular point on which he held strong views. The Special Rapporteur's fifth report contained, in the preliminary considerations on chapter III, the following statement, with which all the members of the Commission would agree:

The Commission also pointed out the correlation—which admits of no exception under international law—between the breach of a legal obligation by the State perpetrating the internationally wrongful act and the infringement of the international subjective right of one or more other States, caused by that breach (*ibid.*, para. 3).

That statement, however, did not mean that the Commission could or should exclude the possibility of international responsibility of a State arising from a multilateral treaty of a general character. The point was perhaps obvious but it should be made clear. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide conferred on all the States parties to it a subjective right to see that it was observed. For that reason, he was entirely opposed to the negative and restrictive judgment of the International Court of Justice in the second *South West Africa* case.⁵

17. Lastly, as to the question of the length of the Commission's report, to which reference had been made at the 1360th meeting he thought that was a matter of balance and judgment. There was no need for the Commission to submit a long report, provided that the Special Rapporteurs' reports were full and detailed. The Commission's report to the General Assembly was a working tool for diplomats and should be sufficiently concise to be used by Foreign Office officials. Scholars who wished to study a topic more deeply could always go back to the reports of the Special Rapporteur concerned, which in the present case constituted a monument to the science of international law.

18. Mr. MARTÍNEZ MORENO said that the Special Rapporteur, faithful to the inductive method he had adopted, had analysed with remarkable legal logic the objective element of the internationally wrongful act. In doing so, he had rightly warned the Commission not to go beyond the boundaries of international responsibility proper.

⁴ "Le problème dit du droit intertemporal dans l'ordre international", provisional and final report by Mr. Max Sørensen, in *Annuaire de l'Institut de droit international*, 1973 (Basel), vol. 55, pp. 1-114.

⁵ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

19. The Special Rapporteur had examined the question whether any distinction could be made between breaches of international obligations according to the source of the obligation breached. On that point, he had arrived at the conclusion, expressed in article 16, that there were not several types of international responsibility depending on the source of the obligation concerned: the breach of any international obligation constituted an internationally wrongful act and the international responsibility incurred was the same “regardless of the source of the international obligation breached”. He (Mr. Martínez Moreno) fully agreed with that conclusion, but wished to make some comments to assist the Special Rapporteur. The question of the source of the international obligation breached had been explored when the League of Nations had endeavoured to codify the law of international responsibility, and the Conference for the Codification of International Law (The Hague, 1930) had reached the conclusion that there were three sources of international obligations, namely treaties, custom and the general principles of law (A/CN.4/291 and Add.1-2, para. 24). He himself found that list unduly restrictive, since there could be other sources of international obligations. At the same time, he found the Special Rapporteur’s formula “regardless of the source . . .” much too wide. In that connexion, he drew attention to the formula used by the International Court of Justice in the case concerning the *Barcelona Traction, Light and Power Company Limited*: “the breach of an international obligation arising out of a treaty or a general rule of law”.⁶ The Special Rapporteur had indicated in his report, however, that the term “general rule of law” as used by the International Court of Justice, referred first and foremost to international customary rules, but could also cover general rules based on general principles of law or on analogy (A/CN.4/291 and Add. 1-2, para. 16, foot-note 22). He (Mr. Martínez Moreno) would be reluctant to accept, in the context of international responsibility, any rule based on analogy. In internal criminal law, it was not permissible to consider an act as punishable by analogy with an existing offence. Similarly, he would not favour considering an act of a State as internationally wrongful, and hence as engaging that State’s international responsibility, purely on grounds of analogy.

20. On the other hand, he would agree that a State would be committing an internationally wrongful act if it violated an obligation deriving from an international judgment or award that was no longer open to appeal. There might also be cases in which failure to comply with the decision of an international organization would constitute an internationally wrongful act, but it was necessary to be cautious on that point. Decisions taken by international organizations were based not only on concepts of justice and fairness, but also on political factors; a decision that was manifestly unjust could, in some cases, attract a majority of votes.

21. At the previous meeting, the Special Rapporteur had referred to the sources of international law mentioned in article 38, paragraph 1 of the Statute of the

International Court of Justice. He (Mr. Martínez Moreno) had reservations regarding the “subsidiary means for the determination of rules of law” mentioned in paragraph 1 d of the Article, which included not only “judicial decisions”, but also “the teachings of the most highly qualified publicists of the various nations”. Judicial precedents were, of course, very useful for the purpose of reaching a decision on a specific case, but he did not think they could be considered as a source of international law for purposes of the present discussion on chapter III of the report. As for the opinions of writers, they were not in themselves sufficient to establish the existence of an international obligation incumbent on a State, the breach of which constituted an internationally wrongful act.

22. In conclusion, he stressed that his comments were not intended as a criticism of the position taken by the Special Rapporteur on the insufficiency of the three sources adopted by the 1930 Codification Conference and on the need for recourse to a more general formula. He had merely wished to express his doubts on a number of points and thereby assist the Special Rapporteur in drafting the commentaries.

23. Mr. KEARNEY said that, in general, the preliminary considerations concerning chapter III of the Special Rapporteur’s fifth report met with his approval. However, with regard to the correlation between the breach of a legal obligation by the State perpetrating an internationally wrongful act and the infringement of the international subjective right of one or more other States caused by that breach (A/CN.4/291 and Add. 1-2, para. 3), he fully agreed with Mr. Hambro that there were international obligations whose breach could infringe the rights of the whole community of nations. The Convention on the Prevention and Punishment of the Crime of Genocide afforded a most appropriate illustration of the existence of a right of all States to ensure that certain obligations were fulfilled.

24. The Commission was none the less moving on to ground which, through not perhaps *terra incognita*, was not at all easy to explore. In some areas, it was extraordinarily difficult to determine what actually were the particular rights conferred on the community of nations. The Commission had, as yet, no indication of the consequences of formulating rules based on the theory of invasion of the rights of the international community. For example, if a State committed an “international crime”, were the leaders of that State international criminals and, if so, what action was the international community to take with regard to them? The Commission might have to investigate all the aspects of that question. If it was to move into an uncharted area, the question arose what directions the Commission proposed to take and whether there were limits on the points it wished to examine. The Commission needed greater knowledge and understanding of what it intended and hoped to accomplish in that area.

25. Mr. SETTE CÂMARA said that the Commission was once again indebted to the Special Rapporteur for his masterly work. The draft articles and the learned commentaries thereto displayed an impeccable, logical

⁶ *I.C.J. Reports 1970*, p. 46.

consistency and harmony which placed them well above any earlier fragmentary and perfunctory attempt to codify such a rich and complex field as State responsibility.

26. He had no difficulties with the general guidelines indicated by the Special Rapporteur. The Commission should proceed by the inductive method and should carefully avoid being diverted into any matters that constituted something more or something less than State responsibility; in particular, it should not engage in a study of the primary substantive rules of international law or try to define the sources of international obligations. Similarly, it should be very cautious in dealing with the question whether or not an international obligation could be considered to be retroactive. In his view, the Commission could not do better than follow the guidance given by the Special Rapporteur.

The meeting rose at 12.30 p.m.

1363rd MEETING

Thursday, 6 May 1976 at 10.25 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*)

(A/C.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III. PRELIMINARY CONSIDERATIONS (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission, said that he wished to join in the praise bestowed on the Special Rapporteur's fifth report on State responsibility (A/CN.4/291 and Add.1-2) and that he approved the approach he suggested in his brilliant introduction.

2. In stating in paragraph 5 of the report that "an obligation does not necessarily and in all cases flow from a rule; it may very well have been created by a legal instrument or by a decision of a judicial or arbitral tribunal", the Special Rapporteur presumably had in mind Article 38, paragraph 1 d, of the Statute of the International Court of Justice, which stated that the Court would apply "judicial decisions . . . as subsidiary means for the determination of rules of law". It would be remembered, however, that that provision represented a compromise formula between common-law countries, which considered such decisions as sources of law that

constituted the law, and civil-law countries, which considered them as interpretations of the law and not as rules of law. Again, he wondered whether the English term "legal instrument" was the exact equivalent of "*acte juridique*", the term employed by the Special Rapporteur, but that point could be discussed at a later stage.

3. With regard to the question of the subjective element, raised at an earlier meeting, he fully agreed with Mr. Hambro's view of the judgment of the International Court of Justice in the *South West Africa* cases,¹ when the Court had ruled that Ethiopia and Liberia did not have any legal right or interest in the subject-matter of their claims.² As former Members of the League of Nations, however, they had, in his opinion, an over-all interest in the application of the strict obligations undertaken by the international community, represented by the League of Nations, towards the inhabitants of a mandated territory.

4. On the question of an "international crime" and the machinery to be applied, it was true, as Mr. Kearney had pointed out, that the Commission should not plunge into matters without knowledge of the full implications. However, some precedents did exist—for example, the draft Code of Offences against the Peace and Security of Mankind. The Commission could establish a concept and consider it in principle, leaving the problem of appropriate machinery to be determined by other organs. That same type of problem had been encountered in *jus cogens*; although the relevant modalities had not been fully defined the Commission had not shied from committing itself to the notion of *jus cogens*.

5. More generally, he considered that the notion of the breach of an international obligation should include recent developments in international law relating to the maintenance of peace, the self-determination of peoples and human rights.

6. Lastly, the Commission should not be inhibited by adverse criticism of the length of its reports. Indeed, the final report to the General Assembly should be as comprehensive as possible and contain a wealth of commentary, which would be extremely useful to the representatives of States, since they would then be able to ascertain whether or not their ideas had been discussed by the Commission.

7. Mr. USTOR said that the Commission could not but admire the remarkable patience and the logical approach of the Special Rapporteur. Paragraph 1 of his fifth report stated: "the rules relating to the international responsibility of the State are, by their very nature, complementary to other substantive rules of international law; they are complementary to those which give rise to the legal obligations which States may be led to breach". It was entirely true that the rules pertaining to State responsibility were rules which presupposed the existence of other substantive rules not only primary,

¹ See 1362nd meeting, para. 16.

² *South West Africa* case, second phase, *I.C.J. Reports 1966*, p. 51.

but also other rules. The Commission must take care not to encroach on all those other rules in constructing the text on State responsibility.

8. In paragraph 3 of his report, the Special Rapporteur noted that “the correlation—which admits of no exception under international law—between the breach of a legal obligation by the State perpetrating the internationally wrongful act and the infringement of the international subjective right of one or more other States caused by that breach” had already been emphasized by the Commission. It was obvious that any breach of a legal obligation would infringe an international subjective right of one or more other States. But on the other hand, the international subjective rights or interests of other States might be infringed as a result, not of the breach of a legal obligation, but of activities that were lawful. Consequently, unless the Commission admitted the maxim: *sic utere tuo ut alienum non laedas* as a general rule of international law, the correlation was not complete.

9. In the matter of the source of a legal obligation and in particular of decisions of judicial or arbitral tribunals, he agreed with those speakers who considered that non-observance of the decision of an arbitral tribunal also constituted the breach of a rule—a rule that the State itself had adopted in submitting itself to the judgment of the arbitral tribunal. Therefore, it was not an exception to the general rule, as might be thought from a reading of paragraph 5 of the report.

10. In conclusion, although not in any way opposed to the text of article 16, he none the less considered that it was something of an embellishment, in view of the terms of article 3. If the general rule *lege non distinguente nec nobis est distinguere* was applied, it was sufficient to say that under international law, any breach of a legal obligation constituted an internationally wrongful act.

11. Mr. TAMMES said that, in general, he agreed with the clear positions and the programme set out in the preliminary considerations of the Special Rapporteur’s masterly report. The Commission must not yield to the temptation to deal with primary rules, nor could it elaborate a general theory of the sources of international law. On the other hand, it could attempt to distinguish between types of breaches of international obligations, in terms of the more or less fundamental nature of the laws breached or the seriousness of the particular breach. The dichotomy between the source of the law and the content of the law was not perhaps as strict as it might seem, for in drawing distinctions between breaches of international law according to the content of the law, it might well emerge that there was often a close relationship between the nature of the law and the nature of its source. Indeed, some of the examples mentioned in the course of the present debate, particularly those concerning fundamental human rights, demonstrated the existence of such a relationship. If humanitarian international law called for special sanctions, it was because of its moral quality, in other words, its source or “status” above the law, as well as its content. For that reason, in the case of the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,

the International Court of Justice had adopted a very liberal position on the necessity for consent when it had stated that the Convention had been “adopted for a purely humanitarian and civilizing purpose”.³

12. In his view, the best course at the present stage would be to refrain from adopting positions that were too rigid or going too far beyond the statement already made in article 3, in which the objective element of the internationally wrongful act was defined as a breach of an international obligation and no mention was made of the source of the obligation.

13. Mr. ROSSIDES said that the Special Rapporteur was a great asset to the Commission and deserved warm praise for the care with which, in elaborating principles, he had taken full account of the requirements of the modern world, while strictly adhering to a necessary continuity of codification from past developments in international law.

14. He agreed with the view that what mattered was not the source but the content of an international obligation, particularly in such areas as the maintenance of international peace and security, human rights, racial discrimination or genocide.

15. Distinguishing between the means of development of international law and internal law respectively, he said that internal law evolved through judicial decisions in common law, which significantly adapted it to the needs of the time, but for international law there was no such possibility. International law had to be progressively developed mainly through its effective codification by the Commission in a manner which adjusted it to meet the requirements of a changing world.

16. State responsibility was one of the topics placed on the first list of those selected by the International Law Commission for codification in 1949,⁴ and later approved by the General Assembly.

17. State responsibility was now a different concept from what it had always been in the days before the United Nations, when war was accepted as a legitimate exercise of sovereignty, and peace as an interlude between wars which might legitimately be used to prepare for the next war. The illegitimacy and irrationality of that outdated approach had proved as yet no hindrance to its continuance, impelled by some residual momentum of the past, even though the obligations of the Charter of the United Nations and the deterrent effect of the nuclear threat had practically abolished the concept of war as an instrument of policy.

18. The security of nations now hung precariously from a supposed balance of power or terror, a negative conception which sustained or even intensified the armaments race, now extended by local wars to smaller and developing countries in a downward course to anarchy and chaos. All efforts towards peace and development of a new economic order were thus frustrated. There could be no halt to the armaments race without international security,

³ *I.C.J. Reports, 1951*, p. 23.

⁴ See *Yearbook... 1949*, p. 281, report to the General Assembly, para. 16.

and there could be no international security without a basis of a legal order.

19. That was where the Commission's main responsibility lay. It must proceed expeditiously with the task of progressive development and the codification of international law on matters pertaining to international peace and security, as it was already doing most effectively for the topic now being considered, which also merited high priority. The Commission would thus contribute significantly to international legal order in a world where such order had become a vital necessity. It had been said that the Commission might require more knowledge and information before venturing further in the field of State responsibility. It would seem to him that rather than call for still more information—it had been fully and ably supplied with that already by the Special Rapporteur—the Commission might put its wisdom to better use by proceeding rapidly and effectively to the necessary codification.

20. Mr. ŠAHOVIĆ said that in his preliminary considerations the Special Rapporteur had given two warnings and asked a number of questions concerning his approach to the problem and the procedure to be followed. Most of those questions had already received the positive replies warranted by the Special Rapporteur's thorough research.

21. The Special Rapporteur's two warnings referred, one, to the relationships between primary and secondary rules, and the other to the relationships between international and internal law. In distinguishing those two categories of relationship, the Special Rapporteur had established the general framework for chapter III of the draft. Like the Special Rapporteur, he felt that the Commission should avoid elaborating any general theory of the sources of international law. None the less, the attitude the Commission eventually adopted towards the problem of the sources of international law and the relations between primary and secondary rules would not be without importance. In particular, the way in which it treated secondary rules would necessarily affect the development of primary rules. As regards the Special Rapporteur's second warning, he shared Mr. Kearney's view that it was important to ensure that the concept of breach of an international obligation to be developed by the Commission fitted readily into the body of general international law. In that respect, the Commission should take account of the changes which international law had undergone since the Second World War and of the existing relationships between international and internal law.

22. He would comment on the Special Rapporteur's approach which related to the importance of the sources of international law and the content of international obligations, when the Commission came to consider chapter III article by article.

23. With regard to methods of work, he said that up to the present the inductive method had shown itself to be the only one possible. However, as the Special Rapporteur had said, the Commission would henceforth have to pay more attention to the progressive development of international law. It would also be necessary to take the views of Governments more closely into consideration. He welcomed the fact that, at the thirtieth

session of the General Assembly, representatives of States in the Sixth Committee had expressed particularly relevant opinions which could be of benefit to the Commission. The Commission had been right in giving a detailed description of its programme of work in the report on its twenty-seventh session,⁵ particularly with regard to the study of the subject of State responsibility.

24. As regards the length of the Commission's reports, he felt that a report which numbered less than 150 pages, as had the last one, was not too long and its contents could be mastered quite quickly. It should not be forgotten that, in addition to its legal duties, the Commission had an educational function, and from that point of view, its reports could never be too voluminous.

25. Mr. QUENTIN-BAXTER said that the discussion had clearly shown that the topic of State responsibility was not only at the heart of international law and of the activities of the Commission, but also a touchstone of its success. It was a subject of a fundamental and philosophical character, in which the paths to be followed were not clearly marked out, and the Commission had to rely on the Special Rapporteur's wise guidance, his learning and his great care for matters of detail; all those qualities were much in evidence in the section of his fifth report dealing with preliminary considerations.

26. He entirely agreed with those speakers who had pointed out that the stress should be placed on the content of international obligations rather than on their sources. But Mr. Tammes had appropriately observed that the contrast between source and content was not absolute. The Commission, was, however, certainly concerned in the present discussion with the nature and character of obligations. In that connexion, the Special Rapporteur had rightly drawn attention to the problem of the borders of the subject under discussion. When dealing with that subject, the Commission had to reflect on the growth and dynamism of the law rather than on the problem of retroactivity. It would be recalled that, during the discussion of the topic of succession of States in respect of treaties, that was to say, the succession to treaty obligations, the Commission had considered the relevance of the inter-temporal rule, recognizing that what was now the law at present might not have been the law before. That particular point was a vital one with regard to the formulation of secondary rules such as those now under consideration, which were intended to serve as a vehicle for all kinds of sets of primary rules. The Commission must accordingly heed the Special Rapporteur's comments on the boundaries of the subject (A/CN.4/291 and Add.1-2, para.7). The fundamental problem was that of identifying those boundaries so as not to fall into the trap of extending the Commission's research into innumerable primary rules, or into the opposite error of drawing up rules lacking in content and impact.

27. One method of avoiding both those errors was to make explicit reference in the draft to established rules and to recognize that there was a hierarchy of obligations

⁵ *Yearbook... 1975*, vol. II, pp. 184-186, document A/10010/Rev.1, paras. 139-147.

in international law. In the first place, there were obligations that bound only States which had an interest. In the second place, there were obligations which were owed to the whole international community, but which could be changed by agreement between two individual States for purposes of the relations between them. Above those two categories, there were the rules of *jus cogens* which could not be changed or derogated from by agreement among States.

28. Recognition of that hierarchy of obligations was one means of bringing the present draft into harmony with prevailing trends of the law. Another means of doing so was the approach adopted by the Commission and referred to by the Special Rapporteur (*ibid.*, para. 5) of preferring, as a matter of terminology, to speak of the breach of an "obligation" rather than of a "rule" or "norm". He had been impressed by Mr. Yasseen's observation on that point (1362nd meeting) that the Commission must not accept the possibility of obligations which were not founded on rules or norms of international law.

29. The use of the two terms "rules" and "norms" was, however, a reminder of the growth of international law, of the inchoate nature of some parts of it and of the role played in its formation by international organizations. Appropriately, the activities of United Nations bodies provided many an illustration of the growth and multiformity of contemporary international law. In the elaboration of secondary rules, the Commission had to reflect on that point, even if only implicitly. More and more law-making or law-declaring agencies of the United Nations were having occasion to refer to the principles of the Charter and to other guiding principles which illuminated whole areas of the law. Reference to the concept of obligation, in correlation with that of a rule or norm, could cover those wider considerations.

30. The useful reference by the Special Rapporteur to the abusive exercise, of a right (*ibid.*, para. 4), or to what might also be called "liability for risk", was a reminder that it was not the Commission's function to deal with liability for risk under the present topic. If, however, the abusive exercise of a right could be found to be wrongful, the consequences would fall within the scope of the set of rules on State responsibility. There were some noteworthy passages referring to liability for risk in the chapters on State responsibility of the Commission's reports on its twenty-sixth⁶ and twenty-seventh⁷ sessions. Those passages stressed that the question of liability for possible injurious consequences arising out of the performance of lawful acts fell outside the scope of the set of rules which the Commission was drafting on the topic of State responsibility.

31. For his part, he believed that the concept of liability for risk, that was to say for damage arising from lawful activities which because of their nature gave rise to certain risks, would continue to interest the international community. It would continue to be discussed in United

Nations bodies because such a discussion was consistent with the spirit of the growth of international law and the development of new forms of obligation. He also believed that, at some appropriate point in the draft on State responsibility, a provision would have to be included stating that, if the abusive exercise of a right entailed an international wrong, then the question was fully within the rules of State responsibility, but that if it entailed some other form of obligation, it fell outside those rules.

32. In conclusion, he congratulated the Special Rapporteur on his admirable report and looked forward to the discussion of the specific articles in chapter III of the draft.

33. Mr. KEARNEY said that Mr. El-Erian, had suggested that the Commission had adopted the doctrine of *jus cogens* in the law of treaties, even though all the necessary modalities of that doctrine had not been worked out. The Commission's reports and the records of its proceedings on the topic of the law of treaties, however, made it abundantly clear that there had been a lengthy discussion with regard to what constituted principles of *jus cogens*. At the time of the adoption by the Commission in 1966 of its draft articles on the law of treaties, its total inability to agree on any principles as having the character of *jus cogens* had resulted in none of them being put forward in the chapter of the Commission's 1966 report containing those draft articles.

34. At the United Nations Conference on the Law of Treaties there had been a considerable debate on the subject, spreading over both sessions of that Conference in 1968 and 1969. In fact, the dispute between States as to what constituted *jus cogens* had been a major difficulty experienced by that Conference. An outcome of that discussion had been the adoption by the Conference of the provision which became article 66 (Procedures for judicial settlement, arbitration and conciliation) of the Vienna Convention on the Law of Treaties.⁸ Sub-paragraph (a) of that article empowered any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64—the articles on *jus cogens*—to submit the dispute to the International Court of Justice for a decision. That possibility for recourse to the Court was open if no solution to the dispute had been reached within a period of 12 months.

35. It was the need of developing such modalities which he had in mind when he had spoken on the need to examine what was to be the scope and effect of international crimes. If, in the present draft articles on State responsibility, provision was going to be made for the possibility of a State being accused of committing an international crime, and the consequent likelihood of its leaders being charged accordingly, the Commission could not avoid the problems of definition and procedure which were involved.

36. Throughout the discussions—both in the Commission and at the two sessions of the United Nations

⁶ *Yearbook... 1974*, vol. II (Part One), p. 273, document A/9610/Rev.1, para. 109.

⁷ See *Yearbook... 1975*, p. 54, document A/10010/Rev.1, para. 33

⁸ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

Conference on the Law of Treaties—on the *jus cogens* principle, he had never been opposed to that principle as such; he had merely been concerned with the problem of how to determine the rules governing *jus cogens*. It would be recalled that the 1968 and 1969 Vienna Conference had very nearly failed precisely on that issue, and that experience should not be forgotten if the Commission was going to embark on a consideration of responsibility for international crimes, which was just as difficult a question as that of *jus cogens*.

37. In his statement at the 1362nd meeting, he had had no intention of opposing the concept of an international crime. In fact, the Commission would recall that, when, in 1972, it had considered its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, he had himself suggested that the killing of a diplomat should be described as an "international crime",⁹ but the Commission had not included his proposed definition in the draft articles finally adopted. In the present discussion, he was once again concerned with the problem of the determination of what constituted an international crime; he had no objection to the concept itself.

38. The CHAIRMAN, speaking as a member of the Commission, said that, in his statement at the beginning of the meeting, he had mentioned the question of *jus cogens* simply as an illustration of the manner in which the Commission could accept a concept as a norm of international law without having to go into all its implications and into all its modalities. The Commission could well do so if it was satisfied that the concept in question was well established in customary international law or that the time had come to pave the way for it.

39. He did not believe that the concept of an international crime involved anything like the difficulties which had arisen with regard to the doctrine of *jus cogens*. As early as 1947, the General Assembly had adopted resolution 177 (II) whereby it had entrusted the International Law Commission with the task of formulating "the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal" and of preparing "a draft code of offences against the peace and security of mankind". The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, which had been endorsed in 1946, by resolution 95 (I) of the General Assembly, had been codified by the Commission in 1950.¹⁰ The concept of an international crime was referred to in that formulation, Principle VI of which gave a list of "crimes under international law". The same was true of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954 by the International Law Commission; article 1 of that draft stated that those offences "as defined in this Code, are crimes under international law".¹¹ Lastly, on the subject of procedural machinery for the determination of what

constituted international crimes, a suggestion might perhaps be made by the Special Rapporteur. Should any such suggestion be put forward, he himself would give it sympathetic consideration.

40. Mr. AGO said that he wished first of all to reassure the members of the Commission, and particularly Mr. Hambro, concerning the interpretation to be placed on the second sentence of paragraph 3 of his report (A/CN.4/291 and Add. 1-2). That sentence, which merely reproduced a view expressed by the Commission itself in the report on its twenty-fifth session,¹² meant that, while there might exist in internal law, and particularly in administrative law, an obligation on a subject to which there was no corresponding subjective right of another subject, in international law there was always a correlation between the obligation of one subject and a subjective right of others, whether it was the subjective right of one specific subject, of a number of subjects or even of all subjects. On the other hand, the expression did not mean that the relationship of responsibility was equivalent always and exclusively to a relationship between the State committing the offence and the State directly injured. What it meant was that there were certain obligations which bound the State, not to a particular State, but to all the members of the international community. That idea, which appeared in his commentary to draft article 18, had already been expressed by the International Court of Justice in the preamble to its judgment in the *Barcelona Traction* case.¹³

41. With regard to the source of the international obligation, which Mr. Ushakov felt must be defined, it would be for the Drafting Committee to find the best form of words for that concept, if the Commission decided to use it. Mr. Tammes had been right in saying that the word "source" could be understood in different ways. He (Mr. Ago) himself had used it in its strict sense to denote any process which gave rise to a rule of law, and consequently to an obligation on a State. He had not meant to refer to material sources, such as moral principles. He was concerned with the formal act that an obligation had been created and not with the influence which might be exercised by any other factor on the content of that obligation.

42. It had not been his intention, in referring to arbitral awards and international judicial decisions, which he had cited as examples of possible sources of international obligations, to suggest that, when an international judge or arbitrator decided a case simply by applying existing customary or treaty or other rules, his decision was a source of law. It was clear that in such a case the judge did no more than interpret and apply existing law. But also, far more frequently than in internal law, cases occurred in international law when the same principle was applied as was set out in article 4 of the Swiss Civil Code whereby, if the legal order provided the judge with no rule to be applied, it was the judge himself who

⁹ See *Yearbook... 1972*, vol. II, p. 201, document A/CN.4/L.182, article 1.

¹⁰ See *Yearbook... 1950*, vol. II, p. 374, document A/1316, part III.

¹¹ *Yearbook... 1954*, vol. II, p. 151, document A/2693, para. 54.

¹² See *Yearbook... 1973*, vol. II, p. 182, document A/9010/Rev.1, chap. II, Sect. B, para. 9 of the commentary to article 3.

¹³ *Barcelona Traction, Light and Power Company, Limited, second phase, I.C.J. Reports 1970*, p. 33.

had to create the rule applicable in that particular case, as if he was himself legislator. It was obvious that in cases of that kind, the judge's decision was the source of often the case in international arbitrations that the arbitrator did not apply a rule already existing in the international legal order, but himself created a rule, particularly if he was empowered to settle the case before him *ex aequo et bono*. But what he wished to stress most of all was that, whatever the origin of the international obligation, from the moment the obligation came into existence, it could be breached and its breach was an internationally wrongful act which entailed the responsibility of the author.

43. Mr. El-Erian had been right in noting, with regard to paragraph 5 of the report, that the expression *acte juridique* had been incorrectly translated into English. The reference was not to a "legal instrument" (*instrument juridique*) but rather to a unilateral act. In its judgment in the *Nuclear Tests* case¹⁴ the International Court of Justice had attributed to a unilateral statement by the President of the French Republic the force of an international legal obligation, and had even gone so far as to say that, if that obligation was not discharged, it would have to review its own decision. Thus, the sources of international obligations were numerous and the wording selected must be broad enough not to exclude any of them.

44. He could not agree with Mr. Ustor that article 16 was superfluous, because it was necessary not merely to state that the breach of an international obligation was always an internationally wrongful act, whatever the source of the obligation, but also to bring out that the application of any one régime of responsibility rather than another could not depend on the source of the obligation. It was clear that the régime of responsibility was not necessarily the same for all internationally wrongful acts. There were cases when the breach of an obligation entailed only the obligation to make reparation, and others when it also called for the application of sanctions. There were also cases when the only "active" subject of responsibility was the State whose rights had been infringed, and cases where other States too (or international organizations) could invoke that responsibility. But it was important to emphasize that the source of the obligation breached was irrelevant to the régime of responsibility applicable. It could not be put forward as a principle that obligations deriving from a treaty were more or less important than those resulting from custom. The distinction between the régimes of responsibility must be based on something else.

45. With regard to the relationship between the concept of international crime and that of *jus cogens*, to which Mr. Kearney and Mr. El-Erian had referred, he himself, while reminding the Commission that it would come up for closer examination during the consideration of article 18, said that there was a certain link between the concept of *jus cogens* and that of *crime*. The two concepts could be said to be linked despite the fact that the fields

they covered were not identical, and that it was possible moreover to affirm the existence of rules of international *jus cogens* without first specifying what those rules were—whereas, extreme care had to be taken, when maintaining that the breach of an international obligation was an international crime, to state precisely which were the obligations the breach of which could constitute a crime. That being so, he said that he himself had spoken of progressive development rather than merely of codification of international law in that matter, but the notion of international crime, like that of *jus cogens*, was quite old. As early as 1914, in a note concerning an arbitral award in a river case, Anzilotti had made a distinction between peremptory and dispositive rules of international law. Towards the middle of the nineteenth century the Swiss jurist Bluntschli had established very clearly, in respect of international responsibility, the distinction to be made between the breach of certain obligations and that of others. At the beginning of the First World War, American jurists had reverted to the same distinction. Consequently, the Commission would not be venturing on untrodden ground.

The meeting rose at 1.5. p.m.

1364th MEETING

Friday, 7 May 1976 at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (*continued*)

ARTICLE 16 (Source of the international obligation breached)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 16 of his draft article (A/CN.4/291 and Add.1-2) which read:

Article 16. Source of the international obligation breached

1. The breach by a State of an international obligation incumbent upon it is an internationally wrongful act, regardless of the source of the international obligation breached.

2. The fact that the international obligation breached results from one source rather than from another does not justify, in itself, the application of a different régime of responsibility to the breach complained of.

¹⁴ *Nuclear tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457.

2. Mr. AGO (Special Rapporteur) suggested that the Commission begin by considering certain formal aspects of the international obligation in order to see whether they could be said to have a bearing on the characterization of an act committed in breach of that obligation and the responsibility resulting from it. The Commission might then consider the substantive aspects which related to the content of the international obligation.

3. In the case of the formal aspects, the first question was that relating to the source of the obligation. That question concerned, not what was required by the international obligation of the State bound by it, but the manner in which the obligation had arisen. As he had indicated in his preliminary considerations, it was not necessary for that purpose to formulate a theory of the sources of international obligations, but merely to determine whether the source of an international obligation had an incidence on the possibility of describing a breach of the obligation as an internationally wrongful act, or at least on the kind of responsibility which would be entailed by that breach.

4. If the true formal "sources" of international law, and hence the obligations laid States upon by the rules derived from those sources were considered, it would be seen that an international obligation could have three main origins: it could arise either from a customary rule of law, or from a treaty, or from a general principle of law applicable within the framework of the international legal order. An international obligation might nevertheless also result from a decision by an organ of an international organization, in particular the Security Council, a court judgement or arbitral award, or, in some cases, a unilateral act of a State. The Commission, however, was not concerned with drawing up an exhaustive list of international obligations but with deciding whether or not, once the existence of an international obligation was established, a breach of that obligation always constituted an internationally wrongful act, irrespective of the source of the obligation, and if so, whether or not a distinction should be made between different types of internationally wrongful act according to the source of the obligation breached.

5. On that point there often appeared to be a tendency to refer to the internal legal order. Most systems of internal law distinguished between breaches of obligations created by a contract and breaches of obligations resulting from a law or a general rule. A distinction was thus made between two types of civil wrong: contractual (breach of contract) and extra-contractual (tort), which in French law, for example, included *délits* and *quasi-délits*. Should an analogous distinction be made in international law?

6. The problem was therefore not only to establish—in accordance with the principle already implicitly set forth in article 3—that the breach of an international obligation was an internationally wrongful act, whatever the source of the obligation breached; it was also necessary to determine whether, for example, the customary or contractual source of the obligation had or had not an incidence on the régime of responsibility applicable in the event of a breach. In that connexion, agreement

must be reached on what should be understood by the expression "régime of responsibility". There was no doubt that not all breaches of an international obligation had the same consequences. A breach might entail the obligation to make reparation, but it might also entail the applicability of sanctions. Furthermore, there was considerable variation in the matter even of reparation and sanctions. In the matter of reparation, for example, a distinction had to be made between reparation pure and simple—restoring the previous situation, equivalent reparation—required when it was impossible to restore the previous situation—and satisfaction—which might consist of an apology or the punishment of the culprits when there was moral injury (for example, when a country's honour had been impugned by the infringement of one of its subjective rights) and other possible forms of compensation. In the matter of sanctions, there was even greater variety, since sanctions could be individual or collective, ranging from the severance of diplomatic or commercial relations and the blockade of ports to the granting of military assistance to the victim of an aggression, or possible reprisals, since even war might in some cases be considered as a sanction.

7. But that was not all. It was also necessary to know whether the subject which might claim reparation or inflict sanctions was a particular State or a number of States, or all the States of the international community, or an international organization. This was not the occasion to establish the cases which that might happen, and the safeguards to which it should be subject. What had to be accepted at the present stage was, generally speaking, that the breach of an international obligation could entail different régimes of responsibility and that consequently there were different kinds of internationally wrongful acts. The present problem was accordingly to ascertain whether or not to distinguish between different categories of these acts according to differences in the source of the obligation breached.

8. In order to avoid one serious source of misunderstandings, it would be wise from the outset to separate the cases with which the Commission would have to deal, namely those where responsibility resulted, not from the breach of a genuine international obligation, but from the breach of one of those obligations, generally of a purely economic character, which arose under internal law by virtue of a contract concluded between one State and another State, or more particularly between a State and foreign private individuals. Such contracts were not international treaties, since the contracting State did not participate in them as a subject of international law: they were instruments of internal law, generally governed by the legal order of the State which concluded them, although in that context certain writers sometimes invoked the operation of a "transnational" law or "international law of contract". In any case, since such contracts were not governed by the international legal order, the breach by a State of an obligation entered into under such a contract could not entail the international responsibility of that State. Before that situation could be changed, it would be necessary to establish the existence of a genuine international obligation, the source of which was custom or treaty, requiring the State to respect a

specific contract concluded under internal law. In any case, even then, a breach of the contract by the State would constitute an internationally wrongful act only if it entailed a shortcoming in respect of the international obligation requiring the State to respect the contract.

9. It might be noted that the case-law appeared to consider as an internationally wrongful act the breach of any obligation arising from any rule of international law, whatever, the origin of the rule. That was apparent from the judgment of the International Court of Justice on 5 February 1970 in the *Barcelona Traction* case,¹ and in the award made on 22 October 1953 by the Italian-United States Conciliation Commission in the *Armstrong Cork Company* case.² A glance at the large number of international arbitral awards was enough to show that, in the opinion of the judges and arbitrators who made them, the breach of an international obligation was always an internationally wrongful act which entailed the responsibility of the State, whatever the source—treaty, custom or other—of the obligation.

10. Clearly, therefore, in international jurisprudence the source of the obligation breached was not considered as having any bearing on the characterization as wrongful of the conduct constituting the breach. Nevertheless, it might still be asked whether, according to the same jurisprudence, the source of the international obligation breached by the State's conduct likewise had no incidence on the determination of the régime of the international responsibility entailed by such conduct and whether, a distinction should not be made between different categories of internationally wrongful acts according to the source of the obligation breached. However, there was nothing to suggest that international jurisprudence had endeavoured to establish a distinction between régimes of responsibility according to the source of the obligation breached. A comprehensive review of international judicial decisions in fact showed that the source of the various obligations had played no part in that respect and that no relationship had been established between the choice of the régime of responsibility and the source of the obligation breached.

11. State practice left no doubt as to the position of Governments on that question. The opinions expressed by Governments in their replies to the questionnaire sent to them by the Preparatory Committee of the 1930 Hague Conference for the Codification of International Law had been most revealing. The Austrian Government in particular had distinguished, according to source, three different categories of rules of international law which imposed obligations on States concerning the treatment of foreigners—provisions of treaties, special rules of customary law, and general principles of customary law—but had stated that infringement of any obligation deriving from those three sources “directly involved State responsibility” (A/CN.4/291 and Add.1-2, para. 22). None of the States had proposed that a distinction should be drawn, in respect of State responsibility, between the breach of a treaty obligation and the breach of an obligation arising

from another source, whatever it might be. Taking into account the replies received, the Preparatory Committee had drafted two bases of discussion for the Third Committee of the Conference, which had finally agreed to distinguish between three sources of international obligations: treaties, custom and the general principles of law (*ibid.*, paras. 23-24), but the distinction was not reflected by any distinction between the types of wrongful acts constituted by breaches of the obligations arising from those sources.

12. As the Hague Conference had been concerned with only a limited aspect of State responsibility—responsibility for damage caused to the person or property of foreigners—it had envisaged only one form of responsibility—the obligation to make reparation for damage caused through the breach of any international obligation concerning the treatment of foreigners. It had provided for different forms of reparation, but had not made their choice dependent on the source of the obligation breached. During the debate on the distinction to be made between the various types of consequences arising out of the breach of international obligations concerning the treatment of foreigners (Basis of Discussion No. 29), no one had suggested that different types of responsibility should be applied depending on whether the obligation breached resulted from a treaty, custom or some other source (*ibid.*, para. 25).

13. At the present time, the Commission was, of course, considering State responsibility as a whole and not only responsibility in regard to the treatment of foreigners, as the Hague Conference had done. It was nevertheless worth remembering that, in the course of the debates on the subject in the Sixth Committee of the General Assembly, the members of that Committee had not suggested that breaches of obligations resulting from treaties, custom or some other source should be subject to different régimes of responsibility. While it was true that some of them had at times recommended that the International Law Commission should devote particular attention to the consequences of the breach of obligations arising out of certain principles of the Charter of the United Nations, or certain legal resolutions of the General Assembly, those suggestions had been prompted by what representatives considered as the particularly important content of the obligations in question rather than by their source.

14. The codification drafts relating to State responsibility drawn up by private bodies as well as those prepared under the auspices of international organizations were based on the same criteria as international judicial decisions and State practice, stating only that the breach of an international obligation, whatever its source might be, always constituted an internationally wrongful act and always entailed international responsibility. It was particularly interesting to recall that article 1, paragraph 2 of the preliminary draft on international responsibilities of the State for injuries caused in its territory to the person or property of aliens, prepared in 1957 by Mr. García Amador, explicitly provided that international obligations whose breach entailed State responsibility were those “resulting from any of the sources of international law”.³

¹ *I.C.J. Reports 1970*, p. 4.

² United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 159.

³ See *Yearbook... 1975*, vol. II, p. 128, document A/CN.4/106, annex.

15. Consequently, there seemed to be no exception to the principle that the source of the obligation breached in no way affected the wrongful character of a State's act or the régime of responsibility arising from that act. Was it necessary to depart from that principle, hitherto observed in jurisprudence and State practice, and to distinguish for the purposes with which the Commission was concerned, between the sources of international obligations? For example, should a distinction be made between breaches of obligations arising from customary rules and those arising from treaty rules? Some writers had advocated such a distinction. Unfortunately, their argument appeared to be based on a mistaken assumption that the situation in international law was the same as that in internal law, though in fact the two were quite different.

16. In his opinion, it would be wrong to base the approach on an imagined parallel between internal law and international custom on the one hand, and between contracts in internal law and international treaties on the other hand. In the international juridical order, it might be said that, custom covered only part of the field which in internal law was covered by legislation, the rest being covered by treaties, particularly multilateral treaties. The object of multilateral treaties was obviously often the protection of interests which were just as general and essential for the international community as those protected by international customary rules. There was therefore no justification for equating the responsibility resulting from breaches of obligations created by treaties with the responsibility entailed by breaches of obligations arising from custom.

17. Furthermore, notions differed as to the relation between customary rules and treaty rules: some writers considered that customary rules ranked above treaty rules, while others took the opposite view. Some made a distinction between the breach of an obligation established by a normative treaty or treaty-law, and the breach of an obligation established by a treaty-contract. The category of treaty-contract would include those treaties which gave rise only to specific relationships between given subjects, whereas the category of normative treaties would comprise multilateral treaties concluded for the purpose of establishing rules of objective law. The responsibility entailed by the breach of an obligation arising from a normative treaty—like the responsibility entailed by the breach of an obligation arising from custom—would thus be characterized as delictual responsibility, while the responsibility entailed by the breach of an obligation created by a treaty-contract would be defined as contractual responsibility. Mr. Reuter, who was one of the writers in favour of the distinction between the treaty-law and the treaty-contract, had nevertheless, rightly observed that it “was impossible to derive from it any difference with respect to the régime of international responsibility”.⁴ Moreover, in practice it was difficult to establish a clear distinction between a treaty-law and a treaty-contract, as the same instrument might contain

both normative provisions and contractual provisions. There was no statement to the effects that normative treaties always created obligations of higher rank than treaty-contracts.

18. Some writers distinguished between the constitutional principles of the international legal order and other “sources” of international law, and saw in those principles a higher source of legal obligations, more important than customary or contractual rules. Should a distinction be made, therefore, between the breach of an obligation arising from a constitutional principle and the breach of an obligation arising from some other source, and a stricter régime of responsibility be laid down for the former than for the latter? Once again such a distinction appeared to be based on arbitrary equation of the situation under international law with that under internal law, where constitutional principles often had a place apart. In international law, constitutional principles were not in themselves a “source”, but were rules deriving from the same sources as other rules, since they themselves arose out of custom or treaties, or even the decisions of international organizations. Closer examination revealed that the principles which writers called “constitutional” were in fact those which they considered more important than others for the vital interests of their international community. Their determination was based on their content, not on their origin. Consequently, the pre-eminence of the obligations imposed by those principles and the seriousness attributed to a breach of such obligations were determined by the content and not by the origin of the obligations.

19. Thus, any distinction between international obligations and the applicable régimes of responsibility for breaches of those obligations, should be based, not on the source, but on the content of the obligation.

20. Article 16 consequently stated that the source, or if it were preferred, origin, of the international obligation breached had no bearing on the characterization of the breach as an internationally wrongful act, or on the régime of responsibility applying to that breach. He was prepared to clarify the meaning of the term “régime of responsibility” or, if necessary, to replace it by some other term such as “kind of responsibility” or “form of responsibility”, if members of the Commission so wished.

21. The CHAIRMAN said that the comprehensive and lucid presentation by the Special Rapporteur had thrown light on a number of points contained in his very rich commentary, as well as on the drafting of article 16. He noted with interest the Special Rapporteur's remark on the possibility of using the term “origin” instead of the term “source” or perhaps using both terms together. With regard to the text of the article, the Special Rapporteur had explained the importance of the words “in itself” in paragraph 2. He had also put forward the interesting idea of including in the draft at a later stage a definition of the term “régime of responsibility”.

22. Mr. YASSEEN, congratulating the Special Rapporteur on his brilliant introduction of draft article 16, said that it was a fully justifiable provision and that he approved the rules which it set out. He wished never-

⁴ P. Reuter, “La responsabilité internationale”, *Droit international public* (cours) (Paris, Les Nouvelles Editions, 1955-1956), p. 55.

theless to express his views on certain questions raised by the Special Rapporteur.

23. With regard to the international responsibility which States might assume contractually, the Special Rapporteur had observed that contracts concluded between States or between a State and foreign private individuals were extraneous to the subject and governed by private international law; they therefore came under internal law, or possibly transnational law, but in no way under public international law. The Special Rapporteur had accordingly excluded that class of contract from his study of the topic of the international responsibility of States. Yet the question might be asked whether the conflictual rules applicable to contracts of that kind were rules of internal law or of international law, and the conclusion might be that some of those contracts were in fact governed directly by international law. For it was conceivable that some contracts concluded between States might be subject to an international agreement establishing a uniform law. UNCTAD was at present studying the question of the conclusion of international commodity agreements and might draw up agreements establishing a uniform law. If it did, the non-performance of a contract governed by such an agreement might constitute a breach of an international obligation, in other words, an internationally wrongful act. The question should be studied, with a view to ascertaining whether the non-performance of contracts of that nature governed by international law could engage international responsibility or if it should give rise to some special form of responsibility.

24. Like the Special Rapporteur, he did not think that the source of the breached international obligation had to be taken into account in characterizing an act as internationally wrongful. International jurisprudence, State practice and doctrine were unanimous on that point. The Commission must certainly not repeat, on this occasion, the mistake made by other bodies, which had tried to construct a theory of the sources of international law. It was not called upon to settle the various problems connected with the sources of international law—for example, to define the constituent elements of custom or to decide the question whether an international obligation could flow, not directly from an international rule, but from a process of application by analogy. Some took the view that such a process belonged to the realm of free scientific enquiry and was connected with the creation of law, while others considered that it was a matter of interpretation.

25. The Special Rapporteur had also raised the question whether provision should be made for different régimes or forms of responsibility according to the various possible sources of the obligation breached. In his (Mr. Yasseen's) opinion, it would be wrong to rely on internal law and argue that the international responsibility of the State was contractual where the breached obligation flowed from a conventional rule, but extra-contractual or delictual where it flowed from international custom. Besides, the notion of international convention hardly corresponded to the notion of a contract in internal law; in international law, treaty law corresponded to written law.

26. As far as the distinction between treaty-contracts and treaty-laws was concerned, although it definitely existed in the doctrine, there was no trace of it in the law of treaties codified by the Commission. As a technical process for the formation of rules of international law, a treaty could obviously have as its object either the performance of an act or a rule to be observed. Generally speaking, there was no great difference in practice. It had not even been necessary to distinguish between treaty-contracts and treaty-laws in the interpretation of treaties, although some writers still quoted maxims more appropriate to the interpretation of the former than to that of the latter. In any event, the distinction would not justify two separate régimes of responsibility.

27. With regard to the constitutionality of the norm which generated the international obligation, the Special Rapporteur had envisaged the existence of a hierarchy of rules in the international legal order. That such a hierarchy undoubtedly existed was evident from the fact that some rules had been regarded as peremptory, and thus at the apex of the hierarchy. In internal law, the criterion for ranking rules of law in the hierarchy was in many countries one of form: rules emanating from a constituent assembly were constitutional rules, rules emanating from a legislative assembly were legislative rules and rules emanating from a government took the form of regulations. In international law there could be no formal criterion: all sources of international law, whether customary, conventional or of other kinds, could generate constitutional rules. In distinguishing among international rules from the standpoint of their constitutionality, therefore, it was the content and not the source of the rule that had to be considered.

28. The two paragraphs which made up article 16 were perfectly justified, since it was fully established in contemporary international law that the source of an international obligation had no incidence either on the characterization of a breach of the obligation or on the form of the responsibility which the breach entailed. Although not perhaps essential, it was certainly useful to state that principle in the draft. Article 16 should therefore be retained, subject to possible drafting changes. The word "*déplorée*" in paragraph 2 of the French version, for instance, sounded too literary and should be replaced by the word "*perpétrée*" or "*commise*".

29. The CHAIRMAN, referring to the last speaker's remarks on the use of the word "*déplorée*" in the French version, said he noted that the English version spoke of "the breach complained of".

30. Mr. TABIBI said that, in the light of the excellent explanations given by the Special Rapporteur, he was inclined to favour the inclusion of article 16 in the draft. One good reason for doing so was that the text of the article was in harmony with the contents of articles 1 to 15,⁵ which had been warmly received by the Sixth Committee of the General Assembly.

31. Another important reason for supporting the article was that it expressed a fundamental principle of chapter III,

⁵ See *Yearbook... 1975*, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B.

entitled "Breach of an international obligation". In the report on the work of its twenty-seventh session, the Commission had promised to the General Assembly that it would take up at the present session a series of important articles dealing with the breach of an international obligation.⁶ Chapter III of the draft articles on State responsibility was therefore eagerly awaited.

32. In his view, the contents of chapter III were of the greatest importance for smaller nations which, unlike the powerful ones, could not afford to breach their obligations. It was therefore natural that small nations should wish to examine carefully the contents of chapter III before considering acceptance of the whole draft.

33. The wording of the article could, of course, be improved. The Special Rapporteur himself had mentioned the possibility of replacing the term "source" by the term "origin" and the concept of "régimes of responsibility" by that of "types" or "forms" of responsibility. Drafting changes of that kind would serve to allay certain fears; the same was true of the definition of "régime of responsibility" which the Special Rapporteur had said he was prepared to introduce at a later stage if required.

34. In conclusion, he accepted the substance of article 16, which dealt with the specific notion of breach and which did not overstep the boundaries of the subject under discussion.

35. Mr. TSURUOKA said he wished to thank the Special Rapporteur for having introduced article 16 with his customary clarity. The article would manifestly be very useful, as it would dispel any doubt which might linger, if not in State practice and international jurisprudence at least in the doctrine, concerning the source of the international obligation breached. The two principles stated in article 16 simply reflected a usage. They were well established and as such in the right place at the beginning of chapter III. The question was not one which called for any progressive development of international law.

36. In order to make the idea expressed in paragraph 1 clearer, he would suggest the insertion of the words "kind of" between the words "regardless of the" and the word "source". Paragraph 2 might be worded in the terms which the Special Rapporteur had used in introducing it, namely: "The origin of the international obligation breached has no incidence on the régime of responsibility applicable". In addition, the commentary should state that the régime of responsibility applicable did not vary according to the source of the international obligation breached but according to the content of the obligation.

37. Mr. CALLE Y CALLE said that, with his customary lucidity, the Special Rapporteur had explained that the task before the Commission was to determine whether or not the source of an international obligation had an incidence on the characterization of the internationally wrongful act and the kind of responsibility and had indicated that, although different sources were mentioned in the Statute of the International Court of Justice and in certain conventions, it would not be

advisable for the Commission to follow a similar course. It was true that no distinction was to be found in the jurisprudence, but it did refer sometimes to general rules of law or sometimes to norms recognized by civilized nations. Consequently, it was essential to employ a term that was sufficiently comprehensive to embrace references of that kind. In the present attempt at codification, the Commission should be careful not to introduce distinctions such as those employed in the work of the 1930 Hague Conference for example.

38. However, it was imperative to make distinctions according to the content of the obligation, for there was undeniably a hierarchy of importance among the rules. Unfortunately, States which breached their international obligations took no account of the character of the obligation. He was therefore convinced of the necessity for a rule which stated clearly that the non-observance of an international obligation, regardless of the origin or source of the obligation, entailed responsibility, and which specified, as a general rule of law, that difference of sources did not, in itself, justify the application of a different régime with regard to the obligation to make reparation. Such a rule was necessary as an introduction to the articles which would deal with the content of obligations, for the existence of a legal order was the essential basis of State responsibility. A precise definition of legal obligations would avoid the present confusion with regard to "duties" and vague "commitments", which were regarded by some nations as obligatory but by others as having no binding force.

The meeting rose at 1 p.m.

1365th MEETING

Monday, 10 May 1976 at 3.15 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 16 (Source of the international obligation breached)¹ (*continued*)

1. Mr. HAMBRO said that, while the entirely agreed with the underlying basis of article 16, he felt that para-

⁶ *Ibid.*, p. 58, document A/10010/Rev.1, para. 49.

¹ For text, see 1364th meeting, para. 1.

graph 2 tended to complicate the text, without adding anything new to it. He agreed with Mr. Yasseen that, in the French version of article 16, the word “*déplorée*” was more a literary than a legal term.

2. Mr. USHAKOV said that paragraph 1 of the article consisted of two parts. The first stated that the breach by a State of an international obligation incumbent upon it was an internationally wrongful act. Since the concept of an internationally wrongful act was defined in article 3 and all the articles of chapter II concerned the “act of the State” according to international law, it seemed logical to specify at the beginning of chapter III the conditions under which the breach by a State of an international obligation incumbent upon it occurred. That could be done in a paragraph in article 16 preceding the present paragraph 1, or in a separate article preceding article 16. The new provision might read:

A breach of an international obligation of a State occurs when the act of that State is found to be contrary to its international obligation.

Only after the inclusion of such a provision would it be appropriate to state, as in the second part of paragraph 1, that the wrongful character of the act of the State did not depend on the source of the obligation breached.

3. As he had said earlier (1361st meeting), he was not in favour of using the term “source”. The writers did not agree on the meaning to be attributed to that term, which could be applied equally to a formal source and a material source. He suggested that paragraph 1 be redrafted to read:

The wrongful character of the act of the State did not depend on the legal character of the obligation breached.

4. Paragraph 2 of article 16 dealt with the régime of responsibility applicable. That provision seemed unnecessary, since the question of the applicable régime of responsibility would come within the scope of the second part of the draft, dealing with the content, form and degrees of international responsibility. Moreover, the term “régime of responsibility” was unsatisfactory and would have to be defined if the Commission was going to use it. It would therefore be better to replace it by the term “legal consequences”. Paragraphs 1 and 2 of the proposed article might then be combined to read:

The wrongful character and legal consequences of the act of the State do not depend on the legal character of the obligation breached.

That provision would merely express in different words the idea at present embodied in the article under consideration. He would not, however, oppose the retention of paragraph 2.

5. Mr. TAMMES said that, at the present stage, the formulation of rules like those contained in article 16 was useful in shaping the Commission’s thoughts. Although the rules in question were not controversial and the Special Rapporteur had produced convincing arguments for placing them in a separate article, it might be possible, later on, to consider combining them with the provisions of article 3 (b).

6. The term “source” was not completely satisfactory; it was rarely found in international instruments and no need had been experienced to employ it in what was regarded as the most authoritative statement of the sources of international law, namely, Article 38, paragraph 1 of the Statute of the International Court of Justice. It led to confusion, since it was not clear whether formal sources or material sources were meant. If the latter, then the rule set out in paragraph 1 of article 16 was not true, because it did matter very much in practice whether an international obligation was rooted in the legal or in the moral order. Similarly, the term “origin”, which had been suggested as an alternative, was not sufficiently precise, since it could easily refer to the historical origin of international rights and obligations. Consequently, it would be better to replace the last part of paragraph 1 with a more neutral phrase, such as “regardless of the manner in which the international obligation has come into existence”.

7. Again, it was essential to incorporate into the wording of article 16 a reference to the Charter of the United Nations in order to safeguard the primacy of the principles of international law embodied in the Charter, as compared with any other source. Such a reference had been included in, for example, article 30 of the Vienna Convention on the Law of Treaties,² where the application of successive treaties relating to the same subject-matter fell under the provisions of Article 103 of the Charter. Accordingly, it was apparent that, by reason not only of its material but also of its formal eminence, the Charter occupied a special place among the sources of international law. It was thus not possible to state, as in draft article 16, that the source was irrelevant, for if the source of the international obligation breached lay in an instrument other than the Charter, the breach might be justified by the fact that it was an act in accordance with the Charter. For the Commission, which was an organ of the United Nations, the Charter had a universal character. The Special Rapporteur had pointed out (A/CN.4/291 and Add.1-2, para. 14) that, in the context of a particular treaty concluded between them, some States might well provide for a special régime of responsibility for the breach of obligations for which the treaty made specific provision; obviously, if such a breach occurred, the perpetrator would be subject to the special régime established by the treaty in question, but that had nothing whatsoever to do with the problem under consideration.

8. Mr. ŠAHOVIĆ said that the presence of article 16 was entirely justified as an introductory provision of chapter III. Its purpose was to state that the formal source of the international obligation breached had no incidence on the wrongful character of the act constituted by the breach of the obligation. Having settled that problem, the Special Rapporteur had considered whether the diversity of sources of international obligations should not have at least some influence on the determination

² For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

of different régimes of responsibility. In his written introductory comments on article 16 (*ibid.*, para. 13), he had pointed out that the former problem logically involved the latter, but it appeared from his explanations and his proposed text for the article that he had preferred not to specify whether article 16 was meant to refer more particularly to formal sources or to material sources. In the light of the comments by Mr. Hambro and Mr. Ushakov, he doubted whether paragraph 2 could be retained in its present form. He would suggest that the idea it expressed be included in paragraph 1, with the emphasis on the formal aspect only.

9. The commentary to article 16 should reflect the ideas expressed at the previous meeting by Mr. Yasseen on the subject of the international responsibility of States in contractual matters. Those ideas were particularly important at a time when States were trying to establish a new international economic order.

10. The term "source" was certainly ambiguous. It should perhaps be made clear that what the Commission had in mind was formal sources.

11. Finally, he wondered whether it was appropriate to recognize, in paragraph 2, the existence of more than one régime of responsibility, or whether it would not be better to refer only to a general régime of responsibility governed by the universal legal order. Since the Commission was required to codify the rules of general international law, it would be better to avoid speaking of more than one régime of responsibility.

12. Mr. MARTÍNEZ MORENO said that article 16 was useful not only for reasons of clarity but also because, as other speakers had pointed out, it helped to ensure that the draft had a harmonious and integrated structure. Furthermore, it was clear from the jurisprudence—the *Barcelona Traction Company* case, for example—that the problem of sources should be analysed.

13. Schwarzenberger, like the Conference for the Codification of International Law (The Hague 1930), had spoken of three main sources: treaty, custom and general principles of law. But other writers, C.F. Amerasinghe for instance, maintained that the sources of an obligation giving rise to responsibility were coextensive with the sources of international law in general (A/CN.4/291 and Add.1-2, foot-note 46). It would be remembered that Mr. García Amador also had referred specifically to the question of sources.

14. In his view, the term "source" was not wholly satisfactory, but it was better than the alternatives that had been suggested. At the same time, while he could accept the wording of paragraph 1 of article 16, there were a number of matters that needed to be further clarified in the commentary. At the 1362nd meeting he had pointed out in connexion with the reference to "analogy" in the report (*ibid.*, foot-note 22) that something recognized as valid in internal law was not necessarily valid in international law. Great care must be exercised before admitting that international responsibility could be incurred through the breach of an obligation analogous to something regarded as an authentic obligation of the State committing the breach. Again,

while it was true that Article 38 of the Statute of the International Court of Justice did not employ the word "source", it had nevertheless given rise to analyses of the general doctrine of sources in terms of that article. The Commission could not accept the idea that doctrine could give rise to obligations that might be breached, although doctrine might of course constitute custom.

15. He too had felt some hesitation regarding the expression "different régime of responsibility", in paragraph 2 of the article, but again, it was better than any of the alternatives suggested. The best course would be to discuss those suggestions in the commentary and thereby dispel any doubts that might arise in connexion with the expression used by the Special Rapporteur.

16. Mr. SETTE CÂMARA said that the Special Rapporteur had clearly demonstrated that neither treaties, customary law, jurisprudence nor earlier attempts at codification had ever sought to categorize types of responsibility on the basis of the source of the obligation involved. Even the few writers who acknowledged the necessity for a distinction between sources similar to that which existed in internal law were not emphatic. For instance, O'Connell, who favoured the distinction between the "tort situation" and the "contract situation", recognized that contracts governed by international law were not treaties and thus could not be utilized to vest jurisdiction in matters arising out of treaties.³ In other words, "contract situations" had to be dealt with by internal law.

17. Only a false analogy with internal law (which distinguished between régimes of liabilities according to the source of the obligation), could cause the Commission to do the same in the field of international law. It was also important to bear in mind the comment in the report (*ibid.*, foot-note 11) that régimes of liability for civil wrongs were differentiated on the basis of determination of burden of proof, forms of reparation, types of judicial action to which recourse might be had, and so forth. The Special Rapporteur also stated, that the possible application to internationally wrongful acts of different régimes of responsibility, based on the difference in the source of the obligation breached, should not be taken into account unless general international law so provided (*ibid.*, para. 14), and had then gone on to show that general international law made no provision in that respect. Indeed, the Special Rapporteur's entire examination of the subject, including judicial and arbitral decisions and the work of the 1930 Hague Conference, revealed that at no time had there been any acceptance of the idea of categorizing régimes of responsibility according to the source of the obligation. It was surprising, therefore, to read (*ibid.*, para. 29) that the Commission could only question whether or not it was advisable to promote changes in the existing state of international law through the introduction of differentiation of régimes of responsibility, when the report itself made it very clear that such a course was not advisable.

³ D. P. O'Connell, *International Law*, 2nd. ed. (London, Stevens, 1970), vol. II, pp. 962, 976 and 978.

18. If any doubt did exist, it was whether an article on the general lines of article 16 was necessary at all, since nothing in the earlier articles would allow for different régimes of responsibility applicable to treaty law and international customary law, by analogy with objective law and contractual obligations in internal law. However, convincing arguments had been advanced for an explicit wording that would avoid tendentious interpretations. Moreover, article 16 might prove necessary, since the draft was to incorporate a categorization of régimes of responsibility, but of responsibility in terms of the content and not the source of the obligation. It might even be more useful to adopt an affirmative rather than a negative approach and to state that the application of different régimes of responsibility could result only from the content of the obligation breached.

19. For the moment, however, he could accept the text proposed by the Special Rapporteur, subject to some minor changes. The title was not appropriate, since the text of the article neither dealt with nor defined the source of the international obligation breached. On the contrary, it ruled out consideration of the source of the obligation, either to establish the existence of the internationally wrongful act or to justify the application of different régimes of responsibility. The title should therefore read something like "Different types of responsibility".

20. The concept of "source" had given rise to a great deal of controversy in international law, and he was accordingly pleased with the Special Rapporteur's suggestion (1364th meeting) that the term might be replaced by the word "origin". Likewise, it would be advisable to use, instead of the word "régime", the simpler word "type" or "form". The Drafting Committee could fruitfully discuss the constructive suggestions made by previous speakers. While he had no objection to including a reference to the Charter of the United Nations, it would probably be better to do that later, in the articles devoted to types of responsibility.

21. Mr. KEARNEY said that, like nearly all the speakers who had participated in the debate so far, he agreed that there was some measure of usefulness in article 16. That usefulness, however, was not imperative; paragraph 1 of the article at least was already implicit in article 3. At a later stage, the contents of article 16, when they were agreed upon, might perhaps be merged with those of article 3.

22. The problem raised by Mr. Ushakov with regard to the wording of paragraph 1 seemed to relate essentially to the French version and to the civil law terminology used in that version. As far as the English version was concerned, he would urge strongly that the expression "breach of an obligation" be retained because it was a clear and often-used expression based on normal common law terminology.

23. With regard to the term "source", he agreed that it involved some element of ambiguity, but all the suggestions so far made failed to remove that ambiguity. The use of the term "origin" would raise the question of the distinction between material and formal origin, the dividing line between which was not necessarily the

same in all legal systems. As to the suggestion put forward by Mr. Tammes,⁴ it raised the question whether the proviso should be "regardless of the manner in which the obligation came into existence" or "regardless of the manner in which the obligation became incumbent on the State committing the breach", or possibly a combination of both those aspects. The Drafting Committee would be called upon to deal with that problem in due course, but for his part he would suggest that the reference to "source" be retained if no better expression could be found which was valid for all the language versions.

24. As for paragraph 2, its provisions had some utility but it did not seem to him logical to have them in article 16, because they referred to a very different concept from that of the source of the obligation mentioned in paragraph 1. The Special Rapporteur's commentaries to paragraph 2 discussed at considerable length the League of Nations' codification efforts and indicated that the replies received to the questionnaire then sent out to Governments showed general adherence to one theory on the subject of régimes of responsibility, namely, that of reparation. It should be remembered, however, that at the time, only international responsibility for injuries to foreigners was being discussed. Actually, it was only article 18 which shed light on the meaning of the expression "different régimes of responsibility". Paragraph 2 of article 16 was clearly connected with article 18 and possibly with other articles which would come later.

25. With regard to the point raised by Mr. Tammes concerning the Charter of the United Nations, there were strong differences of opinion, possibly based on political considerations, on the question whether the Charter was in itself a source of law. The affirmative view was not very widely accepted. In any case, article 16 did not appear to be the best place for a provision on that point.

26. He was somewhat concerned at the analogies drawn between private and public law in the commentaries to article 16. Some of those analogies were based on civil law concepts. In particular, it did not appear appropriate to import into international law as an analogy the private law antithesis between tort law and contract law as affecting the range of private law application. It seemed to him that the field of status law—diplomatic law was a good example—played as prominent a part in analogical reasoning for international law purposes. On the whole, he thought that the commentaries would be improved by eliminating the reference to private law concepts, unless the subject was explored in much greater detail.

27. Mr. USTOR said that he shared the view of Mr. Sette Câmara that the title should be altered and would himself suggest that it be replaced by the wording originally put forward for that title in the Commission's report on the work of its twenty-seventh session: "Irrelevance of the source of the international obligation

⁴ See para. 6 above.

breached to the existence of an internationally wrongful act".⁵ The language used in that title was much closer to the intended purpose of article 16.

28. In his remarks during the discussion on the preliminary considerations,⁶ he had commented that article 16 was no more than an elaboration of article 3 (b), as the Special Rapporteur himself had stated in his commentary. It had not been his intention thereby to suggest the deletion of article 16, since that article was very useful, particularly in relation to article 18. He agreed with Mr. Kearney that it was article 18 which expressed the idea that the content of the obligation determined the régime or grade of responsibility, or the different kinds or types of responsibility.

29. Article 16 specified that the breach of any international obligation constituted an internationally wrongful act, but it did not explain what was meant by an "international obligation". The Special Rapporteur's commentaries, however did give examples of certain obligations which did not constitute "international obligations". One example given was that of obligations undertaken by a State under a contract entered into with a foreign individual or a corporation. Clearly, contracts of that kind were governed by the internal law of a State and fell outside the present topic. The Special Rapporteur, however, stated at one point in his commentary that the breach by a State of its obligations under a contract entered into with another State did not constitute the breach of an international obligation, since the contract was not governed by international law (A/CN.4/291 and Add.1-2, para. 15).

30. Personally, he would hesitate to accept that view. It was true that, in article 2 of the 1969 Vienna Convention on the Law of Treaties, the term "treaty" was defined as an international agreement concluded between States in written form "and governed by international law", so that in the rare case in which two States concluded a contract governed by domestic private law, such a contract would not constitute a "treaty" for the purpose of the application of the Vienna Convention. Nevertheless, in the event of the breach of an obligation arising from such a contract, it could not be said that no international obligation had been violated. He would take the example of a receiving State which undertook to place a house at the disposal of a sending State for use as that State's embassy, stipulating in the agreement that the transaction was governed by the private law of the receiving State. As he saw it, if the receiving State failed to fulfil that contract for political reasons, the sending State could protest, even though the contract did not constitute a "treaty" for the purposes of the Vienna Convention. The problem which would arise following such a protest pertained to the topic of State responsibility. If a State undertook to perform something for the benefit of another State, the failure to fulfil that undertaking would constitute the breach of an international obligation,

even if the whole agreement were governed by the internal law of a State.

31. That being so, the question arose whether some definition of "international obligation" should be included in the present draft. Such a definition would, among other things, make it clear that the reference was to a legal obligation and not to a moral obligation or to an obligation of comity. The commentary to article 16 should also cover that point.

32. Mr. CALLE Y CALLE said that, in his brief remarks at the previous meeting, he had pointed out that, since an enumeration of sources was contained in other instruments, it was sufficient in article 16 to speak of sources in general terms and not make any distinction between various sources.

33. One of the instruments which he had had in mind was the United Nations Charter itself, which, in its preamble, affirmed the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from "treaties and other sources of international law" could be maintained. The purpose of that passage of the preamble of the Charter was to cover all the rules of conduct incumbent upon States, whether derived from a treaty or from any other source of international law. Any failure by a State to observe such conduct entailed its international responsibility.

34. In the light of the use of the term "source" in the Charter and in other instruments, it was important to retain it in article 16. Any attempt to replace it by a reference to the "origin" or the "nature" of the obligation would lead to difficulties and ambiguities.

35. Lastly, he favoured the suggestion to replace the present title by the wording "Irrelevance of the source of the international obligation breached to the existence of an internationally wrongful act".

36. Mr. REUTER, referring to the terminology of article 16, said it was essential to use the word "source" and to use it alone, without qualification. The meaning of article 16 seemed quite clear. In his opinion, the article should be kept very concise, or it should be deleted, as a text containing too many explanations would not be suitable for expressing the very simple and very cogent idea the Special Rapporteur wished to convey.

37. What was the exact scope of article 16? It might be considered a very simple, slightly tautological, article confined to stating that the general régime of responsibility—as explained in the subsequent articles—did not involve distinctions based on the source of the obligation breached. That would mean that, if a distinction had to be made according to the source of the obligation, such a distinction would not be part of the general régime of responsibility and would have to be considered at a later stage. In fact, in a case involving reparation, the breach of an obligation might conceivably have special consequences when the source of the obligation lay in a treaty. The Special Rapporteur was perhaps leaving open the possibility of reverting to that question later. It was also possible, however, that the Special Rapporteur had intended to exclude finally the possi-

⁵ *Yearbook... 1975*, vol. II, pp. 56-57, document A/10010/Rev.1, para. 45.

⁶ 1363rd meeting, paras. 7 *et seq.*

bility, in the matter of responsibility, of any distinction being made based on the source of the obligation and had no intention of reverting to that question later. He would therefore be interested to know what were the Special Rapporteur's intentions in that regard.

38. Mr. YASSEEN said he agreed with Mr. Calle y Calle that the word "source" should be retained, as its meaning was quite clear and its use was hallowed by international law. Any attempt to replace it by less well-established terms might lead to misunderstanding. It was hard to find an international law treaty which did not refer to "source". The word "source" was used in the Preamble to the Charter of the United Nations. There need, therefore, be no hesitation about retaining the term in article 16.

The meeting rose at 5.50 p.m.

1366th MEETING

Tuesday, 11 May 1976 at 10.20 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPporteur (*continued*)

ARTICLE 16 (Source of the international obligation breached)¹ (*concluded*)

1. Sir Francis VALLAT said that the reasoning in the Special Rapporteur's fifth report (A/CN.4/291 and Add.1-2) had convinced him of both the need for and the basic soundness of article 16. He believed that the two ideas contained in paragraph 1 and 2 respectively were a necessary part of the structure of the draft articles. Article 16 itself was not a controversial provision but it paved the way for the more difficult provisions of article 17 and the still more difficult ones of article 18.

2. A number of points of drafting had been raised during the discussion and he himself shared the doubts which had been expressed with regard to the title of the article and most of those relating to the wording of the two paragraphs.

3. With regard to the mention in paragraph 1 of the "source" of the international obligation breached, he

found the reference to the provisions of the Preamble to the Charter of the United Nations somewhat misleading. The key to the approach to article 16 was that the article was concerned with obligations rather than with rules. The third paragraph of the Preamble to the Charter called for the establishment of conditions under which "respect for the obligations arising from treaties and other sources of international law can be maintained". If the Commission was going to follow the language of the Charter in article 16, the key word would be "arising" and the article would have to speak of obligations arising from treaties or other sources of international law.

4. All those who, like himself, had been called upon in the course of their academic work to explain the provisions of the Preamble to the Charter knew how much confusion had resulted from the particular passage which he had quoted. It raised the question whether it was intended to refer to the distinction between treaty law and customary international law and thence immediately brought to mind all the statements by the International Court of Justice on the role of treaties as a source of customary international law.

5. The use of the term "source" would involve the difficulty of determining whether it was meant to refer to material sources, formal sources, historic sources or law-making factors. He himself preferred that the term should be avoided and that an effort should be made to find a more neutral one.

6. Mr. QUENTIN-BAXTER said that he shared the anxiety expressed by other members regarding the use of the term "source" but could see no better alternative. Probably the best way of solving the problem was to maintain a proper balance between article 16 and the following articles, especially article 18. He agreed with Mr. Sette Câmara that the emphasis should be placed on content; if that emphasis was maintained, the drafting problems would be easier to solve.

7. He also shared the concern expressed by other members regarding the expression "régime of responsibility" and would have been glad if he could have concluded that paragraph 1 of article 16 was sufficient to express the intention of the article. In his view, however, the presence of paragraph 1 made paragraph 2 necessary. It was one thing to say, in paragraph 1, that an internationally wrongful act would occur whatever the source of the obligation breached; it was another thing to say, in paragraph 2, that the source of the obligation would not in itself determine the legal consequences of the breach.

8. As he understood the Special Rapporteur's intention the expression "régime of responsibility" carried with it not only the idea of legal consequences but also the idea that a distinction should be made among obligations according to a hierarchy: certain obligations affected only States having an interest; others affected the whole community of nations, and obligations under a rule of *jus cogens* stood above both those categories.

9. Mr. HAMBRO said that he was surprised at the criticism of the word "source". The term was so commonly used that he saw no reason for replacing it by another term in the draft. It would be better to try to

¹ For text, see 1364th meeting, para. 1.

indicate in the commentary how the term was used, in order to make its meaning absolutely clear. He was certain that the Special Rapporteur would be able to do that.

10. Mr. ROSSIDES said that he himself wished to retain the term "source" in article 16 where it had been very appropriately used by the Special Rapporteur. The term was to be found in a great many instruments, including the Charter of the United Nations.

11. He agreed with those speakers who had stressed that, in the present context, the content of the obligation was of greater importance than its source. Nevertheless, there were cases in which the source of the obligation was material and those cases should not be ruled out. He felt that the language proposed by the Special Rapporteur for article 16 left that question open.

12. Bearing in mind the important remarks by Mr. Tammes at the 1365th meeting, he proposed that the Special Rapporteur's wording for paragraph 1 be retained with the insertion of the proviso: "subject to Article 103 of the Charter of the United Nations". That proviso already appeared in a number of important international instruments. In particular, it constituted the opening proviso of paragraph 1 of article 30 (Application of successive treaties relating to the same subject-matter) of the Vienna Convention on the Law of Treaties.² It had been included by the International Law Commission in the corresponding article 26 of its draft articles on the law of treaties and had been retained as article 30 in the final text adopted by the United Nations Conference on the Law of Treaties. He believed there were two good reasons for inserting that proviso: the first was the need to recall the terms of the Charter of the United Nations, on which the whole structure of the world legal order was based; the second was that it would lend greater accuracy to the wording of paragraph 1.

13. Mr. BILGE said that article 16 set forth two principles: that the source of the international obligation breached had no incidence on the characterization of an internationally wrongful act, and that it had no incidence on the régime of responsibility applicable. The Special Rapporteur had asked the question whether international obligations should be distinguished according to their source—custom, treaty, a general principle of law, or even a unilateral act, an arbitral award or a decision of an international organization. That had led him on to deal with two preliminary questions: the existence of a special régime of responsibility and the existence of a contractual responsibility.

14. With regard to the first question, the Special Rapporteur had acknowledged the existence of a special régime of responsibility, but had decided to confine himself to the general régime of responsibility, which did not depend on the source of the obligation. The Special Rapporteur had been aware of the difficulties

raised by the second question; indeed, the notion of contractual responsibility was not very clear, since the writers who propounded it sought to establish some kind of relationship between a contract and an international rule, or to create a new legal order lying between the internal legal order and the international legal order. He himself thought that it would be best to leave those ideas aside for the purpose of the draft articles, since he did not see how international law could be modelled on internal law. Like the Special Rapporteur, he believed that contracts did not constitute a separate and independent source of international law and that, as far as international responsibility was concerned, it was best not to make any distinction according to whether the international obligation breached had its source in a contract or in a rule of international law.

15. Having analysed international jurisprudence and State practice, the Special Rapporteur had concluded that neither distinguished between the sources of the international obligation breached for the purposes of the characterization of an internationally wrongful act. He had been considered whether, as progressive development of international law, a distinction might be made between an obligation arising from a treaty-contract and an obligation arising from a treaty-law, or between an obligation arising from a constitutional principle and an obligation established by some other source. He had concluded that the present state of international law did not justify such a distinction, a conclusion which he (Mr. Bilge) shared.

16. It might be asked whether article 16 should remain a separate article or be incorporated in article 3, which had already been adopted. He favoured the first course on the ground that article 16, coming at the beginning of chapter III, could play a very useful role. However, the title of the article was possibly a little long and did not really explain the contents of the article. In his opinion, the Commission should establish a link between article 16 and article 3 by indicating, in paragraph 1 of article 16, that the latter article dealt with only one of the elements of an internationally wrongful act.

17. With regard to the source of the international obligation, he fully subscribed to the principle that it had no incidence on the characterization of an internationally wrongful act and on reflection, thought that the word "source", which was used in the Charter, should be retained.

18. As far as paragraph 2 was concerned, it would be best not to distinguish between multiple régime of responsibility according to the source of the obligation breached; the Commission should defer that question until later, since for the time being it was concerned only with the objective element of the internationally wrongful act.

19. The CHAIRMAN, speaking as a member of the Commission, said that the debate had shown clearly that there was a need for the provisions of article 16 in the draft articles on State responsibility. Any hesitations which he might have felt at first on that point had been dispelled by the discussion. Moreover, it was the Commission's practice to make its drafts as complete as pos-

² For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

sible, even to the point of including provisions of an expository character.

20. He agreed with the suggestion that the title of the article should be improved but was somewhat reluctant to use the term "irrelevance". The title should be reworded so as to make it clear that the source of the international obligation breached did not have any incidence on the existence of an internationally wrongful act. The Drafting Committee would have to find some means of qualifying the word "source" so as to indicate more clearly the purpose of article 16.

21. The underlying purpose of article 16 was to stress that there was only one general régime of responsibility, irrespective of the source from which the obligation arose. The Commission did not wish to embody in the draft articles a fragmentary system of responsibility. In his commentary, the Special Rapporteur had drawn attention to the possibility that in the text of a particular treaty concluded between them, "some States may well provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision" (A/CN.4/291 and Add.1-2, para. 14). The Special Rapporteur had emphasized, however, that the existence of such a special régime did not affect the subject-matter of article 16, which was the determination of the régime of State responsibility under the general rules of international law and not under the provisions of a specific treaty. The Charter of the United Nations itself provided examples of specific régimes of responsibility. Thus, Article 6 of the Charter specified that a State Member of the United Nations "which has persistently violated the Principles contained in the present Charter may be expelled from the Organization". Similarly, the Charter provisions dealing with the problem of aggression and the non-use of force specified that a breach of the peace brought into play the machinery of collective security. Those provisions thus laid down a very specific régime of responsibility.

22. The wealth of material provided by the Special Rapporteur in his report on State practice, the writings of learned authors and the previous attempts at codification showed clearly that the diversity of sources of international obligations did not warrant any distinction between régimes of international responsibility according to source.

23. He agreed that it would be useful to include a safeguard regarding the application of Article 103 of the Charter which specified that, in the event of a conflict between the obligations of Member States under the Charter and their obligations under any other international agreement "their obligations under the present Charter shall prevail". The question was more one of validity of treaty provisions than of precedence of obligations. Nor did he believe that any analogy should be drawn from the internal law distinction between constitutional law and ordinary legislation. The Special Rapporteur's conclusion on that point was:

... the responsibility entailed by a breach of an international obligation should be more serious not because the obligation has one origin rather than another, or because it is embodied in one document rather than another, but because international society

has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligation in question (*ibid.*, para. 32).

24. It was the content or the nature of an obligation rather than its source which was important. In some cases, special obligations could be of the greatest importance while the provisions of law-making treaties of a technical character often dealt with minor matters.

25. With regard to the use of the term "source", he realized the difficulties involved but felt that they did not justify discarding the term. Despite all those difficulties, he would urge that the term "source" should be retained. During the discussion on that point, reference had been made to Article 38, paragraph 1, of the Statute of the International Court of Justice. The purpose of that article, and that of the Statute itself, however, was not to enumerate or to define the sources of international law but rather to indicate to the Court the manner in which it had to deal with cases that came before it. The Article accordingly specified that the Court should first investigate whether there existed any treaty provisions as between the contesting States which were relevant to the case. In the absence of any such provisions, the Court was called upon to apply the rules of international custom and, failing such rules, the general principles of law.

26. In connexion with the discussion on the third paragraph of the preamble of the United Nations Charter, a valuable point had been made by Sir Francis Vallat when he had emphasized the importance of the reference in that paragraph to the *obligations arising* from treaties and other sources of international law. That point should be borne in mind by the Drafting Committee.

27. In his fifth report, the Special Rapporteur had dealt satisfactorily and comprehensively with the problem of contracts entered into by States which were governed by private law and which therefore did not constitute treaties. Those contracts should not be confused with "contractual treaties" (*traités-contrats*), which had been so named to distinguish them from law-making treaties (*traités-lois*) but which were none the less treaties and as such governed by international law. The contracts in question were not governed by international law but by another legal order, which was sometimes a "transnational law", to use Jessup's terminology.

28. With regard to the drafting of paragraph 1 of the article, it should be noted that article 16 referred to an "international obligation" incumbent upon a State. Perhaps the Special Rapporteur had the intention of introducing into the draft articles a definition of an "international obligation". The definition would no doubt give that term the meaning of an obligation incumbent upon a State under international law. The definition would thus exclude such obligations as those entered into by a State under a contract governed by private law; the non-performance of such obligations could then only give rise to State responsibility in the event of a denial of justice.

29. With regard to the wording of paragraph 2 of the article, it should be noted that the words "in itself" were important. Diversity of source could have a bearing

on the régime of responsibility, not because of the source itself but because of the content of the obligation.

30. Mr. ROSSIDES observed that, in the phrase "regardless of the source of the international obligation breached", the Special Rapporteur was referring to the generic source. However, if the phrase "subject to Article 103 of the Charter of the United Nations" was not inserted at the end of paragraph 1, the effect would be to ignore the importance of the Charter, which ranked above all other legal obligations. Some writers clearly stated that the Charter was a source of law even for non-members of the United Nations. Kelsen, for example, held the view that it formed an exception, inasmuch as its provisions were binding on States which were not signatories to it.

31. Consequently, it was essential to consider inserting the phrase in question, more especially since the Commission had already employed it in the Convention on the Law of Treaties, in which article 30 began with the proviso: "Subject to Article 103 of the Charter of the United Nations...". Again, in the draft articles on succession of States in respect of treaties,³ article 6 referred to "the principles of international law embodied in the Charter of the United Nations". It was true that the Charter did embody principles of international law; therefore, it had to be taken into account in the article now under discussion. Insertion of the phrase would do no harm and it would be useful as demonstrating the Commission's respect for the Charter.

32. Mr. AGO (Special Rapporteur), replying to the comments of members on article 16, said first that it had never been his intention to take a position on the question of whether contracts concluded between States—including those between a State and a foreign private individual came under the internal legal order of a given State rather than under a "transnational" law or an "international law of contract". That question lay outside the topic of the international responsibility of States. As he had pointed out, it would only come within it if it were established that there was a rule of international law obliging States to fulfil their internal law contracts: a breach of that rule by a State would then entail its international responsibility. In the same context, Mr. Yasseen had spoken of agreements establishing a uniform law.⁴ It was obvious that a State which was party to a Convention establishing a uniform law but did not adapt its legislation to that law would breach an obligation and thus become guilty of an internationally wrongful act. Mr. Ustor had pointed out that a State might for example undertake, in a commercial contract, to place a building at the disposal of another State to house the latter's embassy or an official mission.⁵ In that case, a commercial contract and an international treaty co-existed in a single instrument and an international obligation would be breached if the building were not made available to the State requiring it. In his

view, such anomalies were not uncommon in international law, but it would be best, as Mr. Kearney had suggested,⁶ not to mention them in the Commission's report, in order to avoid misunderstanding as to its purpose. To do so might give rise to long and fruitless discussions, particularly as the nature of contracts of that kind was regarded differently in countries which had a Roman law system and in those which had a common law system.

33. The purpose of article 16 was to indicate that rules of international law relating to State responsibility were based, not on the source, but on the content of the international obligations breached, with a view to determining the consequences with regard to the régime of responsibility applicable. Article 16 must accordingly indicate that the manner in which those obligations had arisen and been imposed on States had an incidence on that responsibility. The incidence on responsibility of the content of the international obligations breached would be considered in article 18.⁷ With regard to the comments of Mr. Reuter at the previous meeting, and of Mr. Bilge and the Chairman at the present meeting, on the subject of the general régime of international responsibility which the Commission was formulating, he said that States would be prevented from agreeing on different rules of responsibility in a particular treaty only if the general régime of responsibility contained rules of *ius cogens*, which at present was unlikely. That point had been brought out in the commentary to article 16 (A/CN.4/291 and Add.1-2, para. 14). That did not mean, however, that the régime of responsibility contemplated in a treaty as important as the Charter of the United Nations would have no effect on general international law; it would have to be taken into account as a régime governed by general international law. If, on the other hand, the régime of responsibility established by the treaty was linked to that treaty in particular, it had no general international law. If the constituent instrument of an international organization provided that a member State which breached certain obligations could be expelled, that was a rule of responsibility peculiar to that organization. It could not be extended into a general rule permitting a State to be expelled from the international community, since a State was a member of the international community regardless of the will of other States.

34. There were treaties which provided that a State might be released from certain treaty obligations if another State breached those obligations. He wondered more especially whether that was a question of State responsibility or rather of the validity of the rules established by a treaty. The Vienna Convention on the Law of Treaties seemed to have opted for the second interpretations. The freedom enjoyed by a State to divest itself of treaty obligations which were not respected by another State should be equally valid for customary obligations as well. His conclusion was that, in the general system of international responsibility, there was

³ Yearbook... 1974, vol. II (Part One), p. 174, document A/9610/Rev.1, chap. II, sect. D.

⁴ 1364th meeting, para. 23.

⁵ 1365th meeting, para. 30.

⁶ *Ibid.*, para. 26.

⁷ *Ibid.*, para. 36.

no reason to distinguish obligations according to whether they arose from treaty or from custom. If it proved necessary to make a distinction which reflected the internal law distinguishing between contractual responsibility and delictual or quasi-delictual responsibility, it would be best to rely for that purpose on the notion of treaty-contracts and treaty-laws. Treaty-laws, however, should be assimilated to custom, because there could be no difference between an obligation arising from a treaty-law and a customary obligation. In the final analysis, it also seemed impossible to introduce differences based on the distinction between treaty-contracts and treaty-laws into the régime of international responsibility, as Mr. Reuter had pointed out.

35. Mr. Tammes at the previous meeting⁸ and Mr. Rossides at the present meeting, had mentioned the desirability of referring to the Charter of the United Nations in article 16. The fact that it was not mentioned was not an oversight; it was because he had thought there was no need to refer to the Charter as a special source of international obligations. In article 18, he had mentioned several obligations which flowed from the Charter. Since the Charter was a treaty, the rules it contained were unquestionably the product of an international agreement. Admittedly, the Charter was a treaty which took precedence over all others, firstly because in adopting it, States had wished to create an international organization of supreme importance and to lay down in its Statute particularly important obligations. But the importance of those obligations did not derive from the fact that they were embodied in a given text, but from the fact that what they required of States was essential for the ordered development of international life. The Charter contained both essential obligations, such as those concerning the safeguarding of peace and the prohibition of the use of force, and less important obligations, such as for example those concerning the payment of contributions and the registration of treaties. It was true that Article 103 stated:

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

That clause however, simply meant that any obligation which arose from a particular international agreement and conflicted with an obligation under the Charter would be regarded as invalid. If a State under those conditions complied with its obligation under the Charter, it would not be breaching any other international obligation, since by the terms of Article 103 any conflicting obligation would be deemed invalid. A reference to that provision was justified in the Vienna Convention, precisely because it concerned the validity of treaties and the obligation established by them. On the other hand, it would be out of place in a set of draft articles relating to the breach of international obligations, for obviously must be valid or it could not be breached.

36. Certainly when the Commission came to take up the question of the content of international obligations, it would have to refer especially to the Charter, bearing

in mind that not all the obligations the Charter set out had the same importance. For instance, the obligation to maintain peace had pride of place, whereas other important obligations were simply mentioned in the enumeration of the purposes and principles of the United Nations; those obligations had only arisen when other international instruments had been adopted. That was the case with the obligation not to commit genocide and the obligation to abstain from a policy of massive discrimination. In addition, as Mr. Rossides had pointed out,⁹ the Charter contained no obligation concerning the exploitation of the resources of the sea and there could be doubt as to the present; and even more, the future importance of such obligations. For the Charter reflected the ideas current at the time of its adoption; the world had changed since then and would continue to change. And the Commission must work for the future.

37. As far as the wording of article 16 was concerned, Mr. Ushakov had suggested including, either before the article or in the article itself, a definition of the notion of breach of an international obligation.¹⁰ In point of fact, chapter III was modelled on chapter II, which contained no corresponding definition of "act of the State". That notion grew out of the provisions of chapter II as a whole, and he thought that the notion of "breach of an international obligation" would grow out of chapter III. Yet he was not against the idea of introducing a definition at the beginning of chapter III. The Chairman had suggested stating that an "international obligation" meant an obligation incumbent on a State under international law. A statement of that kind would have some point. But as regards the provision which Mr. Ushakov suggested adding, its scope was such that it would be better to place it in a special article before article 16 rather than in the article itself. It might perhaps begin with a formulation identical with that of article 5, which headed chapter II, and might for instance be worded as follows:

For the purposes of the present articles, it is a breach by the State of an international obligation incumbent upon it under international law if an act of that State conflicts with what is required of it by the international obligation in question.

It should be made clear that the obligation required something of the State: some action, omission or specific result. A breach of the obligation resulted precisely from a conflict between the conduct followed by the State and that which was expected of it. If the Commission agreed to an introductory article of that kind and if the Drafting Committee could produce an acceptable text, the new article would need a separate commentary.

38. Ultimately, the discussion of paragraph 1 of article 16 had turned largely on the use of the word "source". Some members of the Commission had proposed other terms, whereas Mr. Calle y Calle had pointed out¹¹ that the word "source" appeared in several treaties, among them the Charter of the United Nations and the

⁸ *Ibid.*, para. 7.

⁹ 1361st meeting, para. 14.

¹⁰ 1365th meeting, para. 2.

¹¹ *Ibid.*, para. 34.

Charter of OAS. Sir Francis Vallat had rightly said at the present meeting that there was a difference between the source of the obligation, which was the point at issue, and the source of the rule of law from which the obligation arose. It was correct to say that the source of a treaty obligation was a "convention" (or if preferred, a "treaty" or "agreement"). But the terms "agreement" or "treaty" were understood to mean both the procedures for establishing certain rules and the instrument containing those rules. Both were referred to as the "source", but the meaning of the term was not the same in both cases. In speaking of the "source" of an international obligation, it was evident that the source of a treaty obligation was a rule established by treaty procedure and that the source of a customary obligation was a customary rule. In that connexion, the importance of what were called "secondary" sources might have been exaggerated. Article 38 of the Statute of the International Court of Justice did not even mention the word "source". It was the writers who had introduced the notion of "secondary sources". The draftsmen of the Statute had envisaged the case in which the Court might fall back on doctrine and judicial decisions as auxiliary means of establishing the existence of a rule, which remained none the less a customary rule. Consequently, doctrine and jurisprudence seemed to be means of ascertaining the existence of obligations, not separate sources of international obligations. Some members of the Commission had emphasized the ambiguity of the word "source" and had cited in that connexion the fact that the term was sometimes used to designate material rather than formal sources. Nevertheless, even though it was ambiguous, the term "source" was the one which he had considered the most appropriate. Etymologically, it designated the place where water emerged from the ground, and that was the image which jurists employed to indicate how an obligation arose. Mr. Ushakov had suggested the term "character",¹² but that had the disadvantage of being vague and applicable to other notions, such as that of the fundamental or non-fundamental character of the obligation. The term "origin", which he had occasionally used in introducing article 16, was also rather unsatisfactory, because it might be said that some obligations had their origin in common law or in Roman law, and that was obviously unconnected with the formal source of an obligation. Whatever the term chosen, it would perhaps be best for the Commission to say in the commentary what it meant by "source" or in the body of article 16 itself, to describe the source as "customary, contractual or of any other kind".

39. As far as the expression "régime of responsibility", in paragraph 2, was concerned, it denoted generally the consequences of an internationally wrongful act, for the State which committed it. In addition to being obliged to make reparation, it might be required to give a particular kind of satisfaction; it might also incur sanctions, which might vary widely in character. The régime of responsibility therefore also included the determination of the subject of international law entitled to set those consequences in motion—the subject directly

injured, other States, the international community as a whole, or international organizations. The Commission might either define the expression "régime of responsibility" or use the expression "legal consequences" proposed by Mr. Ushakov,¹³ but the commentary should make it clear that the expression applied also to the determination of the subject of international law authorized to set those consequences in motion.

40. The CHAIRMAN suggested that draft article 16 should be referred to the Drafting Committee for consideration in the light of the comments and suggestions made in the discussion.

It was so decided.

The meeting rose at 1.05 p.m.

¹³ *Ibid.*, para. 4.

1367th MEETING

Wednesday, 12 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Organization of work (*continued*)*

1. The CHAIRMAN suggested that item 1 of the agenda, "Filling of casual vacancies in the Commission (article 11 of the Statute)" should be considered on Thursday, 20 May 1976. Meanwhile the secretariat would immediately inform members who had not yet been able to attend the session, including, of course, the two African members, so that they could make any arrangements they thought necessary.

2. If there were no objections he would take it that the Commission agreed to that course.

It was so agreed.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPporteur (*continued*)

ARTICLE 17 (Force of an international obligation)

3. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 17 which read:

¹² *Ibid.*, para. 3.

* Resumed from the 1361st meeting.

Article 17. Force of an international obligation

1. An act of the State contrary to what is required by a specific international obligation constitutes a breach of that obligation if the act was performed when the obligation was in force for the State implicated.

2. However, an act of the State which, at the time it was performed, was contrary to what was required by an international obligation in force for that State, is not considered to be a breach of an international obligation of the State and hence does not engage its international responsibility if, subsequently, an act of the same nature has become proper conduct by virtue of a preemptory rule of international law.

3. If an act of the State contrary to what is required by a specific international obligation

(a) is an act of a continuing nature, it constitutes a breach of the obligation in question if the obligation was in force for at least part of the duration of the continuing act and so long as the obligation remains in force ;

(b) is an act considering of a series of separate conducts relating to separate situations, it constitutes a breach of the obligation in question if that obligation was in force while at least some of the conducts making up the act were taking place and those conducts were sufficient by themselves to constitute the breach ;

(c) is a complex act comprising the initial act or omission of a given organ and the subsequent confirmation of such act or omission by other organs of the State, it constitutes a breach of the obligation in question if that obligation was in force when the process of carrying out the act of the State not in conformity with such obligation began.

4. Mr. AGO (Special Rapporteur) said that the source of the international obligation breached was not the only formal aspect that might have to be considered for the purposes with which the Commission was concerned in the context of State responsibility. The question also arose whether the fact that the obligation had been in force at the time when the State had adopted conduct in conflict with the requirements of that obligation was or was not an essential condition for establishing the existence of a breach of that obligation. The difficulty was that the international legal order was not static and that there were many possible manifestations of conduct which could constitute a breach of an international obligation. In order to establish whether the conduct of a State at a particular moment was or was not in conformity with the requirements of an international obligation, several possible cases might have to be considered, according to the time at which the obligation had been in force in relation to that State. For international obligations were not permanent; like obligations under internal law they arose and came to an end.

5. There was a general principle, set out in 1928 by Max Huber, the arbitrator in the *Island of Palmas* case, that a juridical fact must be appreciated in the light of the law contemporary with that fact, and not of the law in force at the time when a dispute in regard to it arose, or fell to be settled.¹ That opinion had related to a lawful act, but it was obvious that it also applied to wrongful acts. Moreover, the principle had also been confirmed in cases relating to wrongful acts, such as the *Pelletier* case, in which it had been provided, in 1884, that the arbitrator should apply the rules of international law

existing at the time of the transactions complained of.² There could therefore be no question of taking into consideration an obligation which had existed at the time of the award but had not been in force at the time of commission of the act which was not in conformity with that obligation. In another case, submitted to arbitration in 1900, the Imperial Russian Government had been accused by the Government of the United States of America of having seized American vessels engaged in seal-hunting outside Russian territorial waters. At the time of the seizures, the States concerned had not been bound by any convention on the subject, but subsequently, and before the award had been made, they had concluded a convention under which it was permissible to seize vessels outside territorial waters. In the arbitration agreement, the general principle had once more been confirmed: the arbitrator was to apply the general principles of the law of nations and the international agreements in force and binding upon the parties at the time of the seizure of the vessels.³

6. There were three possible cases, according to the time when the obligation was in force for the State. In the first case, the obligation had arisen but had ceased to exist for the State concerned before the act was committed. In that case, there could be no doubt that no breach of the obligation had taken place. Nothing in the practice of States or in international jurisprudence could justify a different conclusion.

7. In the second case, the obligation had existed at the time when the act was committed, but subsequently had ceased to exist. It was tempting to conclude that the conduct of the State constituted an undoubted breach of the international obligation then incumbent on it and, consequently, an internationally wrongful act on its part. Doubts arose, however, if one made an excursion into internal law, in particular civil and criminal law. In civil cases, most systems of law allowed a claim for reparation for damage caused by an act committed in breach of an obligation incumbent at the time on its author, even if the obligation had been extinguished when judgment was given. In criminal cases, however, a person could not generally be held responsible for an act committed in breach of an obligation incumbent upon him at the time of its commission, but which had ceased to exist at the time of the judgment; it was usually the law most favourable to the accused which was then applied. He was nevertheless convinced that the application of that principle would not be justified in international law. In internal law, criminal liability set the author of the wrongful act against society as a whole, whereas in international law the State committing a breach was normally set against another State, the victim of the breach. To apply to the former State the law most favourable to it would amount to applying on principle,

² See G. F. De Martens, *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1887), 2nd series, vol. XI, pp. 800 and 801. For a full account of the case, see J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. II, p. 1749.

³ United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 58.

¹ United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 845.

to the State injured by the breach, the law most unfavourable to it. The necessary conclusion, therefore, was that, in that case, it was enough for the obligation to have existed at the time when the act was committed for the act to be wrongful and for responsibility to be incurred. That conclusion was confirmed by international jurisprudence.

8. For instance, in the middle of the nineteenth century, the umpire of the United States-Great Britain Mixed Commission, set up under the Convention of 8 February 1853, had had to hear a number of cases relating to the slave trade. Bad weather had obliged American vessels carrying African slaves to take shelter in a port in Bermuda, where the British authorities had freed the slaves and seized the vessels. At the time, the slave trade had not been prohibited and the umpire held that Great Britain was therefore required to respect foreign property, in that instance consisting of the African slaves. The umpire, who subsequently had to settle a number of similar cases, stated that it was necessary to examine, in those further cases, whether the slave trade had become contrary to the "law of nations" at the time the acts complained of had been committed. It should be noted that by the "law of nations" he did not mean international law, but the internal law of the nations concerned. It was only when the "law of nations" had not prohibited the slave trade that Great Britain had violated an international obligation incumbent upon it. But the more recent cases had occurred when the slave trade was prohibited by the law both of the United States and of Great Britain, and the umpire had decided that, in such cases, the freeing of the slaves and the seizure of the ships was lawful. Roughly speaking, that amounted to saying that if the obligation existed at the time when the act was committed, the act was wrongful, whereas if the obligation had ceased to exist at that time, the act was lawful and the responsibility of the State was not entailed.

9. In the *James Hamilton Lewis* case, the arbitrator had decided, in 1902, that the determining factor was the time at which the act had been committed: if the act had been wrongful at that time, it was of no consequence that it had subsequently become lawful.⁴ The same principle had been confirmed in 1937 in the *Lisman* case.⁵ Finally, the International Court of Justice had recognized the principle in 1963, in the *Northern Cameroons* case.⁶ It had stated, in substance, that if the Administering Authority had committed an act contrary to obligations under the Trusteeship Agreement, while that Agreement was in force, the act would remain contrary to those obligations even if the Agreement terminated. As he had pointed out in his report (A/CN.4/291 and Add.1-2, para. 48), the Commission itself had referred to that judgment in its commentary to article 56, paragraph 3 of the draft convention on the law of treaties, adopted on first reading at its sixteenth session.

⁴ *Ibid.*, pp. 69 *et seq.*

⁵ *Ibid.*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1789.

⁶ *I.C.J. Reports 1963*, p. 15.

10. Although the rule was thus well established in international practice and jurisprudence, it was nevertheless open to question whether it was absolute and whether it should not be open to exceptions, for humanitarian reasons, for example. It would have been noted that, in the cases he had previously mentioned relating to the slave trade, the umpire had taken the view that the freeing of the slaves and seizure of the vessels were to be regarded as unlawful acts if slavery had not been prohibited at the time of those acts, and as lawful acts if slavery was prohibited at the time in question. But since then such acts were not merely lawful: they had become obligatory and "due" conduct under a peremptory humanitarian rule of international law. In our time, if a State seized a vessel being used for the slave trade and freed the slaves, it would be doing more than performing a lawful act: it would be complying with an obligation imposed upon it by international law. Now that there was a rule of *jus cogens* requiring such conduct from a State, would a State be condemned by a court to pay compensation to another State because in the past it had committed an act which might have been wrongful at the time of its commission but had now become due conduct under a peremptory rule according to modern ideas on international law? The same would apply in the case of a neutral State which had undertaken by treaty to deliver arms to another State, but had refused to fulfil its obligation, knowing that the arms were to be used for genocide or aggression, and had done so before the rules of *jus cogens* prohibiting genocide and aggression had been adopted. If the case were brought to trial after the entry into force of those rules, would an international tribunal condemn the neutral country for what it had done in the past when its refusal to assist a State about to commit an act of genocide or aggression had become required conduct at the present time under a peremptory rule of international law? Although cases of that kind were unlikely, they could not be excluded, and he therefore proposed to provide for an exception to the general rule—an exception relating particularly to the case where the international obligation breached when the act in question had been committed had not only ceased to exist subsequently but had been replaced by another obligation requiring that State to do exactly the opposite.

11. In the third possible case, the State adopted a certain conduct at a time when it was not contrary to any existing international obligation incumbent upon it, but a new obligation was subsequently imposed on the State. If the retroactivity of that obligation was accepted, the conduct would be wrongful. But the principle of non-retroactivity seemed to be well-established in international law. There were no exceptions to that principle, although certain treaties provided that the obligations they imposed on the parties also related to periods preceding the date on which the treaty had been concluded. In reality, such provisions did not in any way mean that the parties had agreed to consider as wrongful the conduct adopted by one of them before the treaty had come into force. To illustrate that point, he had referred in his report to the Convention of 17 October 1951 between Switzerland and Italy concerning social insurance (A/CN.4/291 and Add.1-2, para. 58). Writers

had considered the case to which he was referring, and the conclusions they had reached corresponded to those which he had mentioned. From a more general point of view, the Institute of International Law had adopted in 1975 a resolution on "The Intertemporal Problem in Public International Law" in which it recognized, as an exception to the general rule, that States and other subjects of international law had the power to determine by common consent the temporal sphere of application of norms, subject to any peremptory norm of international law which might restrict that power.

12. The situation was sometimes complicated by the fact that the conduct of States was not always instantaneous; it might be extended over a period of time and constitute what writers called "*faits continus*" (continuing acts). Thus when an international convention required a State to adopt a law having a certain content, or to abrogate a law, and it did not do so, the act of the State continued over a period of time. The same applied to the unwarranted occupation of the territory of another State, the blockade of a coast or a law or practice obstructing innocent passage of ships through a strait. In all such cases there was a breach of an international obligation with which the conduct of the State was in conflict, in so far as for a certain period of time, at least, the act of the State coincided with the existence of the obligation incumbent upon it.

13. The act of the State might also be constituted not by a single and continuing conduct but by a succession of more or less identical conducts adopted in a series of separate situations. For instance, a State might be free to adopt any rules it considered appropriate regarding the residence of aliens and the exercise of a gainful occupation or a particular profession by an alien, but it might be under an international obligation where such matters were concerned to abstain from discriminatory practices in regard to aliens of a certain nationality. The wrongful act was then represented by the practice itself. For there to be a breach of an international obligation of that kind, there must have been a certain number of conducts which as a whole constituted a practice. Those conducts necessarily related to different actual situations. But the international obligation in question could arise before, during or after the adoption of a practice. In such cases it seemed clear that there was no internationally wrongful act unless a series of conducts sufficient in themselves to constitute a "practice" had taken place while the obligation was in force for the State.

14. Lastly, the act of the State might be a "complex" act. That was understandable when it was considered that there were obligations known as "obligations of result" whereby a State were required, not to adopt a specified conduct, but to achieve a certain result by means of its own choice. There was therefore a breach of its obligation if that result was not obtained. Supposing that a government had undertaken to permit nationals of another State to exercise a certain profession in its territory: if one of them were refused the necessary permit by a local authority, that would only be the beginning of a breach of the obligation in question, because the person concerned could apply to the central authorities, who might annul the local decision. If the

central administrative authorities did not grant his application, he could still apply to the courts. It was only if the court of final instance dismissed his claim that the breach of the international obligation would be complete. But, there again, it was possible that the obligation might come into being while the conduct constituting the complex act complained of was taking place or, on the contrary, that it might cease to exist during that time—as was the case, for example, when the State denounced the treaty imposing the obligation before the court of final instance had given its judgment.

15. When therefore the act of the State was a complex act in which several organs of the State might take part, it was the time when the breach began which might be said to be decisive. If the obligation was not in force at the time when the local authority refused to grant a permit to an alien to exercise a profession, that refusal was lawful. If the alien subsequently applied to a central authority when the obligation had entered into force, that authority was not required to annul a decision which had originally been lawful; but if that authority also refused a further application addressed to it, the breach began at that moment. On the other hand, if the initial act or omission of an organ of the State had been in conflict with an international obligation deriving from a subsequently denounced treaty, the State could not refuse to restore the situation which ought to have existed at the time when the process of carrying out the act of the State had begun; the complex unlawful act could be completed even after the obligation had ceased to exist.

16. The distinctions he had made had led him to propose an article divided into three paragraphs. Paragraph 1 set out the general principle, paragraph 2 stated the exception and paragraph 3 referred to the three separate cases in which the act of the State extended over a period of time.

17. Mr. USHAKOV said he fully accepted the principle stated in paragraph 1 of article 17, that there was a breach of an international obligation only if the obligation was in force at the time when the act in conflict with it was committed. But he was not entirely satisfied with the way the principle was stated. The repetition, in the three paragraphs, of the circumlocution "an act of the State contrary to what is required by a specific international obligation" was due, in his opinion, to the lack of a definition of the term "breach". If that term were defined in the draft, the circumlocution could be avoided by referring simply to a "breach of an international obligation". He had already proposed that the notion of a breach of an international obligation should be defined in article 16 or in a separate article.⁷ His own view was that there was a breach of an international obligation by a State when it was established that the act of the State was contrary to the obligation in question. And it was precisely the term "established" that was lacking in article 17, paragraph 1. If the notion of a breach were defined in that way, the paragraph could be worded to read:

⁷ 1365th meeting, para. 2.

The breach of an international obligation by a State is established only when it relates to an obligation in force for that State at the time when the wrongful act was committed.

18. In affirming that there was no breach of an international obligation by a State if the obligation was subsequently voided by a new peremptory rule of international law, paragraph 2 raised the question of the retroactivity of the nullity of an international obligation of the State. For in the case contemplated in that paragraph, the conduct of the State was no longer considered to be a breach of an international obligation, because the rule imposing the obligation on the State had been superseded by a new rule of international law and the obligation had become void retroactively through the effect of that new peremptory rule of general international law.

19. Was that provision always valid? It was undoubtedly justified in the slave-trading ships case quoted by the Special Rapporteur. But there were cases in which the nullity of the obligation was not retroactive. For example, if a State unilaterally established an economic zone and seized foreign fishing vessels in that zone, it was breaching an international rule. If, subsequently, the Conference on the Law of the Sea adopted a rule providing for the establishment of economic zones, could the State in question plead that peremptory rule of international law to maintain that its conduct was not wrongful and, therefore, that it could not be required to make reparation for the damage caused? In that case the nullity of the obligation was not retroactive. Consequently, the provision in paragraph 2 could not be stated as a general rule since it was valid only in certain cases.

20. On the whole, he agreed with paragraph 3, but he was not convinced of the need for the principle stated in subparagraph (a), which seemed to be already contained in the principle stated in paragraph 1. For if it was accepted that a breach of an international obligation was established only when it related to an obligation in force at the time when the wrongful act was committed, it was obvious, in the case contemplated in subparagraph (a), that a continuing act only constituted a breach of an international obligation if the obligation had been in force for at least part of the duration of the continuing act, since the breach no longer existed once the obligation had ceased to be in force. Thus subparagraph (a) of paragraph 3 added nothing to what was already stated in paragraph 1. On the other hand, the principles in subparagraphs (b) and (c) were very valuable.

21. With regard to article 16, it must be remembered that an international obligation always had as its source a rule of international law. It was the origin of the rule that varied, not the source of the obligation. It was therefore incorrect to speak of an obligation deriving from a treaty or some other source of international law, for in fact the obligation always derived from a rule, which itself derived from a treaty or other source of international law.

22. The wrongfulness of the international act and its legal consequences did not depend on the origin of the rule from which the obligation derived. In contemporary international life there were identical obligations with different sources. For example, if a State party to the

1958 Geneva Conventions on the Law of the Sea violated a rule relating to freedom of navigation on the high seas, it was violating a conventional rule, whereas if a State which was not a party to those Conventions committed the same internationally wrongful act, it was violating a customary rule. In both cases, the breach and its legal consequences were the same, but in the former case it was a conventional rule that was violated and in the latter, a customary rule. The obligation imposed on the States was the same, but the source differed; for States parties it was a conventional rule, while for States not parties it was a customary rule, since the Geneva Conventions on the Law of the Sea had codified rules of customary law. Thus the responsibility of the State did not depend on the source of the obligation breached. All the members of the international community were subject to the same obligations: some under codification conventions to which they were parties, others under customary rules of international law. But their responsibility in the event of a breach of those obligations was the same.

23. The same applied to the Charter of the United Nations, some of the basic principles of which were valid both for Member States, and for other States, in the latter case by virtue of customary law which imposed on them the same obligations as the Charter—for the Charter stated established rules of contemporary international life. Similarly, with regard to diplomatic law, the States parties to the 1961 Convention on Diplomatic Relations were subject to the same rules as States which were not parties to that Convention, though the former were bound by conventional rules and the latter by rules of customary law.

24. Mr. YASSEEN said that with article 17, the Commission was taking up a very important problem which it was essential to solve in order to establish the rules of responsibility. Max Huber had given a very clear opinion on that problem in the award he had rendered on 4 April 1928 in the *Island of Palmas* case, when he had affirmed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arose or had to be settled.⁸ That was a general principle of international law which was not contested. It was not, however, a principle of *jus cogens*, and States could derogate from it by agreement. In its resolution on "The Intertemporal Problem in Public International Law", already mentioned by the Special Rapporteur, the Institute of International Law had recognized that States and other subjects of international law had the power to determine by common consent the temporal sphere of application of norms, notwithstanding that principle, subject to any norm of *jus cogens* which might restrict that power. It was nevertheless in the light of that principle that the problems raised by the three possible cases put forward by the Special Rapporteur in paragraph 38 of his report (A/CN.4/291 and Add.1-2) must be solved.

25. It was obvious that, in the first case, the State had not breached an international obligation, because the obligation had already terminated when the act had been committed. The second case, on the other hand, could

⁸ See foot-note 1 above.

raise a problem, since the obligation had still been in force at the time when the act had been committed, though it had subsequently terminated. It was tempting to conclude, by analogy with internal criminal law, that the State could not be held responsible when the obligation breached no longer existed. But the Special Rapporteur had clearly shown the difference, in that respect, between international law and internal law, and had rightly affirmed that an act of the State constituted a breach of an international obligation if it had been committed while the obligation was in force.

26. It was also necessary, however, to take into consideration the content of the rule which had voided the obligation. For it was possible to imagine cases in which the international community could not agree that a State should be held responsible for a breach of an international obligation which had subsequently ceased to exist for reasons connected with the vital interests of the international community. It could rightly be maintained that to hold a State responsible for the breach of an obligation which had ceased to exist by reason of the supervention of a new rule of *jus cogens* would in itself be contrary to that new peremptory rule of general international law.

27. The Special Rapporteur had thus been right to take account of the rules of *jus cogens* by providing, in paragraph 2 of article 17, that the responsibility of the State was not engaged when the obligation breached no longer existed by reason of the supervention of a peremptory rule of international law. He did not find the wording of the paragraph entirely satisfactory, however, and thought it could be improved by modelling it on article 71 of the Vienna Convention on the Law of Treaties, entitled "Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law". Paragraph 2 of that article provided that termination of a treaty "releases the parties from any obligation further to perform the treaty" and "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination", and added that "those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law".⁹ Consequently, if a State had breached an international obligation before the entry into force of the rule of *jus cogens* which had voided that obligation, and if the injured State had obtained reparation, it was not possible to go back on the arbitral award or judgment which had been rendered.

28. He therefore proposed that paragraph 2 of article 17 should read:

However, an act of the State ... does not engage its international responsibility if the obligation breached by the State no longer exists by reason of the supervention of a peremptory rule of general international law and if the fact of holding the State responsible is in conflict with that rule.

⁹ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

29. In the third case considered by the Special Rapporteur, the obligation had arisen after the conduct of the State. The Special Rapporteur then envisaged three forms of conduct. In the case of continuing conduct, there was a breach of an obligation if the obligation had been in force for at least part of the duration of the conduct.

30. In the case of composite conduct, the responsibility of the State was entailed if the repetition of the acts composing the conduct had been sufficient, while the obligation was in force, to constitute a practice contrary to that obligation. It might be compared with the case of the "habitual offender" in internal law, which was characterized by the commission of several acts.

31. In the case of complex conduct, the Special Rapporteur had considered that the responsibility of the State was entailed if the obligation had been in force when the conduct began. But it might be thought that the responsibility of the State was also entailed when the obligation arose after the beginning of the conduct, if the organs responsible in the final instance refused reparation for the fault committed by other organs of the State before the obligation arose. It might indeed be considered that that final decision constituted a breach of the obligation, since it was taken by an organ of the State at a time when the obligation was in force.

The meeting rose at 1.5 p.m.

1368th MEETING

Thursday, 13 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Force of an international obligation)¹ (*continued*)

1. Mr. AGO (Special Rapporteur) said that he had never intended to suggest in paragraph 2 of article 17 that when an international obligation ceased to exist, the wrongful act committed when the obligation was in force ceased retroactively to be wrongful. On the con-

¹ For text, see 1367th meeting, para. 3.

trary, he had been careful to emphasize that, under international law, the consequences of an act must be determined on the basis of its wrongfulness when the act was performed, and that all the rights acquired by another State through the wrongfulness of an act remained rights of that State even if the obligation no longer existed when the wrongfulness of the act was invoked. Even if an obligation ceased to exist by reason of the super-vention of a rule of *jus cogens*, an act previously committed in breach of that obligation did not automatically cease to be wrongful, since the wrongfulness of an act had to be judged on the basis of the law in force when the act was committed. In his view there was only one exception to that rule, namely, the case where the rule of *jus cogens* which terminated the previous obligation made the previously wrongful conduct of the State not only lawful but mandatory. That exception was stated in paragraph 2.

2. As Mr. Ushakov had rightly pointed out at the previous meeting, if a State seized a trawler beyond the limits of its territorial sea but within a limit of 200 miles, at a time when the latter limit had not yet been recognized by international law, it committed a wrongful act and that act would remain wrongful even if the limits of the "patrimonial sea" had later been increased to 200 miles by a rule of international law. After the adoption of that rule, of course, the country in question would be entitled to seize a fishing vessel within a 200-mile limit, but it would certainly not be obliged to do so. Its act would have become lawful but not mandatory.

3. The situation was quite different in the cases already referred to of the slave trade or the supply of arms to a country intending to commit aggression or genocide. In such cases, the confiscation of the vessel and freeing of the slaves, or the refusal to supply arms, had not only become lawful acts; they had become "due". When the British authorities had seized the vessel *Enterprize*, which had had to put into a port in Bermuda, and had freed the slaves found on board, they had performed an act which had been wrongful at the time but had subsequently become conduct that was internationally "due". Consequently, the only exception stipulated to the rule set forth in paragraph 1 was where an act of a State which had been wrongful at the time it was performed had become "proper conduct by virtue of a peremptory rule of international law".

4. Mr. USHAKOV said that, in his opinion, the obligation of the State subsisted, since a rule of law always entailed a right for one State and an obligation for the other.

5. Mr. AGO said that, in the case of the *Enterprize*, the British Government had had the obligation to respect foreign property. However, the conscience of States had since developed in such a way that it had become impossible to regard human beings as the property of a government and a State was under a duty to free the slaves if a ship carrying slaves fell into its hands. When the obligation had simply ceased to exist and the wrongful act had become lawful, but no more, as in the case of the fishing vessels mentioned by Mr. Ushakov, a State which had committed a wrongful act when the obliga-

tion existed continued to be responsible when the obligation had ceased. In the case contemplated in paragraph 2, however, the wrongful act had become not only lawful but mandatory, and it was unthinkable that it should any longer entail the responsibility of the State.

6. Mr. KEARNEY said that article 17, particularly in the English version, raised a number of drafting problems. Paragraph 1 embodied a desirable and reasonable rule. The language should be improved, however, and in particular should be brought into closer harmony with that of earlier articles.

7. He had considerable difficulty with the provisions of paragraph 2, difficulties which had if anything been made greater by the discussion between the Special Rapporteur and Mr. Ushakov. The paragraph was couched in terms of a problem arising from a peremptory norm of international law. In that connexion, reference had been made to the proposed 200-mile economic zone at present under discussion in the Third United Nations Conference on the Law of the Sea. As he saw it, if such a zone were to emerge from the work of that Conference, it would at best give rise to a contractual obligation resulting from a deal between a number of countries on how to divide up among themselves certain economic resources of the sea. It was hard to see how a rule of that kind could be elevated to the status of a peremptory norm of international law.

8. The type of case that could involve the application of the provisions of paragraph 2 was more likely to be one where there was an antithesis between two norms of basic importance to the international community and where eventually one of them was given supremacy over the other or achieved supremacy. A situation of that kind could perhaps result from the operation of the norm set forth in Article 1, paragraph 2, of the United Nations Charter regarding "respect for the principle of equal rights and self-determination of peoples". Self-determination was continually being referred to as a basic norm of international law and not infrequently in terms that would make it a peremptory norm. There was first, of course the basic difficulty in defining a "people". Assuming, however, the existence of a people, having as such a basic right to self-determination but scattered over States A, B and C, and the existence also of a movement to bring that people together in a State of their own, and that the movement was being repressed by States A and B but supported by State C, which had closer relations with the people concerned, in that hypothetical example, State C might finally take armed action against States A and B and in effect free the people concerned and let them establish their own State. That action, however, would run counter to a rule which would be regarded by most as a peremptory norm of international law, namely, that of refraining in international relations from the threat or use of force against the territorial integrity or political independence of any State (Article 2, paragraph 4, of the United Nations Charter).

9. As he saw it, in such a situation, there would inevitably be a conflict between those two norms. In due course, one of them might well predominate in such a

way as to rule out the possibility of relying on the principle of self-determination in order to engage in aggressive action against another State. A situation of that kind would then be covered by a provision such as that in paragraph 2 of article 17. The State which had acted in reliance on the rule since prohibited in the particular circumstances might find itself required to pay damages. It seemed to him unlikely, however, that one rule could be made to predominate so completely over the other as to make it desirable to achieve the result stated in paragraph 2 as it stood.

10. Another factor to be considered was the time that would necessarily be required for a rule to be accepted by the world community as a peremptory norm of international law. Such a process would in all probability not take place within such a short period that a rule of customary international law in conflict with it could remain in full force and effect. A considerable time would be required for such a process, and during that time, rules in conflict with the emerging peremptory norm of international law would be steadily losing their force.

11. As he had pointed out, the 200-mile economic zone did not provide a good example of a peremptory norm of international law. The judgment of the International Court of Justice in the *Fisheries Jurisdiction* cases,² however, provided a perfect example of what might be called the disintegration of a prior norm as a result of the emergence of a new norm of international law. A careful reader of that judgment was forced to the conclusion that nothing definite could be said on the extent of fisheries jurisdiction unless it was governed by a binding treaty commitment. The judgment of the International Court of Justice had upset the pre-existing position and what had formerly been the traditional rule had disappeared. The same was bound to happen in connexion with the emergence of a peremptory norm that would overcome the right of self-determination.

12. The situations which paragraph 2 attempted to cover, even if they occurred at all, would be far from frequent. Moreover, the provisions embodied in that paragraph were bound to provoke a good deal of discussion and give rise to serious concern. He therefore had considerable doubts regarding the inclusion of paragraph 2 in article 17.

13. As for paragraph 3, he thought that all three situations envisaged in it required consideration, but there were difficulties with respect to each one of them.

14. Subparagraph (a), as Mr. Ushakov and other speakers had pointed out, seemed to add little to paragraph 1. His own impression was that, if it did add anything, it was of doubtful accuracy. In the form in which it was drafted, subparagraph (a) was ambiguous on one point. It appeared to say that, if the obligation was in force during at least part of the duration of the continuing act, the entire continuing act might possibly be subject to the obligation and be a source of responsibility for the entire time for which the act continued. He did not believe that such an effect would be correct,

but the English version of the article at any rate seemed to suggest it. If the intention was to avoid that effect, subparagraph (a) of paragraph 3 would constitute merely a different way of expressing the thought in paragraph 1.

15. Subparagraph (b) referred to "an act consisting of a series of separate conducts relating to separate situations". The provision would be clearer if the passage were reworded so as to refer to "a series of separate acts making up a course of conduct". The provision which followed seemed somewhat ambiguous, at least in its English version. It seemed to refer to a course of conduct containing a series of acts that were legitimate and a series of acts that were illegitimate, all of them separable, and to say that, because they were all part of the same course of conduct, that entire course was illegitimate and was subject to a régime of responsibility, even though a large part of the course of conduct was perfectly legitimate. No such consequence was perhaps intended but the language used in subparagraph (b) suggested that conclusion. On the other hand, that language perhaps meant only that where a course of conduct included wrongful acts which were separable and which had taken place while the obligation was in force, those wrongful acts would give rise to responsibility regardless of the fact that they formed part of a course of conduct which included acts that were lawful. It was difficult to see the exact scope and intent of the provisions of subparagraph (b) but if the result contemplated was the second one he had mentioned, the subparagraph was perhaps not necessary. In any case, the intended consequences should be clarified.

16. Subparagraph (c) dealt with a complex act but it was difficult to see the effects of that provision. Although the procedure was somewhat different, it brought to mind the *Mavrommatis Concessions* case, which had led to prolonged litigation before the Permanent Court of International Justice.³ The case had arisen because of the refusal of a British official to take a certain action which was incumbent upon him. *Mavrommatis* had applied for a review of that decision by a higher official but the delay had resulted in the withdrawal by the bankers' consortium of the financing arranged by *Mavrommatis* to build a dam. The lower decision had in due course been reversed by the higher official but the resulting collapse of the financing could not be reversed. It would seem that, under the rule set forth in subparagraph (c), a person in *Mavrommatis's* position would be entitled to get paid because, when he had originally been refused, there had been an obligation on the United Kingdom. If he had construed the provision correctly as covering cases of that kind, it seemed to him a reasonable rule.

17. Article 17 necessarily had a place in the draft and some of the ramifications dealt with in it were useful, but much of the wording required rephrasing in order to make it clearer.

18. Mr. SETTE CÂMARA said that article 17 appeared very complicated at first sight but the Special Rappor-

² *I.C.J. Reports 1974*, pp. 3 and 175.

³ *P.C.I.J.*, Series C, No. 5, vol. I; No. 7, vol. II; No. 13 (III).

teur's commentaries and introductory statement had clarified its meaning.

19. The article embodied in fact a single basic principle, namely, that an act of the State contrary to an international obligation constituted a breach if committed at a time when the obligation was in force. The crucial point was the validity of the obligation at the time when the act was committed. That proposition emerged from all the complex situations of intertemporal international law envisaged in the article. In other words, the provisions of the article confirmed the propositions embodied in paragraphs 1 and 2(f) of the resolution on "The Intertemporal Problem in Public International Law" adopted by the Institute of International Law in 1975 and quoted by the Special Rapporteur in his fifth report (A/CN.4/291 and Add.1-2, para. 60). In all the intricate situations arising from the various applications of the intertemporal law, the principle was that all facts must be assessed in the light of the rules of law contemporaneous with it. That principle was illustrated by the Special Rapporteur by the example of the different awards delivered in the *Enterprize* and *Lawrence* slave trading cases by J. Bates, umpire of the United States-Great Britain Mixed Commission set up under the Convention of 8 February 1853, and more recently, in 1937, by the arbitrator in the *Lisman* case and by the International Court of Justice in its judgment of 2 December 1963 in the *Northern Cameroons* case (*ibid.*, paras. 45-47). The inductive method adopted by the Special Rapporteur clearly demonstrated that the principle set out in article 17 had always been respected as the basic solution of every situation of intertemporal law.

20. The single exception to that rule was the case envisaged in paragraph 2 of the article. Incidentally, the wording of that paragraph, particularly in the English version, did not adequately reflect the Special Rapporteur's intention, which was to refer to an act which had become compulsory conduct by virtue of a rule of *jus cogens*, and not to an act which had merely become "proper conduct". The problem was not simply one of translation, although the French version (*comportement dû*) was closer to the intended meaning. Great care was needed, as Mr. Yasseen had urged, in dealing with the retroactive application of *jus cogens*, and he fully shared the view that any such retroactive application should be made subject to the limitations set forth in article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law) of the Vienna Convention on the Law of Treaties.⁴ That remark applied with even greater force to article 18 of the Special Rapporteur's draft, which dealt with international crimes, in respect of which retroactivity would be very dangerous; in fact, it would conflict with the principle of *nullum crimen sine lege*, which could also be considered as a rule of *jus cogens*. Moreover, he shared Mr. Kearney's view that only in very rare cases would a breach of an international obligation become required

conduct under a rule of *jus cogens*. For that reason it would seem wiser not to deal with such rare cases in article 17 since a provision of that kind was bound to give rise to controversy.

21. That being said, he wished to draw attention to a few points of drafting, or possibly translation. In the first place, the rather awkward title "Force of an international obligation" should be changed so as to indicate that the article dealt with the question whether an obligation was valid or not. Similarly, the reference in paragraph 1 to "the State implicated" (*mis en cause*) stood in need of improvement. The wording of paragraphs 2 and 3 would also have to be carefully reviewed. In particular, he agreed with Mr. Kearney that the provision in paragraph 3 (b) related to conduct consisting of a series of separate acts and not to "an act consisting of a series of separate conducts".

22. He fully supported the basic principle stated in the Special Rapporteur's article 17 and suggested that the article be referred to the Drafting Committee.

23. Mr. HAMBRO said that he was fully convinced by the arguments advanced by the Special Rapporteur in support of the general rule set out in article 17—arguments that were based on jurisprudence, practice and the doctrine. He simply wished to add a further element which strengthened those arguments and that was paragraph 53 of the advisory opinion of the International Court of Justice, of 21 June 1971, in the *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* case, where it was stated:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary;⁵

and that consequently, viewing the institutions of 1919, the Court must take into consideration in its interpretation "the subsequent development of law, through the Charter of the United Nations and by way of customary law".⁶ In addition, in paragraph 94 of the same opinion, the Court declared that

The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach . . . may in many respects be considered as a codification of existing customary law on the subject.⁷

24. The very pertinent remarks of Mr. Kearney and Mr. Yasseen demonstrated the complexity of the Commission's task as far as *jus cogens* was concerned. The Special Rapporteur had rightly said that it was impossible to go into details concerning the content of *jus cogens*.

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.*

⁶ *Ibid.*

⁷ *Ibid.*, p. 47.

However, the fact that a problem was difficult and complex did not mean that it should be avoided. On the contrary, that was all the more reason for trying to solve it, particularly since the question of the content of *jus cogens* might have important consequences with regard to the wrongfulness of an act. Mr. Ushakov had illuminated the problem by his remark that, even if the Conference on the Law of the Sea fixed the limits of the economic zone at 200 miles, that new rule would in no way detract from the wrongfulness of the act committed by a State which had seized a vessel in that zone before the adoption of the rule. But he (Mr. Hambro) drew a different conclusion from that of Mr. Ushakov. As the Special Rapporteur had pointed out, the essential point in that connexion was that the 200-mile rule would not be a peremptory rule; it would not oblige States to adopt the 200-mile limit, but would simply entitle them to do so. The act committed by the State before the adoption of that rule would therefore remain wrongful. Paragraph 2 of article 17, on the other hand, contemplated the emergence of a peremptory rule of international law which required States to adopt a particular conduct. That must be explained very clearly in the commentary, which must also point out that the paragraph represented a progressive development of international law. Unlike Mr. Kearney and Mr. Sette Câmara, therefore, he considered the rule laid down in paragraph 2 to be necessary.

25. Mr. USTOR said that, like other speakers, he supported the ideas set out by the Special Rapporteur in article 17. He only wished to try to simplify the expression of those ideas.

26. The main issue for discussion was the case dealt with in paragraph 2. The rule stated in that paragraph was clearly based on the nineteenth century cases relating to the slave trade. Article 1 of the draft on State responsibility adopted by the Commission in 1973 stated that "Every internationally wrongful act of a State entails the international responsibility of that State".⁸ That meant that the international responsibility of the State was entailed at the moment when the State concerned had committed an internationally wrongful act. It was therefore not altogether correct to say in paragraph 2 of article 17 that an act which constituted a breach at the time of its commission ceased to be an internationally wrongful act as a result of an event which had taken place later. Subsequent events did not alter the fact that, at the moment of the breach, the act had been wrongful and that the State concerned had engaged its international responsibility. The intention in paragraph 2 was no doubt to state that a tribunal adjudicating upon a case of the kind envisaged in that paragraph would take into account changes which had occurred in the law between the time of commission of the breach and the time of rendering the award. If that was the case, the text of paragraph 2 would have to be redrafted.

27. Nor was he altogether satisfied with the drafting of paragraph 1. The statement that a certain act

constituted a breach of an international obligation if performed when the obligation was "in force" for the State implicated seemed to imply that an international obligation could exist and yet not be in force. As he saw it, if an international obligation existed, it was necessarily in force; if it was not in force, it ceased to be an international obligation. The basic rule in paragraph 1 was that stated by Max Huber in his award in the *Island of Palmas* case, referred to by the Special Rapporteur in his commentary (A/CN.4/291 and Add.1-2, paras. 40 and 44). The purpose of the paragraph was to state that a breach of an international obligation entailed the international responsibility of the State concerned immediately, in virtue of the law in force at the time.

28. In the case envisaged in paragraph 2, the same basic rule applied: the State concerned engaged its responsibility at the very moment of performing the act which constituted the breach. In appropriate cases, however, the competent court or tribunal could take into consideration changes and new developments in the law. The results could be quite extraordinary, as shown by the illustrations given by the Special Rapporteur. His doubts regarding the desirability of including paragraph 2 had not been altogether dispelled by the explanations given by the Special Rapporteur in reply to the point raised by Mr. Ushakov. If the paragraph was to be retained, more cautious wording was required. As it stood, it appeared to envisage the possibility of a new category of legal rules emerging, within the category of rules of *jus cogens*, which would peremptorily compel a State to adopt conduct which previously constituted a breach of an international obligation.

29. As for paragraph 3, subparagraphs (a) and (b) followed from the proposition which he had just put forward that every international obligation which was in existence was necessarily in force. The only question which arose in the cases envisaged in those subparagraphs was whether the international obligation existed at the time when the act had been committed; in the absence of an international obligation, there was of course no international responsibility.

30. Subparagraph (c) dealt with the case of an initial act which was subsequently confirmed or annulled by the organ of the State concerned. If the initial act was annulled, no violation of international law could be said to have been committed. There could, however, be exceptional cases in which the delay in handling the initial act would result in injury and even be tantamount to a denial of justice.

31. Mr. AGO (Special Rapporteur) said he would be grateful if members of the Commission would preferably base their comments on the French version of the article, which was the original version.

32. Mr. ŠAHOVIĆ said that he approved the basic rule stated in paragraph 1 of article 17. That rule concerned the simultaneity of the existence of an international obligation and the performance of an act of the State contrary to what was required by the obligation. It was an important rule, not only because it made it possible to establish the existence of an internationally wrongful act, but also because it was a source of legal

⁸ *Yearbook... 1975*, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B.

certainty, in that States could foresee the legal consequences of their actions and omissions. The Special Rapporteur had rightly constructed article 17 from such well-established principles of international law as the principle of the temporal coincidence of the act of the State with the obligation breached by that act and the principle of non-retroactivity.

33. In view of the development of international law in recent years and the need to take account of the international legal order recognized by States as a whole, there should be a proviso excluding the application of the general principle in the case where a peremptory rule of international law transformed into required conduct an act which, at the time it was performed, had to be considered as a breach of an international obligation. He therefore approved the content of paragraph 2, particularly since the Special Rapporteur, at the present meeting, had said that he had not envisaged all the cases where *jus cogens* operated, but only those in which *jus cogens* made it mandatory to perform an act of the same kind as the act which, at the time it was performed, had been considered as wrongful. However, he wondered whether the Special Rapporteur should not have mentioned, in paragraph 2, the general exception represented by the conclusion by interested States of a special convention derogating from the basic principle stated in paragraph 1.

34. Paragraph 3 made provision for three categories of act whose performance continued in time. It showed that acts were not always as simple as might be imagined from looking at the general principle. Nevertheless, the paragraph might not be indispensable, since the Commission would have to consider later the distinctions to be drawn between instantaneous acts and continuing acts, simple acts and complex acts, and single acts and composite acts, as the Special Rapporteur had pointed out in a foot-note to his report (A/CN.4/291 and Add.1-2, foot-note 101). It might therefore be unnecessary to go into details regarding those distinctions in article 17.

35. Lastly, he would point out that the exception provided for in paragraph 2 concerned not only the general rule laid down in paragraph 1 but also the different cases envisaged in paragraph 3. It might therefore be wise to reverse the order of paragraphs 2 and 3.

Mr. Reuter, first Vice-Chairman, took the Chair.

36. Mr. TAMMES said that reading article 17 gave the impression that the Commission had already started to distinguish between international obligations according to their content, for an exception to the classic and fundamental rule of *temporis delicti*, embodied in paragraph 1, had been made on the basis of a hierarchy of norms. An act which led to condemnation might eventually constitute compulsory conduct because of a change in the moral climate—something which, not long ago, would have been considered revolutionary. Since there was only one practical case to test the soundness of that concept, the inductive method would be of little help to the Commission. Yet the Special Rapporteur had courageously drawn the right conclusions and reversed those reached by Umpire Bates in awards delivered more than a century earlier (*ibid.*, para. 45).

37. However, as other speakers had pointed out, the case in question, relating to the slave trade, might be *sui generis* and it would be prudent not to generalize from one case. In the first half of the nineteenth century, or even earlier, condemnation of slavery had perhaps existed as a kind of “dormant” obligation. A French author had referred to the self-evident truth, stated in the American Declaration of Independence, that all men are created equal. The implications of that statement, although clear to some at the time, had not been generally and fully understood until 90 years later. That was, perhaps, an historical illustration of a “dormant” obligation. A similar observation could be made regarding the Special Rapporteur’s example of an international agreement to supply weapons for the purpose of genocide. No doubt, the fulfilment of such an agreement would have been questioned and the obligation declared null and void long before the Convention on the Prevention and Punishment of the Crime of Genocide came into existence.

38. Nevertheless, he had more hesitation over other examples which had been mentioned. In the seal-hunting case, if the seizure and confiscation of the schooner *James Hamilton Lewis* (*ibid.*, para. 46) outside territorial waters had become permissible, not by virtue of a subsequent treaty but because of a change in the general attitude towards the human environment which called for the conservation of irreplaceable species—as compared to species which constituted economic goods—he very much doubted whether the Commission would be prepared to state that such a sudden and unexpected change in man’s respect for his environment would affect the application of the rules of international law in the same way as a change in humanitarian attitudes. Nevertheless, it had been claimed, and recommended, that nature’s irreplaceable resources should be protected by peremptory rules of international law.

39. The time had come, in the interest of legal certainty, to be more specific in dealing with test cases and in determining the hierarchy of international obligations. The whole problem had become rather confusing and the provision contained in paragraph 2 touched on much wider problems than might have been expected, seeing that it formed an exception. In general, he agreed with the three situations differentiated in paragraph 3, but the drafting of that paragraph could be discussed at a later stage.

40. Mr. TABIBI said that article 16, concerning the source of an international obligation, should indeed be complemented by article 17, which dealt with the force, time and circumstances of an international obligation—facts that were essential in pinpointing the obligation and its breach. The rule set out in article 17 might seem complex but it considered two situations: first, the time factor, the time when the breach of an existing obligation occurred; secondly, the question which rule of international law was applicable in order to remedy the breach of the obligation.

41. Some rules of international law, for example those of humanitarian law, were a part of life and seldom changed. Some were rules of *jus cogens*, from which no

derogation was permissible. But some rules evolved according to the needs of society and it was for precisely that reason that the Commission should be careful in its phrasing of article 17. The Special Rapporteur had referred to the *Island of Palmas* case, in which the arbitrator, Max Huber, had concluded that the rules governing the acquisition of territories which had been *res nullius* had changed and had been replaced by the concepts of *res publica* and *res communis*. Clearly, the rules had evolved because of the needs of society. The role of judge and arbitrator had also become important, especially when the rule was not clear and cases had to be settled by examining all the various elements involved.

42. The basic principle underlying article 17 was that the State should be held to have incurred international responsibility if it adopted conduct different from that required by an international obligation incumbent on it at the time such conduct took place. Paragraph 1 was acceptable, but paragraph 2 called for further reflection and clarification. Similarly, paragraph 3 (a) was acceptable because it was an application of the rule stated in paragraph 1, but, like paragraph 3 (c), it needed redrafting in the light of the comments made in the course of the discussion.

43. Mr. REUTER said that the complexity of the questions dealt with in article 17 was bound to create drafting and translation problems. With regard to the title, it should indicate that the article dealt with intertemporal problems.

44. Although he understood the doubts expressed by some members of the Commission, he thought that paragraph 2 should be retained, for the reasons stated by Mr. Hambro. He personally was not convinced of the existence of a *jus cogens*; in any case, the theory of *jus cogens* was still at the embryonic stage. If the Commission accepted the theory, it would have to accept all its logical consequences, and paragraph 2 would then be necessary. But it should surely be stated that the only case envisaged by the Commission was the case where *jus cogens* imposed certain conduct, and not the case where it conferred a faculty. A rule of international law was a rule of *jus cogens* if a State could not repudiate it. If there were an anti-imperialist rule of *jus cogens* forbidding States from waiving their sovereignty in certain circumstances, for example by agreeing to be subject to a protectorate, that rule would not be the kind of peremptory rule envisaged by the Special Rapporteur in paragraph 2.

45. The distinction between composite acts and complex acts, dealt with in subparagraphs (b) and (c) of paragraph 3 respectively, was a subtle one and merited more extensive treatment in the Special Rapporteur's report. Perhaps the Special Rapporteur should have done more than simply mention in a foot-note the course he had given at the Academy of International Law at The Hague in 1939 (A/CN.4/291 and Add.1-2, foot-notes 45 and 105).

46. It might be possible to merge subparagraphs (b) and (c) in a single provision to the effect that the acts of which a wrong might be composed would have to have been performed while the obligation was in force. He won-

dered whether the case contemplated in subparagraph (c) was really different. If the first act was already wrongful, it was sufficient that it had taken place while the obligation was in force; that was simply an application of the general rule. On the other hand, if the Commission wished to distinguish the very special case in which the first act was lawful and had to be confirmed by a second act for the State's responsibility to be entailed, it would have to set that case forth very clearly, especially if it was to be linked with the rule of the exhaustion of local remedies. More detailed explanations on that point would have to be given in the commentary.

The meeting rose at 12.55 p.m.

1369th MEETING

Friday, 14 May 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Twelfth session of the Seminar on International Law

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

2. Mr. RATON (Secretariat) said he wished first to thank Mr. Tabibi, the then Chairman of the Commission, for having so admirably defended the interests of the Seminar on International Law at the thirtieth session of the General Assembly. The twelfth session of the Seminar would take place from 17 May to 4 June 1976. Several members of the Commission, as well as Mr. Pilloud, of the International Committee of the Red Cross, had kindly agreed to give lectures. The Seminar would have 26 participants chosen by the Selection Committee in accordance with the principle of the broadest possible geographical representation. The statistics for 1965-1975 showed that a number of countries had never nominated candidates for the Seminar, and he hoped they would be encouraged to do so.

3. Thanks to the generosity of Denmark, Norway, Sweden, the Federal Republic of Germany, the Netherlands and Finland, whose contributions for 1976 amounted to \$15,710, it had been possible to award 14 full fellowships and two fellowships confined to subsistence at Geneva. Although some of those contributions had been increased from their level of earlier years, two or three more States would have needed to make a contribution of \$2,000-2,500 for all the qualified candidates to be able to participate in the Seminar. At the thirtieth session of the General Assembly, the representative of Sweden in the Sixth Committee, sup-

ported by Mr. Tabibi, had suggested that the regular budget of the United Nations should include an appropriation for the award of fellowships for the Seminar.¹ That was an interesting suggestion, but it could have far-reaching implications. So far, the Seminar had been organized on a more or less informal basis, which gave it a certain flexibility and kept costs to a minimum. If the Seminar were institutionalized and its secretariat, for example, substantially enlarged, there was a danger that it might become too rigid a structure. Some solution must be found for the future, however, because it was only through the co-operation and devotion of members of the Commission that the Seminar had been able to continue until now.

4. The publication entitled *The Work of the International Law Commission*,² which was an essential tool for Seminar participants, was nearly out of print. He hoped that a revised edition would appear very soon.

5. The date of the Gilberto Amado Memorial Lecture would be 3 June 1976 and it would be given by Sir Humphrey Waldock.

6. Mr. TABIBI said that the Seminar on International Law provided extremely valuable assistance to young jurists, particularly those from the developing countries. In some ways, it could even be said that such assistance, in the excellent programmes arranged by Mr. Raton, was more important than technical and economic assistance. That was why for many years he had tried to secure financing for the Seminar by means of a substantial appropriation in the regular budget of the United Nations. In 1975, members of the Sixth Committee had expressed considerable support for the Seminar, and the Swedish representative had suggested that, in a resolution, the Sixth Committee should raise the question of including the cost of the Seminar in the regular budget. At the next session of the General Assembly, the Chairman might endeavour to gain support for a proposal of that type, for it was not possible to carry out such a useful and beneficial programme solely on the basis of limited voluntary funds. A fresh effort was required from the wealthier nations and he urged the members of the Commission, in the interests of international law, to enlist the support of their Governments.

7. Mr. USHAKOV suggested that the question be discussed by the enlarged Bureau.

8. The CHAIRMAN said that it would certainly be helpful if the question were first discussed by the enlarged Bureau.

9. The publication entitled *The Work of the International Law Commission* was truly indispensable. The most recent edition had appeared in 1973, and he hoped that the Commission would authorize him to express to the Secretariat its wish that the publication should be not simply reprinted but revised so as to include a number of recently adopted conventions which were based on the work of the Commission.

10. He would like to express the Commission's appreciation of the efforts of the outgoing Chairman and of Mr. Raton and his assistant.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Force of an international obligation)³ (*continued*)

11. Sir Francis VALLAT said that the principle set out in paragraph 1 of the draft article was clearly stated, and the three cases enumerated in paragraph 3, assuming for the moment that they were indeed three different cases, were examples of the particular categories of conduct that might have to be identified in order to elucidate that principle.

12. As Mr. Šahović had suggested,⁴ it might be better to place paragraph 2 at the end of the article, in order to make it clearer that it formed an exception or quasi-exception to the general principle, whatever the nature of the conduct. He still had some doubts about paragraph 2, however, for its inclusion might mean that the Commission was moving into the field of the discharge of an obligation rather than application of the temporal element in the question of responsibility. The breach of an obligation might give rise to the responsibility of the State and the responsibility might give rise to a further obligation, in most cases an obligation to make reparation. Subsequently, the law might change in the way contemplated by the Special Rapporteur and, as a result, the obligation to make reparation would be discharged. He therefore felt some hesitation as to the advisability of including paragraph 2 in article 17. The matter should be considered by the Drafting Committee, which could prepare a text, based on paragraph 2, for inclusion in the draft article for submission to Governments. Later, in the light of the comments of Governments, it would be possible to consider whether or not the paragraph should be retained. For the time being he was of the opinion that, despite any doubts concerning the underlying philosophy and the *raison d'être* of the paragraph, it should remain within the ambit of the Commission's work on article 17.

13. The title of the article should be changed and an attempt should be made to express the temporal element, which was the essence of the article. Again, the article itself was drafted in terms of the act of the State and some adjustment might be needed to the English version in order to reflect more clearly the way the ideas were expressed in the French. It might be better to follow the plan of article 3, which divided consideration of an internationally wrongful act of a State into two parts, namely, conduct consisting of an action or omission

¹ See *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1545th meeting, para. 33.*

² United Nations publication, Sales No. E.72.I.17.

³ For text, see 1367th meeting, para. 3.

⁴ 1368th meeting, para. 35.

attributable to the State under international law, and conduct which constituted a breach of an international obligation of the State. In that way, article 17 would be drafted in terms of conduct which constituted a breach of an obligation of the State and could then move on to speak of actions or omissions, if the aim was to discuss particular cases. Such a procedure would be more in keeping with the whole scheme of the draft, for matters covered by article 3 (a) had been dealt with in chapter II and, in chapter III, the Commission was, in effect, now considering article 3 (b).

14. With regard to paragraph 1, he preferred to speak simply of an international obligation and not to qualify it by any such word as "specific".

15. On a literal reading, paragraph 3 (c), which stated that an act constituted "a breach of the obligation in question if that obligation was in force when the process of carrying out the act of the State began", raised considerable difficulties. For example, an immigration regulation might provide for an initial screening by an immigration officer and, if the officer decided not to admit an immigrant, for automatic reference to a higher adjudicator, without any need for an appeal by the individual concerned. It would be extremely harsh to aver that the State incurred responsibility as from the provisional decision by the immigration officer. To his mind, the act of the State occurred at the time of the decision of the adjudicator or appeal tribunal. Again, the paragraph would be unacceptable in the case of legislation. Laws passed by parliaments came into force on approval by the Head of State, but the legislative process often started much earlier, in other words, when the laws were submitted to parliament. Consequently, paragraph 3 (c) might call for more than mere drafting changes.

16. Mr. AGO (Special Rapporteur) said that he wished to clarify the meaning of paragraph 3 (c). In the case of a complex act, international responsibility could only take effect at the end of the process of carrying out the act, in other words at the point when it was definitely established that the result which the international obligation was intended to achieve could not be attained. As long as there was a possibility, within the State, of remedying the breach by the first organ which had acted, the internationally wrongful act, though initiated, was not complete. It was, however, obvious that, for it to be possible for the act to be initiated, the obligation must have been in force at the time when the process of carrying out the complex act began.

17. Mr. MARTÍNEZ MORENO said that article 17 was undoubtedly complex and difficult, but it was apparent from the discussion that paragraph 1 clearly stated a general rule and did not give rise to any problems of substance. But the drafting could be improved and, in his opinion, the Special Rapporteur had used a better formulation in his report when he had said that there was "a breach of a specific international obligation by a State if that obligation was in force for the State at the time when it adopted conduct contrary to that required by the obligation" (A/CN.4/291 and Add.1-2, para. 61). The Special Rapporteur had explained that the general

rule could be modified by the terms of a treaty. Unlike the Special Rapporteur, however, he considered that, since the Commission was endeavouring to prepare a comprehensive text, it would be advisable to incorporate a reference to the possibility of establishing an exception to that general rule by treaty.

18. Paragraph 2 of the article should be retained. In internal law, there were two exceptions to the principle of the non-retroactive character of laws: first, in criminal law, when an exception was favourable to the accused, and secondly, as provided in the legislation of a number of Latin American countries, in the sphere of public order. Admittedly, the latter exception had sometimes led to abuse, but it did constitute an exception and, by analogy, the supreme notion of public order could also exist in international law. Consequently, it should be stated that *jus cogens* formed an exception.

19. The Commission might also consider the possible existence of further exceptions which did not relate to *jus cogens*. For instance, in the nineteenth century, El Salvador had signed a number of commercial treaties, which did not contain the now common stipulation, or exception, that third countries were not entitled to the national or preferential treatment accorded to members of an economic community, common market or customs union. When the agreements establishing the Central American Common Market were being signed, some countries had at least hinted that, since the treaties concluded in the nineteenth century had not contained any exception, they should continue to enjoy the preferential treatment granted to third States, in other words, to Central American countries, which enjoyed a privileged position. Evidently, some interests were so great that a country might not fulfil an obligation to grant special treatment to another State for the more urgent reason that it wished to form part of a common market. While the example might not be entirely valid, it was worth consideration as yet another exception, and not one of *jus cogens*. In paragraph 2, the words "proper conduct" might appropriately be replaced by the words "unavoidable obligation" (*obligación ineludible*).

20. The situations described in paragraph 3 were perfectly clear; the necessary drafting changes could be made on second reading, in the light of the views expressed in the Sixth Committee of the General Assembly. The Special Rapporteur had reached his conclusions by the inductive method and, if he could provide more examples and further clarification, he would be making a truly constructive contribution to the development of international law.

21. Mr. QUENTIN-BAXTER said that the subject now being considered, particularly the principle of non-retroactivity, aroused such strong reactions that an effort of will was required to put aside preconceptions and consider from the available evidence whether the principle was vindicated in all cases. In the circumstances, it was admirable that the Special Rapporteur had been able to follow his inductive method. Yet, if the results afforded an assurance that reason and instinct were correct, the Commission was also entitled to attach weight to the more immediate feeling that retroactivity in itself

was a wrong, something to be avoided, and something that was quite contrary to accepted practice for the settlement of international disputes. In the field of responsibility of the individual for acts of war, however, it would be possible to find another type of vindication. Without exception, tribunals for war crimes had found it necessary and natural to decide whether the terms under which they operated were vindicated by the existing state of international law so that the judges could pursue their task in good conscience.

22. He sympathized with Mr. Ustor's view⁵ on the question whether an obligation could exist at all if it was not in force. Everyone was familiar with the notion of treaties which existed in a kind of limbo and imposed no obligations, perhaps because of an insufficient number of ratifications or because a stated period of time had to elapse before they came into force. In current thinking, that notion was entirely acceptable and necessary. However, the whole point was that the treaties were not in force precisely because no obligation was created, and he wondered whether obligations could be regarded in the same way as treaties.

23. The Commission was now solely concerned with the temporal dimension of an obligation; yet an obligation also had a spatial dimension, possibly extending to the whole community of nations or possibly only to the nations harmed by a particular course of conduct. But the temporal and the spatial dimensions continually intersected. For example, a State's obligation towards eight rather than nine States was spatial, but a temporal element might be involved inasmuch as the ninth State had either not acceded to, or had denounced, the treaty in question. Thus, an obligation existed in space and in time and, in the absence of one of those dimensions, it was not possible to speak of the existence of the obligation.

24. With regard to the central problem, which was paragraph 2 of the article, the precedent concerning the slave trade cited by the Special Rapporteur⁶ had to be recognized and dealt with on its merits. In doing so, however, the Commission might be qualifying the notion that an obligation was never retroactive. The exception set out in paragraph 2 extended only to peremptory norms, those special and so far elusive cases in international law in which there was no right of derogation. But even admitting the narrowness of the exception, he shared the general anxiety lest any exception whatsoever to the principle of the non-retroactivity of the law be regarded as challenging the very principle itself.

25. A further problem was the doubt whether the rule contained in paragraph 2 necessarily applied in all cases of *jus cogens*. It manifestly applied in the case of the slave trade. It was also easy to suggest preposterous hypothetical cases—for example, an attempt to seek satisfaction for failure to comply with an ancient secret treaty compelling the parties to make war on an innocent third State. But he wondered whether all possible cases of *jus cogens* had been covered. Mr. Tammes had referred

to the human environment,⁷ where new rules might well emerge having the character of *jus cogens* but attaching no kind of moral stigma to different standards applied in the past, when the world's natural resources had not declined drastically and there had been enough for all. It had been suggested that peremptory norms would be created so slowly that it was not necessary to consider a possible conflict between the old and the new. That had certainly been true with respect to international legislation on the slave trade. Nowadays, on the other hand, in a period of international organization and of immense pressure on a shrinking world, there was every reason to suppose that peremptory norms, dealing with situations of emergency, would be established much more rapidly.

26. The real nature of the situation was that, when a statute covering a particular offence was repealed, it was not simply that the offence disappeared from the calendar as from the time of repeal and not earlier, but that the jurisdiction to try and punish the offence also ceased to exist. The Special Rapporteur had drawn attention to precisely that principle in referring to the Convention between Switzerland and Italy concerning social insurance (A/CN.4/291 and Add.1-2, para. 58). Obviously, if one of the parties failed to give effect to the convention before it entered into force, no wrong was committed. But if, after its entry into force, one of the parties failed to ensure that the benefits were applied retroactively, that would constitute a wrongful act.

27. The Commission would do well to bear in mind at all times the distinction between time past and time present and to confront the problem in paragraph 2 in those terms. In his view, the principle was not one of retroactivity at all. Because of changes in the law, a situation might arise where the mere act of setting up a tribunal and bringing a case before it could contradict a norm that was in force when the tribunal was set up. If that was a valid approach, the conclusion was that the issue dealt with in paragraph 2 need not necessarily be stated as a temporal problem. Such a conclusion, assuming it to be possible, would afford certain advantages—for example, the possibility of deferring, at least temporarily, consideration of the problem of further defining the nature of *jus cogens*. It would also be advantageous in relation to the structure of the draft, for paragraph 2 of article 16 stated that it was the substance and not the form which determined the régime of responsibility, in other words, not only the kinds of consequences of the wrongful act but also the relationships between States. Nevertheless, the actual structure of the draft articles could be more readily shaped after the Commission had discussed article 18. While he was not sure that the exception expressed in paragraph 2 should be retained in the article, he agreed with Sir Francis Vallat that the problem should certainly be confronted by the Commission and set before Governments.

28. With regard to paragraph 3 (c), it was odd that so little material existed that could be applied inductively to the problem under consideration. The reason was

⁵ *Ibid.*, para. 27.

⁶ 1367th meeting, para. 8.

⁷ 1368th meeting, para. 38.

undoubtedly that, because international law in general lacked a system of compulsory jurisdiction, analogies from private law must be considered sparingly. Precedents like the *De Becker* case cited by the Special Rapporteur (*ibid.*, para. 63) would undoubtedly multiply and the rule propounded in paragraph 3 (c) would find enormous practical application. Consequently, it was gratifying to know that the subject was one that must continue to attract the attention of the Commission.

29. Mr. TSURUOKA said that he subscribed to the principle set forth in paragraph 1 of article 17. Paragraph 2, however, he considered unnecessary, since the rule it expressed was applicable in only very few cases and, in his opinion, was undeserving of special mention in a set of draft articles dealing with the broad outlines of international responsibility. If paragraph 2 were nevertheless retained, he would like the prerequisites for the application of the rule to be defined with precision. The Special Rapporteur had rightly stated that, for that rule to be applicable, a preemptory rule of international law must override the previous rule and the wrongful act must become "due" conduct.⁸ Those two conditions were a safeguard against any abuse of the rule. The Commission might supplement those two conditions by a time element and say that the period between the conduct and the emergence of the new rule should not be too long.

30. With regard to paragraph 3 (c), he wondered whether, in the case envisaged by the Special Rapporteur in a foot-note to his report (*ibid.*, foot-note 109) the conduct of the first organ itself was not internationally a wrongful act attributable to the State. If, in the internal legal order, a second or third organ could annul the decision taken by the first organ, the conduct of the second or third organ from the international point of view would free the State of the responsibility which flowed from the first decision. If, on the other hand, the first decision was wrongful at the internal level only, no conduct would begin in international law until the last decision was taken. He therefore questioned whether it was right to say "the process of carrying out the act of the State began", and he would like some clarification of the point from the Special Rapporteur.

31. Mr. ROSSIDES said that, in order to overcome the drafting and translation difficulties to which attention had been drawn during the discussion, he would suggest the following rewording for the English version of the first two paragraphs of article 17:

1. An act by a State, which at the time of its performance runs counter to the requirements of a specific international obligation then in existence, constitutes a breach of that obligation.

2. Nevertheless an act as above shall not be considered a breach of an international obligation by the State concerned, nor shall it entail the consequent international responsibility of such State, in cases where by supervening circumstances an act of that

nature has become the due norm of conduct in virtue of a preemptory rule of international law.

32. As far as the substance was concerned, paragraph 1 did not give rise to any problem; the provision embodied in it was consistent with the accepted rules of international law. The essential problem was in paragraph 2, dealing with the effect of a succession of rules of international law in the course of time upon the international obligations of States; it was in a sense a problem of trans-temporal law. The question was one of a conflict of norms—not merely as between posterior rules and anterior rules but, what was more important, as between different categories of norms from the point of view of their hierarchy, having regard to their content as well as their origin or source. That point was clearly brought out by the reference in paragraph 2 to the posterior norm as being in the category of preemptory norms of international law. Incidentally, the terms of that provision supported the view that the source of an international obligation was relevant to State responsibility.

33. Paragraph 2 of article 17 made provision for an exception to the generally accepted rule stated in paragraph 1 that no international responsibility arose without the existence of an international obligation at the time when the relevant act of the State took place and that consequently any supervening change in that obligation did not affect the position of the parties in regard to the obligation as it existed at the time of the occurrence of the act. The exception stated in paragraph 2 absolved the State from international responsibility for non-compliance with its obligation only in cases where the supervening norm was a preemptory rule of international law. Paragraph 2 expressed very clearly the idea that only in that case was there an exception to the principle of non-retroactivity of the law.

34. During the discussion, some speakers had expressed doubts regarding the propriety of that exception on the ground that the concept of a preemptory norm of international law—in other words, a rule of *jus cogens*—was much too vague. At the previous meeting, Mr. Kearney had referred to the lengthy discussions in the Commission during the consideration of the draft on the law of treaties and to the Commission's inability to agree on a definition of the rules of *jus cogens* or an enumeration of those rules. Mr. Kearney had also pointed out that article 66 of the Vienna Convention on the Law of Treaties referred the determination of the rules of *jus cogens* to the International Court of Justice.

35. It was of course true that no exhaustive list of rules of *jus cogens* could be given but he could not subscribe to the view that those rules were unduly vague. As he saw it, the notion of *jus cogens* was basic to the very concept of law; it was the legal expression of the law of nature and of the law of the universe. It responded to the need for balance and harmony which was expressed in human affairs by the sense of justice and the requirement of equality. It was essentially moral in content and responded to man's spiritual needs. Article 53 of the Vienna Convention defined a preemptory norm of general international law as "a norm accepted and recognized by the international community of States

⁸ See 1367th meeting, para. 10.

as a whole as a norm from which no derogation is permitted".⁹ Bearing that definition in mind, a list could be drawn up of matters which were governed by rules of *jus cogens* such as the prohibition of aggression, genocide, piracy and slavery; the rules of *jus cogens* were those which protected the most fundamental human rights and covered all questions concerned with human freedom, such as the principle of self-determination of peoples.

36. The rules of *jus cogens*, however, certainly did not include rules on purely economic matters, such as the proposed 200-mile economic zone of the high seas. Any rule that might be adopted on such a subject would merely constitute a compromise in the competition for the resources of the world; it would be entirely outside the scope of the basic norms of international law, since it did not affect life, peace or freedom but merely material interests.

37. The rules of *jus cogens* constituted a means of adapting man's behaviour to the required legal order in human society, both nationally and internationally. At the present critical stage of world affairs, it was becoming increasingly necessary to look more closely into the fundamentals of life and human behaviour. When the law of nature, as expressed by peremptory norms of international law, was ignored too long, situations suddenly arose in the world which showed how necessary it was to codify such norms.

38. That need was particularly apparent with regard to international crimes, in respect of which the experience of the war crimes trials at the end of the Second World War was very significant. At that time, crimes against the peace, war crimes and crimes against humanity had been tried on the basis of rules of law not previously in existence. The relevant principles had been enunciated at the time and given retroactive effect, contrary to the basic concept of non-retroactivity of laws; it had not been possible to do otherwise because of the enormity of the crimes and their implications if they had gone unpunished. The purpose had been to give the world a necessary example. He doubted, however, whether the lesson had been learned and whether the world situation had since improved.

39. The experience of the Nuremberg trials showed the need to proceed expeditiously with the codification of international law. The Commission should therefore go ahead speedily with its codification, especially in matters connected with *jus cogens*. Those matters included the offences against the peace and security of mankind covered by the draft code adopted by the Commission in 1954¹⁰ as well as aggression, which had been covered not by that code but by a General Assembly resolution adopted much later.¹¹

40. As for the provisions of article 17 as prepared by the Special Rapporteur, he found them sufficiently

attuned to present day requirements and could accept them as progressive development of international law.

The meeting rose at 12.45 p.m.

1370th MEETING

Monday, 17 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Force of an international obligation)¹ (*continued*)

1. The CHAIRMAN, after welcoming the participants in the twelfth session of the Seminar on International Law and expressing the hope that it would prove as fruitful as previous Seminars, invited the Commission to continue its consideration of article 17.

2. Mr. BILGE said that he would confine his comments to paragraph 2, since paragraph 1 set forth an accepted general principle which was confirmed by jurisprudence, State practice and doctrine. Paragraph 2 expressed an exception to that principle, and one which he personally hesitated to accept. The paragraph concerned the effect which a peremptory rule that emerged after the performance of a wrongful act might have on the wrongfulness of the act or on the consequences of its wrongfulness. The Special Rapporteur had cited as an illustration the examples of the slave trade and the sale of arms. The sale of arms to be used for aggression was certainly contrary to international law, since the use of force was prohibited by the Charter of the United Nations and by the conventions governing relations between States. After concluding a sale of arms, the selling State might learn that the buying State intended to use those arms to commit aggression against another State, and might accordingly refuse to deliver the arms which it had sold to the aggressor State; it would thereby breach its obligation under the contract of sale, but in accordance with paragraph 2 it would not be responsible internationally, since its non-performance of the contract would have

⁹ *Official Reports of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 296.

¹⁰ *Yearbook... 1954*, vol. II, pp. 149-152, document A/2693, chapter III.

¹¹ Resolution 3314 (XXIX), of 14 December 1974.

¹ For text, see 1367th meeting, para. 3.

become not only lawful but mandatory. In that case, the selling State could not be obliged to perform the contract, since the performance of the contract would have become wrongful. But that did not mean that it would be released entirely from its contractual obligation, since it would have to return the money it had received. The question might therefore be asked, in such a case, whether the wrongfulness concerned the act itself or the consequences of the act.

3. He had no difficulty in accepting paragraph 3, which simply applied the general rule set forth in paragraph 1. He favoured the retention of subparagraph (c), which dealt with the awkward question of the exhaustion of local remedies.

4. Mr. BEDJAOUÏ said that article 17 did not present him with any particular problems in so far as it came down to a purely technical point: that of determining the temporal effect of the force of an international obligation. Paragraph 1 expressed a general rule which presented no difficulty; the only difficulty which might arise, for some, was in paragraph 2. He personally thought that it would be a pity to delete paragraph 2, since it represented a fairly novel departure on the part of the Commission. It was right that the responsibility of the State should not be entailed where wrongful conduct subsequently became required conduct. The example of the slave trade cited by the Special Rapporteur was a typical case in which it would be unthinkable to impute responsibility to the State. The example of the sale of arms by one State to another was equally significant. Admittedly, there were cases in which a State had to arm for self-defence, but where the buying State intended to wage a war of aggression or violated fundamental human rights, the selling State obviously had not only the right but the duty not to deliver arms to be used for aggression or for violating human rights. The United Nations had already applied that principle in calling for an embargo on arms shipments to South Africa and Southern Rhodesia. The provisions of paragraph 2 would therefore be very useful in such cases. Other examples which might be mentioned were nuclear tests and to national liberation movements struggling against colonialism. In the latter case, the obligation for States not to interfere in the internal affairs of another State could not be invoked by the administering Power as entailing the responsibility of a third State which had given aid to national liberation movements. He therefore favoured the retention of paragraph 2.

5. The CHAIRMAN, speaking as a member of the Commission, said that like other speakers before him he fully supported the Special Rapporteur's basic approach in paragraph 1 which expressed the general rule in the matter. He also agreed with the inductive method followed by the Special Rapporteur.

6. In his fifth report, the Special rapporteur raised the important question whether the rule stated in paragraph 1 was an absolute rule, and stated that he knew of no exceptions to be found in international practice. He then went on to explain, however, that the absence of such precedents was not a sufficient reason for assuming that there could be no exceptions and that it was important

not to disregard any cases which might arise in the future, however seldom (A/CN.4/291 and Add.1-2, para. 49). There could be no doubt that, if a case on the lines of the *Enterprize* case were to come up at the present day, the arbitrator's award would not be that given by Umpire Bates over 120 years ago. The basic tenets of the present legal order would not permit such a decision.

7. He also agreed that, with regard to the topic of State responsibility, it was not possible to use the analogy of the private law system of responsibility, which drew a distinction between criminal liability and liability at tort, to use the common law terminology. The position in municipal law was less complex than in international law. In criminal matters, there were clear rules on non-retroactivity. It had been the great achievement of the French Revolution to proclaim the two principles: *pas de crime sans loi* and *pas de peine sans texte*. Those principles of non-retroactivity were enshrined not only in the legislation of practically all countries but in the constitutions of many of them; they were also proclaimed in the Universal Declaration of Human Rights² and in the International Covenant on Civil and Political Rights.³ In criminal law there was only one exception to the principle of non-retroactivity: a new law had retroactive effect when it was more favourable than the old law. That was understandable because, as between the accusing society and the accused individual, the latter was always the weaker party. As was explained by the Special Rapporteur in his report (*ibid.*, para. 44), that reasoning did not apply in a relationship between States, since to apply the more favourable law to a State committing an offence would mean applying the more unfavourable law to the injured State.

8. Several members had already stressed the importance of the principle set forth in paragraph 2, which provided for an exception to the general principle of non-retroactivity stated in paragraph 1, in the case where conduct which, at the time it took place, was contrary to an international obligation, had become required conduct by virtue of a supervening preemptory rule of international law. Article 103 of the United Nations Charter had been rightly mentioned in that connexion. It would be consistent with that important Article of the Charter to state, as did paragraph 2 of article 17, that there were certain basic rules of general international law which must override all pre-existing international obligations. To return once more to the example of the slave trade, it would be noted that the international instruments in the matter not only forbade the trade but laid an obligation on States to punish it in the same way as piracy. It was significant that, contrary to the normal rule of the jurisdiction of the flag State, international law recognized the jurisdiction of all States to try and to punish the crimes of piracy and the slave trade wherever committed on the high seas.

9. The questions which arose in connexion with paragraph 2 were concerned not only with the duration of an international obligation but also with the creation of a new international obligation or the interpretation of an

² General Assembly resolution 217 A (III).

³ General Assembly resolution 2200 A (XXI).

existing obligation. On that point, he would like to draw attention to the important dissenting opinion by Judge Jessup in the *South West Africa* case in 1966,⁴ and the International Court of Justice's advisory opinion in the *Namibia* case in 1971,⁵ that South Africa's obligations under the League of Nations Mandate must be interpreted in accordance with United Nations law.

10. He had a few brief comments to make on the drafting of the article. First, the title should be carefully reviewed by the Drafting Committee, because it was inadvisable to speak of the "force" of an international obligation. Next, the Drafting Committee should consider whether the material in article 17 should form one or two articles. Lastly, it should examine the point raised by Mr. Ushakov at the 1367th meeting, namely whether paragraph 2 dealt with the duration of an international obligation, with the creation of a new obligation, or with the interpretation of an existing obligation; in other words, it should examine the scope of the paragraph in the light of the new values now accepted by the international community.

11. Mr. AGO (Special Rapporteur), replying to the debate on article 17, said that the title of the article was purely provisional. The final title would perhaps have to emphasize the temporal element, which pervaded the whole article.

12. With respect to the general rule set forth in paragraph 1, Mr. Quentin-Baxter had drawn attention to the instinctive reluctance to accept the notion of retroactivity.⁶ Other members of the Commission had pointed out that, although the rule was a general one, that did not make it a rule of *jus cogens*, and that States could derogate from it by treaty. He shared that view, and indeed had expressed it in his report (A/CN.4/291/Add. 1-2, para. 57), but it would be possible to derogate by treaty from most of the articles of the draft, since rules of *jus cogens* would be rare. It would be better to draw up a general provision on the subject, applicable to the draft articles as a whole, than to add a special provision to most of the articles. With regard to the purpose of the basic rule, it was to indicate that an international obligation was not breached unless the performance of the act by the State coincided with the existence of that obligation for the State. The purpose of the rule was not really to indicate that responsibility arose with the breach of the obligation, as Mr. Ustor had suggested.⁷ The question of the point at which responsibility arose came after the question contemplated by article 17 and would have to be considered later.

13. Several members of the Commission had criticized the term "force" (*vigueur*) and had made the point that an obligation which was not in force for a State did not

exist for that State. Although that was true enough, it would be going too far to say that it was wrong to talk of "force" because an obligation either existed or did not exist, for an obligation could be incumbent on a State at one time and not at another. Since the award by Max Huber, the arbitrator in the *Island of Palmas* case, the practice had always been to speak of an obligation in force for a State at the material time, and there was no reason to depart from that terminology. It remained to be seen what happened where an obligation ceased for the State after the performance of the act of the State or where, on the other hand, the obligation arose after the performance of the act, and in particular what happened if the act of the State was continuous.

14. Some members had considered that the wording of paragraph 1 should be improved. The article which Mr. Ushakov had suggested inserting in the draft before article 16⁸ would no doubt enable the succeeding articles to be simplified to some extent, particularly article 17. Mr. Kearney had urged that the wording of article 17 should be brought into line with that of other articles,⁹ while Mr. Martínez Moreno had expressed a preference for the wording used by the Special Rapporteur in his report.¹⁰ He personally had no objection to article 17 being redrafted if it could be improved in form without affecting the substance.

15. He was not surprised that paragraph 2 had raised many doubts, since he himself had been hesitant about including it. He had done so mainly because he feared that there would be a dangerous gap without it. As Mr. Ushakov had pointed out,¹¹ paragraph 2 in no way introduced the idea of the retroactivity of an obligation which was not incumbent on the State at the time when it performed the act; it was concerned rather with the exoneration of the State, in exceptional circumstances, from the wrongfulness of its act and its consequences. It would also be a mistake to draw an analogy between that situation and the situation in which it was possible, in penal law, to apply the law most favourable to the accused. Mr. Tabibi had asked, at the 1368th meeting, whether it was really a general rule and Mr. Ushakov had expressed the view that the rule was not valid in all cases. As an example of a case in which the rule could not apply, Mr. Ushakov had cited the seizure by a State of fishing vessels in an area of the open sea which subsequently became part of the economic zone of that State.¹² On that point, he (the Special Rapporteur) would observe, first of all, that the rules relating to fishing limits were in no wise rules of *jus cogens* and, in addition, that paragraph 2 related exclusively to preemptory rules of international law which rendered mandatory conduct that had previously been wrongful.

16. The exception described in paragraph 2 was therefore very limited in scope. Any cases which fell within it

⁴ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 323.

⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

⁶ 1369th meeting, para. 20.

⁷ 1368th meeting, para. 26.

⁸ 1365th meeting, para. 2.

⁹ 1368th meeting, para. 6.

¹⁰ See 1369th meeting, para. 17.

¹¹ 1367th meeting, para. 18.

¹² *Ibid.*, para. 19.

would be of the kind to which a “moral stigma” attached, to use Mr. Quentin-Baxter’s apt expression.¹³ That was precisely why he had stated in his report (*ibid.*, para. 49) that today a court would be loath to condemn Great Britain for having freed the American slaves on board the vessel *Enterprize* seized in Bermuda. Since those days, a rule had emerged which made it not only lawful to free slaves but mandatory to do so. With regard to the case of a neutral State which undertook to deliver arms to another State, at a time when no peremptory rule of international law existed with regard to aggression or genocide, and subsequently refused to deliver the arms because it learned they were in fact to be used for aggression or genocide, that State would be acting as a kind of precursor by behaving as though the new rule already existed; in so doing, it would virtually be contributing to the creation of the rule. As a result, the act of the State which was unlawful according to the law in force when the act was performed would no longer be regarded as unlawful, but that did not mean, of course, that it would be considered retrospectively as lawful at the time when it was performed. If, for example, the act of the State had given rise to reparation at the time, it was obvious that no one would call for restitution of the reparation.

17. Some members of the Commission had questioned whether paragraph 2 was not concerned with notions of responsibility and competence rather than wrongfulness. On that point, what appeared to be startling in the cases contemplated by paragraph 2 was not that a particular act had to be indemnified but that an act which had become mandatory should continue to be regarded as wrongful. Mr. Kearney, at the 1368th meeting, and Mr. Bedjaoui, at the present meeting, had taken the case of a country furnishing aid to a people struggling for self-determination before the right to self-determination had been recognized. According to the international law of the time, such aid constituted interference in the internal affairs of the country in whose territory the people in question was struggling for its right to self-determination. Not only was aid of that kind now lawful but it might even be mandatory under convention or other rules. There would certainly be a reluctance now to condemn such conduct on the ground that it had been wrongful according to the international law of the time. Although history might not furnish many examples of cases such as those contemplated in paragraph 2, and although it was highly unlikely that such cases would occur in the future, it was nevertheless useful to devote a special provision to them. To remain silent on the question might imply that the general rule in paragraph 1 was so absolute as to permit of no exception, even where its application would be repugnant. In his opinion, it was therefore worth while to retain paragraph 2 and thereby affirm a principle; that represented a modest contribution to the progressive development of international law.

18. As Mr. Šahović¹⁴ and Sir Francis Vallat¹⁵ had pointed out, paragraph 2 applied to paragraph 1 as well as to paragraph 3. In addition, paragraphs 1 and 3 were

linked, so that the possibility of placing paragraph 2 at the end of article 17 might be considered.

19. Paragraph 3 had given rise to a variety of opinions. Some members had approved it; some had doubted whether subparagraph (a) was necessary, while others had thought it essential; still others had considered that the questions dealt with in subparagraphs (a) and (b) had already been settled by paragraph 1.

20. At that stage he would not deal with observations on the wording and translation of article 17, since they would have to be considered by the Drafting Committee.

21. The case dealt with in subparagraph (a) was not as simple as it looked. Although it might be said to be just a logical application of the basic rule, it needed to be mentioned separately, in order to remove any doubt. With regard to the comments by Mr. Quentin-Baxter at the previous meeting, although the European Commission of Human Rights had heard many cases concerning continuing acts, that did not mean that international practice had been non-existent before that. In that connexion, he would also like to make clear the distinction between an instantaneous act of continuing effect and a continuing act. If a State inflicted torture on a person, the act of the State as such ceased when the torture ceased, although the torture might leave lasting effects. On the other hand, if a person was refused the right to exercise his profession, as in the *De Becker* case (A/CN.4/291 and Add.1-2, para. 63), the act of the State itself was prolonged and constituted a continuing act. An act of that kind became wrongful if the obligation of the State arose while the act was prolonged, whereas that did not occur in the case of an instantaneous act of continuing effect. The distinction in question had been made in many cases which had come before international authorities.

22. The case dealt with in subparagraph (b) was that of a succession of acts independent of each other and relating to separate situations, but together forming conduct which in itself constituted a wrongful act of the State contrary to a specific international obligation. If a State had undertaken to refrain from discriminatory practices in connexion with allowing nationals of a particular country to exercise a certain profession, it did not breach its obligation until refusal to allow nationals of that country to exercise the profession in question constituted a definite practice. A composite wrongful act was therefore the result of a whole series of separate acts which, as such, might be lawful, or again might be wrongful, but on the basis of another international obligation.

23. Subparagraph (c), which dealt with complex acts, was connected with the rule of the exhaustion of local remedies, as several members of the Commission had noted. In its present form, subparagraph (c) might perhaps cause some confusion. The initial action or omission concerned, not the beginning of the State’s conduct but the beginning of the breach of the obligation. To illustrate his point, he would imagine the case of an alien who applied to the local authorities for permission to exercise a profession and had his application refused. If the alien then applied to a central authority,

¹³ See 1369th meeting, para. 25.

¹⁴ 1368th meeting, para. 35.

¹⁵ 1369th meeting, para. 11.

two kinds of situation could arise. If, before the refusal by the local authorities, the State had undertaken to permit persons of the applicant's nationality to exercise the profession in question, the central authority would have to annul the local decision, grant the permission requested, and possibly indemnify the applicant. If, on the other hand, the obligation had arisen after the refusal by the local authorities, no exception could be taken to the refusal, but the central authorities themselves would have to grant the permission if the applicant addressed a further request for it to them. If they did not grant it, the wrongful act began from that moment and would continue, unless a court restored the situation to what it should have been. Subparagraph (c) would have to be slightly reworded so that such consequences were quite clear.

Mr. Calle y Calle, second Vice-Chairman, took the Chair.

24. Mr. MARTÍNEZ-MORENO, referring to the problem of the so-called *rebus sic stantibus* clause, said that an obligation deriving from a treaty could be modified by a fundamental change of circumstances. But the Vienna Convention on the Law of Treaties stated in article 62 that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty, if it was "the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty".¹⁶ He wondered whether it might not be advisable to deal with that intertemporal problem in article 17, in order to bring the draft into line with that Convention.

25. Mr. AGO (Special Rapporteur) said it was true that the rule of the Vienna Convention was that a treaty could be terminated as a result of a fundamental change of circumstances, but the actual breach of an obligation could not be interpreted as a fundamental change of circumstances. Thus, in the case of a breach of an obligation, it was not possible to say that, for that reason, the treaty had ceased to be valid because of a fundamental change of circumstances. On the other hand, if a fundamental change of circumstances had occurred and had caused the treaty to cease to be valid, it was not possible to speak of "breach", because the breach no longer existed. The question needed further thought, but he doubted whether a matter of that kind should be dealt with in article 17.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 17 to the Drafting Committee, for consideration in the light of the discussion.

*It was so agreed.*¹⁷

The meeting rose at 5.20 p.m.

¹⁶ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 297.

¹⁷ For the consideration of the text proposed by the Drafting Committee, see 1401st meeting, paras. 22-45.

1371st MEETING

Tuesday, 18 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramanga-soavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Organization of work

1. The CHAIRMAN said that, on 17 May, the enlarged Bureau had decided to recommend to the Commission that, at the conclusion of its consideration of article 18 of the draft articles on State responsibility (item 2 of the agenda), the Commission should take up the question of the most-favoured-nation clause (item 4 of the agenda) for one week and a half. Next, for another week and a half, the Commission should consider the topic of succession of States in respect of matters other than treaties (item 3 of the agenda). The Commission should then revert to its consideration of the most-favoured-nation clause until it had completed the first reading of its draft articles on that topic. The Commission should then devote a further one week and a half to the topic of succession of States in respect of matters other than treaties. The Commission should allocate one or two meetings to consideration of the first report by the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses (item 6 of the agenda). The Commission should also devote a number of meetings to consideration of the fourth and fifth reports by the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations (item 5 of the agenda).

2. It had also been deemed advisable that the Commission, depending upon the information to be obtained by the Secretariat, should insert in its report on the work of the present session a paragraph concerning the desirability and usefulness of reissuing the publication entitled *The Work of the International Law Commission*.¹ However, the Secretariat should be requested to include additional paragraphs on the Commission's activities, together with the text of the conventions that had been adopted on the basis of its work since the issue of that publication in 1972.

3. Lastly, it had been suggested that, in considering the complex draft articles on State responsibility, it would expedite the work of the Commission if the Special Rapporteur were not required to wait until the close of the discussion before answering questions, but were to reply to points as they arose. In that way, the Special Rapporteur's summing-up would be confined to a general

¹ United Nations publication, Sales No. E.72.I.17.

appraisal of the Commission's attitude towards each article as a whole.

4. Mr. AGO (Special Rapporteur for the topic of State responsibility) said that he would certainly follow that course if it proved necessary.

5. Mr. HAMBRO said that it would be of great assistance to members if the Secretariat issued a conference room paper setting out the time-table for the programme of work.

6. The CHAIRMAN said that the Secretariat would note that suggestion.

7. If he heard no objection, he would take it that the Commission agreed to the recommendations of the enlarged Bureau.

It was so agreed.

State responsibility (*continued*)
(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Force of an international obligation)²
(*concluded*)

8. Mr. AGO (Special Rapporteur) said he wished to amplify the statement he had made at the previous meeting in replying to two questions put by Mr. Tsuruoka.³ In reality, the first of those questions, which related to the field of application of paragraph 2, he had already answered indirectly when he had stressed the limited scope of the provision. The second question related to paragraph 3 (c). Mr Tsuruoka had asked whether there was not already a complete wrongful act when an organ of first instance adopted conduct which was not in conformity with the international obligation incumbent upon it. In his (the Special Rapporteur's) view, that question must be answered in the negative if the obligation was one of result. On the other hand, if the obligation was a genuine obligation of conduct which specifically required a certain conduct by the organ in question, and if that organ had adopted conduct which was not in conformity with the obligation, there was immediately a breach of the obligation and an internationally wrongful act. But if there was an obligation of result, the decision taken by the first organ only constituted the beginning of a breach, which might become complete if another organ did not restore the situation *ab initio*, but confirmed the first decision. It was only in the case of confirmation that the internationally wrongful act became complete, and it then clearly went back to the conduct of the first organ.

² See 1367th meeting, para. 3.

³ See 1369th meeting, paras. 29 and 30.

ARTICLE 18 (Content of the international obligation breached)

9. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 18, which read:

Article 18. Content of the international obligation breached

1. The breach by a State of an existing international obligation incumbent upon it is an internationally wrongful act, regardless of the content of the obligation breached.

2. The breach by a State of an international obligation established for the purpose of maintaining international peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an "international crime".

3. The serious breach by a State of an international obligation established by a norm of general international law accepted and recognized to be essential by the international community as a whole and having as its purpose:

(a) Respect for the principle of the equal rights of all peoples and of their right of self-determination; or

(b) Respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or

(c) The conservation and the free enjoyment for everyone of a resource common to all mankind,
is also an "international crime".

4. The breach by a State of any other international obligation is an "international delict".

10. Mr. AGO (Special Rapporteur) said that it had been established in article 16 that the source of the international obligation breached did not affect either the existence of the internationally wrongful act or the régime of responsibility resulting from it. To his mind, the expression "régime of responsibility", which was widely used by writers, and which he was using, though without any wish to impose it on the Commission, covered both the form of responsibility applicable and the determination of the subjects entitled to invoke that responsibility. In article 18, the same questions were examined from the point of view of the possible effect, not of the source but of the content of the international obligation breached. Did a breach by the State of an international obligation incumbent upon it constitute an internationally wrongful act regardless of the content of the international obligation breached? Did such a breach always entail the same régime of responsibility whatever the content of the international obligation breached, or was it necessary in that connexion to distinguish between different régimes of responsibility applicable according to the content of the obligation?

11. Since the first question raised no difficulty, he would merely refer members of the Commission to his report (A/CN.4/291 and Add.1-2, paras. 73-78) and his conclusion that "a breach by the State of an international obligation incumbent upon it is an internationally wrongful act regardless of the content of the international obligation breached. No restrictions are to be laid down in this regard."

12. On the other hand, it was not so easy to determine whether differentiation between separate categories of internationally wrongful acts should not be justified according to the content of the international obligation breached. Clearly, such a differentiation, if it was to be

included in the present draft, should be normative and not purely scientific or didactic. It would necessarily have to be expressed by a difference in the régime of responsibility applicable; otherwise it would amount to no more than, for instance, the differentiation made in speaking of internationally wrongful maritime acts because the breaches in question related to the law of the sea, though that did not entail any difference from the point of view of responsibility.

13. Formerly, the great majority of international jurists had held that the content of the international obligation breached had no incidence on responsibility and they had therefore recognized only one régime of responsibility applicable to all internationally wrongful acts. Between the two World Wars, that "classical" view had begun to be contested and there was now a broad current of opinion that a different régime of responsibility should apply when the content of the obligation breached was of special importance for the international community as a whole. Obligations of that kind included those prohibiting States from committing certain acts, such as acts of aggression, genocide and *apartheid* and other acts of comparable gravity. Breaches of those obligations were often called "international crimes". That category of breaches was sometimes distinguished from "normal breaches" or "ordinary breaches", which were hardly acceptable expressions either, since they suggested that it might be "normal" or "ordinary" to commit a breach. Bearing in mind the development of international thought, the Commission would have to decide whether it wished to adopt the classical view, or to go cautiously beyond it and accept that certain internationally wrongful acts could not be treated like others and entailed the application of a different régime of responsibility.

14. On the questions dealt with in article 18, international jurisprudence was relatively sparse. It was true that there was no decision which expressly excluded the possibility of attributing to a breach of an international obligation having a certain content legal consequences more serious than those ensuing from other obligations, but it was equally true that there was no evidence of an actual trend of jurisprudence in the direction of such attribution. Moreover, international tribunals had always confined themselves to recognizing the existence of an obligation to make reparation incumbent on the State which had committed an internationally wrongful act; and that was not surprising, for when the parties to a dispute agreed to refer it to a judicial or arbitral tribunal, it was in order that the tribunal might decide whether reparation was due and, if so, fix the amount to be paid, and not for any other purpose. On the other hand, when a State injured by an internationally wrongful act considered itself entitled to apply a sanction, it did not think of asking an international tribunal for authority to do so. States did not take reprisals or go to war on the authority of a court. Conversely, when the offending State agreed that the dispute should be referred to an international tribunal, it was not in order that the tribunal should give an opinion as to the possibility of a sanction being applied to it, but, at most, in order that the tribunal might decide whether reparation was due and if so, fix the amount.

15. Moreover, international tribunals were not generally competent to pronounce on consequences of the breach of an international obligation other than reparation. That applied particularly to the International Court of Justice; Article 36, paragraph 2 (d), of the Statute of the Court only empowered it to determine the nature or extent of the reparation to be made for the breach of an international obligation. In the *Corfu Channel* case, between the United Kingdom and Albania, the United Kingdom had had to confine itself to asking the Court to declare that Albania was bound by an obligation to make reparation, that limitation being imposed by article 36, paragraph 2, of the Statute of the Court. Yet, in the memorial it had submitted to the Court on 1 October 1947 and in the draft resolution it had previously submitted to the Security Council, the United Kingdom had characterized the act complained of as an "offence against humanity".⁴ The only case in which an international tribunal had given an opinion on the application of a sanction by an injured State appeared to be that of the *Responsibility of Germany arising out of damage caused in the Portuguese colonies of Africa*, heard in 1928 by the arbitral tribunal set up under articles 297 and 298, paragraph 4, of the annex to the Treaty of Versailles. The tribunal had held that the reprisals had been legitimate, in so far as they had been proportionate to the wrongful act.⁵

16. International jurisprudence went into greater detail, however, on the problem of entitlement to invoke the responsibility of a State which had committed a wrongful act. In 1966, in the *South-West Africa* cases, the International Court of Justice had refused to admit that contemporary international law recognized "the equivalent of an *actio popularis*" or "right resident in any member of a community to take legal action in vindication of a public interest".⁶ But in 1970, in the *Barcelona Traction* case, the International Court of Justice had recognized the notion of obligations *erga omnes* deriving, for example, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person. Where there was a breach of obligations of that kind, the Court had stressed that "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection".⁷ That statement of opinion by the International Court of Justice had been interpreted in different ways, but he thought it would mark an important stage in the history of international jurisprudence. It should not, however, be seen as showing a final position.

17. The practice of States had passed through three successive phases. Before the First World War, it was held that the content of the international obligation breached had no incidence on the régime of responsibility. During the period between the two World Wars, there

⁴ *I.C.J. Memorials 1949*, p. 40, para. 72b.

⁵ United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 1025 *et seq.*

⁶ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 47.

⁷ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32.

had been signs of evolution, which had found expression in 1930 in the attempted codification of the responsibility of States for damage done to the person or property of foreigners (Conference for the Codification of International Law, The Hague, 1930). It was moreover possible that Governments would have expressed more decided opinions if that work had related to responsibility in general and not to a limited aspect of it. None of their replies, however, could be interpreted as meaning that the obligation to make reparation constituted the only form of responsibility arising from an internationally wrongful act. One of the questions put by the Preparatory Committee of the 1930 Conference had concerned reprisals, though they were considered not from the point of view of the consequences of the breach of an international obligation, but from that of the circumstances excluding responsibility. Basis of discussion No. 25, which had been drafted in the light of the replies from Governments, had recognized the legitimacy of the exercise of reprisals by the injured State, on condition that it had first vainly attempted to obtain reparation and that the reprisals were proportionate to the internationally wrongful act.

18. The period between the two World Wars had been marked by the affirmation of the principle prohibiting recourse to war. In that connexion there had been a gap in the League of Nations Covenant, since it had prohibited the use of armed force only where States Members could settle their disputes by peaceful means. Once those means had been exhausted, war became lawful. To fill that gap States Members had made several attempts to conclude other international instruments such as the Treaty of Mutual Assistance drawn up in 1923 by the League of Nations; the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, which had defined a war of aggression as a violation of the solidarity of the members of the international community and an international crime; the resolution adopted on 24 September 1927 by the League of Nations, which had confirmed that definition; and the resolution adopted on 18 February 1928 by the VIth Pan American Conference, which had declared that a war of aggression constituted an international crime against the human species.⁸ None of those instruments specified the régime of responsibility applicable to an aggressor, but the very fact of declaring that breaches of obligations relating to international peace constituted international crimes necessarily implied that, in regard to responsibility, such breaches did not have the same consequences as breaches of less important obligations, such as those deriving from a trade agreement. In view of the premise, such differentiation was logically inevitable. It was during the same period that the Briand-Kellogg Pact was concluded, which outlawed war and prohibited recourse to war as a means of settling international disputes. At the end of the Second World War it had been held that that Pact had been in force at the outbreak of hostilities and represented the law applicable.

19. After the Second World War, the need to distinguish between two categories of internationally wrong-

ful acts had been felt more strongly. The terrible memory of that war had raised the fear of another conflict, in which the new weapons of mass destruction would be used. That being so, war could no longer be regarded as a means of settling disputes to which recourse might be had after the exhaustion of other means. Moreover, before and during the Second World War, whole populations had been deported and exterminated in brutal violation of the most elementary human rights, and the conscience of mankind had been shocked. Acts of that kind could no longer be considered as merely entailing an obligation to make reparation. It was also after the Second World War that recognition had been given to the right of peoples subject to colonial domination to gain their freedom and establish independent States.

20. It was logical that a breach of obligations in those different spheres should have come to be regarded as different from a breach of obligations that were less serious for the fate of mankind and less repugnant to the conscience of the international community. That view had been given expression in three ways, which it would be necessary to examine successively; namely, by the recognition in international law of the existence of rules of *jus cogens* from which it was not possible to derogate by special treaty, by the acceptance of the principle of the criminal responsibility of the individual for his part in certain acts as an organ of the State, and by the fact that the United Nations Charter imposed special consequences on the breach of certain international obligations.

21. The rules of *jus cogens* were rules which appeared so important to the international community that the international legal order did not permit derogation from them by means of a special convention between two or more members of that community. That did not mean that the breach of an obligation of *jus cogens* necessarily constituted an international crime, an internationally wrongful act more serious than the breach of another international obligation. Conversely, the possibility that the breach of a non-preemptory rule of international law might constitute an international crime was not ruled out. Generally, however, obligations to which the international community attributed such importance that it did not permit derogation from them coincided with the obligations whose breach constituted an internationally wrongful act entailing more serious consequences from the point of view of responsibility. Indeed, the rules he had referred to as rules of *jus cogens* in the course he had given at the Hague Academy of International Law in 1971⁹ were in his view precisely those from which arose the obligations whose breach was a matter of particular gravity for the international community.

22. At the present time, international law imposed on States the obligation to punish individuals guilty of crimes against peace, crimes against humanity and war crimes properly so called. It would be wrong to see that as a special form of the international responsibility of States. It would be only too easy for a State to evade its international responsibility, for example after starting a war

⁸ See document A/CN.4/291 and Add.1-2, para. 96.

⁹ *Ibid.*, foot-note 147.

of aggression or committing genocide, by claiming that it had punished the individuals responsible at the internal level. The obligation of the State to punish the guilty persons in case of aggression, genocide or *apartheid* simply showed that the international community attached exceptional importance to certain obligations—an importance which found expression both in the fact that it was the State's duty to punish the persons guilty of having taken part in carrying out a breach of those obligations and in the graver international responsibility imputed to the State itself.

23. The third and most important element to be taken into account as evidence of the trend which had emerged after the Second World War was the fact that the United Nations Charter itself had instituted a special régime of responsibility for the breach of certain international obligations. It laid down certain obligations firmly, without leaving any gaps—something the League of Nations Covenant had not done—and provided, in the event of a breach of one at least of those obligations, for the application of collective measures which included the use of force.

24. What were the obligations laid down by the Charter? First and foremost was the obligation in Article 2, paragraph 4, for States Members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. And what were the purposes of the United Nations? As stated in Article 1 of the Charter, they were first of all to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace” (paragraph 1). But they also included ensuring “respect for the principle of equal rights and self-determination of peoples” (paragraph 2), and encouraging “respect for human rights and for fundamental freedoms for all” (paragraph 3). However, when Chapter VII, especially Article 39, specified the conditions under which enforcement action could be taken in accordance with a Security Council decision, it referred only to the first of the purposes stated in Article 1 and specified only that enforcement measures could be taken in the event of a threat to the peace, breach of the peace or act of aggression. For the drafters of the Charter, therefore, aggression, breach of the peace or threat to peace clearly represented the ultimate breach, the supreme international crime. Only that crime entailed the application of the procedure envisaged by the Charter for restoring peace, namely, not only the penalties not involving the use of armed force specified in Article 41 of the Charter, but also the enforcement action provided for in Article 42. Also in the case of that crime, the Charter lifted the general ban on the use of force and authorized its use in the exercise of the right of self-defence in response to an act of aggression. The other penalties provided for in the Charter, such as expulsion from the Organization or suspension of the rights of membership, were always mentioned in connexion with a breach of that fundamental obligation to preserve the peace.

25. The whole of United Nations practice proved beyond any doubt that a breach of the peace was the fundamental international crime. Many countries had tried to broaden that concept by representing certain acts—especially the forcible maintenance of colonial rule by a State, genocide and the adoption of measures of large-scale racial discrimination such as *apartheid*—as a threat to peace, in order to induce the competent organs of the United Nations to take enforcement measures to punish such breaches of certain international obligations. United Nations practice had revealed the unanimous belief that a breach of the international obligation not to use force was not the only breach which could be characterized as an international crime. In the view of the majority of States, there were other international crimes, such as the breach of the obligation to respect the independence of peoples and not subject them to colonial rule by force, and the breach of the obligation to refrain, in internal matters, from recourse to the destruction of a racial minority or to intolerable, large-scale forms of racial discrimination such as genocide and *apartheid*.

26. However, although the Members of the United Nations more or less unanimously agreed that a breach of those two obligations was an international crime which ought to have particularly manifest consequences in regard to responsibility, they did not agree on the nature of those consequences. While perhaps a majority of the present Members of the United Nations would equate colonialism, *apartheid* and genocide with a breach of the obligation not to use force, other Members, including the majority of the members of the Security Council, were not prepared to go so far. Moreover, even the States whose position on the matter was the most extreme had never gone so far as to say that the maintenance of colonial rule or *apartheid* constituted a “breach of the peace”. They had always talked of “a threat to peace” and when speaking of the penalties attaching to such a threat, had generally invoked Article 41 rather than Article 42 of the Charter. In connexion with such breaches the tendency had been rather to envisage the possibility of assistance to peoples struggling for their independence. Moreover, although some States had referred to the “right of self-defence” in regard to the struggle of peoples to free themselves from colonial rule or *apartheid*, the legitimacy of assistance, especially military assistance, to such peoples by a third State had been contested. Nonetheless, both United Nations practice and State practice in general undeniably distinguished the more serious wrongful acts as constituting crimes and therefore entailing a more severe régime of responsibility. The question was what régime of responsibility should be applicable to each of those crimes and what States would be qualified to invoke that responsibility.

27. It was indeed clear that not all breaches belonging to that category of wrongful acts grouped under the heading of “international crimes” were considered by the international community as a whole as being on the same level. It was possible to say that the breach of such and such an international obligation was an international crime, but all international crimes were not equally serious, just as under internal law crimes differed in

degree of seriousness, and homicide and aggravated theft did not carry the same penalty. Consequently, even if the concept of international crime was accepted and international crimes were distinguished from other internationally wrongful acts, it was necessary to accept that a distinction had to be made between international crimes. Shocking though they might be to the conscience of mankind, crimes such as colonialism, *apartheid* and genocide did not entail the same legal consequences for the international community as a whole as the supreme international crime, a war of aggression. Members of the United Nations appeared to be unanimous on that point.

28. That conclusion was supported, not only by United Nations practice, but also by the discussions in the Sixth Committee of the General Assembly during consideration of the International Law Commission's reports on the subject of State responsibility. The representative of Iraq at the twenty-eighth session, the representative of the German Democratic Republic at the twenty-ninth session, and the representatives of the Soviet Union and Cyprus at the thirtieth session, had cited aggression, genocide, *apartheid* and colonialism as examples of offences to be included in the category of most serious wrongful acts,¹⁰ although they had not suggested that they should be made subject to the same régime of responsibility as that which was applied to armed aggression.

29. As regards doctrine, writers before the First World War had generally made no distinction between internationally wrongful acts according to the content of the obligation breached. In the middle of the nineteenth century, however, the Swiss jurist Blüntschli had urged the need to make a distinction between different régimes of responsibility according to the seriousness of the offence.¹¹ He had also approached the question from the angle of the determination of the subject or subjects of international law entitled to invoke the responsibility of the State guilty of an international breach; his contention was that, when a breach constituted a danger to the community, not only the injured State but all other States which had the necessary power to safeguard international law were entitled to take action to restore and safeguard the legal order.¹² Other writers of that period, such as Heffter, had expressed similar views.

30. At the beginning of the First World War, United States jurists had also tried to decide what subjects of international law were authorized to invoke the responsibility of the State guilty of aggression, with a view to instituting, after the conflict, a régime of law capable of averting another world war in the future. For example, Root in 1915 and Peaslee in 1916 had maintained that international law should follow the same evolution as municipal law and distinguish between two kinds of breaches, those affecting only the injured State, and those which affected the whole community of nations. Root

had considered that any State should be authorized, and indeed required, to punish the latter kind of internationally wrongful act, whereas Peaslee had suggested that the organs of the community, which he recommended should be established after the end of the war, should be responsible for the punishment of such acts.¹³

31. After the Second World War, two periods were clearly discernible: that of the 1950s and that of the 1960s and 1970s. In the 1950s, Lauterpacht, expounding the British doctrine, and Levin the Soviet doctrine, had both asked the question whether international law should make a distinction between two different categories of internationally wrongful acts according to the gravity of the act. Both had replied in the affirmative. Lauterpacht had concluded that, in the case of breaches which "by reason of their gravity, their ruthlessness and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilized countries", State responsibility was not confined to the obligation to make reparation, but also included the application of coercive measures such as war or reprisals under traditional international law, or the sanctions provided for in Article 16 of the Covenant of the League of Nations, or in Chapter VII of the Charter of the United Nations.¹⁴ Levin had stressed the need to distinguish between simple breaches of international law, and international crimes which undermined the foundations and essential principles of the international legal order. At the same time, the American jurist Jessup had taken up the idea put forward by Root in 1916, of the need to treat offences endangering the peace and order of the international community as a violation of the right of every nation.¹⁵

32. It was during the 1960s and 1970s that the idea of distinguishing among different kinds of internationally wrongful acts on the basis of the importance of the content of the obligation breached had finally taken shape and been formulated. In the first place, the position taken by a number of Soviet authors on that subject was noteworthy. In a 1962 study devoted to consideration of the consequences of the internationally wrongful act, supported by an analysis of international jurisprudence, Tunkin had arrived at the conclusion that, since the war, international law had distinguished between two categories of offences, each entailing different types of responsibility. In the first category he had included offences which represented a danger to peace, and in the second all other breaches of international obligations. In 1966, Levin had adopted the distinction established by Tunkin between international crimes and simple breaches, and his ideas with regard to the consequences of that distinction for the régime of responsibility. Soviet doctrine thus distinguished between two categories of breaches of international law: those affecting the rights and interests of the particular State and those more serious breaches which "are assaults upon the fundamental principles of international relations and thus encroach upon the rights

¹⁰ *Ibid.*, para. 119.

¹¹ *Ibid.*, para. 124.

¹² *Ibid.*, para. 125.

¹³ *Ibid.*, para. 131.

¹⁴ *Ibid.*, para. 136.

¹⁵ *Ibid.*

and interests of all States", the latter category comprising attacks on peace between peoples and on the freedom of peoples. That distinction between simple offences and "international crimes" entailed consequences with respect to the subjects entitled to demand compliance with the rules of international law, and with respect to the forms of responsibility. The doctrine had been adopted by jurists of other socialist countries, particularly Graefrath and Steiniger in the German Democratic Republic, who had proposed a division of internationally wrongful acts into, not two, but three groups, based on the content of the obligation breached.¹⁶

33. During the same period, in western doctrine, some authors had distinguished between an ordinary delict and an international crime. For Verzijl, for example, an international crime was distinct from a delict in that it not only created an obligation on the part of the offending State to restore the previously existing situation or indemnify the victim of the offence, but also entailed the application of sanctions by the international community. Schindler had proposed that the perpetuation of a colonial régime or a régime of racial discrimination should be treated as an internationally wrongful act *erga omnes* justifying non-military intervention by third States. According to Brownlie, the category of international crimes should include the breach of any obligation deriving from a rule of *jus cogens*, such as the rules which prohibited wars of aggression and other crimes against humanity, and the rules which sanctioned the self-determination of peoples. Following the same reasoning, some authors had asked whether, in the event of the breach of particularly important obligations, it might not be necessary to envisage the possibility of an *actio popularis*.¹⁷

34. There had thus been a marked evolution in doctrine, as in jurisprudence and State practice. The thinking of the International Law Commission had also evolved. Since 1963, following its decision to codify the general principles of State responsibility separately from the question of the treatment of aliens, the Commission had progressively recognized the need to draw a distinction between internationally wrongful acts and their consequences, on the basis of the content of the international obligation breached. The time had now come for the Commission to decide whether or not a distinction should be made between different categories of internationally wrongful acts on the basis of the content of the obligation breached.

35. It was premature, however, to specify what régime of responsibility should be applicable to the various types of internationally wrongful acts. For the present, the Commission should confine itself to deciding whether the seriousness of an internationally wrongful act depended on the degree of importance for the international community of the obligation breached. It would have to be very cautious in answering that question and be careful not to turn all breaches of international obligations into international crimes, since the concept of an

international crime was one which should be confined to the most serious breaches. The basic obligation of refraining from the use of armed force was a clear and definite obligation, and care should be taken not to obscure it by asserting that all kinds of other acts constituted a breach of that specific obligation, just as care should be taken not to broaden the category of other international crimes unduly. While an act of aggression was always an international crime, an act of discrimination could only be described as an international crime if it attained a certain magnitude, as in the case of genocide or *apartheid*.

36. There were two conditions governing the identification of an international crime: the exceptional importance for the international community of the obligation breached, and the seriousness of the breach itself. The content of the obligation should be crucial to the distinction between a crime and a simple breach, since there was a whole range of other obligations whose violation could not be regarded as a crime. But even in the case of a violation of an obligation whose content was of special importance, it was also necessary to take into account the seriousness of the breach, even if that might seem difficult to assess, for it was possible to speak of an international crime only when the breach reached a certain degree of gravity.

37. The Commission would therefore have to be very cautious in distinguishing between international crimes and other breaches. For there to be an "international crime", he would once again emphasize, the breach must be a serious one and the obligation breached must be an obligation whose crucial character was recognized by the entire international community, that was to say, by all its main components, since even a majority of States should not be allowed to impose their views on a minority. It should not be forgotten, moreover, that the United Nations Conference on the Law of Treaties had been most cautious in that respect when it had adopted the concept of *jus cogens*: in the text of the Convention on the Law of Treaties,¹⁸ it had accompanied that concept with the necessary safeguards, leaving it to the International Court of Justice to decide, in case of dispute, whether a rule was a rule of *jus cogens*. It had in fact incorporated a clause (article 66) to the effect that any dispute over the interpretation of article 53 or article 64 of the Convention, on *jus cogens*, could be submitted to the Court by unilateral application. The Commission should take the same precautions on the basis of similar criteria. The existence of an international crime should always be established by an international instance—the Security Council in the case of certain matters and the International Court of Justice in the case of others.

38. The Commission would have to return to that subject when it came to deal with the forms of responsibility. That was not the only point on which a safeguard of that kind would be needed, since there were other

¹⁶ *Ibid.*, para. 140.

¹⁷ *Ibid.*, para. 141.

¹⁸ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

forms of dispute which had to be settled by an impartial authority. The Commission would have to include clauses to that effect, as it was impossible to codify rules on the international responsibility of States without taking the necessary precautions. The Commission should be bold and not hesitate to move forward in the direction pointed by doctrine, jurisprudence and State practice.

The meeting rose at 1.5 p.m.

1372nd MEETING

Wednesday, 19 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Ros-sides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 18 (Content of the international obligation breached)¹ (*continued*)

1. Mr. TABIBI said that he would be the first to respond to the Special Rapporteur's appeal to members of the Commission to be bold and accept the rule in article 18. The basic ideas contained in the four paragraphs of that article were in line with present-day international law and with the views of both past and contemporary authors who advocated the categorization of breaches of international obligations embodied in the article.

2. He fully agreed with the Special Rapporteur that the Commission's task would be made much easier if a provision were included at an appropriate point in the draft to deal with the settlement of disputes by means of some legal or political machinery such as the Security Council.

3. The basic rule of article 18 was stated in paragraph 1, which specified that the breach by a State of an existing international obligation incumbent upon it constituted an internationally wrongful act regardless of the content of the obligation breached. The actual concept of an "international crime" was, however, specified in paragraphs 2 and 3. Paragraph 4 dealt with the breach of an obligation of lesser significance, termed an "international delict". There was no doubt that contemporary international law distinguished between different categories

of internationally wrongful acts, and recognized the special gravity of breaches of certain obligations whose observance was of fundamental importance to the international community as a whole, such as those concerning the maintenance of international peace and security, prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, and respect for the principle of equal rights and self-determination of peoples. That distinction clearly should be made. Just as private law did not treat theft and homicide in the same manner, so international law could not treat an act of armed aggression on the same footing as the breach of a minor international obligation.

4. But for an act to be described as an international crime, the peremptory rule of international law which is violated must be recognized by the entire international community. In his account of the historical background of the subject, the Special Rapporteur had noted that the principles and the categorization embodied in article 18 had been recognized by prominent authors of western Europe long before the Covenant of the League of Nations and the Charter of the United Nations. He would point out that those same principles had already been recognized many centuries before by the great eastern religions—Buddhism, Brahmanism, Judaism, Christianity and Islam. The principles of Islam enunciated thirteen centuries ago enshrined the fundamental rights of man; so far as the breach of an obligation was concerned, the Koran said that a complaint should be made only when an individual's right was violated, adding "Then ask redress with a loud voice because God sees and hears and protects those who have seen injustice".

5. The concept of an international crime could be illustrated by reference to three factors of contemporary life. The first was the emancipation of colonial peoples and the great changes which had taken place in the countries of Asia, Africa and Latin America, whose fundamental rights had been violated for centuries. The peoples of the third world were now in a position to seek redress and to brand the acts from which they had suffered as breaches of international law. The second element was the suffering undergone by the western countries during the First and Second World Wars. The third was the invention of weapons of mass destruction. The emancipation of the peoples of the third world had meant that in all United Nations organs there had emerged a strong body of support for human rights and fundamental freedoms. Their suffering during the two World Wars had led the European countries to recognize those rights which they had themselves violated when colonizing Asia and Africa for many centuries. The invention of weapons of mass destruction had been largely responsible for inducing the major Powers to agree at Yalta, Postdam and San Francisco to adopt the provisions of the Charter for safeguarding peace and human freedom. And now the prospect of the appearance of weapons even more destructive than the atomic and hydrogen bombs made it all the more imperative to safeguard peace and security and to treat resort to the threat or use of force as an "international crime".

6. As pointed out by the Special Rapporteur (A/CN.4/291 and Add.1-2, para. 146), the Commission was now

¹ For text, see 1371st meeting, para. 9.

called upon to decide whether there was any justification for drawing a distinction between the different categories of internationally wrongful acts according to the content of the obligation breached. He himself felt that the time had come to recognize such a distinction because it was in keeping not only with the Charter but also with the provisions of many important instruments, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,² the International Convention on the Suppression and Punishment of the Crime of *Apartheid*³ and the definition of aggression adopted by the General Assembly.⁴

7. He could accept article 18 but he would propose that, in the light of the growing economic rights and interests of States as a whole and of those of the third world in particular, paragraph 2 should be amended so as to refer to the prohibition of any resort to the threat or use of force not only the territorial integrity or the political independence of another State, but also against its economic independence. The inclusion of that reference was essential because economic aggression was much more common than armed aggression, which was often inhibited by the fear of provoking a world war. Economic threats could also be much more effective than threats of armed intervention.

8. He realized that in making that proposal he was touching on the very complex area of the interpretation of the term "use of force" in Article 2, paragraph 4, of the United Nations Charter. In his view, the expression "threat or use of force" covered both economic and political coercion. It should be noted that paragraph (3) of the commentary to article 49 (Coercion of a State by the threat or use of force) of the Commission's 1966 draft articles on the law of treaties recorded the view of some members of the Commission "that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion".⁵ The Commission had decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter" and had considered that "the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter".⁶

9. Ten years had elapsed since that commentary had been written and many important declarations and decisions had been adopted by the General Assembly of the United Nations, the most important of which were resolution 3281 (XXIX) on the "Charter of Economic Rights and Duties of States" and resolution 3171 (XXVIII) on "Permanent sovereignty over natural resources". Those resolutions supported his understanding of the scope of Article 2, paragraph 4, of the Charter, an

understanding which was also consistent with the terms of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,⁷ and the resolutions adopted at all the conferences of non-aligned countries held since 1964. Any failure now to recognize the importance of economic force would constitute a denial of history itself.

10. During the discussion at the United Nations Conference on the Law of Treaties of article 49 of the Commission's draft, he had proposed, on behalf of Afghanistan and a large number of other third world countries, an amendment which would have made a treaty void if its conclusion had been procured by the threat or use of force "including economic or political pressure" in violation of the principles of the Charter of the United Nations.⁸ In a spirit of compromise, that amendment had later been withdrawn following the consent of the Conference to include as an annex to its Final Act a detailed "Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties".⁹ Since that conference, the importance of economic coercion had steadily increased and the attention of the whole community of nations was now focused on the issue of economic rights. The adoption in 1974 by the United Nations of the Charter of Economic Rights and Duties of States was particularly significant in that respect.

11. For those reasons, he again proposed the insertion of the words "or economic" before the word "independence" in paragraph 2 of article 18, so that the violation of the economic rights of a State could be considered as an international crime and he urged the Commission to adopt his amendment.

12. Mr. YASSEEN said the Special Rapporteur was to be congratulated on his excellent report and oral statement. The international community was in a state of flux and the notions and rules of international law were evolving from year to year at such a rate that it seemed like a revolution. The international community had inherited a body of rules of international law protecting the rights of States, peoples and individuals, which had been developed and amended first by the League of Nations Covenant and then by the United Nations Charter. But the international community had not rested content with the Charter: it had created a United Nations law based on the Charter, by developing some notions which had already been latent in the Charter and producing others, while at the same time respecting the fundamental principles of that instrument.

13. International law had developed more especially in three spheres: international peace, the rights of peoples

² General Assembly resolution 2625 (XXV), annex.

³ General Assembly resolution 3068 (XXVIII), annex.

⁴ Resolution 3314 (XXIX), annex.

⁵ *Yearbook... 1966*, vol. II, p. 246, document A/6309/Rev.1, part II, chap. II.

⁶ *Ibid.*

⁷ General Assembly resolution 2200 A (XXI), annex.

⁸ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 172, document A/CONF.39/14, para. 449 (a).

⁹ *Ibid.*, p. 172, para. 454; and *ibid.*, p. 285, document A/CONF.39/26, annex.

and human rights. Progress in the first of those spheres had been remarkable, for it was beyond dispute that resort to force was now prohibited. The Charter stated the obligation to maintain international peace and security—an obligation which had already existed, but which had now become unchallengeable by virtue of the Charter and of United Nations law. At the present time, indeed, resort to force was only permissible in the very limited cases provided for in the Charter itself. A war, even between two States in a remote part of the world, now concerned the international community as a whole. Resort to force was therefore a threat to international peace which must be severely repressed, since it now put the survival of mankind at risk. Thus there was an obligation on States to respect international peace and, consequently, not to resort to force.

14. With regard to the rights of peoples, the development of international law had also been remarkable, thanks to the Charter and United Nations law, which was based on the body of resolutions adopted by the General Assembly and other United Nations organs, and on the favourable trend of the international conscience. In that connexion he might mention the Declaration on the granting of independence to colonial countries and peoples,¹⁰ and the various resolutions adopted by the General Assembly in favour of the liberation of peoples and equal rights. Maintenance of a colonial régime by force had become an international crime. That principle was no longer contested, as was shown by the attitude of the international community to certain countries which were still trying to preserve a colonial situation.

15. In the sphere of human rights, classical international law had been content to prohibit States from infringing the rights of aliens. But it was now recognized that the human being had a right to some protection, even against his own country. There had been interesting developments in that sphere. After the last war, when the problem of *apartheid* had been raised in the United Nations, certain States had invoked Article 2, paragraph 7 of the Charter, according to which the United Nations was not authorized to intervene in matters which were essentially within the domestic jurisdiction of any State. But it would be inconceivable, today, that anyone should invoke that article in favour of certain discriminatory régimes, such as that of South Africa, because of the interest taken by the international community in peoples subject to such régimes. There was, indeed, no denying that international law imposed respect for fundamental human rights.

16. The breach of an international obligation by a State was an internationally wrongful act whatever the content of the obligation breached, and any breach of an international obligation entailed the responsibility of the State. But the content of the obligation could vary. The breach of a conventional obligation resulting from an agreement concluded between two States for the settlement of unimportant questions entailed the responsibility of the State, in the same way as the breach of an obligation to respect international peace and security.

Nevertheless those two obligations were not of equal weight, and their difference in weight might perhaps represent a difference in kind which would justify the application of a special régime of responsibility when the obligation breached was particularly important. It would mean distinguishing basic obligations of vital interest to the international community, the breach of which would entail the application of a special régime of responsibility. That régime would involve not only reparation, but possibly also sanctions of a severity proportionate to the importance of the obligation breached. The distinction was necessary in contemporary positive law. United Nations law already contained the germ of that difference in régime, since it provided for a different régime of responsibility for the breach of obligations which related to the maintenance of international peace. The principle existed and so should be stated in the draft articles and developed with a view not only to the present, but also to the future.

17. Article 18 not only stated positive law, but also met the requirements of the international conscience. He therefore fully subscribed to the general idea it expressed, but he had a few comments to make on the structure and wording of the article. Paragraph 1, which affirmed that the breach of an international obligation entailed the responsibility of the State regardless of the content of the obligation, raised no problem.

18. Paragraph 2 stated a fundamental principle which was set out in Article 2, paragraph 4, of the Charter, but did not state it in full. He wondered why the phrase "or in any other manner inconsistent with the Purposes of the United Nations" had been omitted.

19. Paragraph 3 was based on article 53 of the Vienna Convention on the Law of Treaties,¹¹ which set out the concept of *jus cogens*. He admitted the need to take account of the seriousness of the breach, but thought it was wrong, by restricting the scope of the paragraph to a certain number of purposes, to exclude the possibility of evolution. It might be better to formulate a general principle, as the Conference on the Law of Treaties had done, and then merely give examples, instead of listing purposes. The article might say, for instance that an international crime was the breach of a fundamental norm indispensable to international life, and then refer as an example to the breach of obligations relating to the maintenance of peace, and others. The article should indicate the criterion for determining those obligations the breach of which entailed a special régime of responsibility, and give examples that were not restrictive, so that it would be possible subsequently to include any new categories of particularly important obligations which the development of international life might bring into being.

20. Mr. TAMMES said that he fully subscribed to the idea embodied in article 18 of making an essential distinction between violations of international law according to the weight of the international obligation breached in

¹⁰ General Assembly resolution 1514 (XV).

¹¹ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 289.

each case. That proposition was in line with the general evolution of international ideas, as demonstrated in the Special Rapporteur's commentary.

21. The progressive position adopted by the Special Rapporteur in article 18 was consistent with the Commission's earlier decisions on the topic of State responsibility. The concept of an international crime was also very much at the basis of the Commission's draft Code of Offences against the Peace and Security of Mankind which it adopted at its sixth session, in 1954.¹² It should be noted, however, that the offences defined as "crimes under international law" in article 1 of that draft were offences for which individuals were held responsible. The draft Code did nevertheless give a precise definition of the crimes of a State for which individuals were punishable.

22. In the light of those reflections, he unreservedly approved the basic idea contained in article 18, and his comments were intended only to facilitate the presentation of the draft article to States. As he saw it, article 18 was a tentative draft which would serve mainly to invite comments by Governments that would enable the Commission on second reading to take a decision on the full significance of the distinctions and selections made in the article.

23. It was only at the second reading stage that the terminology used in the article would take final shape. He had some hesitation regarding the use of the term "international crime", because of the danger of confusion with "crimes under international law, for which the responsible individuals shall be punished", referred to in article 1 of the draft Code of Offences against the Peace and Security of Mankind. At the present stage, however, it would serve no purpose to argue about terminology when little or nothing was yet known of the substance of the concepts covered by the terms used.

24. Article 18 adopted a tripartite classification of breaches of international obligations, namely, "international delicts", "international crimes" and the international crimes *par excellence* described in paragraph 2. He was not at all certain that international legal thinking had already evolved to such an extent as to make such a classification feasible. He had carefully examined the records of the proceedings both of the International Law Commission and of the United Nations Conference on the Law of Treaties on the subject of peremptory norms of international law from which no derogation was permitted (*jus cogens*), without finding any trace of a distinction being made between the various examples given in paragraphs 2 and 3. In fact all those examples, except for that in sub-paragraph (c) of paragraph 3, had been mentioned in connexion with *jus cogens*, and all those cases, including that of aggression, had been consistently treated as being on the same level. For those reasons, he would prefer to bring all serious breaches of international obligations under the one heading of peremptory norms of international law. The formula

used in article 53 of the Convention on the Law of Treaties declared a treaty void if, at the time of its conclusion, it conflicted with a peremptory norm of general international law. The sanction thus specified for the breach of a rule of *jus cogens* was of more general application and could extend to a unilateral act and to material acts that flowed from a treaty or a unilateral act.

25. Subject to those observations and reservations, he welcomed draft article 18 and hoped the Special Rapporteur's new venture in the development of international law would be successful.

26. Mr. HAMBRO said that he shared some of the misgivings on points of detail which had been expressed by Mr. Yasseen and Mr. Tammes.

27. However, he entirely agreed with the Special Rapporteur that a distinction must be made between different cases of breaches of international obligations. The legal community expected the Commission to draw a clear distinction somewhere in its draft between ordinary breaches and more serious violations of international law. But he had some doubts regarding the terminology used in article 18, which made it difficult to distinguish between crimes attributable to States and crimes attributable to individuals. It was generally agreed that very grave violations of international law constituted international crimes attributable to the State, but there were also crimes under international law, such as piracy and war crimes, for which individuals were punishable. It was difficult to develop a terminology that would make it possible to distinguish between those two classes of crimes.

28. At a later stage the Special Rapporteur would have to clarify the question of the consequences of the "international crime" mentioned in article 18. From the commentary to article 18, it was clear that international crimes were acts of the State which were sanctioned by something more than a mere compensation in money. It would be agreed by all members of the Commission that provision would have to be made elsewhere in the draft for international sanctions by the world community.

29. He agreed with Mr. Tammes that article 18 had an even more tentative character than was usual for draft articles discussed by the Commission on first reading. The Commission would have to await the reactions of States before reaching a conclusion on the terms in which the contents of the article should be expressed. In particular, it would have to decide to what extent it should single out certain acts as international crimes and draft a detailed criminal code. He would have to reserve his position on that point until he had seen the comments by Governments.

30. With regard to the historical background of the subject, so ably dealt with by the Special Rapporteur in his commentary, he wished to mention two points which gave him grounds for optimism. The first concerned the crime of waging a war of aggression or using force in international relations. He himself had always agreed with the view that the use of armed force had been outlawed as an instrument of international policy by the 1928 Briand-Kellogg Pact. It must be remembered, however,

¹² See *Yearbook... 1954*, vol. II, pp. 151 and 152, document A/2693, chapter III.

that at the time a number of serious writers had maintained that the Pact only prohibited war in the legal sense and not armed reprisals. He himself, in a book he had written forty years ago,¹³ had refuted the contention that the Briand-Kellogg Pact had only outlawed the word "war" and not the act itself. It was beyond doubt that no writer at the present day would dare to put forward the theory that, although aggressive war was outlawed, armed reprisals were permissible under international law. A great change had thus taken place in legal thinking in a matter of a few decades.

31. His second point related to colonialism, which for a very long time had been regarded as perfectly permissible under international law. Today, any attempt to retain a colony by force was regarded as an international crime, and that remarkable evolution, which had also taken place within a very short time, gave him further grounds for optimism. The magnitude of that historical development was shown by the fact that, in the ten years prior to the Second World War, international lawyers and experts on international relations had been discussing the problem facing certain countries which had no colonies and were therefore regarded as the "have nots" of international society. In those years, the possibility had been quite seriously discussed of transferring some colonies from one country to another in order to remedy the situation of "have not" countries. The fact that only forty years later such a discussion seemed palpably absurd was a reason not only for optimism but also for gratitude.

32. Sir Francis VALLAT said that it would be of assistance to the Commission in its further discussion if the Special Rapporteur, when answering the point raised by Mr. Yasseen, would explain the reason for including in paragraph 2 of article 18 only the first part of the wording of Article 2, paragraph 4, of the United Nations Charter and omitting the concluding words "or in any other manner inconsistent with the Purposes of the United Nations".

33. Mr. CALLE Y CALLE said that the Special Rapporteur exemplified the truth of the aphorism, that the wise man was not the man who gave the correct answers but the man who asked the real questions. In his admirable report the Special Rapporteur had also given the answers to the real questions, the questions that were bound to be raised by jurists, politicians or anyone who formed part of the existing legal order, which, though imperfect, constituted a set of rules to guide the conduct of States.

34. The wrongful act of a State had to be determined according to the rule concerned, for it was the content of the rule which shaped the particular obligation and defined the principle to be observed and the conduct to be followed. Paragraph 1 of article 18 rightly stated that the breach by a State of an existing international obligation was an internationally wrongful act regardless of the content of the obligation breached. But the question

then arose whether, precisely because of the content of the obligation, not only the State injured by the breach but also the international community either might demand that the State which had committed the breach should be made to comply with the obligation, or might seek to restore the balance which had been disturbed by the wrongful conduct of the State.

35. The Special Rapporteur's report had demonstrated the changes and developments that had occurred in the international legal order. The first three paragraphs of the preamble to the draft Declaration on the Rights and Duties of States affirmed that the States of the world formed a community governed by international law; that the progressive development of international law required effective organization of the community of States; that a great majority of the States of the world had accordingly established a new international order under the Charter of the United Nations, and that most of the other States of the world had declared their desire to live within that order.¹⁴ Obviously, a new international legal order did now exist and the wrongful nature of a State's conduct would have to be assessed in relation to that order.

36. The community of States in the United Nations had decided that a distinction must be drawn between breaches of obligations involving the permanent and fundamental interests of the international community embodied in the Charter, and breaches of obligations of a conventional character established between two or more States. The Special Rapporteur had drawn the necessary conclusions from the few pertinent judicial or arbitral decisions and had gone on to demonstrate that, in State practice, such distinctions had been drawn little by little, especially since the end of the Second World War.

37. Paragraph 2 of the article dealt with that had been described as the international crime *par excellence*, namely, resort to the threat or use of force, which constituted the first category of international crimes. That category was supplemented in paragraph 3 by an enumeration of other international crimes—breaches of the obligation to respect the right of self-determination, human rights and the free enjoyment of a resource common to all mankind. The paragraph was necessarily couched in general terms, since it was essential to leave no gap in the list of the major categories of international crimes. However, since the article was drafted on the basis of the concept of *jus cogens*, the general condition stated at the beginning of paragraph 3 should speak of the breach of a "peremptory norm of general international law". That was all the more indispensable because the same criterion had already been employed in article 17. It was also the formula used in article 53 of the Vienna Convention on the Law of Treaties. Again, the expression "international community as a whole" was somewhat tautological. It had once been an appropriate term, because it had meant that a rule had been accepted not just by a simple majority of States. But the time was long past when a rule could be applied simply because

¹³ E. Hambro, *L'exécution des sentences internationales* (Paris, Sirey, 1936).

¹⁴ *Yearbook... 1949*, p. 287, report to the General Assembly, part II, para. 46.

European States had accepted it. The nations of Africa, Asia and Latin America now formed part of the new international order and had helped to create the new legal system.

38. He fully agreed with the Special Rapporteur's commentary on the rules of *jus cogens*. Certain obligations were not accepted willingly by States, but were imposed on them by the international community. For example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations in fact represented a means of affirming certain international obligations and ensuring that they were recognized by States.

39. Mr. AGO (Special Rapporteur) said he would like to clarify a number of points which had been raised during the debate and might lead to unnecessary discussion.

40. With regard to Mr. Tabibi's proposal that article 18 should include a reference to the use of "economic force", it was a proposal that had provoked a lively discussion at the United Nations Conference on the Law of Treaties, which had considered it in relation to coercion as a cause of the nullity of treaties. In his opinion, article 18 was already delicate enough and it would be dangerous to introduce further complications. The Conference had not been unanimous in accepting purely economic coercion as a cause of the nullity of treaties, and had left it to international practice and jurisprudence to determine in individual cases whether the traditional notion of the use of force should be extended to include recourse to economic pressure. The introduction of the concept of economic pressure into article 18 would be even more serious than would have been a reference to economic coercion in article 52 of the Convention on the Law of Treaties. It would mean considering that the use of economic pressure was included in the concept of aggression and that mere recourse to that form of pressure constituted an international crime carrying the severest penalties envisaged by the United Nations Charter in cases of aggression. There was every reason to deplore recourse to economic pressure by States, but such conduct could not be assimilated to dropping bombs or firing cannon. The supreme international crime to be condemned was the use of armed force; to include recourse to economic pressure in that concept might weaken it and deprive it of its criminal character. In his opinion it would therefore be better to avoid embarking on a discussion on that subject.

41. The words "or in any other manner inconsistent with the Purposes of the United Nations" did not appear in paragraph 2, as Mr. Yasseen and Sir Francis Vallat had observed, for the reason that he had wished to circumscribe as closely as possible the supreme crime for which the Charter provided the severest penalties—the crime of aggression, in other words the use of force against the territorial integrity or political independence of another State. To his mind, offences, even with the use of force, against the other Purposes of the United Nations should be covered by paragraph 3. He nevertheless saw no objection to inserting those words in the

article. To avoid misunderstanding and fruitless discussion in the United Nations bodies which would consider the fifth report on State responsibility, he would himself propose that those words should be added in the final version of the article.

42. He had indeed intended to refer to the rules of *jus cogens*, or rather to the rules of essential importance to the international community, in paragraph 3, and it was the haste in which he had had to draft addendum 2 to his fifth report (A/CN.4/291/Add.2) that was responsible for the involuntary omission of the words "and recognized as essential" from the mimeographed version of that addendum.

43. Like Mr. Yasseen, he believed that the list of international crimes in paragraph 3 should not only faithfully reflect the present situation but should be adaptable to future situations if necessary. That was precisely why he had refrained from expressly mentioning aggression, genocide and *apartheid* and had referred to general categories of international obligations which covered those crimes at the present time and could embrace new obligations added in the future. Future contingencies might be provided for by inserting the word "particularly" at the end of the introductory sentence of paragraph 3, to make it clear that the list which followed was not exhaustive. Care should be taken, however, to ensure that it would not be possible to invoke that provision in every situation by claiming that the breach of some international obligation constituted a crime warranting the application of sanctions.

44. For him, the text proposed for article 18 was by no means final. It was only a tentative solution, as Mr. Tammes and Mr. Hambro had remarked, and the Drafting Committee would no doubt change it considerably if the article was referred to it.

45. Although he had no fixed views on the wording of the article, he attached a great deal of importance to the basic distinction between two categories of internationally wrongful acts. Like himself, Mr. Hambro had distinguished between delicts—simple breaches involving only an obligation to make reparation—and international crimes. Mr. Tammes had perspicaciously remarked that the proposed bipartite division was really tripartite, since in article 18 the use of armed force was considered as a crime apart. When the Commission came to define the different forms of responsibility, it would perhaps provide that the measures envisaged in Article 42 of the Charter would be applicable to certain crimes and not others. United Nations practice, as reflected in the resolutions adopted and the attitudes of Member States, showed that, when certain internationally wrongful acts generally described as crimes were committed, the States concerned had themselves stopped short of asking the Security Council to apply the measures provided for in Article 42 of the Charter. They had confined themselves to the penalties specified in Article 41, which did not involve the use of armed force. The Commission should decide forthwith to make a distinction between crimes and delicts, as that would enable it later to distinguish several forms of responsibility. In doing so, however, it would retain full freedom to determine the nature of

those forms of responsibility and their relationship to the different categories of internationally wrongful acts. In his view, there need be no hesitation in dividing internationally wrongful acts into two categories, especially as such a division was not new. States accepted it when they accepted the Charter of the United Nations.

46. Mr. TABIBI said that he had no wish to introduce further complications into what was already an extremely complex matter; but he could not agree, not did he think that the countries of the third world would agree, that economic strangulation of a country constituted a minor breach of an international obligation. The effects of such strangulation were sometimes worse than aerial bombardment. They could lead to the destruction not just of a district or region but of an entire country. The question was of the utmost importance.

The meeting rose at 12.50 p.m.

1373rd MEETING

Thursday, 20 May 1976, at 11.00 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Filling of casual vacancies of the Commission (article 11 of the Statute)

(A/CN.4/289 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN announced that, at a private meeting, in conformity with its Statute, the Commission had elected Mr. Frank X. J. C. Njenga, of Kenya, to fill the vacancy caused by the resignation of Mr. Taslim O. Elias.

2. A communication had been sent to Mr. Njenga inviting him to take part in the Commission's proceedings.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 18 (Content of the international obligation breached)¹ (*continued*)

3. Mr. SETTE CÂMARA said the Special Rapporteur had started from the proposition that, regardless of the

content of the obligation, the breach of an obligation constituted an internationally wrongful act. That was beyond dispute and so the text proposed for paragraph 1 presented no difficulties.

4. The problem that now arose was whether different kinds of internationally wrongful acts should be distinguished according to the content of the international obligation breached. That course was favoured by the Special Rapporteur for normative reasons, in other words, because it allowed him to establish different régimes of responsibility for different types of internationally wrongful acts. Earlier views with regard to responsibility, which had not accepted such a categorization of breaches of international rules, had now changed considerably and current thinking was that there should be one type of régime for breaches that injured the international community as a whole and another for the traditional type of wrongful act that was of immediate concern only to the particular State injured. Aggression, genocide, *apartheid*, gross violations of human rights and fundamental freedoms, colonialism and obstruction of the enjoyment of resources common to mankind were offences that affected everyone in the organized community of States, offences that called for something much more than reparation. Indeed, in those instances, it would be impossible to seek redress on the basis of reparation. How could the lives of millions killed in recent times by acts of genocide be replaced and what could be the *restitutio in pristinum* for centuries of enslavement under colonialism? Faced with the indisputable realities of the modern world, and conscious of the feelings of the vast majority of countries, the Special Rapporteur had taken a bold step forward in the progressive development of international law and had proposed a text for article 18 which dealt openly with a category of offences branded as international crimes.

5. The extracts quoted from the judgment of the International Court of Justice in the *Barcelona Traction* case² were conclusive evidence of an international decision favouring the idea of distinguishing between the obligations of States towards the international community as a whole, and their obligations towards other individual States. However, the Special Rapporteur had rightly recognized that the jurisprudence of the Court was somewhat inconsistent since, in the *South West Africa* cases, the Court had refused to admit the existence of a kind of right to an *actio popularis* on the part of any member of the community of States in specific types of breach of obligation.

6. In State practice, on the other hand, the Special Rapporteur had emphasized that, from the Second World War onwards, Governments had recognized the existence of breaches of international law that were so grave as to be regarded as crimes *erga omnes*. However, the texts prepared under the impact of war atrocities had not dealt with crimes of the State, but crimes under international law for which individuals would be punishable. That was true of early drafts of the International Law Commission, for example, the Principles of International Law

¹ For text, see 1371st meeting, para. 9.

² See A/CN.4/291 and Add.1-2, para. 89.

Recognized in the Charter of the Nürenberg Tribunal and in the Judgment of the Tribunal,³ and the Draft Code of Offences against the Peace and Security of Mankind.⁴ Even the Convention on the Prevention and Punishment of the Crime of Genocide⁵ dealt exclusively with crimes under international law, and article IV thereof specified that "Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

7. Obviously, the Commission was now concerned with international crimes for which States were held responsible, in accordance with Article 2, paragraph 4 of the Charter and other international conventions. The Special Rapporteur had not, for the time being, discussed the legal consequences of violation of one of the basic norms involving that type of aggravated responsibility, but it was evident that redress would be sought under the provisions of Chapter VII of the Charter. That would apply not only in the cases provided for in paragraph 2 of article 18, but also in those enumerated in paragraph 3, since offences against the right of self-determination, human rights or the right to free enjoyment of a resource common to mankind would necessarily constitute threats to the peace.

8. With regard to the drafting of article 18, since the Commission had decided to take the bold step urged by the Special Rapporteur, it seemed hardly necessary to put the expression "international crimes" in quotation marks. At the same time, paragraph 4 should be deleted, for it would be better, at the present stage, not to qualify an internationally wrongful act as an "international delict". Earlier, the Special Rapporteur had rejected the expression "international delinquency" in order to avoid misleading analogies with internal criminal law. Moreover, in many legal systems, "delict" was merely a synonym for "crime".

9. With regard to the structure of the article, paragraph 1 should stand alone as article 18, and the title should be replaced by some such formula as "Irrelevance of the content of the international obligation breached". Paragraphs 2 and 3 would form a separate article with the title, suggested by Mr. Tamme,⁶ "Violations of peremptory norms of international law". Such a division into two articles would be appropriate because of the differences in treatment that two régimes of responsibility would entail. Whereas ordinary breaches would continue to be dealt with by the traditional remedy of reparation and would constitute a purely legal problem—to be decided by the International Court of Justice, or by arbitration if other means of settlement failed—international crimes would be dealt with by the Security Council, the only political body that could authorize collective action to maintain or restore international peace.

10. He agreed with Mr. Yasseen⁷ that the text of the article should reproduce in full the wording used in Article 2, paragraph 4 of the Charter. While he had every sympathy with Mr. Tabibi's proposal,⁸ he none the less felt that it would seriously complicate an already very difficult topic. The enumeration of international crimes contained in paragraph 3 was not, in his opinion, by any means exhaustive. The Commission should be guided by the definition of aggression adopted by the General Assembly,⁹ article 4 of which stated that the Security Council might determine that acts other than those enumerated in the Definition constituted aggression under the provisions of the Charter. If the economic pressure referred to by Mr. Tabibi was so great as to strangle the life of a country, there was nothing to prevent the Security Council from branding it as an act of aggression.

11. Sir Francis VALLAT said it was apparent from the discussion that members of the Commission accepted a distinction between offences that might be categorized as crimes and lesser breaches of international obligations that might be subject to a different régime of responsibility. In the development of international legal thinking, that distinction had been clearly established and the Commission should proceed accordingly.

12. In his view, the commentary should stress, more than did the Special Rapporteur in his report, another distinction, which was the distinction between the criminal responsibility of individuals and responsibility for a crime attributable to the State, irrespective of the question whether or not an individual might also be punishable for an "international crime". A mere classification of certain acts as international crimes could perhaps lead to some confusion, in which efforts might be made to use it as a shield for individuals who might be held accountable. Indeed, it would be better if that point were emphasized not only in the commentary but also in the article itself.

13. He hoped that, as indicated by the Special Rapporteur, paragraph 3 would be more closely modelled on article 53 of the Convention of the Law of Treaties,¹⁰ which was the generally accepted definition of *jus cogens*, as now understood in international law. If a peremptory norm was one from which there could be no derogation by agreement, it was because the norm was so regarded by the international community as a whole. Consequently, he wondered whether the breach of such a norm was not a breach of an obligation towards the international community as a whole and, if so, whether a breach of such a peremptory norm must not constitute an international crime. The problem could be considered from another angle: if two States were free, by agreement, to derogate from a particular rule, in other words, a rule that was not a peremptory rule of *jus cogens*, such a

⁷ *Ibid.*, para. 18.

⁸ *Ibid.*, para. 11.

⁹ General Assembly resolution 3314 (XIX), annex.

¹⁰ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

³ *Yearbook... 1950*, vol. II, p. 374, document A/1316.

⁴ *Yearbook... 1954*, vol. II, p. 149, document A/2693.

⁵ United Nations, *Treaty Series*, vol. 78, p. 277.

See 1372nd meeting, para. 24.

derogation could not reasonably be qualified as a crime if the act was performed by one State alone? Obviously, there must be a very close identity between the concept of *jus cogens* and the concept of an international crime, for it was difficult to conceive of an act which, if not a breach of a peremptory norm, could at the same time be considered as an "international crime", at least in the sense in which the Commission was using that term. That matter should be more clearly reflected in the text of the article.

14. Paragraph 2 related to the principle of the maintenance of international peace and security, but the crimes enumerated in paragraph 3 could also very well lead to threats to international peace and security. However, the breaches listed in paragraph 3 were described as "serious", and he doubted whether States could be called upon to distinguish between breaches that were serious and breaches that were not serious. In categorizing an act as a crime, the pertinent factor was the nature of the particular obligation. A breach of a bilateral treaty might not necessarily amount to an international crime, but if it threatened international peace and security, the breach entered the field of criminal responsibility. Thus, the concept of a threat to international peace and security lay at the root of the categorization of acts as crimes. At the same time, the Commission was concerned with breaches of obligations towards the international community as a whole. In many systems of internal law, a crime was an act regarded as contrary to the public interest and, consequently, punishable by public process. In his opinion, paragraph 3 should be expanded in order to reflect more fully the concept of the interests of the international community as a whole.

15. With regard to the purpose and consequences of the distinction to be drawn between different acts, in other words, the régimes of responsibility and the forum for application of the rules, threats to international peace and security would fall under the terms of Article 39 of the Charter, which specified that the Security Council would determine the existence of any threat to the peace or breach of the peace. On the basis of its determination, the Council was then entitled to take the necessary steps, either by recommendation or by action under Chapter VII of the Charter. The fact that Chapter VII was concerned with the maintenance or restoration of peace and security and did not provide for punishment of the wrongdoer did not mean that the Commission had to refrain from describing acts that were covered by Article 39 as international crimes if it thought such a course appropriate. With regard to *jus cogens*, the characterization of a peremptory norm was, in the event of a dispute, a matter to be referred in principle to the International Court of Justice, as was only appropriate, since it was difficult to envisage how legal findings of that kind could be made other than by the judicial organ of the United Nations.

16. He agreed with those members who considered that paragraph 2 should incorporate in full the language employed in Article 2, paragraph 4 of the Charter. Lastly, it should be made very clear that the list of international crimes given in paragraph 3 was in no sense exhaustive.

17. Mr. ŠAHOVIĆ said he entirely approved the principles on which article 18 was based and endorsed the views expressed by the Special Rapporteur in his written and oral introductions. The Special Rapporteur had succeeded in bringing out the recent trends in international law and in showing that the Commission should take them into account in its attempts to codify and promote the progressive development of the rules concerning State responsibility. In that respect, article 18 was a keystone of the draft.

18. If the Commission had been slow to codify the law of State responsibility, it was precisely because it had been impossible for it to consider proposals of the type contained in article 18 so long as international law had not evolved in a certain way. Particular mention should be made in that respect of the growing importance of the United Nations Charter and the entire body of legal rules to which its application had given rise. In adopting article 18, the Commission would put an end to a controversy which had begun with the establishment of the United Nations, over the place of the Charter and United Nations law in relation to general international law. As the organ responsible for the codification and progressive development of international law, the Commission was well placed to proclaim that that United Nations law could now be identified with general international law. The General Assembly had already taken a step in that direction in 1970, when it had adopted by consensus the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹¹ That Declaration contained a provision to the effect that the principles of the Charter which it embodied constituted basic principles of international law by which all States should be guided in their international conduct and which they should observe strictly in their mutual relations. Doctrine, on the other hand, had not always been as innovative; very few authors had shown the boldness which had led States to develop international law in that direction.

19. There could be no doubt that the principle set out in article 18, paragraph 1, was firmly established in international law. At first, he had wondered, like Mr. Sette Câmara, whether the rules set out in the other paragraphs should not form a separate article, but he had come to the conclusion that it was better to deal in a single provision with all the questions concerning the content of the international obligation breached. However, it could be seen from the plan of the draft articles which the Special Rapporteur had submitted to the Commission at its twenty-seventh session that he intended to devote a special article to international obligations of which the breach was particularly serious for the international community. The distinction which the Special Rapporteur was now proposing to make in article 18, based on the content of the international obligation breached, was entirely acceptable, for it was in keeping with the recent trend in international law.

¹¹ General Assembly resolution 2525 (XXV), annex.

20. None the less, like Sir Francis Vallat, he felt that the ideas contained in paragraphs 2 and 3 could be expressed differently. In particular, he wondered whether it was necessary to distinguish between the international crimes referred to in the two paragraphs. Again, the criterion of seriousness of the breach proposed in paragraph 3 for determining which were international crimes, as opposed to international delicts, did not seem to him to be the best. It would be better to analyse, in each individual case, the nature of the obligation breached. All the principles which the peremptory rules of international law sought to safeguard were interdependent. The question of the precedence of certain principles over others, particularly of the principle of the equal rights of peoples and their right to self-determination over the principle of the prohibition of the use of force, had been keenly debated. Consequently, he felt it would be preferable to draft a single paragraph stressing the importance of peremptory rules of international law, and basing the distinction between international delicts and international crimes on the concept of the community of interests of all States.

21. The phrase "or in any other manner inconsistent with the Purposes of the United Nations", which was contained in Article 2, paragraph 4, of the Charter and which some members of the Commission had suggested should be reproduced in paragraph 2 of article 18, in fact referred to the crimes which were the subject of paragraph 3 of that article.

22. Finally, he was glad to see that the Special Rapporteur had mentioned, in paragraph 3 (c), "the conservation and the free enjoyment for everyone of a resource common to all mankind". That provision reflected a recent trend in international law and met the needs of the entire international community.

23. Mr. MARTÍNEZ MORENO said that he was in full agreement with both the contents and the underlying ideas of article 18. Those ideas were in conformity with the rulings of international tribunals, with the practice of States and with the writings of the most eminent authors, all of which accepted the distinction between violations of peremptory norms of international law and breaches of ordinary rules of international law from which derogation was possible by agreement among States.

24. He therefore approved the basic rule of the article, contained in paragraph 1. At a later stage, however, a separate article should be included in the draft setting out as an exception to that rule, the case where a different conclusion had been provided for in a specific treaty by agreement between the States concerned; it should of course be made clear that that exception did not apply to a rule of *jus cogens*, since no derogation from such a rule was possible.

25. The Special Rapporteur's excellent report showed clearly that there had been an evolution in international legal thinking, marked in the first place by the emergence of rules of *jus cogens*. Another significant development had been the acceptance of the concept of the punishment of individuals for acts committed by them in their capacity as organs of the State, without thereby in any

way exonerating the State from international responsibility. The United Nations Charter strongly condemned certain violations of international law, in particular armed aggression. United Nations law regarded the threat or use of force, colonialism, racial discrimination and the oppression of minorities as grave international crimes, while it strongly affirmed the obligation to respect human rights. The traditional notion of international responsibility as giving rise only to the duty to make reparation had been replaced by a wider concept. It was now possible to apply to the State committing the breach such sanctions as the severance of diplomatic and consular relations, total or partial severance of economic relations and of communications by rail, sea and air, and even—in the event of aggression—the use of armed force.

26. All those new developments had to be taken into account and the Special Rapporteur had therefore acted wisely in making provision in article 18 for international crimes and in particular for aggression, which constituted the international crime *par excellence*. It was essential, however, to mention the exception, embodied in Article 51 of the United Nations Charter, which safeguarded "the inherent right of individual or collective self-defence" against an armed attack.

27. In paragraph 2, he favoured, like several other speakers, the insertion of the concluding words of Article 2, paragraph 4 of the Charter: "or in any other manner inconsistent with the Purposes of the United Nations". Inclusion of that reference to the Purposes of the Charter was particularly important because of the existence of other international instruments prohibiting the use of force.

28. For instance, article 1 of the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947 stated:

The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty.¹²

Article 10 of that same treaty, moreover, specified:

None of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations.¹³

The Treaty of Rio de Janeiro was particularly important because it had been ratified by all the States of America. Articles 3 and 11 of the Treaty provided that, in the event of an armed attack, consultations should immediately take place by means of a meeting of Ministers for Foreign Affairs which constituted the Organ of Consultation. That body was empowered to recommend sanctions against the aggressor State, including the use of armed force; the use of such force, however, was subject to the observance of the constitutional provisions in force in each State concerned.

¹² United Nations, *Treaty Series*, vol. 21, p. 95.

¹³ *Ibid.*, p. 101.

29. There had been considerable discussion among writers on the question of priority of the United Nations Charter over the Inter-American System embodied in the Treaty of Rio de Janeiro and in the Charter of OAS signed at Bogotá on 30 April 1948, both of which stated that they had been concluded in the framework of the United Nations Charter. Article 2 of the Treaty of Rio de Janeiro, however, specified that the Parties to it undertook to endeavour to settle any dispute among themselves "by means of procedures in force in the Inter-American System before referring it to the General Assembly or the Security Council of the United Nations."¹⁴ Article 20 of the Charter of Bogotá, in turn, stated that:

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations.¹⁵

30. In that discussion on the question whether priority should be given to the Inter-American system or to the United Nations system, many writers such as Jiménez de Aréchaga had held the view that the provisions of the United Nations Charter prevailed over those of the OAS Charter. A number of other writers, such as Caicedo Castilla, considered on the contrary that the dispute should first be submitted to the competent organs of the Inter-American system before being referred to the Security Council of the United Nations. In view of that controversy, it was essential to include in paragraph 2 of article 18 the full text of Article 2, paragraph 4 of the Charter of the United Nations, so as to leave no doubt regarding the priority of that Charter over any regional charter.

31. He agreed with Mr. Yasseen that the list of international crimes contained in paragraphs 2 and 3 was not exhaustive and left the door open to the progressive development of international law in the matter. Thus, paragraph 2 did not cover specifically the case of the denial by a State to the people of a dependent territory of the right of that people to a government of its own. Very grave international crimes could be committed by denying the right to independence to the inhabitants of a non-self-governing territory. The case of Namibia was an obvious example. A crime of that kind would not constitute an attack against the "territorial integrity or political independence of another State" because the dependent people concerned did not yet constitute a State of their own.

32. Mention should also be made of war crimes, defined by the International Law Commission itself in its 1950 Codification of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal as "violations of the laws or customs of war which include . . . wanton destruction, of cities, towns, or villages, or devastation not justified by military necessity".¹⁶ Article 2, para. 12 of the Draft Code of Offences against the Peace and Security of

Mankind adopted by the Commission in 1954 also listed as such offences: "Acts in violation of the laws or customs of war".¹⁷

33. He fully agreed with Sir Francis Vallat regarding the criterion of international peace and security. There were indeed breaches of international obligations which affected the international community but not international peace and security. He would take the case of the sea bed and its sub-soil beyond the limits of national jurisdiction, the resources of which had been acknowledged to be the common heritage of mankind. If international machinery were set up to control the exploitation of those resources, the act of a State which sent one of its ships to exploit those resources contrary to international regulations would constitute a grave breach of that State's international obligations but would not imperil the peace and security of mankind. That example demonstrated the soundness of the view put forward by Sir Francis Vallat.

34. As for paragraph 4, he was not in favour of deleting it, although he agreed that the expression "international delict" raised a problem of terminology, a problem far more serious in Spanish than in English and French, since the Spanish text of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind used the Spanish term "delito" to render the English (and French) term "crime". It would be better to avoid the expression "international delict" and to refer simply, in paragraph 4, to the breach by a State of an ordinary international obligation.

35. In conclusion, he expressed his thanks to the Special Rapporteur for his masterly contribution to the development for international law.

36. Mr. USHAKOV said that he approved entirely of the underlying idea of article 18 and the commentary, but he had some comments to make on certain points. In his opinion, whereas an international crime always constituted a breach of an obligation *erga omnes*, it could not be said that the breach of an obligation *erga omnes* always constituted an international crime. For example, the current rules of the law of the sea were obligations *erga omnes*, but a breach of those obligations was not necessarily an international crime. The same was true of peremptory rules: whereas an international crime was always a breach of a peremptory rule, the breach of such a rule was not necessarily an international crime.

37. What, then, was the criterion for determining whether the breach of an international obligation constituted an international crime? In his view, it was the importance for mankind of the right safeguarded by the obligation. If violation of the obligation to maintain international peace and security was considered as an international crime, it was because of the importance of that obligation for the international community. On the other hand, there were less important peremptory rules,

¹⁴ *Ibid.*, p. 95.

¹⁵ *Ibid.*, vol. 119, p. 58.

¹⁶ *Yearbook... 1950*, vol. II, p. 377, document A/1316.

¹⁷ *Yearbook... 1954*, p. 152, document A/2693.

the breach of which did not always constitute an international crime.

38. He wondered whether article 18, paragraph 1, added anything to article 3. Article 3 already said that there was an internationally wrongful act of a State when that Act "constitutes a breach of an international obligation of the State".¹⁸ By "an international obligation of the State" was to be understood "every international obligation of the State". The word "content" to be found in article 18 added nothing to what was said in article 3, since it was obvious that every obligation had content. In fact, what counted was not the content, but the importance, the scope of the obligation breached. Consequently, either article 18, paragraph 1, was pointless, or it meant that article 3 was incomplete and the reference in it was not to "any international obligation whatsoever of the State".

39. With regard to paragraph 2, he said it was not the breach of an international obligation which constituted an international crime, but the internationally wrongful act resulting from the breach. What was the significance of paragraph 2? Paragraph 2 stated the general rule that the breach by a State of an international obligation established for the purpose of maintaining international peace and security was an international crime. But, in the final analysis, all the rules of contemporary international law had been established for the purpose of maintaining international peace and security. Should it then be concluded that any violation whatsoever of a rule of international law was an international crime? That was what the general rule set out in the first part of the paragraph seemed to imply. In fact, it was only "the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State", mentioned by way of example in the second part of the paragraph, which constituted an international crime.

40. He accordingly proposed that, in order to avoid any problems of interpretation, paragraph 2 should be reworded to read, much like Article 2, paragraph 4, of the Charter:

The internationally wrongful act arising from a breach of the obligation upon all States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, constitutes an international crime.

41. In the context of paragraph 3, the expression "accepted by the international community as a whole", was extremely ambiguous. Should it be taken to mean that the three rules which followed had already been accepted by the international community as a whole, or, on the contrary, that those rules had not yet been accepted and that their breach would not constitute an international crime until they had been universally recognized?

The meeting rose at 1 p.m.

¹⁸ Yearbook... 1975, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B.

1374th MEETING

Friday, 21 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

APPOINTMENT OF THE DRAFTING COMMITTEE

1. The CHAIRMAN said that, following consultations in accordance with the Commission's usual practice, he proposed that the Commission appoint a drafting committee consisting of the following twelve members: Mr. Šahović as Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ushakov, Sir Francis Vallat and Mr. Tsuruoka, the Commission's Rapporteur.

It was so agreed.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 18 (Content of the international obligation breached)¹ (*continued*)

2. Mr. USHAKOV, resuming the statement he had begun at the previous meeting, said that the expression "serious breach by a State of an international obligation", in paragraph 3 of article 18, raised the question of the weight to be attached to the seriousness of the breach. Admittedly there were more serious and less serious breaches, but he questioned whether the seriousness of the breach warranted an internationally wrongful act being characterized as an "international crime"? In his opinion, the characterization of an internationally wrongful act depended, not on the seriousness of the breach, but on the importance of the obligation breached, in other words, the interests protected by the obligation. In internal law, it was not the seriousness of the breach but the importance of the obligation breached which determined the crime. For example there might be a serious breach of an obligation to refrain from defamation, but that did not make the act of defamation a crime. Conversely, manslaughter was not a serious breach of the obligation to respect human life, but it was nonetheless a crime, because respect for human life was an important obligation.

¹For text, see 1371st meeting, para. 9.

3. Similarly, with regard to respect for the principle of equal rights of all peoples and their right of self-determination, mentioned in paragraph 3 (a), there could be serious breaches which were not international crimes. For example, the fact of not having admitted certain States to the United Nations for several years was a serious violation of the principle of equal rights of peoples, but it was not a crime. On the other hand, to keep a people under colonial rule was an international crime. Thus, a serious breach of a minor obligation was not an international crime, whereas even a minor breach of an essential obligation was. For example, any breach, irrespective of its gravity, of the obligation to refrain from the use of force against the territorial integrity or political independence of another State constituted the crime of aggression. It was therefore the importance of the obligation, not the importance of the breach, which determined the crime.

4. He questioned too, whether the breach of every international obligation whose purpose was to ensure respect for the principles stated in sub-paragraphs (a), (b) and (c) of paragraph 3, constituted an international crime. There were many obligations whose purpose was to ensure respect for those principles, but did that mean that a breach of any one of those obligations was a crime? Of course not. For example, refusal to admit certain States to the United Nations might be considered a violation of the principle of the equal rights of peoples, but it was not a crime. Again, an isolated act of discrimination constituted a violation of human rights, but that did not make it an international crime. *Apartheid* and genocide, however, were international crimes since they imperilled the existence of an entire people. The term "international crime" could not therefore be applied to breaches of all international obligations whose purpose was to ensure respect for the principle of the equal rights of peoples and of their right to self-determination, or respect for human rights and fundamental freedoms. Similarly, with regard to sub-paragraph (c), if a ship polluted the sea with oil, it would breach the obligation to conserve a resource common to all mankind, but would not be committing an international crime. On the other hand, if a State conducted large-scale nuclear tests near the territory of another State, that could be called an international crime.

5. Some internationally wrongful acts were therefore crimes, but there were others which merely constituted breaches of international law. An international crime might therefore be defined as "the breach of an obligation whose purpose was to safeguard a fundamental interest of the international community". Where the interests protected by the international obligation were less important, there was an offence but not a crime. In his opinion, that was the criterion by which "international crimes" could be distinguished from "international offences".

6. A distinction must also be made between the acts of individuals, which entailed only criminal responsibility, and the acts of subjects of international law such as States, which always gave rise to international responsibility. Criminal responsibility of persons could arise at the same time as the international responsibility of the State, but

the Commission was at present concerned only with international responsibility.

7. Mr. AGO (Special Rapporteur), replying to Mr. Ushakov's last point, said that he had emphasized in his report that it was absolutely essential to draw a clear distinction between the international crimes of the State and the acts of individuals punishable under internal law, even if they were described as crimes against international law or crimes against the peace. Admittedly there appeared to be an increasing tendency on the part of the international community to attribute criminal responsibility to persons who, as organs of the State, had taken part in the perpetration of an internationally wrongful act by the State. That tendency had been particularly marked in the matter of genocide. The crime of genocide committed by the Nazis had been considered as a crime of the State, but the persons who had physically participated in perpetrating it had themselves also been punished under internal law. It would be wrong, however, to see a special form of international responsibility in the "right and duty" recognized as possessed by certain States to punish individuals guilty of certain acts. That would have to be made clear in the commentary. To make that distinction clearer in the text of the article, it might be better to speak of an "international crime of the State". The term "international crime" should not lead to any ambiguity since it was already established in international law in the definition of aggression adopted by the General Assembly.²

8. Sir Francis Vallat had brought out clearly the true sense of article 18 when, at the previous meeting³ he had referred to the two separate paragraphs on which it was based: the maintenance of international peace and security, and the interests of the international community as a whole. Mr. Ushakov in turn had emphasized the basic aspects of an international crime, which he had defined as an offence against a fundamental interest of the international community. Sir Francis Vallat had shown that, by giving prominence to those two aspects, the Commission was inevitably moving towards the subsequent definition of the régime and forms of responsibility and the establishment of essential procedural safeguards for the protection of States.

9. There were two omissions in his draft article, one deliberate and one inadvertent. In paragraph 2 he had deliberately omitted the phrase "or in any other manner inconsistent with the Purposes of the United Nations", which appeared at the end of paragraph 4 of Article 2 of the Charter. In fact, the entire economy of article 18 was based on the pursuit of the Purposes of the United Nations: paragraph 2 dealt with the breach of one among several international obligations established for the purpose of maintaining international peace and security, and paragraph 3 with the breach of obligations safeguarding the pursuit of the other purposes of the United Nations. Nevertheless, as he had already said, if the reader was likely to misinterpret the omission of

² General Assembly resolution 3314 (XXIX), annex.

³ See 1373rd meeting, para. 14.

the last phrase of paragraph 2, it might be preferable to reproduce therein the wording of paragraph 4 of Article 2 of the Charter as a whole. The Commission should perhaps also reproduce in paragraph 2, which dealt with aggression, the wording used in article 1 of the Definition of Aggression, which seemed more restrictive than the one in the Charter.

10. He had, however, inadvertently omitted to refer in paragraph 3⁴ to the rules accepted and recognized as "essential" and hence, in particular, to the rules of *jus cogens*. His intention had precisely been to make it clear that, for there to be an "international crime", the norm of international law breached would have to be one that was recognized as essential by the international community as a whole. That qualification was a fundamental one and its omission had been responsible for most of the misunderstandings which had arisen over paragraph 3.

11. Like Mr. Ushakov, he did not think that the breach of any one of the international obligations whose purpose was to ensure respect for the principles enunciated in subparagraphs (a), (b) and (c) constituted an international crime, but only the breach of certain of those obligations, namely, the ones recognized as essential by the sections of the international community. Was that limitation sufficient? Perhaps not. Perhaps it should be added, as suggested by Mr. Ushakov, that the obligation must be one whose purpose was to "safeguard a fundamental interest of the international community".⁵ It was important not to broaden unduly the concept of an international crime, which should apply only in very serious, and fortunately rare, cases.

12. With regard to the concept of obligations *erga omnes* used by the International Court of Justice in its judgment in the *Barcelona Traction* case,⁶ the fully shared Mr. Ushakov's views on the inadvisability of making use of it. Indeed, was prepared to go further than Mr. Ushakov and say that, not only the rules of the law of the sea, but virtually all the rules of customary international law were *erga omnes* rules. What in fact had the International Court of Justice meant? It had wished to distinguish between certain categories of obligations whose "breach" harmed the interests of all States. Clearly, if a State denied the vessel of another State passage through its territorial waters, it harmed the interests of only one State. But if a State committed an act of aggression, it infringed not only the rights of the State which was the victim of aggression, but the rights of all members of the international community, since the maintenance of peace was an interest of the entire international community. The concept of obligations *erga omnes* was dangerous, for it could be ambiguous.

13. He had emphasized the relationship between the concept of the "peremptory rule" and that of an "international crime". However, as Sir Francis Vallat had rightly remarked,⁷ although it was difficult to imagine

an international crime which was not a breach of an obligation arising from a peremptory rule of international law, it was questionable whether the converse was true, that the breach of any obligation arising from a peremptory rule was an international crime. There could be peremptory rules whose breach was not a crime. In diplomatic relations, for example, although the safeguarding of embassy archives might be considered, as suggested in some quarters, as a peremptory rule from which there could be no derogation, no one would claim that a breach of that rule was *ipso facto* an international crime. It would in any case be going too far to say that an international crime was the breach of a peremptory rule of international law. The provision would have to be more restrictively drawn, since the idea of an international crime and that of a peremptory rule were two separate concepts which, although they derived from the same principle, did not fully coincide. Only the breach of certain imperative rules could be considered an international crime.

14. The United Nations Conference on the Law of Treaties had, probably rightly, confined itself to a general definition of the concept of a "peremptory rule", since it had not been possible, for the purposes of the Convention on the Law of Treaties, to study all the rules of international law one by one, in order to determine which of were peremptory rules. The Conference had therefore simply laid down a general criterion for determining them and had left it to judicial opinion progressively to identify, as it had already done in internal law, those specific rules from which no derogation was possible.

15. But the Commission had to be more precise in the case it was now dealing with, because it could not leave international crime as a vague concept. The doctrine, jurisprudence and practice of States and of the United Nations clearly identified at present certain categories of internationally wrongful acts, such as aggression, genocide, *apartheid* and colonialism. Those were the categories of breach that had to be characterized as international crimes, and that was what the Commission must try to do, because if it confined itself to a vague general criterion, it would not be producing the clarification that was expected of it. It was therefore essential to define certain categories of internationally wrongful acts, such as those now mentioned in article 18, and also to provide a number of guarantees—perhaps even stricter ones than he had proposed.

16. Mr. Ushakov had said, in connexion with paragraph 2, that all rules of contemporary international law ultimately had been established for the purpose of maintaining international peace.⁸ But the international law of a century ago, many of the rules of which were still in force, had not had as its essential purpose the preservation of peace. The wording he had used to describe for the present purposes the main categories of rules was that of the Charter: those categories were determined by the Purposes of the United Nations, as set out in Article 1 of the Charter.

⁴ In the mimeographed version of document A/CN.4/291/Add.2.

⁵ See para. 5 above.

⁶ See document A/CN.4/291 and Add.1-2, para. 89.

⁷ 1373rd meeting, para. 13.

⁸ *Ibid.*, para. 39.

17. Paragraph 1 should be retained; if it were deleted, he would be unable to accept the rest of the article. He was quite agreeable to its being stated that some breaches were more serious than others, but he did not wish States to conclude from that that the Commission attached little importance to the breach of other international obligations. It should be emphasized above all that the breach of an international obligation of any kind whatsoever was an internationally wrongful act which entailed the responsibility of the State. That principle should remain intact. Only after it had been stated could a distinction be made between more serious and less serious internationally wrongful acts. How should internationally wrongful acts which were not international crimes be characterized? Was it possible to speak of a simple breach or an ordinary offence? Were breaches of international law which did not fall into the category of crimes really simple offences? Would not such treatment suggest that little importance was attached to such breaches? The Commission would have to answer that question in paragraph 4.

Mr. Calle y Calle, Second Vice-Chairman, took the Chair.

18. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the use of the term "delito" in the Spanish version would not create any great difficulty.

19. He thanked the Special Rapporteur for his interesting observations which would be very helpful for the preparation of the final commentary to article 18, particularly the explanation of his reasons for not using the term "peremptory norm" in paragraph 3. Of course, a peremptory norm of general international law was not only one from which no derogation was possible by agreement between States, it also prohibited any conduct which conflicted with it. The purpose of sub-paragraphs (a), (b) and (c) of paragraph 3 was to indicate the various categories of norms of general international law the violation of which constituted an international crime.

20. Mr. RAMANGASOAVINA said that the principles stated in article 18 were already established in international law, even though they had not yet been confirmed in a convention having the force of positive law. In his presentation of the article, the Special Rapporteur had traced the development of opinion, showing that today's views were no longer those which had prevailed in 1930 when an attempt had been made to codify certain rules relating to State responsibility. The Conference for the Codification of International Law (The Hague, 1930) had distinguished three sources of international obligations—treaties, custom and the general principles of law. Since then, new principles had emerged and become established, such as the principles of the equal rights of peoples and their right of self-determination and the principle of respect for human rights and fundamental freedoms. The League of Nations Covenant had initiated a prohibition of recourse to war and required the States Members of the League to settle by peaceful means any dispute between them likely to lead to a rupture, giving them the choice of two procedures. It was the

Briand-Kellogg Pact which, a few years later, had outlawed war. The new outlook of the international community after the Second World War had found expression in the Charter of the United Nations, which set out the major principles relating to international security. Whereas, in the period between the two World Wars, certain States had still taken pride in being colonial powers, as soon as the United Nations was established, wars of aggression had been considered genuine international crimes. Since article 18 followed that trend of thought, as reflected in the practice of States, he approved of it in principle.

21. With regard to the international cases cited by the Special Rapporteur, he wished to draw attention to two judgments of the International Court of Justice. In the *South West Africa* cases (1966), the Court had rejected the claims of Ethiopia and Liberia, on the ground that the applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of the claims.⁹ Four years later, in the *Barcelona Traction* case, referring to the determination of subjects having a legal interest in the observance of international obligations, the Court had considered it necessary to make a distinction between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection.¹⁰ The former obligations concerned all States and each of them could be held to have a legal interest in invoking the breach of an obligation of that kind. The Court had specified that those were obligations *erga omnes*. That development of jurisprudence was significant. The judgment rendered in the *South West Africa* cases had been adopted by a majority of one vote, that of the President, and the Court's decision had been much criticised, particularly by the younger States. It was not surprising, therefore, that in the *Barcelona Traction* case the Court had thought fit to make a kind of restatement of the principle.

22. With regard to legal writings, he had nothing to add to the Special Rapporteur's detailed report.

23. The wording of the proposed article could be improved in certain respects, but that would be the task of the Drafting Committee. Paragraph 1 stated a well-established principle which did not raise any difficulties. Paragraph 2 contained a sort of definition of an international crime, while paragraph 3 related more particularly to the international crime resulting from the serious breach by a State of an international obligation. That paragraph was acceptable, but it might raise difficulties when it became necessary to determine the seriousness of a particular breach. The principles of the equal rights of peoples and their right to self-determination, which were the subject of paragraph 3 (a), were considered sacrosanct by the great majority of States Members of the United Nations, and it was time they were enshrined in an instrument on State responsibility. Paragraph 4,

⁹ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, second phase, judgment, *I.C.J. Reports 1966*, p. 51.

¹⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, second phase, judgment, *I.C.J. Reports 1970*, p. 32.

which established the concept of an international delict, was an innovation. That new concept would still have to be discussed, but there was no doubt that, in addition to the serious breaches referred to in paragraph 3, there were breaches which came under the ordinary law of reparation and the protection of aliens. The expressions used in the different provisions of article 18 should be carefully examined, for they could raise practical problems. There was no denying, however, that the article would take the Commission a great step forward, especially when it was remembered that it had taken some twenty years for the Special Committee on the Question of Defining Aggression to reach a definition of that concept, and that the definition finally adopted was a rather unsatisfactory compromise.

24. Article 18 should not, however, raise any false hopes. It would be difficult to obtain the consent of practically all the members of the international community to a definition of an international crime. Again, it was very difficult to apply Chapter VII of the United Nations Charter; when the Security Council had to take concrete measures it was generally reduced to making a recommendation, like the General Assembly. The notions of a threat to the peace, a breach of the peace and an act of aggression were established in the Charter, as were the principles of the equal rights of peoples and respect for fundamental freedoms, but it was difficult in practice to take coercive measures against a State. There was some doubt about the practical efficacy of General Assembly resolutions such as resolution 2625 (XXV) to which was annexed the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, a war of aggression constituted a crime against the peace, entailing responsibility under international law, and resolution 3314 (XXIX) (Definition of aggression).

25. In that connexion, be stressed that, under Article 24 of the Charter, the great Powers were the principal guarantors of international security in so far as they could call a halt to the bellicose gestures of some States, but in reality they were responsible for international insecurity rather than international security. For instance, on the pretext of maintaining the balance of power, they took the liberty of setting up bases in parts of the world where their presence caused grave concern, thus creating a threat to peace; he was thinking particularly of an ocean which had recently been declared a peace zone by all the coastal States. Again, the proliferation of nuclear weapons, which constituted a threat to small States, conflicted with the decision of the international community to use nuclear energy for peaceful purposes only.

26. To sum up, the concept of an international crime entailed not only reparation, as formerly, but also sanctions. It was, however, precisely on the value of those sanctions, as provided for in Chapter VII of the Charter, that the efficacy of the instrument in preparation would depend. He nevertheless wished to pay a tribute to the Special Rapporteur, who had adopted a very pragmatic approach in preparing his draft. The Commission was moving towards a distinction between international crimes and international delicts with correspondingly

different régimes of responsibility. Article 18 might raise some doubts about its application, but it must not be forgotten that it would be supplemented by other provisions which would further define its content. Moreover, the article was so worded that it could be applied to unforeseeable situations which might arise as international law evolved.

Mr. El-Erian resumed the Chair.

27. Mr. KEARNEY said Mr. Ramangasoavina had concluded that, despite his misgivings on various points, the Special Rapporteur's proposal for article 18 constituted a great step forward. The question was, however, whether it was a step in the right direction. It was sometimes tempting to start on a path that appeared attractive but it was always wise to try to ascertain where the path was leading.

28. Article 18 was of very great importance because it dealt with problems which could give rise to serious international disputes. That was true not only of paragraph 2, which referred to the problem of "maintaining international peace and security", but also of paragraph 3, which covered equally important problems.

29. Article 18 constituted in fact an attempt to remedy the deficiencies of the United Nations Charter. That was clear from paragraph 105 of the Special Rapporteur's report (A/CN.4/291 and Add.1-2), which caused him much concern. That paragraph began by stating:

Of course, it is not for us to examine in detail the system provided for in Chapter VII of the Charter to permit specific action by the Security Council or to retrace the history of the circumstances which have prevented that system from being established.

The Special Rapporteur then proceeded to state that the question of the measures which might be taken within the United Nations system would be examined in detail at a later stage in the draft and added:

We shall then indicate whether, and within what limits, such measures can be juridically characterized as *sanctions* which of them are of a *punitive* nature and purpose and which may be described more aptly as a means of constraint to enforce performance of the obligation which has not been complied with.

30. He believed it was quite inappropriate to begin an attempt to fill the gaps in the Charter with respect to the maintenance of peace and security by trying to define the term "international crime". Some thought ought first to be given to the reasons for the present world situation with regard to wars of aggression and the use of armed force. It was clear that the system provided for in Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace and acts of aggression) did not operate at all in a conflict which opposed major Powers; that it operated to some extent in the case of conflicts between smaller Powers, when the major Powers supporting the contenders to the dispute wanted to avoid a confrontation; and that it operated well only in those rare cases in which the major Powers were in full agreement to prevent a minor conflict.

31. The result of that unsatisfactory experience had been that Article 2, paragraph 4 of the Charter, which outlawed war, had not in practice materially reduced the number of actual acts of aggression; and that situation was likely

to continue, not only because of man's aggressive instincts but also because the concept of unrestricted national sovereignty still dominated international life. For the international community to outlaw war in reality and not merely on paper, it would be necessary for human beings to learn to regard themselves as brothers and for the spirit of nationality to be replaced by the international spirit.

32. As matters now stood, however, the facts of aggression and belligerency had to be dealt with in the knowledge of the inadequacy of the system embodied in Chapter VII of the Charter, and in recognition of the fact that international violence remained a factor in international life. In those circumstances, the question was whether the Commission could do anything to improve the machinery of the Charter and bring it into accord with the lofty principles embodied in it. The problem was one of feasibility, of formulating a draft that was workable.

33. There was, however, one preliminary question, namely, whether it was wise to try to supplement the Charter in the context of State responsibility. It could be argued persuasively that there was no imperative need to deal with international crimes in article 18, the article could be confined to the provisions of paragraph 1, followed by a statement to the effect that the question whether an act was criminal or not had no effect upon the obligation of the State concerned to make reparation for the violation of its international obligations. There were sound arguments in favour of the view that a criminal code did not necessarily fall within the scope of international responsibility. Of course, the contrary view could also be put forward, on the grounds that the two questions of State responsibility and international crimes were closely interconnected.

34. Should the Commission decide to deal in its draft with criminal activities, it would have to decide how to approach the task. Some passages of the Special Rapporteur's commentary might be misconstrued as a proposal to deal with international crimes entirely without reference to the Charter. He was particularly concerned at the concept of "an international wrongful act *erga omnes*", which could mean that every State had a right to prevent such acts and possibly even to take action to punish them. A sweeping proposition of that kind would constitute a challenge to the terms of the Charter.

35. He had been struck by the contents of paragraph 140 of the report, which analysed the position taken by a number of Soviet authors, particularly with regard to the distinction between simple offences and "international crimes", regarding which those authors held that "besides the State directly injured, in the case of an 'international crime' other States may 'require compliance with the rules of international law'". They also held that "the transgressor is liable to the immediate application of sanctions, including measures of military coercion, there being no need to wait until the transgressor has refused to meet the obligation to make reparations".

36. Further on, the Special Rapporteur had queried the view of one author—Schindler—that "the perpetuation of a colonial régime or a régime of racial discrimination should be regarded as an internationally wrongful act *erga omnes* and, as such, justifying non-military inter-

vention by third States" (A/CN.4/291 and Add.1-2, para. 141). The same author had also asserted that, "in the case of an 'international crime', the third State might have recourse to reprisals against the perpetrator of the crime and against those who may have assisted the perpetrator" (*ibid.*).

37. The doctrinal views quoted in those passages of the report were inadmissible. It would be contrary to the Charter of the United Nations to allow any State the licence to take such action. In fact, to allow any such licence to third States would be extremely dangerous to international peace and security. It would be tantamount to allowing large States to intimidate small ones and to intervene in their affairs. He was firmly opposed to any approach of that kind and it should be totally excluded.

38. If, however, the Commission were to embark on a consideration of international crimes within the context of the Charter, the problem would be a very arduous one; it would mean attempting to make the Charter more workable in dealing with threats to international peace and security. The question would arise whether failure on the part of a State to observe certain provisions of the Charter should be regarded as an international crime. Article 25 of the Charter imposed upon Member States the obligation to carry out Security Council decisions, while Articles 36 and 37 conferred upon the Security Council the power to recommend appropriate steps for the settlement of disputes; would non-compliance by a State with such recommendations constitute an international crime? The same problem arose with regard to the powers of the Security Council under Chapter VII of the Charter to take action to avoid threats to the peace, to put a stop to breaches of the peace, and to impose sanctions upon States which committed acts of aggression. The question would thus have to be examined whether failure by a State to comply with a Security Council decision under such Charter provisions as Article 41 should be treated as an international crime. Under those provisions, the Council would call upon States to take measures "not involving the use of armed force", such as the interruption of economic relations and the severance of diplomatic relations.

39. Another important point was that crime could not be considered in a vacuum. If the Commission were to embark on a study of international crimes, would it not also have to take up the problem of punishment? If the Commission drafted a code of crimes, the work would probably have to be completed by drawing up a list of penalties. And the next problem would be that of devising machinery for imposing penalties upon States and enforcing those penalties. Regarding the possibility that the International Court of Justice might play a part in that respect, it was worth recalling that the *Corfu Channel* case¹¹ was the only case in which the Court had dealt directly with a problem involving an alleged breach of the peace and was also the only case in which a judgment of the Court had never been complied with. Although only one precedent could thus be cited, it

¹¹ *Corfu Channel (United Kingdom v. Albania)* (Merits), judgment, *I.C.J. Reports 1949*, p. 4.

nevertheless illustrated the difficulties which would have to be faced if any attempt were made to confer upon the International Court of Justice a role in the determination of international crimes and application of sanctions.

40. In conclusion, he would urge the Commission, before taking a first step in dealing with the problem of international crimes, to consider carefully what was possible, workable and acceptable to the nations of the world.

The meeting rose at 12.55 p.m.

1375th MEETING

Monday, 24 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (*continued*)

ARTICLE 18 (Content of the international obligation breached)¹ (*continued*)

1. Mr. TSURUOKA said that paragraph 1 should be retained in its present form, since it stated an undisputed rule of international law. As the seriousness of the breach of international obligations varied with the content of the obligation, the Special Rapporteur had seen fit to distinguish, in paragraphs 2 and 3, two categories of more serious and less serious breaches. Paragraph 2 concerned the most serious breaches—those which related to the maintenance of international peace and security, and especially the prohibition of resort to the threat or use of force; such breaches were considered as international crimes *par excellence*. He agreed that the international community should treat such breaches with the utmost severity. The breaches covered by paragraph 3 were also characterized as international crimes, but were considered to be less serious.

2. Although the reasoning which had led the Special Rapporteur to propose paragraphs 2 and 3 was easy to follow, it was open to question whether the rules they contained should be affirmed. That question could only be answered when it was known how the two paragraphs

would be applied, and what instance would establish that there had been a violation and decide on the measures to be taken to redress the wrong. It was no doubt too early to devote any time to that problem at the present stage, since the Commission would have to consider it in the course of subsequent work, but it should be remembered that in the meantime Governments would be invited to comment on the articles adopted by the Commission up to the end of the present session. If the Special Rapporteur would indicate briefly in the commentary to article 18 what régimes of responsibility he advocated, that would greatly facilitate the study of the provision by foreign ministries.

3. Paragraphs 2 and 3 were on the borderline between politics and law. The United Nations Charter dealt both with the maintenance of international peace and security, the subject of paragraph 2, and with the principles enunciated in subparagraphs (a) and (b) of paragraph 3. Chapters VI to VIII of the Charter also specified the way in which those principles should be implemented. Obviously the article could not amend the Charter, especially where it concerned the principal purposes of the United Nations. It might therefore be asked what function the rules stated in article 18 would perform in view of the fact that the United Nations was essentially a political institution. As political logic was often not the same as legal logic, he feared that the provisions of those paragraphs might clash with the Charter provisions dealing with the same issues but applied with political, not legal logic. According to Article 103 of the Charter, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail. In the circumstances, therefore, the Commission might be wasting its efforts.

4. United Nations practice, as revealed by the action of the Security Council and the General Assembly, confirmed his apprehensions. For example, according to purely legal logic, the possession of nuclear weapons constituted a threat to peace, but according to political logic, as expressed during the negotiation of the Treaty on the Non-proliferation of Nuclear Weapons, it was the proliferation of possessors of nuclear weapons which constituted a threat to peace. The Commission must therefore proceed cautiously if it intended to draft provisions concerning matters covered by provisions of the Charter. Again, the hierarchy among the breaches dealt with in paragraphs 2 and 3 was also determined by political logic: the use of force was prohibited when directed against the territorial integrity or political independence of another State, but it was frequently maintained that the use of force was not prohibited, and should even be encouraged, when its purpose was to help a people struggling for independence. There were even situations in which the principles enunciated in subparagraphs (a) and (b) of paragraph 3, might also conflict.

5. Mr. QUENTIN-BAXTER said that article 18 raised a number of problems that were central to what was perhaps the most challenging task ever entrusted to the Commission.

¹ For text, see 1371st meeting, para. 9.

6. All members were agreed that the term "crime", as employed in article 18, had nothing to do with the notion of individual responsibility. However, the discussion had demonstrated that the use of that term, which added to the conceptual difficulties experienced by the Commission, might well prove to be an even greater stumbling block to a wider group of readers examining it not just in the purely legal context, but in the context of the world community and of the United Nations, which served the world community. Sometimes the political organs of the United Nations had legitimately taken into account the two aspects of "crime", the aspects of individual responsibility and of State responsibility. For example, the Governments which had concluded the 1948 Convention on the Prevention and Punishment of the Crime of Genocide² had obviously considered that an act of genocide by a State was an extremely grave wrongful act and that it also entailed the responsibility of the individuals who had participated in it.

7. On the other hand, the word "crime" was more generally used by the political organs of the United Nations, again legitimately, to mobilize international opinion and draw attention to the heinous character of some particular conduct. There was also an analogy with the use of the term "crime" in national criminal law to designate an act that was punishable at the instance of the State. In a national parliament, however, some governmental action might be described by the indignant opposition as "criminal", just to characterize the seriousness of the action and not to suggest that it should be punished by an established process of law.

8. Consequently, it was very important to bear in mind the respective roles and methods of operation of judicial organs and political organs, so as to ensure that they continued to assist one another in the development of the law. The notion of "crime" almost inescapably carried with it other connotations that lay outside the Commission's fundamental concept of international responsibility. Even in war, when an individual was tried for international crimes, there was no deviation from the standard that a trial was necessary and that the conduct of the individual should, so far as possible, be impartially assessed. But that approach was not essential to the actions of political organs.

9. It was the duty of the principal organs of the United Nations to determine, at least in the first instance, legal questions falling within the sphere of their activities, but the methods employed were not the same as those required for a court trial. For instance, decisions by the General Assembly on important questions called for a two-thirds majority, but the decision as to whether an item should be classed as an important question was made by a simple majority and that decision, although it involved an element of objectivity, also involved wider considerations that were not of a judicial nature. Each delegation casting its vote had to make a broad political judgment in order to decide whether the particular purpose would best be served by declaring the matter an important question and proceeding accordingly, or by

adopting the less exacting criterion of the simple majority. Again, in the decisions of the Security Council relating to the peace of the world, the criteria were not always objective, nor did they necessarily imply a judgment as to the quality of the action taken by a particular State. To realize that there was no parallel between the mode of operation of the Security Council and that of a court, it was enough to recall that an action by one of the permanent members could be characterized by the Council as a wrongful act only with the acquiescence of the permanent member concerned.

10. A great deal had been done to ensure that the political organs of the United Nations which took important decisions did so in accordance with objective legal principles. That was the basis and the justification for the enormous efforts that had been made to enunciate the great declarations adopted by the United Nations, but extraordinary care was needed to prevent a reversal of that process. It was in the interest of the members of the Commission, as lawyers, to make sure that decisions which must in the end remain political should nonetheless be taken, so far as was possible, in the light of objective legal standards. At the same time, the Commission was concerned to attach the fullest weight to developments in the political organs of the United Nations. One of the great merits of the text of article 18 was that it did precisely that, since it placed the United Nations in the forefront of the system of contemporary law.

11. Mr. Tabibi had been right to raise the extremely important question of economic aggression,³ for a large number of Member States would want to see it mentioned in the article, or alternatively to be assured that the fact that it was not so mentioned did not harm the principle they wished to assert. Like most members of the Commission, however, he experienced the greatest difficulty with regard to incorporating that question specifically in the draft. Once again, the difficulty lay in the difference between the mode of operation of a political organ and the mode of operation of a judicial organ attempting to make an impartial and dispassionate statement of the law.

12. Nobody could contest the idea underlying the concept of economic aggression, namely, that a member of the international community could be crippled by some means other than the direct use of force. But it was almost impossible to convey that idea in legal terms. The Commission could not follow the example of resolutions of the General Assembly; it could not simply enunciate a number of important norms and leave their interrelationship to be worked out later, in a political or other context, as the occasion arose. Therefore, despite a wealth of authority to be found in the practice of international organizations and the writings of scholars, great care was needed to determine whether, at the present time, an act should be characterized as an international "crime". Obviously certain acts were regarded by the international community as forming a class apart, but it was difficult to ascertain exactly how the classification now being made by the Commission would fit in with the enumera-

² United Nations, *Treaty Series*, vol. 78, p. 277.

³ See 1372nd meeting, paras. 7 *et seq.*

tion of internationally wrongful acts at a much later stage. Members of the Commission were, in varying degrees, worried by the possibility that the course now being taken might have to be radically reviewed.

13. On the other hand, it was essential to respond to the Special Rapporteur's call for boldness and to distinguish between a simple breach and a much more serious breach that affected the entire international community. Failure to make the distinction would prejudice the enormous task on which the Commission was now engaged. He favoured the kind of distinction drawn by the International Court of Justice in the *Barcelona Traction* case,⁴ although he accepted the Special Rapporteur's warning that the Court had used the notion of obligations *erga omnes* in the special sense that they were obligations of such intrinsic importance that a mere breach thereof affected the legal interest of all the members of the international community.

14. Closer agreement might be reached, with less risk, if the term "crime" were replaced by the term "offence". Every action which involved the breach of an obligation towards all nations—an obligation *erga omnes*, as understood by the International Court of Justice—carried with it a notion of offence, for it offended international society. Moreover, the use of that term would to some extent take account of the doctrine that had been developed in the political organs of the United Nations with regard to the term "crime". Yet, like the language of the Court, "offence" might be better suited to the draft; if the Commission, as a legal organ of the United Nations, was to give maximum support to the Organization, it must not only attach the fullest value to the developments brought about through the action of States as members of the political organs of the United Nations, but it must also ensure that the kind of contribution it was making was in keeping with its own judicial standards.

15. He too shared the doubts expressed with regard to the expression "serious breach" in paragraph 3. However, if the term "offence" were used instead of "crime", there would be less need for the qualification "serious". After all, paragraph 1 already enunciated the basic notion that every breach of an existing international obligation was an internationally wrongful act, regardless of the content of the obligation breached—in other words, regardless of the relative seriousness of the breach. In distinguishing between the régimes of responsibility and in dealing with the higher order of breaches, the imprecise word "serious" could be eliminated by speaking of a breach by a State of an international obligation that constituted an offence because it was a breach of an obligation *erga omnes*. That would have the added advantage of dispelling another doubt—the doubt whether a classification of breaches in terms of the content of the obligation breached was possible before the consequences had been determined. In making that statement, he had no wish to imply a belief that all breaches of obligations *erga omnes* were of equal importance, since he did not question the hierarchy of obligations indicated in article 18.

16. He supported the view that paragraph 2 should reproduce in its entirety the formula used in Article 2, paragraph 4, of the Charter; it was right that subparagraphs (a) and (b) of paragraph 3 should embody the basic purposes of the United Nations by reflecting the language of the Charter, and that the current preoccupation of the international community, as mirrored in paragraph 3 (c), should underscore the non-exhaustive nature of the listing of breaches in paragraph 3 as a whole.

17. With those reservations regarding the wording—for words had such strong overtones that it was not always easy to distinguish substance from form—he fully and sincerely endorsed the basic purposes of the article.

18. Mr. BEDJAOUI said it was important to observe the distinction between the political and the legal; the law did not have an absolute value and should not be revered or worshipped for its own sake. The law performed an internal and international social function and if law and politics moved too far apart, it would mean disregarding that fundamental reality. In drafting article 18, the Special Rapporteur had followed the advice of the Emperor Marcus Aurelius to accept with good grace what could not be changed, to have the courage to change what could be changed, and to have the wisdom to take both into account; he had heeded the call of the times and had tempered boldness with caution; indeed, both the practice of some States, or groups of States, and doctrine had sometimes gone further than he had.

19. The Commission was sometimes reproached for not taking sufficient account of the rapid and revolutionary changes which the international community was undergoing. Article 18 offered it an opportunity to avoid an unduly long interval between the formation of a rule of law and its acknowledgement by jurists. It was Philip Jessup who had said that international law must not be regarded as an obsolete collection of moribund rules going back to a remote period of world history and that the "standard to be applied by the Court must be one which takes account of the views and attitudes of the contemporary international community."⁵ The content of that provision, moreover, represented a minimum of international ethics. In their declarations, the non-aligned countries, which numbered over a hundred, had expressed views going far beyond what was said in article 18. They had characterized *apartheid* practices as international crimes and had declared themselves ready to intervene collectively on behalf of the victims of *apartheid*, or those threatened with the use of force or aggression, including economic aggression. At the Conference of Ministers for Foreign Affairs of the Non-Aligned Countries (Lima, 25-30 August 1975), it had been decided that, if a non-aligned country was subjected to "threats of the use of force or of aggression, or subject to measures applied under pressure destined to prevent the full, free and effective exercise of its sovereign rights," such measures, acts or threats "should be considered as being directed against the non-aligned countries as a

⁴ See A/CN.4/291 and Add.1-2, para. 89.

⁵ South West Africa, second phase, judgment, *I.C.J. Reports 1966*, p. 441.

whole which, at the request of the country concerned, would provide it with assistance...”⁶

20. With regard to the contents of article 18, it was essential to establish different régimes of responsibility according to the seriousness of the breach of the international obligation. Paragraph 1 stated the principle that every breach of an international obligation was a wrongful act which entailed the responsibility of the State. That provision might not appear to add anything new to the preceding articles, but in the context of article 18 it gave a timely reminder that there was no such thing as a normal breach as opposed to an “abnormal breach”. The Special Rapporteur had distinguished between two categories of breaches, which he had described as international “delicts” and “international crimes” respectively. Three problems, however, arose, namely, whether such a distinction was wise and legitimate; if so, whether the choice of breaches considered as crimes was not arbitrary, and whether the seriousness of the breach was a practicable criterion.

21. On the question of the desirability and validity of such a distinction, he said that certain obligations were fundamental because they affected the very existence of States, peoples, the international community or mankind in general. A breach of any such obligation struck a blow against every element of international society. That distinction was clearly eminently well justified, since the United Nations Charter itself made it in practice by providing for sanctions in certain cases and, moreover, by graduating those sanctions according to each case. Those remarks applied to the definition of aggression adopted by the General Assembly,⁷ “aggression is the most serious and dangerous form of the illegal use of force”. The use of force was in itself the negation of the foundation of present-day international society.

22. Similarly, the right of self-determination of peoples was an essential element of international law, since it governed the society of States; it had become a primary rule which took precedence over all other rules of international law, and was the starting point for an open society striving towards universality. The right of self-determination was the expression of a political and legal master concept (*idée-force*), which had matured in the depths of the universal consciousness and been confirmed by an impressive number of governmental, bilateral and multilateral declarations. Through the exercise of that right, the one-time “private club of civilized nations” had been enlarged, and the right itself had been strengthened thereby. It had become the instrument of an open and democratic international society. The right of self-determination, which was a right of *jus cogens*, conditioned the entire present-day international community. It should be distinguished from decolonization, which was only one of its forms. The violation of such a fundamental right could therefore be considered an international crime. The growth of universal awareness and of international law in regard to self-determination had been

remarkable for its rapidity and the codifier could not disregard it.

23. The exercise of the right of self-determination had not been a matter of indifference to the international community, which had asserted an extensive right of supervision as it had gradually come to realize that violation of that right concerned all States. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁸ had proclaimed the principle of the equal rights of all peoples and of their right of self-determination, which was reaffirmed in paragraph 3 (a) of article 18. That principle made it the duty of States jointly and separately to promote decolonization, a process which concerned not only the administering Power but the international community as a whole. That was the principle on which the proclamation of the legitimacy of the struggle of peoples under colonial denomination was based. In its 1971 advisory opinion on the subject of Namibia,⁹ the International Court of Justice had said that States Members, and even non-members, should give assistance to the United Nations in the action it had undertaken with regard to Namibia.¹⁰ It was, in fact, action by the international community as a whole, and that action was considered as legitimate because the aim was to put an end to *apartheid*. Wars waged to reconquer colonies were characterized as a crime against humanity in General Assembly resolution 2270 (XXII) *inter alia*.

24. To reject article 18 would amount to a refusal to comply with the new law of nations and would raise the problem of the non-fulfilment of international obligations in terms which would seriously impair the credibility of international law in a society which unfortunately had no enforcing authority as yet. Now that the unlawful character of colonialism had been established and violation of the principle of the equal rights of peoples and of their right of self-determination was singled out for special opprobrium, a graduated scale of breaches of international obligations needed to be worked out, and that was precisely what the Special Rapporteur had done in article 18. The International Court of Justice had taken the same line in its advisory opinion on the subject of Namibia when it had stated that:

A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.¹¹

25. It had been suggested that the distinction made by the Special Rapporteur was arbitrary, but paragraphs 2 and 3 were based mainly on the Declaration of Principles of International Law concerning Friendly Relations and

⁶ “Lima Programme for Mutual Assistance and Solidarity” (circulated to the General Assembly at its seventh special session as document A/10217), para. 119.

⁷ Resolution 3314 (XXIX), annex.

⁸ General Assembly resolution 2625 (XXV), annex.

⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 476 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

¹⁰ *Ibid.*, p. 58.

¹¹ *Ibid.*, p. 54.

Co-operation among States. Only two of the principles set out in that Declaration were emphasized by the Special Rapporteur, namely, the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and the principle of the equal rights of peoples and of their right of self-determination (principles 1 and 5 of the Declaration). According to the Declaration, every State had the duty to promote the realization of the latter principle through joint and separate action and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of that principle. The Special Rapporteur appeared to have extracted the essence from that Declaration in adapting it to the subject of State responsibility. Other principles might of course prove to be fundamental in the future in the light of the new needs of the international community. For that reason article 18, although innovative up to a point and therefore welcome, nevertheless did not seem to make sufficient allowance for future developments, in other words for the possibility that breaches which at present constituted only international delicts might one day be considered as international crimes.

26. The criterion of the seriousness of the breach of an international obligation seemed bound to raise difficulties; he wondered, for instance, who would assess the degree and extent of a breach to characterize it as serious and therefore as constituting an international crime. He also wondered whether there could be a serious breach and a minor breach of the obligation to respect the principle of the right of self-determination of peoples. The international instance responsible for resolving such matters might have to take into account the trend of world opinion as well as that of international law.

27. Mr. ROSSIDES said that he was basically in agreement with the provisions of article 18, which were forward-looking and represented a step forward in the codification and development of the law of State responsibility. His comments would be directed to interpreting those provisions and strengthening the article so that it might command greater support, not only from the General Assembly but in a future conference of plenipotentiaries.

28. Paragraph 1 reflected a principle of international law which had long been accepted. In its subsequent paragraphs, the article made a much needed departure from traditional international law by recognizing the important distinction between different kinds of international obligations by reason of their content and of the consequences of their breach as affecting not only the injured State but also the interests of the international community as a whole. Internationally wrongful acts arising from the breach of the latter type of obligation had therefore to be classified as more serious offences—termed “international crimes”—as distinct from minor wrongful acts, which could be described as “international delicts”. That distinction represented an advance in the progressive development of the law of international responsibility in the vitally important field of the maintenance of peace and security. It was not only in keeping with the Commission’s mandate but would also bring

international law into harmony with the present day international legal conscience.

29. The Special Rapporteur had acted wisely in placing in a separate category, in paragraph 2, breaches of international obligations pertaining to the maintenance of international peace and security, particularly the breach of the prohibition of the threat or use of force against the territorial integrity or political independence of any State. Those were particularly serious international crimes because of their devastating effects on the life of the international community. Such separate treatment was prompted also by the United Nations Charter itself which made specific provision for enforcement action to remove threats to the peace and to suppress acts of aggression. With regard to the partial text of Article 2, paragraph 4 of the Charter contained in paragraph 2 of article 18, he supported the suggestion that the full text of the Charter paragraph should be reproduced.

30. The maintenance of international peace and security was set forth as the very first of the Purposes of the United Nations in Article 1, paragraph 1 of the Charter which, to that end, called for “effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression”. The obligation on Member States under Article 2, paragraph 4 of the Charter to refrain from the use of force and from acts of aggression was thus linked with a parallel obligation to take the effective collective measures required to suppress such acts. The point was important because the failure of the United Nations in its paramount responsibility of maintaining international peace and security resulted from the grave deficiency in the functioning of the Security Council, which had failed to adopt appropriate procedures to give effect to its decisions, thereby defeating the very purpose for which it had been established.

31. The problem of the implementation of Security Council decisions was vital to the future of the United Nations as an instrument of international security, and acquired greater significance at a time of increasing international insecurity like the present. As was well known, the detailed preparations in the late 1940s for making the necessary arrangements for collective enforcement action had fallen down over minor differences as to the relative ratios of armed forces, which had been magnified out of all proportion by the tensions of the cold war. Such difference would probably be no impediment in the present period of *détente* and should not be accepted as an excuse for not completing the necessary arrangements at a time of grave danger to the world. The imperfections of the Charter had been stressed by Mr. Kearney, who had pointed out that Article 2, paragraph 4 had not prevented acts of belligerency.¹² The reason for that, however, was not any deficiency in the Charter, but the fact that its provisions had not been implemented because of the failure of Member States to take the appropriate measures for giving effect to the provisions of Article 2, paragraph 4 in the manner prescribed by the Charter.

¹² 1314th meeting, para. 31.

32. On the domestic plane, law and order would inevitably break down if crime were not curbed. It was the knowledge of the existence of effective enforcement machinery which had the effect of curbing crime; law itself did not do it. The drafters of the Charter had had that point in mind when they had made provision for enforcement measures to ensure respect for Security Council decisions. Apart from their obligation to refrain from actual acts of aggression, Members of the United Nations had an international obligation under the Charter to contribute to effective collective action to suppress aggression; that obligation was mandatory under Articles 1, paragraph 2, 2, paragraphs 4 and 5 and Articles 25, 41, 42 and 49 of the Charter. Because of its importance to the international community, that obligation belonged to the category of obligations *erga omnes* the breach of which had been recognized by the International Court of Justice as being “the concern of all States”¹³ and not merely of the injured State. It was therefore logical that, in cases of aggression against a Member State, there should be a degree of responsibility attaching to other members of the international community to participate in collective action to suppress the aggression. That decision by the International Court of Justice had initiated a trend in international judicial decisions more in keeping with the spirit of the Charter. As indicated by the Special Rapporteur (A/CN.4/291 and Add.1-2, para. 131), however, such early writers as Root in 1915 and Peaslee in 1916 had already arrived at the conclusion that it was necessary to distinguish between breaches of international obligations. Root had considered that any State should be authorized and even required to punish acts which affected the whole community of nations, but Peaslee had suggested the better course of institutionalized international action.

33. Such institutionalization had materialized with the establishment of the United Nations, whose declared purpose was the maintenance of international peace and security. The malfunctioning of the Security Council, however, had meant that the world today lacked even the modicum of international security which had existed in the nineteenth century during the concert of Europe. The situation was a matter of concern to the Commission in its task of codifying and developing the law of international responsibility. The only way to establish law and order in the world was to ensure the functioning of the Security Council in the event of a violation of a peremptory rule of general international law, and the Purposes and Principles of the Charter constituted indisputably such peremptory rules.

34. The term “international crime” was being appropriately applied to violations of peremptory rules of general international law. He could not conceive of any rule of *jus cogens* whose violation would not constitute an international crime. It was not of course possible to draw up an exhaustive list, but a contemporary author had written that “The least controversial examples of the class are the prohibition of aggressive war, the law

of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy”.¹⁴ The list might be expanded to cover unlawful acts of an economic character, but the international community had not yet accepted rules of *jus cogens* in that particular field. The rules of *jus cogens* were rules of general international law from which no derogation was permitted by treaty. The same restriction on treaty-making capacity also applied in respect of Charter obligations which, under Article 103, prevailed over any other treaty obligations. The overriding character of rules of *jus cogens* pertained, in particular, to the basic obligations imposed upon Member States by Articles 1 and 2 and Chapter VII of the Charter.

35. With regard to the wording of paragraph 3, he did not favour the use of the adjective “serious” before the word “breach”, because it would lead to doubts concerning the criteria for determining whether a breach was sufficiently “serious” to constitute an international crime. He welcomed the Special Rapporteur’s expressed willingness to clarify the meaning by introducing the words “as essential” after the words “a norm of general international law accepted”, though he himself would prefer the qualification “accepted as fundamental”. A number of drafting changes would also be needed in paragraph 3. First, the wording should not give the impression that the enumeration it contained was exhaustive. Secondly, in sub-paragraph (c), the expression “resource common to all mankind” should be replaced by the more appropriate one “resource which constitutes the common heritage of mankind”. Thirdly, sub-paragraph (e) should also begin with the words “Respect for”.

36. Lastly, he could accept the expression “international delict” which was appropriately used in paragraph 4.

37. Mr. USTOR said he would suggest that the title of article 18 be reworded so as to reflect better the contents of the article. Two possible wordings would be “International crimes and international delicts”, or “Classification of internationally wrongful acts”.

38. With paragraph 1, he had the same difficulties as with paragraph 1 of article 16. The real purpose of the paragraph was to state that, while the breach by a State of any of its international obligations constituted an internationally wrongful act, such acts could be classified either as international crimes or as international delicts. If the paragraph were retained in its present form, the words “existing” and “incumbent upon it” (“*existant à sa charge*” in the French version) should be deleted as superfluous.

39. The Special Rapporteur had rightly referred in his commentary to the gravity of the consequences of an internationally wrongful act implied by its categorization as an international crime (A/CN.4/291 and Add.1-2, para. 152). That was something that had to be kept in mind when drafting the article itself and because of the grave consequences of the classification, it was essential

¹³ See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, (second phase), judgment, *I.C.J. Reports 1970*, p. 32.

¹⁴ I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 500.

that the text should be extremely clear and precise. If it was intended to lay the foundations of an international criminal code with respect to the conduct of States, it was essential not to define international crimes by means of provisions which could be stretched at will. Bearing in mind the nature of the undertaking, it was necessary to circumscribe in exact terms the international wrongful acts which could be categorized as international crimes at the present time.

40. Perhaps because he came from a country which twice in his lifetime had suffered harsh sanctions, he felt strongly that any codification providing for sanctions, that was to say, the punishment of States, should define strictly and precisely the situations which entailed such sanctions. For that reason, he could not agree with the Special Rapporteur's statement: "The recognition in our draft that a distinction should be made between some internationally wrongful acts which are more serious and others which are less serious is comparable in importance to the recognition, in the Convention on the Law of Treaties, of the distinction to be made between 'peremptory' norms of international law and those norms from which derogation through particular agreements is possible." (*Ibid.*, para. 151.) There was a world of difference between article 53 of the 1969 Vienna Convention on the Law of Treaties¹⁵ and the provision in draft article 18. The inherent uncertainty of article 53 could lead to problems in regard to the validity of a given treaty. The importance of that question, however great, could not be compared with that of the question of sanctions against, or punishment of, a State which was envisaged in draft article 18. For that reason, he considered that the use of the words "a norm of general international law accepted and recognized as essential by the international community as a whole", drawn from article 53 of the 1969 Vienna Convention, did not provide a firm basis for the description of an act as entailing the criminal responsibility of a State.

41. He fully shared the Special Rapporteur's hope that the rules of international responsibility would be accepted and ratified by States, including the concept that some internationally wrongful acts qualified as crimes. But it was unlikely that States would be prepared to submit to such a code unless it specified with the utmost precision the courses of State conduct which were categorized as "international crimes". The Commission was not in the same position as a national legislature which could impose a criminal code upon its subjects. If it wished to succeed in its work, it must take into account the unwillingness of States to risk being branded as criminals. Possibly all States would agree that armed aggression and genocide were international crimes, and the same probably applied to the practice of *apartheid*, to systematic racial discrimination and to colonization, but with regard to the other matters mentioned in paragraph 3, he very much doubted whether a sufficient number of States would agree to accept criminal responsibility unless the conditions were

defined with greater precision. It was difficult, for example, to see how States, which were so slow in ratifying the International Covenants on Human Rights, could agree to accept criminal responsibility for the violation of some of those rights without clarification: the question which of those rights could be violated by a State only at the risk of being charged with a criminal act should be made crystal clear.

42. He fully understood the noble aspirations of the Special Rapporteur but the Commission should be cautious and remember the bitter experience of the past, as in the case of its draft on arbitral procedure. If the Commission wished its work to live instead of just being consigned to the records, it had to take into account the probable reaction of States. The Special Rapporteur had invited the Commission to embark on the progressive development of international law. Practically all the members of the Commission had responded to his invitation and agreed with the basic idea of dividing internationally wrongful acts into two categories. He fully shared that idea and also agreed with the use of the term "international crimes". He would urge the Commission, however, to moderate its intellectual aspirations so as to take account of the requirements of the international community as it was at present.

43. Subject to those comments, he could endorse article 18 in essence. It would mark an important step in the progressive development of international law in a direction which would not conflict in any way with the Charter, for the Charter itself provided for such development. The Commission was engaged in the preparation of a text on the substantive law of State responsibility, which did not touch at any point on the procedural rules of Chapter VII of the Charter. As had already been pointed out during the discussion, Chapter VII was concerned less with the punishment than with the prevention of crime. And article 18, if adopted, might also have a deterrent effect.

44. Lastly, a short paragraph might perhaps be introduced into article 18 to express the idea that its provisions were without prejudice to any criminal responsibility of individuals. Even if the point was self-evident, there was no harm in making it explicit.

The meeting rose at 6 p.m.

1376th MEETING

Tuesday, 25 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

¹⁵ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

State responsibility (continued)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (concluded)ARTICLE 18 (Content of the international obligation breached)¹ (concluded)

1. The CHAIRMAN, speaking as a member of the Commission, said that a number of important points had been raised in the course of a debate conducted in the best traditions of the Commission and marked by a remarkable depth of analysis and breadth of coverage as well as by a notable contrast of opinions. He shared the hope of Sir Francis Vallat that the discussion would produce a common pool of understanding from which the Commission would be able to draw the elements for a text of article 18 that would prove generally acceptable.

2. With regard to the place of the article in the general economy of chapter III (Breach of an international obligation), it should be remembered that, in its discussion on article 16,² the Commission had agreed that the source of the obligation breached was irrelevant to the question of determining the different régimes of responsibility. In his commentary to article 16, the Special Rapporteur had explained that the pre-eminence of certain international obligations was determined by their content and not by the process by which they were created:

... the responsibility entailed by a breach of an international obligation should be more serious not because the obligation has one origin rather than another, or because it is embodied in one document rather than another, but because international society has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligation in question (A/CN.4/291 and Add.1-2, para. 32).

Article 18, the purpose of which was to set forth the different régimes of responsibility with due regard for the content of the obligations breached, thus appeared as the corollary to article 16. The provisions of article 18 followed logically from those of article 16.

3. Article 18 played a very important role in the draft; it was one of the pillars on which the whole law of State responsibility rested. The Commission's first attempt, in 1961 and 1962, to deal with the topic of State responsibility (on the basis of six reports produced by the then Special Rapporteur, Mr. García Amador) had proved unacceptable to the General Assembly. Its approach to the topic at that time had followed the traditional lines of the textbooks, which were pivoted on the status of aliens. The concepts of denial of justice, of the exhaustion of local remedies and of international claims had been developed in connexion with the rules of State responsibility for injury to aliens.

4. The Commission had then proceeded to appoint a Sub-Committee on State Responsibility with Mr. Ago

as Chairman. The Sub-Committee had met in January 1963 and had recommended in its report to the Commission that much more general scope should be given to the topic of State responsibility. The Commission had agreed that "careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility",³ while some members had felt that "emphasis should be placed in particular on the study of State responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law".⁴ The broad scope of the topic had been confirmed by the Commission at its nineteenth session.⁵ Such was now the Commission's mandate, as approved by the General Assembly, regarding the scope of the topic and the impact upon it of new developments in international law.

5. On the question of the different régimes of responsibility, the Commission was not working in a vacuum. The Charter of the United Nations set forth in Chapter VII a system of responsibility with respect to threats to the peace, breaches of the peace and acts of aggression. That chapter established machinery to deal with the requirements of collective security. Article 6 of the Charter laid down a very serious sanction—expulsion from the Organization—against a Member State which persistently violated the Principles of the Charter. The purpose of Article 6 was thus to provide for punishment and not merely preventive action. Other provisions of the Charter, such as Article 41, empowered the Security Council to recommend the severance of diplomatic relations and the interruption of economic relations against a State responsible for a threat to the peace, breach of the peace or act of aggression. Contrary to what had been suggested by one or two speakers during the discussion, the Charter of the United Nations did not merely define obligations: it also made provision for sanctions and established different régimes according to the gravity of the act to be punished. Those Charter provisions showed the universal recognition of the fact that there existed different régimes of responsibility—a point on which there was virtual unanimity in the Commission.

6. The problem with regard to article 18 was that of determining the criteria for applying the different régimes and also how far it was appropriate to elaborate on the subject by giving examples. Speaking from different standpoints, Mr. Kearney⁶ and Mr. Ustor⁷ had both counselled prudence because of the need to secure the acceptance of Governments. Personally he felt that it was universally recognized that there were serious violations which undermined the very foundations of the international order. They included aggression and the "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United

¹ For text, see 1371st meeting, para. 9.

² 1364th to 1366th meetings.

³ See *Yearbook... 1963*, vol. II, p. 224, document A/5509, para. 52.

⁴ *Ibid.*, para. 53.

⁵ *Yearbook... 1967*, vol. I, pp. 225-228, 934th meeting, paras. 75 *et seq.*, and 935th meeting, paras. 2-14.

⁶ 1374th meeting, paras. 27 *et seq.*

⁷ 1375th meeting, paras. 39 *et seq.*

Nations", as stated in Article 2, paragraph 4, of the Charter. The Purposes and Principles of the Charter constituted an international order; whoever struck at the foundations of that order committed an international crime.

7. There were two categories of international crimes. The first category included (1) the violation of the territorial integrity of a State, (2) the suppression of the right of a people to self-determination, which struck at the identity of the people concerned, and (3) the violation of basic human rights and fundamental freedoms, which struck at the dignity of man. Breaches in that first category violated basic norms of State conduct and outraged the conscience of mankind; they included such crimes as genocide, *apartheid* and doctrines based on racial discrimination. The second category of international crimes consisted of violations injurious to international co-operation or detrimental to a common heritage of mankind. In that connexion Mr. Ushakov⁸ and Mr. Ustor⁹ had made the important point that the obligations whose breach, even serious breach, could be characterized as an international crime, did not correspond with the obligations covered by the notion of *jus cogens* as defined in article 53 of the Vienna Convention on the Law of Treaties.¹⁰ Paragraphs 2 and 3 of article 18 dealt only with categories of rules of *jus cogens* whose violation constituted an international crime.

8. The distinction between those two categories of violations involved a distinction between different régimes of responsibility. The second category did not have the element of culpability which called for punitive sanctions. For example, a breach of the principles governing the use of resources which constituted the common heritage of mankind gave rise to reparation and not to punishment.

9. There was yet a third category of breaches, namely, that of violations which did not have a grave character, and which were described in paragraph 4 of article 18 as "international delicts".

10. During the discussion, attention had been drawn to the difficulties involved in the use of the term "international crime" and it had been pointed out that both the Convention on the Prevention and Punishment of the Crime of Genocide¹¹ and the Commission's own Draft Code of Offences against the Peace and Security of Mankind¹² used the expression "crimes under international law" and specified that individuals were responsible for such crimes. The solution of that problem was the usual one of including in the draft article dealing with the use of terms a specific provision to explain the meaning attached to the term "international crime", or any other term chosen, for the purposes of the draft articles. Provi-

sions of that type did not represent general definitions but constituted merely explanations regarding the use of a term in a particular draft or instrument.

11. Much had been said during the discussion on the relationship between the United Nations Charter and international law and between law and politics. On that last point, he associated himself with the pertinent remarks of Mr. Bedjaoui.¹³ It was well to recall the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁴ During the many years spent on the formulation of the Declaration, its contents had been frequently criticized as political, but the drafters had not been deterred by that criticism and had ultimately formulated a legal instrument which, like all such instruments, inevitably had political implications. It should also be remembered that all questions, even technical ones, had their political undertones. The International Court of Justice itself, in its advisory opinion on *Certain Expenses of the United Nations*, had disposed in the following terms of the objection that the question put to it was political rather than legal in character:

It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise.¹⁵

The question of the different régimes of responsibility was a legal one but any attempt to separate law from politics in that connexion would condemn the law to remaining static. In fact, the mere statement that law should not deal with politics was, in itself, a political pronouncement.

12. Nor was the Commission attempting, in article 18, to revise or supplement the provisions of the Charter. In that connexion it was appropriate to refer to the theory of implied powers developed by John Marshall, the fourth Chief Justice of the Supreme Court of the United States of America. The provisions of article 18 could not impair in any way those of Chapter VII of the Charter; they came under the heading of implied powers deduced by way of interpretation. Chapter VII entrusted the Security Council with the task of determining whether an act of aggression had been committed and empowered it to take action in pursuance of collective security. Those Charter provisions did not preclude other action that might be taken in connexion with acts of aggression or the threat or use of force. At the previous meeting, Mr. Bedjaoui had appropriately drawn attention to the responsibility of all States to take action whenever a basic norm of international law was violated. Such violations included, apart from aggression itself, the occupation of territory, violations of the Geneva Conventions, the attempt to annex occupied territories and the suppression of the will of their inhabitants.

⁸ 1374th meeting, paras. 2 *et seq.*

⁹ 1375th meeting, para. 40.

¹⁰ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

¹¹ United Nations, *Treaty Series*, vol. 78, p. 277.

¹² *Yearbook... 1954*, vol. II, p. 150, document A/2693, para. 50.

¹³ 1375th meeting, paras. 18 *et seq.*

¹⁴ General Assembly resolution 2625 (XXV), annex.

¹⁵ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion, I.C.J. Reports 1962*, p. 155.

13. Finally, he commended the Special Rapporteur for his imaginative formulation of article 18. He was reminded of a passage in a book by the late Wilfred Jenks where the author emphasized the revolutionary changes brought about by the Second World War in the political, economic and scientific background of contemporary international law, which could “no longer be presented within the framework of the classical exposition of international law as the law governing the relations between States but must be regarded as the common law of mankind at an early stage of its development”. Jenks had stressed the difficulties created by the severe crisis of growth through which the law was passing, commenting that those difficulties would nevertheless provide “the elements of a universal legal order more comprehensive in character than any previous generation could have even imagined”, and concluding by calling for “a radical appraisal of the scope of international law . . . worthy of the opportunities presented by a decisive stage in the development of the law as an element in the creation of an effective world order”.¹⁶ He (Mr. El-Erian) hoped that the Commission would accept the challenge contained in that remarkable passage written almost twenty years ago.

14. Mr. BILGE said that the Special Rapporteur had been right in article 18 in making a distinction between internationally wrongful acts according to the content of the international obligation breached and the seriousness of the breach. That distinction already existed in international law, for certain conventions spoke of international crimes. The sufferings caused by the two World Wars had led the international community to safeguard peace by prohibiting all acts of aggression. Thus the League of Nations Covenant and the Briand-Kellogg Pact, following the First World War, and the United Nations Charter, following the Second, categorically condemned recourse to force.

15. Should a distinction be made between different régimes of responsibility according to the content of the international obligation breached? In theory, it was not difficult to establish a special régime of responsibility for international crimes. But careful thought must be given to the practical consequences of such a distinction. The first question to arise in that respect was that of sanctions, and the Special Rapporteur had shown clearly its importance in paragraph 144 of his report (A/CN.4/291 and Add.1-2). Should the sanctions be collective, like those provided for by Chapter VII of the Charter in the event of breaches of the peace? The Commission should draw the attention of Governments to that question, for there could hardly be acceptance of a different régime of responsibility for the breach of certain particularly important obligations without acceptance of a régime of collective sanctions. But, while the members of the international community were generally in agreement when it came to condemning an international crime, they were not always united in applying a sanction against the guilty State. Governments must, therefore, be fully conscious of their responsibility in that respect when they gave their

opinions as to the advisability of applying régimes of responsibility differing according to the importance of the obligation breached.

16. A criterion must be found for characterizing certain internationally wrongful acts as international crimes. It was not a question of defining primary rules, but of cataloguing international crimes. The Special Rapporteur had proposed various categories of such crimes. He had made a distinction between the use of force (paragraph 2), and the breach of other obligations established by the Charter (paragraph 3). Was that distinction justified or should the Commission go no ruder than to distinguish international crimes in general from other international offences? There was no doubt that aggression was an international crime. But the Special Rapporteur had placed the use of armed force in the front rank of international crimes. However, the use of armed force was not always an international crime. In order that it should be considered an international crime the acts concerned or their consequences must, as stated in article 2 of the definition of aggression adopted by the General Assembly¹⁷ be “of sufficient gravity”. Mere border incidents, for example, were not generally considered as international crimes. A distinction must therefore be made, in both paragraph 2 and paragraph 3, between varying degrees of seriousness of a breach, for the breach of an international obligation established for the purpose of maintaining international peace and security was not necessarily an international crime. That being so, it could be asked whether there was any need to distinguish between the obligations referred to in paragraphs 2 and 3 respectively.

17. It was difficult to find a criterion by which an international crime could be distinguished from a mere international offence. The Special Rapporteur had spoken in paragraph 3 of a “serious breach”. Other possible terms were “systematic breach”, for example, in the case of human rights or “continuous breach”. Should there be express and individual mention of the various international crimes, or should the Commission limit itself, as the Special Rapporteur had done, to referring to the main categories of international crimes? The solution adopted by the Special Rapporteur was probably the best, but perhaps it would still be preferable to be more laconic, as the International Court of Justice had been in its decision in the *Barcelona Traction* case.¹⁸

18. Being aware of all those difficulties, the Special Rapporteur had taken his precautions and, like the United Nations Conference on the Law of Treaties, in the case of the rules of *jus cogens*, had suggested the possibility of entrusting to an international authority the task of determining, in the event of dispute, whether an offence constituted an international crime. That task could hardly be entrusted to a judicial body for States seemed ill-disposed to such a solution and generally preferred to settle their disputes amongst themselves or to bring them before a political body such as the Security

¹⁶ C. W. Jenks, *The Common Law of Mankind* (London, Stevens, 1958), pp. xi and xii.

¹⁷ General Assembly resolution 3314 (XXIX), annex.

¹⁸ *Barcelona Traction, Light and Power Company, Limited*, second phase, judgment, *I.C.J. Reports 1970*, p. 3.

Council. The Security Council's practice with respect to the use of armed force showed that it reached its decisions on the basis of certain political considerations, for it had to weigh up the situation in the light of the circumstances. It would therefore be advisable to draw the attention of Governments to the Council's practice with respect to aggression.

19. The Commission was faced with a very difficult problem: it could not ignore the development of international law or overlook the fact that there were international crimes. It could not therefore refuse to make a distinction between different régimes of responsibility, for international crimes could not be treated like other international delicts. But it must also consider the very significant consequences which the application of different régimes of responsibility could have in the future and draw the attention of Governments to those consequences.

Mr. Calle y Calle (second Vice-Chairman) took the Chair.

20. Mr. AGO (Special Rapporteur), replying to the observations on article 18 made since his previous statement (at the 1374th meeting), said that he would comment first on the most favourable of them and end with the least favourable.

21. Mr. Ramangasoavina had emphasized the development of international judicial opinion and shown how the principle of "no interest, no action" had given place to the principle asserted by the International Court of Justice in its decision in the *Barcelona Traction* case.¹⁹ It was precisely that development that underlay article 18. While it was true that by endorsing it the Commission would to some extent be entering the realm of the progressive development of international law, it would be wrong to infer that it would be altogether innovating. In fact, the Commission would be simply reflecting a trend which had gradually developed in the legal consciousness of States. The idea of an international criminal law of States had long been established, both in international practice and judicial decisions and in legal opinion. Mr. Ramangasoavina had also said that the wording of article 18 could be improved.²⁰ Personally, he fully concurred with that view but he wished to stress that it would not be easy to produce an entirely satisfactory text which faithfully reflected the Commission's intentions.

22. Mr. Bedjaoui had considered that article 18 represented only a minimum of international ethics, and that without that minimum it would probably injure the non-aligned countries.²¹ He had emphasized the need to accept as a basis the fact that the breach of certain international obligations affected not just a particular State, but the entire international community. That, indeed was the essential point which article 18 was intended to bring out. Mr. Bedjaoui had also considered that the

right of self-determination was a right of *jus cogens*.²² He was inclined to share that view since, if there were legal rules relating to self-determination, they could only be rules of *jus cogens*. It would, after all, be inconceivable at the present day for two States to conclude an agreement whereby one of them would be placed, or placed again under the colonial domination of the other; by virtue of the Vienna Convention on the Law of Treaties, such an agreement would certainly be void. However, the Commission was not now concerned with identifying the rules of *jus cogens*, and furthermore it ought to be cautious in broaching the possibility of establishing new internationally wrongful acts as international crimes. For an international obligation really to be considered as essential for the protection of the fundamental interests of the international community and for its breach to constitute an international crime, its essential character must be recognized by the entire international community. The obligation must be vital for the existence or survival of the international community as a whole and not just of a group of States, however important, like the group of non-aligned countries or any other.

23. When speaking as a member of the Commission, the Chairman had emphasized that article 18 was the logical corollary to the considerations contained in the introduction to chapter III and in the commentary to article 16,²³ since chapter III concerned the breach of an international obligation, which raised the question whether the content of an obligation had a bearing on the responsibility arising from its breach. As he saw it, the boundaries of the Commission's task were clearly defined, it must not go any further, even if it knew that article 18 raised problems which would have to be solved in the future. The Chairman considered that a distinction should be drawn between breaches of different international obligations—a distinction which had already taken root in the international legal consciousness—but that that was no justification for claiming that any violation of a peremptory rule of international law constituted an international crime.²⁴ On that last point, there seemed to be general agreement. The international obligations referred to in article 18 were those which were more or less unanimously considered as vital to the existence of the international community at the present time. Thus, recourse to war, which had previously been considered admissible at least, in certain cases, was no longer so considered, since it now endangered the existence of the international community as such. As Mr. Ushakov had pointed out, any war endangered the very foundations of modern international society. That was why the breach of international obligations relating to the maintenance of international peace and security had been dealt with separately in article 18.

24. Several members of the Commission had referred to the right of self-determination. The Commission's efforts to codify the rules on international responsibility followed closely upon the greatest revolution mankind

¹⁹ 1374th meeting, para. 21.

²⁰ *Ibid.*, para. 23.

²¹ 1375th meeting, para. 19.

²² *Ibid.*, para. 22.

²³ See above, para. 2.

²⁴ *Ibid.*, paras. 7 and 8.

had ever known; peoples which had long been under the domination of other peoples had liberated themselves. The perpetuation or restoration of colonial domination was so abhorrent to the contemporary international conscience that it was bound to be considered an international crime. The same was true of certain violations of the most elementary rights of the individual. Much water had flowed under the bridges of the Tiber since the time when the Treaty of Westphalia had endorsed the principle *cujus regio ejus religio*, according to which a human being had to change his religion by reason solely of the fact that a piece of territory had passed from one sovereignty to another. That principle showed a complete disregard of human rights. Later, massive attacks upon human dignity had finally aroused the conscience of nations. While he did not wish to be accused of blind optimism, he felt bound to place on record that awakening of conscience, thanks to which an act of genocide or an absolute policy of *apartheid* were now considered inadmissible. A tiny breach had thus been opened in the principle of the sovereignty of States. International law now prohibited States from committing, even against their own subjects, certain acts which, under the notion of exclusive domestic jurisdiction would previously have been considered legitimate. Again, the notion of the common heritage of mankind had now emerged. A State could not destroy a common heritage and thereby deprive the international community of an asset essential for its survival. It was all those developments that had led the international community to realize that certain offences were more serious than others.

25. Mr. Quentin-Baxter had clearly demonstrated that the distinction between international offences and international crimes was inevitable;²⁵ in his view it was primarily a question of terminology. It was indeed a case where, as in many others, legal language was inadequate. The terms in common use were confusing and it was important to specify as clearly as possible the sense in which they were used, mainly in order to avoid any confusion between the international crimes of the State and the crimes of individuals. None the less, it should be noted that chapter II of the draft was devoted to the act of the State and that chapter III dealt with the case where the act of the State constituted a breach of an international obligation of that State. Again, the commentary should make it clear that the Commission was dealing only with acts of the State. The obligation to punish individuals might be part of the responsibility of the State for its own crime but it did not exhaust that responsibility, and the international responsibility of the State should on no account be confused with the criminal responsibility of individuals. The term "offence" suggested by Mr. Quentin-Baxter²⁶ was the equivalent of the French term "*infraction*". He wondered whether those terms adequately conveyed the idea of a particularly serious breach affecting the international community as a whole. He would be reluctant to drop the term "crime", since it was used in several international instruments, particularly in connexion with genocide, *apartheid* and

aggression. It would be better to retain the term "crime" and to explain in the commentary that it applied only to a crime of the State. The Drafting Committee might even consider the possibility of using the term "State crime".

26. Mr. Quentin-Baxter, like other members of the Commission, had mentioned the notion of economic force²⁷ but the use of economic force could not be described as an international crime without first establishing the existence of an international obligation not to exert economic pressure to induce a State to adopt or not to adopt a certain line of conduct. In his opinion, such an obligation, if it existed, could apply only in exceptionally serious cases. If the Commission accepted the notion that economic pressure on a State to force it to conclude a treaty was not only a cause of the nullity of the treaty but also justified the application of penalties, it would run the risk of making international relations impossible. Besides, the economic pressure might be applied, not by a State, but by a commercial undertaking, in which case there could be no question of a breach by the State of an international obligation. The Commission ought at all events to be cautious in dealing with that subject. It might confine itself to a statement in the commentary to article 18 that some members did not wish to confine the concept of acts of aggression solely to the use of armed force but held that it also covered the use of economic force.

27. Mr. Rossides approved the content of article 18, particularly paragraph 3 (c), but considered that paragraph 3 should be redrafted.²⁸ He shared that view, but did not think that it would be an easy task for the Drafting Committee. When considering the definition of a breach, the Drafting Committee should emphasize the fact that the obligation breached must be of an "essential" or "vital" character—the words he had himself used—or of a "fundamental" character—the word used by Mr. Rossides—or it should try to find a better word with a similar meaning.

28. Judging by his comments, Mr. Ustor was half way between those who were most satisfied and those who were least satisfied with article 18. He had approved of the content of that provision, but had dwelt on points of drafting. He had rightly suggested that the title of the article should bring out the distinction between international delicts and international crimes.²⁹ On the other hand, he had questioned the need for paragraph 1. The answer was that if the Commission did not specify that the breach of any international obligation incumbent upon a State was an internationally wrongful act, the emphasis which the later paragraphs placed on the breach of certain specific obligations might create the false impression that, in the Commission's view, breaches which were not crimes did not constitute internationally wrongful acts. At the same time, there should be no possibility of the list of international crimes being lengthened as soon as a State had reason to accuse another State of committing an internationally wrongful act.

²⁵ 1375th meeting, para. 13.

²⁶ *Ibid.*, para. 14.

²⁷ *Ibid.*, para. 11.

²⁸ *Ibid.*, para. 35.

²⁹ *Ibid.*, para. 37.

Mr. Ustor had noted that the Commission was engaged only in laying the foundations for an international criminal code. Referring to rules of *jus cogens*, he had pointed out that where the breach of an international obligation of *jus cogens* constituted an international crime it would have far more serious consequences than the mere nullity of a treaty.³⁰ It should not therefore be thought that the breach of any obligation arising from a peremptory rule constituted an international crime. The concept of international crime must be restrictive. It was precisely for that reason that he himself had proposed the distinction between various categories of breaches. Furthermore, he considered that it was not possible to refer in general terms to the essential rules for the international community without laying down some criteria for identifying them. If they could not at present be formulated as precisely as the rules of internal criminal law, the obligations whose breach constituted an international crime should at least be defined as closely as possible.

29. He agreed with Mr. Ustor that too much attention should not be paid to relationships between the draft articles and the Charter of the United Nations, especially Chapter VII.³¹ Obviously the Commission could not amend that Charter, as was clear from its Article 103, or even add to it, but it would have to take the Charter into account, especially when dealing with sanctions and régimes of responsibility.

30. Mr. Bilge also kept to the middle of the road. He believed that certain international crimes could entail the application of penalties, but stressed that those penalties should be essentially of a collective nature³²: international crimes involved the breach of an obligation *erga omnes*—one which concerned, more or less directly, all the members of the international community—and they should react in a co-ordinated manner. He shared that view, unlike those authors who claimed that any State was entitled to take individual action in such cases. The United Nations Charter did not exclude the possibility of individual action, especially in the exercise of the right of self-defence, which could be either collective or individual. But in any case the fact that he had mentioned authors who claimed that any State was entitled to react to any breach of an international obligation *erga omnes* by no means implied that he shared their view. In internal law, it was originally the principle of private punishment that had held sway; it was only later that the State had acquired a monopoly of punishment. Sanctions in international society would also have to be institutionalized, but that was going to be a long job. For the present, the Commission had to establish the notion which had taken root in world consciousness, that some breaches were more serious than others and should entail more serious consequences. For the time being, the Commission should not spend too much time on trying to work out a precise definition of sanctions.

31. In his opinion, undue importance should not be attached to the comments of the International Court

of Justice, which Mr. Bilge had mentioned,³³ on the subject of obligations *erga omnes* in its judgment in the *Barcelona Traction* case. Those comments had been made *obiter* in a diplomatic protection case and more by way of explanation. It would be dangerous to give the impression that all obligations *erga omnes* could be included in the list of obligations the breach of which constituted an international crime. He was not opposed to the idea of including examples, such as genocide or *apartheid*, so as to give a better indication of the nature of the offences concerned.

32. In Mr. Tsuruoka's opinion, the justification for paragraphs 2 and 3 would depend on the effects which the provision would give rise to. He had suggested that the commentary to article 18 should briefly indicate the régimes of responsibility envisaged.³⁴ However, even a mere outline of those régimes of responsibility would inevitably lead Governments to raise questions prematurely. It would therefore be better for the Commission to confine itself for the present solely to the question of determining the obligations whose breach constituted an international crime. It should also refrain from defining the content of international obligations. Mr. Tsuruoka had wondered whether the possession of nuclear weapons constituted a breach of an international obligation.³⁵ In his view, it was not the fact of possessing such weapons—apart from weapons covered by specific conventions, such as bacteriological weapons—which constituted a breach of an international obligation, but the use their possessor intended to put them to. If he intended to use them for aggression, their possession constituted a threat to peace. On the other hand, a State could possess nuclear weapons for its own defence and have no intention of committing acts of aggression.

33. While showing a great deal of understanding, Mr. Kearney had expressed some apprehensions.³⁶ He had already replied to one of them when he had explained that he did not share the opinions of all the authors he had cited. As early as in 1939 he had noted that a distinction could perhaps be made between "civil responsibility" and "criminal responsibility" in international law, when he had pointed out that sanctions were sometimes applied, especially in the form of reprisals. Nowadays, in United Nations practice, recourse to armed reprisals by one State against another was considered unlawful. When the Commission came to deal with penalties, it would be concerned principally with collective penalties rather than with those which an individual State might decide to apply. For the time being, the Commission's only task was to give expression to the world legal conscience, according to which the breach of certain international obligations, which it considered to be an international crime, was more serious than the breach of other obligations. Mr. Kearney had asked whether it would not be enough to say that the fact that an act was considered as criminal and punishable did not affect

³⁰ *Ibid.*, para. 40.

³¹ *Ibid.*, para. 43.

³² See above, para. 15.

³³ *Ibid.*, para. 17.

³⁴ 1375th meeting, para. 2.

³⁵ *Ibid.*, para. 4.

³⁶ See 1374th meeting, paras. 27 *et*:

the obligation to make reparation.³⁷ That was not untrue, but it seemed to him that the Commission should lay the emphasis on the converse idea, namely, that a criminal act should entail the application of penalties in addition to the obligation to make reparation. There was no need to be unduly apprehensive about possible abuses, which were in fact inevitable, both at the internal level and at the international level.

34. In conclusion, he said that the very affirmation that international crimes existed might make it easier subsequently to determine the penalties and the procedures applicable. Historically, the definition of crimes had preceded that of punishments, which in turn had preceded the establishment of a procedure for the application of punishments. At the international level there could be no rapid evolution, but there was a discernible tendency to distinguish between international crimes and international delicts, and that should lead to the establishment of more severe régimes of responsibility for the former and, ultimately, to a system for the application of sanctions.

35. The CHAIRMAN suggested that draft article 18 be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

*It was so agreed.*³⁸

The meeting rose at 1.5 p.m.

³⁷ *Ibid.*, para. 33.

³⁸ For consideration of the text proposed by the Drafting Committee, see 1402nd and 1403rd meetings.

1377th MEETING

Wednesday, 26 May 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (A/CN.4/293 and Add.1)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the most-favoured-nation clause (A/CN.4/293 and Add.1).

2. Mr. USTOR (Special Rapporteur) said that the Commission had adopted articles 1-7 of the draft articles on the most-favoured-nation clause at its twenty-fifth

session, in 1973, and articles 8-21 at its twenty-seventh session, in 1975.¹ The seventh report had been prepared in the light of the relevant discussion in the Sixth Committee of the General Assembly at its thirtieth session.² It consisted of two parts, the first containing general provisions, which should be dealt with expeditiously, so as to allow ample time for consideration of the second part, which dealt with the more important aspect of the question, namely, provisions in favour of the developing countries.

3. The first part of the report contained a brief introduction discussing the topicality of the most-favoured-nation clause. The view had been expressed in the Sixth Committee that the clause was clearly an institution corresponding to past economic realities, which were being superseded by new realities that required an adjustment of rules. That view was to some extent true, but the clause was still a most important provision of many treaties—a fact that had been recognized by the Charter of Economic Rights and Duties of States,³ article 26 of which stated that

... International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage equitable benefits and the exchange of most-favoured-nation treatment.

Admittedly, the Commission was not considering the clause exclusively in relation to international trade, but in a more general context. Nevertheless, international trade was an extremely important field in which the clause was commonly used, and the provision he had quoted from the Charter of Economic Rights and Duties of States attested to the fact that the most-favoured-nation clause was not an obsolete institution.

4. Thus the Commission was considering a matter of great current interest, and it would be useful to codify the rules pertaining to the clause, for two reasons. First, codification of the rules would be instructive and helpful to legal departments and foreign ministries in developing countries, since new States sometimes experienced difficulties in concluding treaties containing a most-favoured-nation clause. Secondly, the Commission now had an opportunity of examining the question whether, and to what extent, exceptions in respect of developing countries had become, or should become, general rules of international law—a matter that would encompass some aspects of what was considered to be a new branch of international law, namely, the international law of development.

5. The Commission was not called upon the judge the utility of the most-favoured-nation clause, but to determine the rules applicable when the clause was stipulated in a treaty. The principal rules governing all treaties were embodied in the Vienna Convention on the Law of

¹ For the text of the articles adopted, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. IV, sect. B.

² *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 120-164.

³ General Assembly resolution 3281 (XXIX).

Treaties,⁴ and the Commission had always considered that its task in regard to the most-favoured-nation clause was to draft a supplement to that Convention. He had therefore prepared an article which would recall that fact.

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR

ARTICLE A (Relationship of the present articles to the Vienna Convention on the Law of Treaties)

6. Mr. USTOR (Special Rapporteur) introduced draft article A, which read:

Article A. Relationship of the present articles to the Vienna Convention on the Law of Treaties

The present articles are intended to supplement the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969. The provisions of these articles shall not affect those of the said Convention.

7. Mr. HAMBRO said that, in his opinion, article A presented no difficulties and could be referred to the Drafting Committee at once.

8. Mr. KEARNEY said it was possible to affirm that, if the most-favoured-nation clause did not exist, it would be necessary to invent it. The reason was simply that, generally speaking, developing States could not afford to maintain large and well-staffed treaty sections in their foreign ministries. Without the device of the most-favoured-nation clause, the only way they could keep their treaties up to date would be to conduct a continuous review and, whenever any changes occurred, to enter into a process of re-negotiation to secure new benefits. The clause did not always produce the best results in every case, but no institution devised by human beings ever did. Consequently, he endorsed the Special Rapporteur's views regarding the necessity for the clause.

9. The omission of article A from the draft would not, in general, change the legal situation. As the Special Rapporteur noted in his commentary, there was no real conflict between the provisions of the draft articles and the provisions of the Vienna Convention on the Law of Treaties. Nevertheless, it was a sound idea to include the article, for the Commission was rounding out the Vienna Convention and filling in a number of the gaps in it by preparing a series of draft conventions in the field of treaties.

10. With regard to drafting, the first sentence would be more positive if the words "are intended to", were deleted. In the second sentence, it would be helpful to find a better formulation than the words "shall not affect". Like Mr. Hambro, he thought the article could be referred to the Drafting Committee.

11. Mr. YASSEEN, after congratulating the Special Rapporteur on the clarity of his statement and the details

he had given of the attitude adopted by certain representatives in the Sixth Committee, said that the time was past for asking whether the study of the most-favoured-nation clause was of any use. The subject was on the Commission's agenda and a number of articles on it had already been formulated. The reason why the Commission had undertaken the study was, in particular, that the subject must be examined in the light of the new realities of international life. Even if it was thought that the question was covered by the 1969 Vienna Convention on the Law of Treaties, it had to be re-examined in view of the changes which had occurred in the sphere of development and international trade, particularly in regard to the preferential treatment given to developing countries.

12. Article A was perhaps not indispensable, but it was useful, not so much for the first sentence, which stated that the future convention was intended to supplement the 1969 Vienna Convention, as for the second, which stated that the provisions of the future convention would not affect those of the 1969 Vienna Convention. It was, indeed, permissible, when concluding a treaty, to define its effects on earlier or later treaties. Article A made it clear that the provisions of the draft convention could not be considered as being incompatible with those of the 1969 Convention.

13. The first sentence of article A was intended to answer the questions of interpretation which could arise as a result of the co-existence of the future convention and the 1969 Convention. To state that the future convention would supplement the 1969 Convention meant that it would have to be interpreted in the light of the latter instrument. It would, in particular, be necessary to apply the general rule of interpretation contained in article 31 of the 1969 Convention, according to which a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context", and taking into account "any relevant rules of international law applicable in the relations between the parties". The first sentence of article A was therefore justified, since it settled a problem of interpretation.

14. The second sentence was justified because it constituted an application of article 30, paragraph 2, of the 1969 Vienna Convention, which provided that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". The purpose of the second sentence of article A was, therefore, to avoid any misunderstanding and to prevent the articles of the draft from being considered as constituting special law derogating from the 1969 Convention.

15. Mr. USHAKOV observed that the first sentence of article A did not state a rule of law and might be more appropriate in the preamble to the future convention. Furthermore, while it was true that the draft articles were intended to supplement the 1969 Convention, it should be noted that they went further, since they contained provisions relating to the content of the most-favoured-nation clause. The 1969 Convention, on the other hand, concerned treaties and their provisions,

⁴ For the text of the Convention see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

exclusive of their content. He therefore suggested that it should be stated in the preamble that the articles on the most-favoured-nation clause were intended "in particular" to supplement the 1969 Convention.

16. The second sentence of the article under study contained a real rule of law, modelled on article 30 of the 1958 Convention on the High Seas, which provided that "The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them".⁵ However, article A did not state the provisions of the future convention would not affect those of the 1969 Vienna Convention "in force, as between States Parties to it". The omission of that phrase considerably broadened the scope of article A, for the situation would differ, depending on whether or not the States concerned were parties to the 1969 Vienna Convention. Moreover, he wondered why article A referred only to the 1969 Convention and not to the other conventions or international agreements in force between the States to which it was addressed. In that respect, the scope of article 30 of the Convention on the High Seas was far broader. It was quite possible that States parties to the future convention might have concluded a special agreement on the content, scope or interpretation of a most-favoured-nation clause, and there was no reason why they should not be bound by such an agreement.

17. To sum up, article A raised little more than questions of wording, which it should be possible to settle in the Drafting Committee.

18. Mr. AGO, referring to Mr. Ushakov's suggestion that the first sentence of article A should be placed in the preamble to the future convention, pointed out that that change of position would completely alter the nature of the provision. Placed in the preamble, it would simply mean that the Commission intended to supplement the 1969 Vienna Convention by dealing with a question not covered by that instrument. If the sentence formed part of an article, on the other hand, it would constitute a rule of the future convention. He wondered whether it was really the Commission's intention to draft a supplement to the 1969 Vienna Convention which would be linked to that instrument. Would the sentence in question then mean that States which henceforth acceded to the 1969 Vienna Convention would automatically accede to the future convention? What would be the position of States already parties to the 1969 Convention, which did not become parties to the future convention? Those questions needed precise answers. In his view, States should be free to be parties to one of the conventions without being parties to the other.

19. The second sentence of article A might perhaps be the result of excessive caution on the part of the Special Rapporteur. He himself was not sure how the provisions of the future convention could affect those of the 1969 Vienna Convention. By accepting the provision, States would to some extent bind themselves, where there were two possible interpretations of the future

convention, to choose the one which was not incompatible with the Vienna Convention of 1969. If the provision was to be retained in an article, its precise meaning should be explained in the commentary.

20. Mr. ŠAHOVIĆ said that he agreed to a large extent with the views of Mr. Ushakov and Mr. Ago. It would be difficult to see whether article A met a real need until the text of all the articles of the draft had been formulated. It was because of the technique by which most-favoured nation clauses were concluded that the draft articles were based on the 1969 Vienna Convention. None the less, the Commission had certainly also formulated substantive rules concerning the content of most-favoured-nation clauses. Hence the scope of article A should perhaps be extended. The Drafting Committee would probably be able to improve the wording of the article by using more precise terms.

21. Both the recent developments in economic affairs and certain statements made in the Sixth Committee had demonstrated the usefulness of codifying the rules relating to the most-favoured-nation clause.

22. Mr. CALLE Y CALLE observed that the Commission was continuing to deal with matters whose origin lay in the work done on the law of treaties. It was precisely because of the importance of the most-favoured-nation clause in international life that it was necessary to determine the rules governing that clause. In his introduction, the Special Rapporteur had explained that it was not the Commission's task to decide whether certain economic or commercial relations in the new law of development should be based on treaties which contained or did not contain a most-favoured-nation clause. The arguments advanced had already been heard in connexion with article 0 proposed at the twenty-seventh session.⁶ Article 0 had sought to enunciate one of the possible exceptions, already announced in a working paper submitted by the Special Rapporteur, which had discussed customary and conventional exceptions to the operation of the clause (Customs unions, frontier traffic, interests of developing countries, interests of public policy and security of the contracting parties, etc.).⁷ At a later stage, the Special Rapporteur had spoken of the duality of treatment accorded in the light of the differences in the economic situations of countries—a principle that was no longer in the process of crystallization but had already made great headway. Accordingly, if the Commission failed to advance in the same direction, it would have to offer very convincing justification in the commentary.

23. He fully agreed with the view that the most-favoured-nation clause was a matter of the greatest current interest. Paragraph 1 of the report (A/CN.4/293 and Add.1) referred to the Final Act of the Helsinki Conference on Security and Co-operation in Europe, in which the participating States had recognized the beneficial effects which could result for the development of trade from the application of most-favoured-nation treatment. Moreover, mention could have been made at Helsinki

⁶ See *Yearbook... 1975*, vol. I, p. 190, 1341st meeting, para. 1.

⁷ *Yearbook... 1968*, vol. II, p. 165, document A/CN.4/L.127, sect. XII.

⁵ United Nations, *Treaty Series*, vol. 450, p. 98.

not only of trade but also of a whole series of areas in which non-discriminatory treatment was highly beneficial. Everybody was aware that there were political problems, caused sometimes by a hesitancy to recognize one of the fundamental principles of international ethics, namely, most-favoured-nation treatment.

24. It was true that the articles under consideration supplemented the Vienna Convention on the Law of Treaties, and the juridical link with that Convention posed some problems regarding the precedence of the relevant provisions in cases where a State subscribed to the articles, but was not a party to the Vienna Convention, or vice versa. The idea embodied in article A was explicit, but the structure of the article did not represent the most effective method of stating the purpose of a rule. It had already been pointed out that a convention on the most-favoured-nation clause could state, in the preamble, that the States Parties wished to supplement a specific aspect of the provisions of the Vienna Convention. It would be preferable for the second sentence of the article to include a general safeguard, under which Customs unions and regional economic groups, for example, would not form the subject of a special exception.

25. The CHAIRMAN, speaking as a member of the Commission, said that with regard to the scope of the saving clause in article A, he agreed with Mr. Ushakov that consideration should be given to using the language of article 30 of the Convention on the High Seas.

26. As to the suggestion that the idea embodied in the first sentence should be transferred to the preamble, he reserved his position until he had heard the views of the Special Rapporteur on that point. He wished to draw attention, however, to the fact that the proposed method had been resorted to in the preambles to the Vienna Convention on Consular Relations,⁸ the Convention on Special Missions⁹ and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character.¹⁰ The preambles to each of those Conventions contained a paragraph indicating that they were intended to supplement the Vienna Convention on Diplomatic Relations,¹¹ and each other, with a view to completing the codification of diplomatic law.

27. If, in the light of the comments made during the discussion and of the Special Rapporteur's response to them, the Commission were inclined to retain article A, it should bear in mind that no article on those lines had been included either in its draft articles on succession of States in respect of treaties, or in its draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations.

⁸ For the text of the Convention, see United Nations, *Treaty Series*, vol. 596, p. 261.

⁹ General Assembly resolution 2530 (XXIV), annex.

¹⁰ See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 201.

¹¹ See United Nations, *Treaty Series*, vol. 500, p. 95.

28. In dealing with the second of those two topics, the Commission, at its twenty-sixth session, had included, in its general remarks concerning the draft articles, a section on the relationship between the draft articles and the Vienna Convention.¹² If it decided in the present instance that it was not necessary to retain article A in the draft itself, he would suggest to the Special Rapporteur that he should adopt the same method and deal with the matter in the introduction.

29. Should the Commission decide to retain article A, it would of course be appropriate to consider the suggestion by Mr. Ushakov that the article should refer to the general law of treaties and not only to the 1969 Vienna Convention. Furthermore, he would suggest that the words "done at Vienna on 23 May 1969" should be dropped in any case; the reference to the "Vienna Convention on the Law of Treaties" was sufficient.

30. Another delicate point of drafting was the use, in the first sentence of the article, of the verb "to supplement" which raised the problems to which Mr. Ago had drawn attention. The use of that verb could give the impression that the present draft articles were intended to become an additional protocol to the 1969 Convention or an instrument forming an integral part of that Convention. He therefore urged the Special Rapporteur to replace that verb by a more suitable one.

31. In conclusion, he doubted the necessity of including an article on the lines of article A, since no such article had been included in the Commission's other two drafts to which he had referred and which also related to the law of treaties. If the Commission decided to retain article A, however, the wording should be adjusted to take account of the comments made during the discussion.

32. Mr. USTOR (Special Rapporteur) said that article A contained two ideas, expressed in its two separate sentences. He agreed that the first of those sentences was not really a legal rule, but an expository statement. Such statements, however, had already been introduced by the Commission into some of its earlier drafts and it might well prove useful to adopt the same approach in the present set of draft articles.

33. It was true that the statement in the first sentence had not been included in the two drafts to which the Chairman had referred. There was, however, a notable difference between those two drafts and the present draft articles. The draft on the most-favoured-nation clause dealt with clauses or provisions contained in treaties and those clauses or provisions were governed in the first place by the law of treaties. That law was to be found in the 1969 Vienna Convention, as far as the States parties to it were concerned; in other cases, the general law of treaties applied. It was therefore appropriate to state expressly that the present articles were intended to supplement the law of treaties. The same arguments did not apply to the topic of succession of States in respect of treaties or to that of treaties concluded between States

¹² See *Yearbook... 1974*, vol. II (Part One), p. 292, document A/9610/Rev.1, chap. IV, part A.

and international organizations or between two or more international organizations; the draft articles on those two topics were autonomous and applied to matters which were not governed by the Vienna Convention; in fact, those matters had been expressly excluded from the scope of that Convention. A treaty containing a most-favoured-nation clause, on the other hand, would be governed first and foremost by the law of treaties and the purpose of the present draft articles was to set forth in detail the rules governing that clause.

34. The question of the relationship between the present draft articles and the Vienna Convention also raised other problems, as the Commission would be able to note when it came to consider article C (Non-retroactivity of the present draft articles).

35. He appreciated the difficulties involved in the provision contained in the first sentence of article A. The problems which had been raised during the discussion were closely connected with the later part of the draft and with the question whether it should include an article providing that the future convention would be open for signature only by States parties to the Vienna Convention. It would, of course, be possible to open the future convention to States not parties to the Vienna Convention, to which it was perhaps better not to link the draft articles too closely.

36. He intended to give full consideration to the points raised during the discussion and to examine further the question whether to retain the idea embodied in the first sentence of article A or to transfer it to the commentary or possibly to reserve it for the preamble of the future convention.

37. If it were decided not to include the second sentence of Article A, on the relationship between the articles on the most-favoured-nation clause and those of the Vienna Convention on the Law of Treaties, the situation would be governed by the rules set out in article 30 (Application of successive treaties relating to the same subject-matter) of the Vienna Convention. The rules embodied in that article constituted the codification of existing rules of international law. That being so, the second sentence of article A might well not be necessary.

38. He welcomed the wise suggestion by Mr. Šahović that the ultimate decision on article A should be taken after the Commission had examined all the other draft articles; it could then see whether the statement in the second sentence of article A was true of all the articles of the draft. He would accordingly suggest that the article should be referred to the Drafting Committee with instructions to submit a text only after the adoption of the last part of the draft articles.

39. Mr. KEARNEY said he was not at all convinced of the wisdom of dropping the first sentence of article A. Bearing in mind the Commission's mandate as set out in Article 13, paragraph 1 (a) of the United Nations Charter, he thought the Commission should regard codification as meaning something more than the preparation of separate draft conventions without consideration of their effects on each other. Codification called for a conscious and deliberate effort to create an over-all

body of law to cover a particular subject, not a series of disparate pieces of legislation. It would be a very grave decision for the Commission to conclude that it could not achieve the codification of a topic in that sense.

40. Mr. HAMBRO urged that the Drafting Committee, when it came to examine article A, should not attach too much importance to the question whether its contents would be retained as an article of the draft or as part of the preamble to the future convention. The preamble to an international convention was just a binding as any other part of its contents.

41. Mr. REUTER reminded the Commission that in the case of the draft articles on treaties concluded between States and international organizations or between two or more international organizations, it had decided to draw up a series of articles which would be independent of the Vienna Convention on the Law of Treaties, so that if those articles were embodied in a convention, it would be applicable to States which were not parties to the Vienna Convention. It was true that that decision gave rise to very difficult drafting problems. But since the course followed by the Commission so far had been to prepare draft articles which could be made into conventions, it was preferable for those draft articles to be autonomous. Hence, if the draft articles on the most-favoured-nation clause were to become a convention, steps must be taken to ensure that it could enter into force whatever the fate of the Vienna Convention. Otherwise, the Commission would be renouncing the policy it had followed since the Vienna Convention, which was to prepare draft articles that could be made into conventions.

42. Mr. AGO endorsed the comments made by Mr. Kearney, Mr. Hambro and Mr. Reuter, and said that he, too, thought the Commission should take a decision on article A. Mr. Hambro had observed that to include the first sentence of that article in the preamble would not solve the problem, for the preamble would be just as binding as an article. In fact, the sentence in question showed that the draft articles were intended to be something new in relation to the Vienna Convention. It was therefore necessary to ensure that the draft articles were autonomous, for they could bind States which were not bound by that Convention.

43. He agreed with the Special Rapporteur that the principle stated in the second sentence of article A could be the subject of a real rule which would link the interpretation of the future convention to that of the Vienna Convention by laying down that interpretation of the new articles must not affect the normal interpretation of the rules of the Vienna Convention. The Commission would thus establish a link between the various parts of the mosaic of codification of international law it was piecing together.

44. Mr. USTOR (Special Rapporteur) said he welcomed Mr. Reuter's remarks on the difference between the draft articles on treaties concluded between States and international organizations or between two or more international organizations and those on the most-favoured-nation clause. The former constituted an autonomous set of articles on a matter which was not governed by the Vienna Convention on the Law of Treaties, whereas

treaties concluded exclusively between States were governed by that Convention. The topic of the most-favoured-nation clause would be governed not only by the draft articles under consideration, but also—first and foremost—by the rules on the law of treaties contained in the Vienna Convention and in the general law of treaties.

45. The idea expressed in the first sentence of article A was that while the articles on the most-favoured-nation clause were intended to serve for purposes of the formulation, interpretation and application of most-favoured-nation clauses, the matters regulated by them were still governed by the law of treaties. Those matters were subject to the Vienna Convention for States parties to that Convention and to the general law of treaties for States which were not parties to that Convention.

46. He suggested that he should prepare a modified text for the Drafting Committee dealing with the two separate ideas expressed in article A and that the Commission should not take a definite stand on that article until it had dealt with the rest of the draft.

46. The CHAIRMAN, speaking as a member of the Commission, said that the remarks made by Mr. Hambro and Mr. Ago on the binding force of the preamble to a treaty brought to mind the discussion that had taken place in the Sixth Committee on the principle of self-determination, in the course of which it had been argued that that principle was not a binding rule of international law because it was stated only in the Preamble to the Charter. He and others had successfully asserted the legally binding force of the Preamble to the Charter, relying, among other authorities, on a book on the Charter of the United Nations of which Mr. Hambro was one of the joint authors.¹³

48. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to accept the Special Rapporteur's suggestion that he should prepare a revised draft of article A and submit it to the Drafting Committee, which would decide on the appropriate time for taking up the article.

It was so agreed.

The meeting rose at 12.55 p.m.

¹³ L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed. (rev.) (New York, Columbia University Press, 1969).

1378th MEETING

Thursday, 27 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 2 (Use of terms), subparagraph (e) ("material reciprocity")

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposal for a new subparagraph (e) in article 2:

Article 2. Use of terms

[For the purposes of the present articles:

...]

(e) "material reciprocity" means the extension by one State to another State or to persons or things in a determined relationship with that State of the same treatment in kind as the treatment extended by the latter State to the former or to persons or things in the same relationship with that former State.

2. Mr. USTOR (Special Rapporteur) said that the purpose of the new provision was to define the meaning in which the term "material reciprocity" was used in the draft and thus to solve a drafting problem. He had already discussed the question of material reciprocity in his fourth report.¹ A good illustration of the concept was to be found in article 46 of the 1958 Consular Convention between Poland and Yugoslavia, whereby the contracting parties accorded most-favoured-nation treatment to each other, with the proviso:

However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.²

3. The purpose of combining the most-favoured-nation clause with the condition of material reciprocity was not to secure in a foreign country treatment equal to that of nationals or institutions of other countries, but rather to secure equal treatment by the Contracting States of each other's nationals or institutions. Equality with competitors was of great importance in matters of trade, particularly Customs duties, and the condition of material reciprocity was therefore practically never to be found in treaties dealing with those matters.

4. His proposed subparagraph was intended to express the idea that the two contracting parties concerned would grant substantially the same advantages to each other's nationals, ships, establishments or institutions. In the light of that explanation, the expression "the same treatment" perhaps went rather too far.

5. He had received from Mr. Ushakov an informal written suggestion redrafting subparagraph (e) to state

¹ See *Yearbook... 1973*, vol. II, pp. 98-102, document A/CN.4/266, commentary to article 6.

² United Nations, *Treaty Series*, vol. 432, p. 322.

that material reciprocity meant a stipulation attached to the most-favoured-nation clause whereby the beneficiary State was only entitled to benefit from the most-favoured-nation clause on condition that it extended equivalent treatment to the granting State.

6. Mr. KEARNEY said it was difficult to draft a provision defining the meaning in which the term "material reciprocity" was used in the draft, because of the need to lay down rather strict limits while at the same time allowing enough tolerance to make the most-favoured-nation clause workable.

7. His own proposal was that the new subparagraph (e) should explain the concept of "condition of material reciprocity" rather than attempt to deal with material reciprocity itself. He would submit in writing, for the benefit of the Drafting Committee, a revised text stating that a condition of material reciprocity meant that the State subject to that condition would receive most-favoured-nation treatment by another State only if it accorded equivalent treatment in respect of equivalent subject-matter.

8. Mr. REUTER said he was in favour of referring subparagraph (e) of article 2 to the Drafting Committee. In his view, the difficulty was caused by the expression "same treatment in kind", which was not satisfactory. It would be better to use the words "treatment relating to an equivalent specific subject-matter", which would be in conformity with the explanations given by the Special Rapporteur in his commentary.

9. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer the proposed new subparagraph (e) to the Drafting Committee for consideration in the light of the various suggestions made during the discussion.

*It was so agreed.*³

ARTICLE 3 (Clauses not within the scope of the present articles), subparagraph (4)

10. The CHAIRMAN invited the Special Rapporteur to introduce his proposal for a new subparagraph (4) to be inserted in the opening paragraph of article 3, which read:

Article 3. Clauses not within the scope of the present articles

[The fact that the present articles do not apply
...]

or (4) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to another such subject of international law.

11. Mr. USTOR (Special Rapporteur) said that the article 3 had been intended to impose the same limitations as article 3 of the 1969 Vienna Convention on the Law of Treaties.⁴ It excluded from the scope of the present

draft, by subparagraphs (1), (2) and (3) of its opening paragraph, clauses on most-favoured-nation treatment contained in oral agreements and in international agreements between States and other subjects of international law. It would be agreed that, as he had pointed out in his seventh report (A/CN.4/293 and Add.1, para. 19), the expression "a subject of international law other than a State" covered intergovernmental organizations. The question arose, however, whether hybrid unions such as EEC would also be covered by that expression, and he had suggested (*ibid.*, para. 20) that the commentary to article 3 should explain that for the present purposes the Commission considered the expression as covering such unions; it might be added that the Commission did not wish to enter into the controversy concerning the precise legal character of such unions.

12. During the discussion in the Sixth Committee, attention had been drawn to the possibility of a most-favoured-nation clause being included in a treaty concluded between two hybrid unions. It had been pointed out that the contemporary world was a "world of areas" characterized by the existence of a considerable number of groupings, particularly customs unions. He had accordingly formulated his proposal for a new subparagraph (4), in order to make it clear that the articles did not apply to a most-favoured-nation clause in an international agreement concluded between two subjects of international law other than States.

13. That exclusion was, of course, implicit in draft article 1 (Scope of the present articles), which specified that the articles applied to "most-favoured-nation clauses contained in treaties between States". Nevertheless, it might be useful to state it explicitly in article 3, so as to make clear that the draft articles would not apply to a most-favoured-nation clause contained in a treaty concluded between say, EEC and a Latin American or African economic group.

14. Mr. YASSEEN observed that article 3 defined the scope of the draft articles by specifying that it did not go beyond that of the 1969 Vienna Convention; in other words, that the articles did not apply to oral agreements or to agreements concluded with subjects of international law other than States. The real problem was that of other subjects of international law, in particular, international organizations. The term "international organization" had a fairly precise meaning; the criterion for distinguishing an international organization from a mere association of States was the existence of an international entity concealing the individual identity of each State. Thus, when EEC negotiated as such with a State or group of States, it was not the States members of the Community themselves which conducted the negotiations, but another international entity.

15. The 1969 Vienna Convention had followed that idea, but it was not entirely categorized in regard to the definition of an international organization. At the United Nations Conference on the Law of Treaties, BIRPI and GATT had defended their status as international organizations on the grounds that, although they had no statutes, they had nevertheless been established by an international agreement. In the light of the communications received

³ For the consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 6-8.

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

from GATT and BIRPI, the Drafting Committee of the Conference had considered the scope to be given to the term "international organization" and had concluded, as its Chairman had stated in the Committee of the Whole of the Conference, that it denoted "institutions established at intergovernmental level either by agreements or by practice and which exercised international functions of some permanence".⁵ No one had contested that statement and the Conference had unanimously adopted article 2, paragraph 1 (i) of the Convention, which stated that the term "international organization" meant an intergovernmental organization. That definition of an international organization included "hybrid unions" such as EEC. In his view, therefore, it was not necessary to add a separate paragraph covering "hybrid unions".

16. Mr. USHAKOV pointed out that in article 1 the Commission had limited the scope of the articles to "most-favoured-nation clauses contained in treaties between States". The term "treaty" had been defined in article 2 (a), as "an international agreement concluded between States in written form...". Article 4, however, referred to a *disposition conventionnelle* ("treaty provision"); that would mean a provision in any agreement, written or oral, concluded between States or between other subjects of international law. The definition of the most-favoured-nation clause given in the French version of article 4 would thus be in contradiction with article 1 and article 3, which excluded from the scope of the draft articles agreements which were not written or which were concluded between subjects of international law other than States. It should therefore be stated in article 4 that the term "most-favoured-nation clause" meant a provision contained in a treaty within the meaning of the term "treaty" as defined in article 2.

17. He also wondered whether it was correct to refer in subparagraph (4) of article 3, to "most-favoured-nation treatment", when dealing with subjects of international law other than States.

18. Mr. USTOR (Special Rapporteur) said that article 4 was the key article of the whole draft, because it defined the most-favoured-nation clause. The provisions of that article made it abundantly clear that the draft dealt only with most-favoured-nation clauses contained in treaties between States. In an earlier report, he had noted that in headquarters or similar agreements of international organizations, the host State sometimes specified that it would extend to the organizations concerned all the advantages which it gave to other organizations.⁶ By virtue of articles 1 and 4, such clauses were excluded from the present draft. If the Commission wished to deal with them it could only do so under item 5 of the agenda: "Question of treaties concluded between States, and international organizations or between two or more international organizations".

⁵ *Ibid.*, Second Session, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.70.V.6), p. 346, 105th meeting of the Committee of the Whole, para. 31.

⁶ *Yearbook...* 1972, vol. II, p. 162, document A/CN.4/251 and Add.1, para. 1 of the commentary to article 1.

19. He understood the difficulty to which Mr. Ushakov had drawn attention but he thought that wording of subparagraphs (1), (2) and (3) of the opening paragraph of article 3 could remain as it stood. He agreed, however, that it would be necessary to adjust the language of his proposed new subparagraph (4), in particular so as to avoid the expression "most-favoured-nation treatment", which was unsuitable in the context of an agreement concluded between two subjects of international law other than States.

20. Mr. USHAKOV said that the difficulty to which he had drawn attention arose mainly because of the use in article 4 of the French expression "*disposition conventionnelle*" ("treaty provision"), which made it possible to construe article 4 as meaning that the expression "most-favoured-nation clause" was intended to cover a provision contained in any international agreement. The real intention was, of course, to confine the scope of that definition, and of the whole draft, to most-favoured-nation clauses contained in treaties within the meaning given to the term in article 2 (a) (Use of terms), namely "an international agreement concluded between States in written form".

21. Mr. HAMBRO suggested, in the light of the comments made by Mr. Ushakov and Mr. Yasseen, that the Special Rapporteur's proposal for a new subparagraph (4) should be referred to the Drafting Committee, leaving that Committee entirely free to drop the provision if it found that course advisable.

22. He noted that reference had been made during the present discussion to the problem of economic groups and Customs unions. He wished to make it clear that it would still be possible for the Commission to take up the whole question of Customs unions and economic unions when discussing later articles of the draft.

23. Mr. CALLE v CALLE said that the purpose of article 3 was to exclude a number of situations from the scope of the draft. The case dealt with in subparagraph (1) of the opening paragraph was that of a most-favoured-nation clause forming part of an oral agreement between States; the need for that exclusion was obvious and called for no comment.

24. Subparagraph (2) excluded the case of a clause by which a State undertook to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law. Subparagraph (3) dealt with the opposite case and excluded a clause whereby a subject of international law other than a State undertook to accord most-favoured-nation treatment to a State. It seemed to him both useful and logical to deal also with a situation in which both of the parties concerned were subjects of international law other than States. It was quite conceivable that a clause on most-favoured treatment might be included in an agreement between two economic unions or systems.

25. He believed that the inclusion of the Special Rapporteur's proposed new subparagraph (4) was justified, notwithstanding Mr. Yasseen's remarks. It was true that article 3 of the draft was modelled on article 3 of the

1969 Vienna Convention, but that did not mean that its formulation need be identical. There was every reason in the present instance for making the opening paragraph of article 3 more extensive than the corresponding passage in article 3 of the Vienna Convention. That had already been done in article 3 of the Commission's 1975 draft articles on treaties concluded between States and international organizations or between two or more international organizations,⁷ in order to meet the requirements of the new topic.

26. For those reasons, he strongly supported the Special Rapporteur's proposal.

27. Mr. TABIBI said that he had no objection to the inclusion of the proposed subparagraph (4). As far as the wording was concerned, he agreed that the Special Rapporteur should seek an expression other than "most-favoured-nation", which was inappropriate for the purposes of that sub-paragraph.

28. The question of a most-favoured-nation clause contained in an international agreement between two economic unions, which had been raised during the discussion in the Sixth Committee, could be left to the Drafting Committee, which might well decide to deal with the matter in the commentary.

29. Lastly, he wished to take that opportunity of expressing his regret at the Special Rapporteur's decision not to deal with national treatment (A/CN.4/293 and Add.1, para. 16). One of the reasons for that decision was probably that the Special Rapporteur would not have sufficient time to deal with the subject before his present term of office expired. He wished to place on record that, in his own statements to the Sixth Committee as the outgoing Chairman of the Commission, he had stressed the importance of continuity for Special Rapporteurs.

30. Mr. REUTER supported the insertion of a subparagraph (4), which he considered a felicitous addition to subparagraph (3). The whole of article 3 should be regarded as a formal reference to the methods of the United Nations Conference on the Law of Treaties and Mr. Ushakov's comments therefore seemed to him to be very sound. In his view, the Commission was bound to use, in subparagraph (4) as in subparagraph (3), the expression "subject of international law other than a State", which was broader than the term "international organization". The recent development of the law of the sea showed that entities other than international organizations or States could conclude agreements governed by international law which were not treaties.

31. The reservations set out in article 3 were formal reservations which did not relate to any problem of substance or application. The problems of practical application remained very difficult, for it was necessary to know what in practice was an international organization or, to use Mr. Yasseen's words, when the entity in question concealed the identity of its members. In particular, it was necessary to know whether an organization

was recognized by a third party, and its status would also have to be known.

32. The reservations stated in article 3 were necessary, but left open the question whether that article could apply in a specific case to a particular union.

33. Sir Francis VALLAT said that the substance of the matter now under discussion did not give rise to any great difficulty; it was the drafting that was very elusive. He therefore urged that before the present draft articles were sent to the General Assembly, the drafting as a whole should be carefully scrutinized.

34. The point raised by Mr. Ushakov⁸ provided a good illustration. It related essentially to the French text of article 4, where the words *une disposition conventionnelle* could lend themselves to misunderstanding. They had in fact a slightly different meaning from the English words "a treaty provision". In the English text, the word "treaty" would undoubtedly be construed as having the meaning attached to it in article 2 (a).

35. The difficulty could, of course, be solved by referring in all languages to "a provision contained in a treaty", thereby bringing the language of article 4 into line with that of article 1. If that were done, however, it would be necessary to examine carefully the other articles of the draft. For instance, article 8 referred to a most-favoured-nation clause "in a treaty" whereas other articles referred to the most-favoured-nation clause without stating that it was contained in a treaty. The question whether or not to include the words "in a treaty" should be carefully considered in each case.

36. He found the addition of the proposed new subparagraph (4) of article 3 logical, but the language would have to be reviewed in the light of the very tight definition adopted in article 4 for the most-favoured-nation clause. If article 4 were reworded so as to replace the expression "treaty provision" by some formula such as "provision contained in a treaty", that change would not affect the application of subparagraphs (a) and (b) of article 3, but it could raise the question of the significance of subparagraph (c) of that article. In the light of that proposed tighter definition of a "most-favoured-nation clause", it was difficult to see how clauses such as those defined in subparagraphs (2), (3) or (4) of article 3 could involve an undertaking by States to accord most-favoured-nation treatment "to other States". That difficulty did not arise in regard to article 3 (c) of the 1969 Vienna Convention on the Law of Treaties, because the reference to the scope of the application of that Convention was not tied to a specific subject-matter such as the most-favoured-nation clause.

37. In conclusion, he urged that article 3 should be examined in connexion with the other articles of the draft and suggested that, if the provisions of article 4 were clarified, article 3 (c) should also be adjusted to make its meaning clearer. He believed the real meaning of the provision to be that, notwithstanding the definition of a "most-favoured-nation clause" contained in article 4,

⁷ *Yearbook... 1975*, vol. II, p. 171, document A/10010/Rev.1, chap. V, sect. B.

⁸ See above, paras. 16 and 20.

the draft articles should apply as between States parties to an agreement even though subjects of international law other than States were also parties.

38. Mr. SETTE CÂMARA said that, like Mr. Calle y Calle and Mr. Reuter, he supported the inclusion of the proposed subparagraph (4). That provision would deal with certain situations which might occur in practice.

39. It had been argued that the provisions of the proposed new subparagraph (4) were not essential, but that statement would be equally true of the present subparagraphs (1), (2) and (3). The interplay of the provisions of article 1, article 2 (a) and article 3 would, strictly speaking, exclude from the scope of the draft all the situations referred to in the opening paragraph of article 3. The essence of article 3, like that of article 3 of the 1969 Convention, lay in the provisions of its subparagraphs (a), (b) and (c). The opening paragraph of the article constituted only an introductory saving clause.

40. With regard to the point raised by Mr. Ushakov concerning article 4, he agreed with Sir Francis Vallat that the difficulty arose only in regard to the French text. As he saw it, the expression "a treaty provision" clearly meant "a provision of a treaty".

41. Lastly, he agreed that the Drafting Committee would have to overhaul the language of the whole draft in order to arrive at a uniform expression of the concept of the most-favoured-nation clause.

42. Subject to those remarks, he suggested that the proposal to insert a new subparagraph (4) in the opening paragraph of article 3 should be referred to the Drafting Committee.

43. Mr. USHAKOV said that the provision should be referred to the Drafting Committee, which should be free to recast it entirely and even to make minor changes in article 4, since that provision was closely linked to article 3.

44. Mr. USTOR (Special Rapporteur) said that the discussion had proved extremely useful. It would be advisable to adopt Sir Francis Vallat's suggestion and authorize the Drafting Committee to consider the drafting of all the articles, with a view to submitting a consistent text to the General Assembly.

45. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer the proposed new subparagraph (4) of article 3 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.

ARTICLE B (Cases of State succession, State responsibility and outbreak of hostilities)

46. The CHAIRMAN invited the Special Rapporteur to introduce article B of his draft, which read:

Article B

Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a

succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

47. Mr. USTOR (Special Rapporteur) said the idea seemed to be emerging that it would be preferable to have an autonomous set of articles not institutionally linked to the 1969 Vienna Convention on the Law of Treaties. Cases of State succession, State responsibility and outbreak of hostilities had a place in the articles on the most-favoured-nation clause and article B followed the provisions of article 73 of the 1969 Convention, which dealt with those cases.

48. All situations that might arise in connexion with succession to treaties containing the clause were covered by the Commission's draft articles on succession of States in respect of treaties.⁹ The commentary to article B drew attention to cases in which the granting State and the third State united to form one State. Needless to say, in that instance, the rights of the beneficiary State, based on the treatment accorded by the granting State to the third State, would terminate, because the third State no longer existed. On that point, article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause), stated in paragraph 1 that:

The right of the beneficiary State to any treatment under a most-favoured-nation clause is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

Article 19 thus covered cases in which extension of the relevant treatment by the granting State to the third State was terminated as a result of the merging of those two States into one. The Commission might regard that point as so obvious that it would be sufficient to mention it in the commentary on article 19. Alternatively, it might wish to insert a new paragraph in article 19 or to adopt an entirely new article.

49. Lastly, it was evident that the breach by a State of an obligation based on a most-favoured-nation clause entailed the responsibility of that State. It was not necessary for the Commission to consider the different situations that might arise in that regard.

50. Mr. KEARNEY said that the question relating to State succession raised by the Special Rapporteur could be dealt with in the commentary. In the matter of State responsibility, however, the text of article B posed a problem, because of the peculiar formulation borrowed from article 73 of the 1969 Vienna Convention on the Law of Treaties, namely, the words "prejudge any question", which were difficult to understand. The Commission was now considering the restricted area of the most-favoured-nation clause. In the case of a claim made against a State contractually bound to accord most-favoured-nation treatment, that it was not giving the treatment required and was therefore responsible for a breach of its international obligation, he thought the international obligation would be determined, at least in large part, by the articles under consideration. The

⁹ *Yearbook... 1974*, vol. II (Part One), p. 174, document A/9610/Rev.1, chap. II, sect. D.

articles would have a direct effect upon determining, or "prejudging", what the correct legal position was with regard to the claims of the States concerned. Unfortunately, it was somewhat dangerous to propose any alternatives to the form of words used in the Vienna Convention.

51. Mr. ŠAHOVIĆ, referring to paragraph 2 of the commentary to article B (A/CN.4/293 and Add.1), concerning the case of uniting of the granting State and the third State, said he would prefer the rule applicable to be stated in the commentary rather than in a separate article, because that particular situation was covered by article 19.

52. With regard to the effect of the outbreak of hostilities on the operation of the clause, which was discussed in paragraph 4 of the commentary, the first two sentences of that paragraph gave the impression that the Special Rapporteur was not inclined to mention the question in the article, but the next sentence contained reasons for doing so. The Special Rapporteur should develop those reasons further, for they were not sufficiently convincing as they stood.

53. Mr. AGO welcomed the inclusion of article B in the draft, particularly as it reserved the question of the international responsibility of States. He did not see how the Commission could depart from the wording of the 1969 Vienna Convention without giving the impression that it wished to derogate from the system provided for in that instrument. To provide that the system of the Vienna Convention applied to treaties in general and that a different system applied to treaties containing most-favoured-nation clauses or to such clauses themselves, would introduce complications.

54. The commentary should explain that the saving clause concerning State responsibility applied not only to the violation of a most-favoured-nation clause, but to any breach of an obligation which might result in the non-application of a most-favoured-nation clause. In the case of a breach of an important international obligation for which sanctions could be applied, suspension of the application of most-favoured-nation treatment was one of the forms which sanctions could take. In the case of a breach of a less important international obligation, on the other hand, only a claim for reparation could be made. Nevertheless, it was a well-established principle that if the guilty State refused to make reparation, sanctions could be taken against it, which often included suspension of the application of a most-favoured-nation clause. The international responsibility referred to in article B thus covered both responsibility arising from the fact that an obligation deriving from the most-favoured-nation clause had been breached, and responsibility arising from the breach of another international obligation which had provoked the reaction of suspension of the application of a most-favoured-nation clause.

55. Mr. USTOR (Special Rapporteur) said that he fully appreciated the point raised by Mr. Kearney, whose comments were applicable not only to the draft, but also to the Vienna Convention itself. A treaty might to some extent prejudice questions of responsibility, for it could contain provisions specifying the consequences of a

breach of the treaty by one of the parties to it. But it would be extremely difficult to suggest language different from that employed in the Vienna Convention. The problem could be explained in the commentary and, at a later stage, the observations of Governments might prove to be of some assistance.

56. With regard to sanctions, paragraph 26 of the report referred to certain special cases that had arisen in connexion with the most-favoured-nation clause, including the case of sanctions applied under Chapter VII of the United Nations Charter. It was not possible to deal in detail in the draft with every conceivable situation, and he thought the Commission would have done its duty if article B followed the wording used in the 1969 Convention and recognized that questions of international responsibility formed a separate subject. The problem of sanctions could be further elaborated in the commentary.

57. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article B to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁰

The meeting rose at 12.50 p.m.

¹⁰ For the consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 37-39.

1379th MEETING

Friday, 28 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE C (Non-retroactivity of the present draft articles)

1. The CHAIRMAN invited the Special Rapporteur to introduce article C of his draft (A/CN.4/293 and Add.1), which read:

Article C. Non-retroactivity of the present draft articles

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses embodied in

treaties which are concluded by States after the entry into force of the present articles with regard to such States.

2. Mr. USTOR (Special Rapporteur) said that article C was closely modelled on article 4 of the Vienna Convention on the Law of Treaties.¹ The idea of incorporating such an article had been suggested at the twenty-seventh session by Mr. Tsuruoka, as a possible remedy in connexion with articles relating to the problems of Customs unions and of exceptions.²

3. Mr. USHAKOV observed that the phrase "the articles apply only to most-favoured-nation clauses embodied in treaties" was not perhaps the most appropriate, for the question arose of the consequences of the application of those clauses. It would be preferable to employ some such wording as "the articles apply only to situations arising in connexion with most-favoured-nation clauses embodied in treaties".

4. Sir Francis VALLAT noted that in the Vienna Convention article 28 (Non-retroactivity of treaties) stipulated that

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

He wondered to what extent, if any, article C would displace that principle. Great care should be taken not to raise doubts because of differences in the language employed.

5. Mr. USTOR (Special Rapporteur) said that if article C, which closely followed article 4 of the Vienna Convention, was adopted, it might be useful to include in the draft an article on the lines of article 28 of that Convention.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article C to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³

ARTICLE D (Freedom of the parties to draft the clause and restrict its operation)

7. The CHAIRMAN invited the Special Rapporteur to introduce article D of his draft which read:

Article D. Freedom of the parties to draft the clause and restrict its operation

The present draft articles are in general without prejudice to the provisions which the granting State and the beneficiary State may agree to in the treaty containing the most-favoured-nation clause or otherwise. Such provisions or agreements may in particular withhold from the beneficiary State right to treatment extended by the granting

State to a specified third State or States, or to persons and things in a determined relationship with such States, or to most-favoured-nation treatment in respect of a specified subject-matter.

8. Mr. USTOR (Special Rapporteur) said that, as pointed out in the Commission's report on its twenty-seventh session,⁴ most-favoured-nation clauses could be drafted in the most diverse ways. States were entirely free to extend or restrict the clause to particular matters and to impose different conditions and time-limits. Obviously, the present draft was not intended to change that situation. At the twenty-seventh session, he had been requested to consider whether the draft should embody a general proviso stating that the present articles did not limit the freedom of the parties, or whether it would be advisable to examine each article in turn and, where necessary, introduce it with the words: "Unless the treaty otherwise provides or it is otherwise agreed". The latter method would be rather cumbersome and he had concluded that the best approach was to include a general proviso, like that in the first sentence of article D, indicating that the articles were not intended to limit the contractual freedom of the granting State or the beneficiary State.

9. In 1975, Mr. Pinto had suggested that it would be helpful to draw the attention of persons drafting treaties to the fact that they were completely free to extend, or more commonly to restrict, the scope of the most-favoured-nation clause—a course that might be of interest to developing countries when they were undertaking to grant most-favoured-nation treatment.⁵ The second sentence of article D adopted that basic idea of Mr. Pinto's tentative proposal and, in doing so, elaborated upon the first sentence of the article.

10. Mr. YASSEEN said that article D was entirely justified because it embodied a residuary rule. Since the draft did not seem to contain any peremptory rules, the contractual freedom of the parties was in no way restricted. States remained free to choose the arrangements they wished and, in particular, to give the most-favoured-nation clause the scope they agreed on *ratione personae* or *ratione materiae*.

11. It might be thought that article D stated something obvious and was therefore unnecessary. The first sentence affirmed a general principle, while the second provided examples. Those examples could have not only an educative character, but also a psychological effect calculated to facilitate the negotiation of most-favoured-nation clauses. In that respect, article D was not without value. Within the international community there were nuclei of close solidarity due to various factors: ethnic, cultural, economic, ideological, etc. It was natural that a State should wish to reserve a special treatment for States with which it had special bonds of solidarity. Similarly, a special régime for developing countries could be provided for. Mention of those possibilities in an article could only facilitate the negotiation of most-favoured-nation clauses, though it might perhaps be

¹ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

² See *Yearbook... 1975*, vol. I, p. 204, 1343rd meeting, para. 35.

³ For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 40-46.

⁴ *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

⁵ See *Yearbook... 1975*, vol. I, p. 174, 1337th meeting, para. 38.

advisable to stress the bonds of solidarity which could exist between the granting State and third States and to give more examples.

12. Mr. SETTE CÂMARA said that the article was important and should be retained. The first sentence established in very general terms the freedom of the parties in stipulating a most-favoured-nation clause. The second sentence, however, referred to only one of an enormous number of possible examples. It was not wise to establish a broad rule and then proceed to give merely a single example. While it would, of course, be possible to insert a separate article on conditions and exclusions, he thought it would be sufficient to delete the second sentence and deal with those matters in the commentary.

13. Mr. USHAKOV pointed out that States could organize their economic relations in general, and their trade or consular relations in particular, without recourse to most-favoured-nation clauses. At all events, they did not resort to such a clause when they agreed that the beneficiary State could not invoke the treatment applied by the granting State to a specific third State or States. An arrangement of that kind did not come within the meaning of the most-favoured-nation clause as defined in the draft articles. According to the draft, there were only two kinds of most-favoured-nation clause: unconditional clauses and clauses conditional on material reciprocity. Any other clause was not a most-favoured-nation clause, particularly if it provided that the treatment extended to a certain group of States could not be invoked, whereas that extended to other States could be. An arrangement of that nature was no doubt possible, but the Commission was not concerned with it, unless it wished to establish an additional category of most-favoured-nation clauses.

14. Mr. USTOR (Special Rapporteur) said it might be right to suggest that the drafting of article D should be improved or that articles 4 and 5⁶ should be made subject to the provisions of article D. The point to be remembered, however, was that in the vast majority of cases most-favoured-nation clauses were not unlimited or unrestricted. They were usually subject to one of two kinds of exceptions: exceptions *ratione personae* and exceptions *ratione materiae*.

15. In the case of exceptions *ratione personae*, the granting State accorded most-favoured-nation treatment, but specified that in determining what constituted most-favoured-nation treatment it did not have to take account of the treatment that it extended, for example, to neighbouring countries. In the case of exceptions *ratione materiae*, most-favoured-nation treatment was accorded in a particular trade, e.g. shipping, but the granting State could nonetheless specify that cabotage, for instance, formed an exception.

16. Such exceptions did not alter the nature of the clause: it remained a most-favoured-nation clause. Mr. Ushakov's objections might be met by redrafting

articles 4 and 5, which defined the notions of most-favoured-nation clause and most-favoured-nation treatment. On the other hand, the Commission should bear in mind that most-favoured-nation clauses involved exceptions, and it was not possible to affirm that, for that reason, they were no longer most-favoured-nation clauses.

17. Mr. USHAKOV said that he was only half convinced. Exclusions *ratione materiae* did not in fact constitute restrictions on the application of a most-favoured-nation clause, but delimited its field of application. When two States agreed that a most-favoured-nation clause would apply to intercontinental shipping, to the exclusion of cabotage, they did not restrict the application of the clause, but delimited its field of application. An exception in favour of frontier traffic was not a real exception, but rather an adaptation of the clause which took into account the special situation of neighbouring countries. That adaptation was widely accepted by the international community. But article D did not relate to a generally accepted practice; it permitted any and every restriction on the choice of third States or persons or subject-matter to be taken into consideration.

18. Mr. USTOR (Special Rapporteur) noted that Mr. Ushakov recognized that there might be exceptions *ratione materiae*. Frontier traffic was an exception *ratione materiae*, but cases existed in which it might also be an exception *ratione personae*. For example, if a most-favoured-nation clause stipulated that the treatment granted by a State which had only one neighbouring country would not apply to frontier traffic with the neighbouring country, only one neighbouring country was involved and the exception was both *ratione materiae* and *ratione personae*. Nevertheless, many clauses excluded preferences granted to certain countries. The granting State declared that the treatment to be granted in a certain sphere would be the same as that granted to any third State, with the exception of the treatment it extended to a neighbouring country with which it formed a Customs union. In most cases, the clause involved exceptions *ratione personae*. If the draft could be interpreted as meaning that, because of such exceptions, the clause was no longer a most-favoured-nation clause, the draft would have to be amended.

19. Mr. USHAKOV emphasized that States could organize their trade relations both on the basis of most-favoured-nation clauses, possibly subject to exceptions, and on other bases. When they made an exception in favour of a Customs union, they were acting, precisely, on another basis. If the Commission wished to include those other bases within the concept of the most-favoured-nation clause, it would have to broaden the definition of that clause. It was not possible to retain in the draft articles a provision which was incompatible with their strict definition of a most-favoured-nation clause.

20. Mr. RAMANGASOAVINA said he had no difficulty in accepting article D and was inclined to share the views expressed by Mr. Yasseen. The principle of the complete contractual freedom of the parties, which was referred to in the first sentence of the article, was a general principle which might seem to be already established by the preceding articles. The second sentence

⁶ For the text of the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

confirmed and illustrated the first. Obviously, the Commission could not draft provisions applicable to all eventualities, however great its desire to formulate an exhaustive text. The future convention could only be a framework, and the Special Rapporteur had been perfectly right not to regard it as a sacrosanct model admitting of no variant. The subject-matter of a most-favoured-nation clause and the particular relations that might exist between the granting State and the beneficiary State or third States might justify special arrangements. For example, the States in question might maintain special trade relations or have established between them a special régime in regard to the right of establishment or exemption from giving surety as a defendant (*cautio judicatum solvi*) or from the requirement of an *exequatur* in order to enforce a foreign judgment. There was, therefore, some point in indicating in a provision that a most-favoured-nation clause could be adapted to all kinds of special situations.

21. Mr. Ushakov's concern was perhaps due to the wording of article D, which would no doubt be improved by the Drafting Committee. In particular, the expression "withhold from the beneficiary State", used in the second sentence, was too strong; it would seem to imply an idea of contention or even discrimination, whereas the idea was simply that the beneficiary State would be excluded from a certain treatment or that restrictions would be placed on the granting of a particular treatment. Those words might be replaced by wording such as "not include certain advantages granted by reason of their nature to certain third States".

22. Mr. KEARNEY said that article D served a useful purpose. The first sentence should state its rule emphatically, however, and the words "in general" should be deleted, for they made the rule somewhat uncertain. Again the meaning of the words "or otherwise" should be clarified.

23. The second sentence of the article did not deal solely with one exception, but with different aspects of the whole problem under discussion. On the other hand it was dangerous, in giving examples of a very general rule, to use the words "in particular", which could give rise to application of the *ejusdem generis* rule. The Drafting Committee might consider replacing those words by "for example".

24. Mr. ROSSIDES said that, although some drafting changes might be required, there could be no basic objection to the first sentence of article D. Nevertheless, it would be advisable, for the sake of extra caution, to insert the proviso: "Subject to the provisions of article 53 of the Vienna Convention on the Law of Treaties".

25. In addition, the article would be much improved by the deletion of the second sentence. For if agreements might in particular withhold the right to treatment extended to a specified third State or States or to persons and things in a determined relationship with such States, it would be entirely illogical to maintain that the clause was a most-favoured-nation clause. It might well have become the custom to employ the expression without reference to its essential meaning, but the expression was in the superlative and the word "most" was an

absolute qualification. The parties were free to insert specific provisions in a treaty, but that matter could not be covered by the article itself.

26. Mr. QUENTIN-BAXTER said that he fully endorsed the idea underlying article D. Like Mr. Yasseen, he believed that it was of psychological value; and it might also assist the Commission in clarifying its idea of the scope of the draft.

27. He had had some doubts about the implications of the first sentence, but they had led him to draw conclusions that were perhaps the opposite of those reached by Mr. Ushakov. Quite obviously, freedom of contract was unlimited, and nothing in the draft should attempt to restrict the right of States to enter into agreements as they saw fit. When States made agreements, it would be necessary to determine, by reference to the content, whether they contained a most-favoured-nation clause. Unfortunately, the first sentence of article D almost reversed that sequence: in other words, it almost seemed to suggest that States must first refer to the draft in order to determine what they might do.

28. The general provisions, particularly articles 1, 4 and 5, determined whether a treaty fell within the scope of the draft. In effect, the first sentence of article D sought to affirm that a treaty containing a most-favoured-nation clause did not lose its character as a treaty of that type because the States parties exercised their contractual freedom in any particular way. States could, and customarily did, specify that they would accord most-favoured-nation treatment in a given area, but they could exclude the treatment extended to a particular State. That did not involve any derogation from the principle of the most-favoured-nation clause. There could be no restrictions on the rights of State A and State B in their dealings. The point was that State C could not be deprived of its existing rights.

29. Nothing in either sentence of article D should be regarded as an exception to the rules laid down, nor should it be supposed that, because the second sentence reflected Mr. Pinto's proposal at the twenty-seventh session, any concession was being made to the developing countries. The Commission was tracing logically the real nature of the clause. If the result was beneficial, it would be beneficial to those States which were interested in extending the use of the clause as widely as possible. But, if the result was that treaties containing the clause were placed outside the scope of the draft, the value of the draft itself would be destroyed and a means would be provided—one which did not exist in present law—of escaping the true consequences of the most-favoured-nation clause.

30. Consequently, the first sentence called for some redrafting, but he fully endorsed the purpose of the article and its place in the draft.

31. Mr. USHAKOV said that, in his opinion, it was not possible to permit all kinds of exceptions to the most-favoured-nation clause, for nothing would then remain of it. If it was accepted that any State could be excluded from the benefit of the clause, it would no longer justify the name "most-favoured-nation clause". It was true that

there could be exceptions to the most-favoured-nation clause, but those exceptions must be clearly determined and generally accepted. It was quite certain, for instance, that the treatment reserved to members of a Customs union could not be claimed by a third State under a most-favoured-nation clause. Similarly, the treatment accorded by a State to neighbouring States in regard to frontier traffic could not be claimed by a State which was not a neighbouring State. Again, under article 21, a developed State was "not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State".

32. Those were well established and generally accepted exceptions; but it was not possible to permit any and every kind of provision restricting the application of the clause to a certain group of States, for in that case it could no longer be called a "most-favoured-nation clause". Thus, if the Soviet Union accorded to a non-socialist State the same treatment as to socialist countries, the clause in question would be not a most-favoured-nation clause, but a most-favoured-socialist-nation clause. It must therefore be made quite clear in the draft articles that the exceptions to the clause must be clearly defined exceptions.

33. Sir Francis VALLAT said that Mr. Ushakov was apparently seeking a form of absolute purity, and absolute purity was rarely fruitful. In the most-favoured-nation clause were to be defined according to the very strict interpretation given by Mr. Ushakov, very few States would be likely to accept the draft articles as a convention. The Commission would thus be accomplishing very pure, but unfortunately altogether fruitless work.

34. The present discussion had in fact shown quite clearly that article D in some form was essential to the viability of the draft. The absence of such a provision would suggest that, as between parties to the future convention, the draft articles would apply to all most-favoured-nation clauses, regardless of any contractual provision to the contrary. Such a proposition would be unacceptable to any trading State. It was essential to preserve the freedom of States to contract out of the draft articles by means of specific provisions in their commercial or other treaties.

35. The fact that the Commission had adopted a definition of most-favoured-nation treatment in article 5 of the draft did not make the articles that followed into rules of *jus cogens* from which no derogation was possible.

36. He was in favour of including article D not simply because of its educative or psychological value, but because a provision on these lines was necessary in the draft.

37. Mr. TSURUOKA said that he appreciated Mr. Ushakov's concern, but did not entirely agree with his views on article D. The Commission had already expressed the same concern at its twenty-seventh session. In its report on that session, it had stated that "the draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty con-

taining the clause or otherwise", and had added that "This residual character can be emphasized by introducing in each individual article, as appropriate, an opening clause" and that "It can also be expressly recognized in an article of general application to all those provisions which are of the same nature".⁷

38. In proposing article D, the Special Rapporteur had opted for the second solution. That article started from the principle of the autonomy of contractual will: the two contracting parties could agree that there should be a most-favoured-nation clause, but could at the same time limit the sphere of application of that clause. In his opinion, it should still be called a "most-favoured-nation clause", even if certain limitations were imposed on its application. By way of example, he pointed out that Japan had concluded, with a country belonging to a Customs union, a treaty which contained a most-favoured-nation clause, but had restricted the application of that clause.

39. Mr. CALLE Y CALLE said that, as pointed out by the previous speaker, the Commission, in its 1975 report, had expressed its intention of adopting a provision on the freedom of the parties to draft most-favoured-nation clauses and to restrict their operation. The problem which had now arisen was whether the draft articles should remain within the strict limits of the most-favoured nation clause in all its legal purity, or whether they should have a wider scope.

40. If the broader approach was adopted, the draft articles would cover those aspects of the law of treaties involving most-favoured-nation treatment and its operation as between States. It would then be appropriate to indicate, in a provision such as article D, that there were cases in which the effects of the most-favoured-nation clause could be curtailed or suspended, and that in certain situations the mechanical and perhaps blind application of the clause should be excluded.

41. With regard to the position of article D in the draft, one possibility would be for it to follow article 6 (Legal basis of most-favoured-nation treatment). That article stressed that entitlement to most-favoured-nation treatment was based on a legal obligation of the granting State and it would be appropriate for article D to follow, because it dealt with certain possible limitations upon, or exclusions from that legal obligation. Another possibility would be to place article D immediately after article 7, which dealt with the source and scope of most-favoured-nation treatment.

42. A question on which he wished to have the Special Rapporteur's views was whether there was any relationship between the provisions of article D and those of article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement). It was his impression that limitations such as those contemplated in article D were particularly necessary in regard to bilateral agreements. When a most-favoured-

⁷ *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

nation clause was included in a bilateral agreement, it was often necessary to specify certain conditions or restrictions in order to prevent the clause from becoming applicable to numerous other States which had concluded bilateral agreements with the granting State, thus giving the clause a virtually multilateral effect. In that connexion, it should be stressed that the most-favoured-nation clause, although apparently bilateral in character, involved a triangular relationship, between the granting State, the beneficiary State and the third State.

43. The provisions of article D were of great interest to the developing countries in connexion with the exceptions being made in their favour in the situation contemplated in article 21 (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) or under arrangements to accord favourable treatment for the purpose of meeting development needs. Article D thus served an eminently practical purpose.

44. Where multilateral treaties were concerned, the extensive commentary to article 15 adopted by the Commission in 1975⁸ drew a distinction between certain economic multilateral conventions of restricted scope and multilateral treaties in general. In that commentary, attention was drawn to the proceedings of the World Monetary and Economic Conference held in London in 1933⁹ and to the resolution adopted at Brussels in 1936 by the Institute of International Law, which stated that the most-favoured-nation clause did not confer the right "to the treatment resulting from the provisions of conventions open for signature by all States whose purpose is to facilitate and stimulate international trade and economic relations by a systematic reduction of customs duties".¹⁰

45. In another passage of the same commentary, reference was made to the proposal by a Japanese writer that a distinction should be made in the field of international trade and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".¹¹ Elsewhere, the commentary gave an example of the type of situation envisaged in draft article D when it quoted article 5 of a 1965 Trade Agreement between the USSR and Australia. That article stated two exceptions to the application of the most-favoured-nation clause contained in the Agreement, namely:

(a) preferences or advantages accorded by the Union of Soviet Socialist Republics to countries immediately adjacent to the Union of Soviet Socialist Republics;

(b) preferences or advantages accorded by the Commonwealth of Australia within the framework of the Commonwealth of Nations or to Ireland.¹²

46. Draft article D served to show that it was possible to restrict the framework of the application of the most-

favoured-nation clause, as the USSR and Australia had done. He found the article desirable and necessary, inasmuch as it stipulated that the draft articles were without prejudice to any provisions agreed upon by the parties in the treaty containing the most-favoured-nation clause. Article D was equally necessary for multilateral relationships in which there were many possible beneficiaries and many possible third States.

47. Mr. USHAKOV said he agreed with Mr. Calle y Calle that it was always possible to derogate from a most-favoured-nation clause by agreement, but that did not mean that the clause remained a most-favoured-nation clause, whatever derogation was made from it. There could be exceptions to the most-favoured-nation clause, but they must be clearly determined. There could, for example, be an exception in regard to developing countries, but not in regard to just any country.

48. Mr. USTOR (Special Rapporteur) said that there was certainly much logic in Mr. Ushakov's remarks concerning a most-favoured-nation clause to which an exception was attached excluding from its operation the favours extended to a certain category of States; the clause to which such a condition was attached could be said not to constitute a most-favoured-nation clause in the strictest sense of the term.

49. In fact, of course, such exceptions *ratione personae* were quite common, and in legal literature most-favoured-nation clauses containing them were none the less termed "most-favoured-nation" clauses. That terminology might not be very precise from the scientific point of view, but he had not seen any legal writing in which it was argued that an exception *ratione personae* precluded a clause from being called a "most-favoured-nation" clause, despite the semantic difficulties created by the use of the superlative "most". As he saw it, the Commission, in its draft on the most-favoured-nation clause, had to deal with that clause in its generally accepted sense and could not avoid laying down rules on exceptions.

50. Mr. Ushakov had referred to the provisions of article 21, but that article dealt with a rather different matter, namely the treatment extended to developing States under a generalized system of preferences. The purpose of article 21 was to state that, under a practice now emerging, those preferences did not count as most-favoured-nation treatment for purposes of bringing a most-favoured-nation clause into operation. The purpose of article D was to deal with exceptions which were expressly written into most-favoured-nation clauses.

51. Despite the logic of Mr. Ushakov's reasoning, he believed that it would not be appropriate to say that a most-favoured-nation clause ceased to deserve its name if an exception was made in regard to the benefits extended to a certain category of States. The Commission should not interpret its task in a narrow sense, and should deal in its draft with the problem of most-favoured-nation clauses modified by a condition or an exception.

The meeting rose at 1.00 p.m.

⁸ *Ibid.*, pp. 138 *et seq.*, document A/10010/Rev.1, chap. IV, sect. B, sub-sect. 2.

⁹ *Ibid.*, pp. 139-140, para. 4 of the commentary to article 15.

¹⁰ *Ibid.*, p. 140, para. 7 of the commentary.

¹¹ *Ibid.*, para. 8 of the commentary.

¹² *Ibid.*, p. 144, para. 28 of the commentary.

1380th MEETING

Monday, 31 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, M. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPporteur (*continued*)

ARTICLE D. (Freedom of the parties to draft the clause and restrict its operation)¹ (*concluded*)

1. Mr. USHAKOV drew attention to article 4,² which defined the most-favoured-nation clause as “a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations”. That meant that, *ratione materiae*, States were free to specify the sphere of relations in which they undertook to grant most-favoured-nation treatment. Thus a State could grant another State most-favoured-nation treatment in respect of certain goods only, to the exclusion of others, without thereby making any provision that could be called an exception to the application of the most-favoured-nation clause.

2. The definition of the most-favoured-nation clause given in article 4 was linked with article 5, which defined most-favoured-nation treatment as “treatment by the granting State of the beneficiary State... not less favourable than treatment by the granting State of a third State...”. And the expression “third State” was defined, in article 2 (*d*), as “any State other than the granting State or the beneficiary State”. Hence the most favoured-nation clause should not make any exception in regard to the third State: if a single third State was excluded from the application of the clause, it could no longer be called a “most-favoured-nation clause”. Under article D, however, the granting State and the beneficiary State could exclude certain third States from the benefits of the clause. It was wrong to speak of most-favoured-nation treatment in such a case, for the treatment accorded would in fact cover discrimination against certain States.

3. The Special Rapporteur had said that in practice there might not, perhaps, be a single true most-favoured-nation clause in the whole world. He himself was con-

vinced that the true most-favoured-nation clause, as defined in articles 4 and 5 and in article 2 (*d*), had a role to play in the future of international trade. A clause could not be described as a “most-favoured-nation clause” when it was not. The Commission should either abandon the draft articles on the most-favoured-nation clause and work on another clause—which, in his view, would be a discriminatory clause—or else keep to the true most-favoured-nation clause, which should be regarded as the real basis of international trade. He considered that article D was incompatible with the definition of the most-favoured-nation clause given in articles 4 and 5 and in article 2 (*d*). The clause which resulted from article D would, in fact, be a least-favoured-nation clause disguised as a most-favoured-nation clause. States were entirely free to conclude any kind of clause, but it would be unacceptable to describe any kind of clause, however discriminatory it might be, as a “most-favoured-nation clause”.

4. Mr. ŠAHOVIĆ thought that the first sentence of article D corresponded to a general principle which must be accepted. There was room for doubt, however, as to the precise effect of the second sentence, which raised very thorny problems. It had been said that that sentence provided for exceptions to the application of the most-favoured-nation clause. He was more inclined to think that it pointed to the possibility of making restrictions. The commentary was perhaps not very clear on that point and might have caused a misunderstanding. The Special Rapporteur should explain the link between the second sentence of article D and article 14. For his part, he would prefer the Commission to retain only the first sentence of article D, because the situation referred to in the second sentence was already covered by other articles.

5. Mr. TAMMES said it was clear from the Commission's discussions that, although article D would not add a great deal to the articles already adopted, it would do much to make the draft as a whole acceptable to States. It had been maintained that article D would have a psychological effect on States, but it should not be assumed that States were unduly naïve. The draft articles comprised certain presumptions, models and definitions, and only very few rules, none of which was mandatory to the extent of not permitting any contracting out. In his opinion, therefore, the best way to indicate the flexible nature of the draft articles was to do so in the preamble, not to add another article at the present late stage. Although that course might not be consistent with the Commission's usual practice, it would make all the work done on the draft articles better understood.

6. The CHAIRMAN, speaking as a member of the Commission, said that article D was intended as an expository provision and had been included in accordance with the Commission's practice of incorporating provisions which, although not strictly essential from the legal standpoint, served a useful expository purpose. The legal rationale of the article was the contractual freedom of the parties to conclude treaties, provided that such treaties did not derogate from any peremptory norm of international law.

7. Although draft article D simply reflected the varied practice of States with regard to most-favoured-nation

¹ For text, see 1379th meeting, para. 7.

² For the text of the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

clauses, its wording had given rise to difficulties. Since those difficulties related to modalities, however, it might be preferable to refer in the title of the article to the freedom of the parties to define the modalities of the clause, and not to speak of restrictions. States did in fact exercise their contractual freedom for different purposes, one of which was to conclude regional arrangements, which were sanctioned by Article 52 of the Charter of the United Nations, and article D reflected that practice.

8. Article D could not be viewed in isolation. It was not only related to article 14, as Mr. Šahović had pointed out, but also represented an elaboration of article 11, in that it extended the scope of rights to combine rights *ratione materiae* and rights *ratione personae*.

9. Article 21 was also relevant to article D, since it was generally recognized that the situation of developing countries should be taken into account in certain rules of international law, as the Commission had already done in the case of State succession.

10. He was therefore in favour of retaining article D, which was a useful elaboration on previous provisions. He wished to suggest that consideration might be given to the possibility of combining article D with article 11 and that the point raised by Mr. Ushakov should be given careful attention.

11. Mr. USTOR (Special Rapporteur), referring to a question asked by Mr. Calle y Calle concerning the relationship between article D and article 15,³ said that when drafting the clause the granting State and the beneficiary State would agree to exclude from the scope of most-favoured-nation treatment advantages given under certain precisely or indirectly indicated agreements.

12. Mr. Ushakov's remarks had placed him in a difficult position, because the draft articles related to clauses concluded by States and the Commission did not yet have before it the Secretariat study which would provide a complete picture of all the clauses contained in the treaties published in the United Nations *Treaty Series*. It was well known that many of those clauses contained provisions which would seem to restrict their operation either *ratione materiae* or *ratione personae*. It was certainly true that certain benefits granted to third States did not accrue to the beneficiary State, and the view could be taken that in such cases the clause was no longer a most-favoured-nation clause as defined in articles 4, 5 and 2 (d). Thus if an exception *ratione personae* was embodied in a clause, it could not be said to be completely non-discriminatory.

13. In that connexion, he referred to article 47 of the Vienna Convention on Diplomatic Relations,⁴ which provided that the receiving State should not discriminate as between sending States, but that discrimination should not be regarded as taking place where, by custom or agreement, States extended to each other more favourable treatment than was required by the provisions of the

Convention. Similarly, article D on the most-favoured-nation clause related to a situation in which a general rule of non-discrimination existed, but discrimination was tolerated in accordance with practical requirements.

14. He was perfectly willing to take account of Mr. Ushakov's point, but he was concerned lest, if all clauses embodying an exception *ratione personae* were excluded, the Commission might be accused in the General Assembly of failing to fulfil its obligations. He was sure that it would be possible to find several cases in which States had concluded treaties which contained, first, a most-favoured-nation clause, and second, a number of exceptions thereto. There were even some treaties concerning most-favoured-nation treatment which contained exceptions *ratione personae*. In those circumstances, he asked the members of the Commission to study the problem and to devise a solution on which it would be possible to reach a consensus.

15. Mr. USHAKOV observed that States were not obliged to conclude agreements containing most-favoured-nation clauses: they were free to conclude any kind of agreement and to choose whatever formula they wished. In the sphere of diplomatic relations, for example, two States might conclude an agreement to extend more or less favourable treatment to each other, but the term "most-favoured-nation treatment" could not be applied indiscriminately to any and every treatment. He still believed that the most-favoured-nation clause did not admit of any exceptions, and that if there were exceptions it could no longer be called a most-favoured-nation clause. In that respect, article D was incompatible with the definition of a most-favoured-nation clause given in article 4 and the definition of a third State given in article 2 (d).

16. The Special Rapporteur had tried to take account of all the possible situations in international life. But it was impossible to take into account all the international economic situations that might arise and call them "most-favoured-nation clauses". There was an enormous variety of situations in international practice and it was impossible to prepare draft articles that would cover them all.

17. Mr. USTOR (Special Rapporteur) drew attention to the lengthy commentaries he had submitted at the twenty-seventh session, concerning the implied exception of a Customs union.⁵ He had argued that a Customs union did not constitute an implicit exception and had maintained that States were free to agree on exceptions involving a Customs union—a course which they frequently followed in bilateral treaties and had adopted in the General Agreement on Tariffs and Trade. His view, which he had clearly expressed at the previous session, continued to be that an explicit exception in a treaty containing a most-favoured-nation clause did not in itself destroy the nature of the clause. He had said that such exceptions were often made both in the East and in the West, and that the Commission must take account of existing practice.

³ See 1319th meeting, para. 42.

⁴ United Nations, *Treaty Series*, vol. 500, pp. 122 and 124.

⁵ See *Yearbook... 1975*, vol. II, pp. 9 *et seq.*, document A/CN.4/286, paras. 9-13.

18. Sir Francis VALLAT noted that the Commission was confronted with two questions, one of form and one of substance. The first related to the bearing of the draft definitions on the question under consideration; the second was whether the draft articles should be confined to pure most-favoured-nation clauses with no restrictions *ratione personae*, or whether they should apply even when the clauses included restrictions of that type.

19. On the first question, he thought the Commission should not allow itself to be tied by prematurely adopted definitions. Normally, definitions should be adopted at the end of the work on a particular text. Hence he was not impressed by the arguments adduced on the basis of the draft definitions. On the second question, the Commission had to make a simple choice. In his opinion, the rules adopted should be viable and useful and should reflect the practice of States, which should not have to modify their practice in order to conform to those rules.

20. Mr. SETTE CÂMARA said that, while he appreciated Mr. Ushakov's views on the purity of most-favoured-nation clauses, he thought the issue was simply one of terminology. He drew attention to paragraph 42 of the Special Rapporteur's report (A/CN.4/293 and Add.1), which referred to the devaluation of the meaning of the term "most-favoured-nation". The Special Rapporteur was dealing with the inescapable reality of the contemporary world: many exceptions to most-favoured-nation clauses existed, and they constituted a form of discrimination. Such cases would be dealt with by the interplay of articles C and D.

21. In his opinion article D should be retained, though the second sentence might perhaps be deleted.

22. Mr. REUTER said that, like Sir Francis Vallat, he was in favour of sending article D to the Drafting Committee, but he did not think the Committee would be able to solve the problem with which the Commission was now faced. That problem had been foreseeable from the outset, and the Special Rapporteur had done what he could to avoid it. He did not subscribe to all the positions the Special Rapporteur had taken in that regard. In particular, the thesis that a most-favoured-nation clause normally enabled a State to claim the favourable treatment extended to the members of a Customs union was, in his opinion, a thesis fraught with consequences and one which was not generally accepted.

23. In fact, the problem which the Commission now had to face was one of codification. In undertaking the preparation of draft articles on the most-favoured-nation clause, the Commission had not had the intention of drawing up rules of *jus cogens*. It had simply wished to define, for the benefit of Governments, an over-all régime for the future. As Mr. Ushakov had clearly shown, the problem of terminology was very important. For if the most-favoured-nation clause was defined as a "pure" clause, the Commission would furnish arguments to governments, which would interpret the clause in the light of the articles. On the other hand, if the clause was defined as an "impure" clause, it would, as Mr. Ushakov had rightly emphasized, be difficult to see how far its impurity could extend.

24. The problem presented an analogy with that of security. For it could be argued that in order to be absolute, security must be world-wide. But the Charter provided for limited regional security, and practice showed that the relationships between general security and regional security were difficult to define. The problem now confronting the Commission was not merely an economic one: it concerned not only trade, but also questions of establishment and human rights. One could therefore appreciate the value of the "purity" invoked by Mr. Ushakov and affirm the need for an absolute world minimum. But it might also be asked, as the Special Rapporteur had done, what would be the reaction of Governments. All the agreements in favour of the third world, and particularly the Convention of Lomé, provided for exceptions in favour of the third world and spoke in that respect of derogations from the most-favoured-nation clause. A system which did not include differential relations in favour of the developing countries would be unimaginable in the world of tomorrow. It could also be accepted that there were different conceptions of human rights in different parts of the world.

25. A balance must therefore be established between universality and differentiation. It would be difficult to achieve, for it meant reconciling two extremes. If the régime chosen was that of the absolute clause, Governments would probably reject it; but, on the other hand, Mr. Ushakov was right in saying that if exceptions were permitted, the most-favoured-nation clause would no longer justify its name. It was a problem of substance, not of wording, and he doubted whether the Drafting Committee would be able to solve it. Perhaps the number of articles could be reduced or alternative versions proposed. In fact, it was the whole constitution of the world's economic and social organization that was at stake.

26. Mr. KEARNEY said that, in his view, the most-favoured-nation clause was simply a useful mechanism for States to use in dealing with certain problems, such as those of international trade, establishment and consular relations. In dealing with those problems, States were entitled to make whatever arrangements they deemed appropriate. It was also true that, in subsequent arrangements with other States, they might find it necessary to exclude particular kinds of treatment from the scope of the most-favoured-nation clause.

27. Canada and the United States of America had, because of the special relationship between their motor-vehicle industries and other factors, entered into an arrangement concerning the manufacture of motor-vehicle parts. One of the results of that arrangement had been a substantial reversal in the balance of payments as between the two countries. It was highly unlikely that the same sort of arrangement would be considered as appropriately falling under most-favoured-nation clauses in subsequent trade agreements with third States. It was special problems of that character which required States to remain free to enter into whatever commitments they thought necessary in the light of, for example, their geographical situation, political organization or financial and economic structure. Otherwise, they would not accept the draft articles.

28. Mr. MARTÍNEZ MORENO said that, to some extent, he sympathized with the views of Mr. Ushakov. Nevertheless, the draft being prepared by the Commission should be based on the realities of State practice. He had often participated in negotiations on treaties containing a most-favoured-nation clause and they had, in every case, involved an exception: for instance, the Central American exclusion clause; it simply was not possible for third States to be granted the special treatment accorded to the members of the Central American Common Market. On one occasion, he had argued that, under an existing treaty between El Salvador and France, El Salvador had been entitled, in the coffee trade, to treatment similar to that being extended by France to its former colonies in Africa. However, the French negotiators had very convincingly shown the particular reasons why that should not be the case. If the "purity" of the most-favoured-nation clause was to be maintained, the Commission would encounter strong criticism in the Sixth Committee, which would affirm that the draft failed to take account of the realities of international affairs.

29. He endorsed article D in its entirety, but would be prepared to accept the deletion of the second sentence if that would help to achieve a consensus. On the other hand, as Mr. Reuter had pointed out, the matter was one of substance, so it would be preferable for the Commission to find an acceptable formula before referring the text to the Drafting Committee.

30. Mr. AGO said he thought the divergence of views in the Commission was such that it would be better to continue the discussion rather than refer article D to the Drafting Committee. If that divergence had related only to the second sentence, the Drafting Committee could doubtless have found a solution. The examples contained in that provision should show the most frequent practice of States.

31. Mr. Ushakov's concerns were justified, since the second sentence could give the impression of suggesting to States exceptions to the application of the most-favoured-nation clause. In fact, that sentence was no way normative; its only purpose was to indicate what States could possibly do. In those circumstances, it would probably suffice to state the principle in the first sentence and mention the practice in the commentary.

32. In fact, it was the first sentence that was the stumbling-block. In that provision, the Special Rapporteur had tried to show that it was the Commission's intention that the rules set out in the future convention should not be peremptory rules. If they were adopted by States as peremptory rules, which was most unlikely, the following situation might arise. When States had concluded a particular agreement containing an "impure" most-favoured-nation clause—that was to say, one with exceptions—the beneficiary State could claim that, in order to conform to the future convention, the clause must be interpreted as not admitting of any exception; the exceptions specified would then be void. The granting State could then maintain that the whole clause or the whole of the treaty containing the clause was void. To avoid such situations, now that the problem had been

raised, it was essential to state that the rules of the draft were not peremptory rules.

33. Mr. USHAKOV said he agreed both with Mr. Calle y Calle that the articles under consideration were without prejudice to any agreement between the granting State and the beneficiary State, and with Mr. Ago that the articles did not contain peremptory rules. Nevertheless, he found it strange that a most-favoured-nation clause could subsist despite all the possible exceptions.

34. Mr. ŠAHOVIĆ reminded the Commission that in the report on its twenty-seventh session it had pointed out that as far back as 1973 it had stated that whether a given treaty provision fell within the purview of a most-favoured-nation clause was a matter of interpretation. In 1975, it had added "Hence, the draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty containing the clause or otherwise".⁶ It had stated that it could emphasize that residual character either by introducing in each individual article a preliminary reservation (such as "Unless the treaty otherwise provides or it is otherwise agreed"), or by drafting an article expressly recognizing the residual character of all the provisions of the draft. The Commission had expressed its intention of opting for one of those two approaches at its 1976 session.⁷ It was now clear from the Special Rapporteur's seventh report that he had opted for the second approach.

35. The CHAIRMAN said he fully appreciated Mr. Reuter's view that the problem was one of substance, and also Mr. Ago's view that it should be solved by the Commission. On the other hand, the Drafting Committee's mandate had broadened in recent years and the Commission had in the past referred questions to it that had not been purely of a drafting character. The Commission operated on the basis of consensus and the value of its work lay precisely in that fact, which made it possible for the Commission's drafts to be approved by the great majority of Governments.

36. If there were no further comments, he would take it that the Commission agreed to refer article D to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁸

EXCEPTIONS TO THE OPERATION OF THE CLAUSE

37. The CHAIRMAN invited the Special Rapporteur to introduce section 10 of chapter I of his draft, entitled "Exceptions to the operation of the clause" (A/CN.4/293 and Add.1, paras. 31-39).

38. Mr. USTOR (Special Rapporteur) said that the term "customary exception" could mean two things: an exception which was customarily included in the clause or the treaty containing it or an exception which, by

⁶ *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

⁷ *Ibid.*

⁸ For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 47-62.

virtue of the rules of customary international law, excepted certain favours from the operation of the most-favoured-nation clause without explicit stipulation. The former might be called a conventional exception and the latter an implied exception.

39. It could safely be said that no implied exception, based on customary international law, precluded all favours from all kinds of most-favoured-nation clauses, whether they applied to consular immunities, to intellectual property or to anything else. It was alleged by some that, in the field of international trade, there were certain exceptions so frequently specified in treaties that they had become part of customary international law and therefore applied without express stipulation in a treaty. The principal problem in that regard was the so-called implied exception of Customs unions and similar groups of States. It might be advisable, however, to discuss the frontier traffic exception first.

40. It had been asserted, in particular by the Institute of International Law in its 1936 resolution (*ibid.*, para. 35), that the frontier traffic exception was incorporated so often in treaties that it operated without necessity of specific stipulation. To his mind, the matter did not raise any difficulties. So far as he was aware, no contentious cases had arisen in connexion with that exception, and it was common practice to include it in international trade treaties. States appeared to be satisfied with that particular situation. Moreover, it was difficult, if not impossible, to adopt a rule which would encompass all the different conventional exceptions in such treaties. The draft already contained the basic rules relating to treaties containing most-favoured-nation clauses, and it was not necessary to formulate extremely complicated rules on the frontier traffic exception. Consequently, he was not proposing any text dealing with that exception. The Commission might perhaps take note of the position, which could be discussed in the commentary.

41. Mr. BILGE said he understood the Special Rapporteur's desire to maintain the integrity of the most-favoured-nation clause as far as possible and, hence, not to introduce exceptions for frontier traffic or Customs unions. In the case of frontier traffic, however, it might be questioned whether the fact that States were satisfied with the present situation was a sufficient reason for not dealing with it. In his view, the commentary should stress the Commission's concern to maintain the integrity of the most-favoured-nation clause.

42. Where Customs unions were concerned, it seemed that the Special Rapporteur had taken into consideration only unions formed between developed States and the diversionary effects such unions could have on trade. But the developing countries were also interested in Customs unions and might one day form such unions among themselves. Hence the Commission should not consider only the negative effects which Customs unions between developed States could have on international trade. In his report, moreover, the Special Rapporteur had mentioned not only the trade diversion which could result from such unions, but also the new trade to which they might give rise. For his part, he was concerned not only with the negative effects which Customs unions

might have in the short term, but also with the positive repercussions they might have in the future. If developing countries which did not at present have a large enough market to produce a certain consumer good joined together in a Customs union, they might be able to make their production competitive. That aspect of the matter should be dealt with in the commentary.

43. Mr. AGO said that he, too, doubted whether the mere fact that States were satisfied with the present situation justified the Commission in not making any provision for the frontier traffic exception. At present, that exception raised no difficulties, probably because there were some customary principles, such as, perhaps, the principle that the facilities accorded to frontier traffic did not extend to the beneficiary State unless otherwise agreed. But at a time when the Commission was codifying the rules on the most-favoured-nation clause, silence on that point might be interpreted as meaning that the most-favoured-nation clause automatically implied that the frontier traffic facilities granted to a third State extended to the beneficiary State. Obviously, that question deserved consideration.

44. Mr. USHAKOV said that he was not sure whether it was better to consider that the exception for frontier traffic was so widely accepted that no special provision was needed, or to decide that there should be an article dealing with that exception.

The meeting rose at 6 p.m.

1381st MEETING

Tuesday, 1 June 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

EXCEPTIONS TO THE OPERATION OF THE CLAUSE (*concluded*)

1. Mr. TABIBI said that the Special Rapporteur had done well to consider (A/CN.4/293 and Add.1, para. 31) the question, which had been raised in the Sixth Committee, whether the Commission's draft covered all the customary exceptions to the application of the most-favoured-nation clause. Frontier traffic was, in his opinion, an extremely important matter. Although States appeared to be satisfied with the present situation it would do no harm to state the obvious and include in the

draft an article formulated along the lines of article XXIV, paragraph 3, of the GATT or of the provision contained in paragraph 7 of the 1936 resolution of the Institute of International Law (*ibid.*, para. 35).

2. Mr. CALLE Y CALLE said that, in referring to "customary exceptions", the representative of France in the Sixth Committee might have had in mind such traditional exceptions as frontier traffic and Customs unions, and even questions of public policy.

3. The Special Rapporteur had said that it was not the task of the Commission to consider specific technical matters, such as international trade or frontier traffic. The rules now being prepared were general in scope and related to all kinds of benefits granted in various areas. The question arose as to whether, in the absence of a specific exception, it would be understood that a rule did exist that, if benefits were granted because of the special character of a frontier régime, such benefits could not be claimed by a State that was not a frontier State. Again, some States had more than one adjacent State, and not all such States could be accorded the treatment that was extended at a particular part of the frontier, perhaps by reason of geographical conditions. For example, the regulations which Peru applied on its frontiers with Bolivia, Brazil, Chile and Colombia differed in each case. The 1936 resolution of the Institute of International Law stated that the most-favoured-nation clause did not confer the right to the treatment which was or might be granted by either contracting country to an adjacent third State to facilitate frontier traffic. However, it had not gone so far as to set forth a rule on that point.

4. Like Mr. Tabibi, he thought that an appropriate provision should be incorporated in the draft. It would be worth while to explore a formula which referred not specially to frontier traffic but to benefits granted as a result of the special circumstances involved in a frontier régime.

5. Mr. YASSEEN said that the customary rules which had been referred to in the Sixth Committee could be either formal clauses, which were often found in treaties containing a most-favoured-nation clause, or customary rules of international law restricting the general application of the most-favoured-nation clause. Those formal clauses were the expression of the will of the parties, which were quite free to include them or not to include them. Since they depended on the will of the parties, they could not be generalized, on the presumption that, if nothing was said, the parties would conform to them.

6. Rules of customary international law which restricted the general application of the most-favoured-nation clause might exist, but they were not peremptory rules. They could only be residuary rules supplementing the expressed will of the parties. The question whether the parties had conformed to those rules or had departed from them raised a problem of interpretation; for treaty interpretation had to take into account all the relevant rules of international law applicable in the relations between the parties. It was perhaps useful to recall in that connexion that in general the silence of the parties to a treaty meant that they intended to conform to the rules of general international law.

7. The frontier traffic exception could be justified by common sense. It was only natural that a State should be able exempt from the application of the most-favoured-nation clause all matters relating to frontier traffic. The only question whether that faculty, which the parties undoubtedly possessed, should be mentioned explicitly in the draft. In his view, there was no necessity to draft a presumptive clause in favour of the frontier traffic exception, since a clause of that type would mean having first to settle the meaning of such terms as "frontier traffic" and "frontier zone", the scope of which depended on the will of the parties and various circumstances, particularly historical ones.

8. Mr. AGO said it was important to remember that, although the Commission's codification of the rules on the most-favoured-nation clause would be valid only for the future, certain past or present situations might one day recur. For example, Italy might become bound to Switzerland by a most-favoured-nation clause which did not provide for any exceptions favour of frontier traffic, and then conclude an agreement with Yugoslavia conceding to Yugoslav nationals resident in the area adjacent to Trieste special facilities regarding traffic with that city. The fact that the most-favoured-nation clause did not provide for an exception would certainly not be grounds for presuming that the frontier régime applying in respect of Yugoslavia was extended to Switzerland. Such cases had, however, given rise to controversy in the past. He therefore felt that it was not enough just to leave the task of settling those questions to the parties themselves. In order to avoid practical difficulties, it was desirable that the Special Rapporteur should submit a draft provision.

9. Mr. USHAKOV said that the frontier traffic exception fell within the category of exceptions *ratione personae*. Although he was opposed to a general exclusion *ratione personae*, he could accept the frontier traffic exception because it derived from a special situation and could be considered as following from natural law. For a non-adjacent State naturally could not expect to enjoy the special régime which the granting State accorded to an adjacent State for frontier traffic. Say, for example, that the Soviet Union established a special frontier régime with Afghanistan, New Zealand, as a non-adjacent country, would not be justified in requesting the same special treatment through the application of the most-favoured-nation clause. That was so obvious that there was no need to state it in the draft.

10. As Mr. Ago had pointed out, the situation became more complicated when several adjacent States were involved. If the Soviet Union established a frontier traffic régime with Afghanistan, it was not obliged by the operation of the most-favoured-nation clause to do the same with Poland. A frontier régime of that kind was not part of international trade, which was what the draft applied to: States established frontier régimes for the benefit of the population of a particular zone. It was obvious that the Soviet Union's position with regard to the frontier population of Afghanistan and Poland might be quite different, but that had nothing to do with natural law. It should therefore be made clear that the establishment of a frontier traffic régime with an adjacent State did not

imply that that régime should be extended, by the operation of the most-favoured-nation clause, to another adjacent State.

11. Article D did not relate to a natural law situation but to an agreement between the granting State and the beneficiary State. It was quite unacceptable, because it meant, in legal terms, that the draft no longer applied when the two States agreed to restrict the number of third States. That was tantamount to rendering without effect all the articles of the draft relating to third States, including article 2 (*d*), where the expression "third State" was defined as meaning any State other than the granting State or the beneficiary State. Other articles which would lose all meaning included article 12, which clearly applied to any third State. No exception to the application of the most-favoured-nation clause should therefore be allowed, other than exceptions deriving from natural law.

12. The draft articles would nevertheless clearly be useful, not only for States wishing to conclude genuine most-favoured-nation agreements, but also for those which might wish to draw up special rules for special situations. Of course, the draft would not be applicable in such cases, but States would at least know exactly what a most-favoured-nation clause was and to what extent special rules would have to be drawn up *mutatis mutandis*.

13. He could not agree with the view expressed at the previous meeting by Sir Francis Vallat that the difficulties which the Commission was now facing resulted from the fact that some concepts had already been defined in the draft articles. In reality, the difficulty was not definitions but the delimitation of the scope of application of the draft and the determination of the subject-matter it was to deal with.

14. Mr. TSURUOKA said that his country, Japan, was an island country which, by definition, had no land frontier and no maritime frontiers, since it was separated from all its neighbours by the high seas. It might therefore be thought that a State like Japan should not be concerned with the question of frontier traffic. However, it was interested in the question because Japanese citizens were interested in joint enterprises which might be affected. It was, moreover, worth noting that Japan had established a special régime with the Soviet Union on coastal trade which had not given rise to any difficulties with regard to the application of the most-favoured-nation clause. If the Commission decided to insert a presumptive rule in the draft, it should take situations of that kind into consideration.

15. Mr. USTOR (Special Rapporteur) said that a non-adjacent country could not claim the privileges enjoyed by an adjacent country in connexion with frontier traffic. Such a claim could not be made because of the natural rule concerning the most-favoured-nation clause, namely the *ejusdem generis* rule embodied in article 11 of the draft. In the case of a special situation, for example the existence of a large city on the frontier, the *ejusdem generis* rule would again apply. On the other hand, if the situation was not special but similar, the most-favoured-nation clause stipulated in favour of one adjacent country would apply in respect of another adjacent

country, but in State practice care was taken to ensure that exceptions were established in such circumstances. Consequently, he saw no need for a rule similar to that contained in article XXIV of the GATT, particularly since it was of such a sweeping character.

16. The Commission could of course establish a general exception in the field of frontier traffic vis-à-vis non-adjacent countries, but such a course was not necessary because the *ejusdem generis* rule obviously applied. The problem was whether the Commission should insert a general customary exception for frontier traffic in respect of another adjacent country. He failed to see the need for such an exception, which would mean that, unless a special situation did exist, a most-favoured-nation clause in favour of one adjacent country would operate in respect of advantages accorded to another adjacent country. Perhaps it would be best to explain the matter in the commentary, stating that it had been considered on a preliminary basis. In the light of comments from Governments, the Commission could then, if necessary, deal with the problem in the course of the second reading of the articles.

17. Mr. ŠAHOVIĆ said that his conclusions concerning the advisability of drafting a provision on the frontier traffic exception were the opposite of those of the Special Rapporteur. The arguments in favour of such a provision were practical rather than theoretical.

18. Mr. AGO said that he had the same impression. The Special Rapporteur was doubtless correct in considering that there was a general *ejusdem generis* rule, but that approach could lead to disputes and it was dangerous to make no express provision to settle such matters. Just to dispose of some old quarrel, two adjacent States might decide to agree on some special rules between themselves. For instance, in order to bring their peoples closer together, they might agree to allow complete freedom of movement in a given area without either passport control or Customs inspection. If one of those States was linked to all its other neighbours by a most-favoured-nation clause, it would obviously hesitate to accept such an arrangement. For that reason, he was apprehensive about the automatic extension of such régimes through the operation of the most-favoured-nation clause.

19. Mr. REUTER said that he had reached roughly the same conclusions as Mr. Šahović and Mr. Ago. He wondered if a general frontier régime was conceivable. If there were only special frontier régimes, the clause would not apply. If, on the other hand, a completely general régime were established in favour of frontier populations, the clause should apply. In theory it was possible to imagine a general régime based on, say, the idea that frontier regions were regions of closer international collaboration, as was argued by the writers who defended the "frontier zones" theory according to which frontiers had a certain breadth. Nevertheless, the idea of a general frontier régime could only be accepted if the rules applicable in the frontier zone were reciprocal, and all the advantages granted by State A to nationals of State B were granted by State B to national of State A. But it would be impossible to generalise such a régime by way of the most-favoured-nation clause; the benefi-

ciary State would not be entitled to invoke the benefit of that treatment without reciprocity. In theory, therefore, a general régime was conceivable but it would have to be reciprocal. The draft article, however, was based on the unconditionality of most-favoured-nation clauses.

20. Mr. MARTÍNEZ MORENO said that the Commission was faced with a particularly complex problem. Frontier traffic might cover such matters as freedom of movement within a particular area. For instance, Guatemala accorded special treatment to nationals of El Salvador and Honduras who wished to make a pilgrimage to a famous religious shrine: all they had to do was to produce their identity cards. That did not, however, apply to Mexican nationals. That was perhaps an example of frontier transit rather than frontier traffic. The Commission would later have to consider other possible exceptions, such as free-trade zones, common markets, Customs unions and special provisions for developing countries. It might then be more useful to leave the question in suspense for the moment and decide later, in the light of the discussion, whether other exceptions would also have to be included in the article.

21. Mr. SETTE CÂMARA said there was no doubt that States were free to agree the terms of special frontier régimes with adjacent countries; that had been done many times all over the world and always by means of treaty provisions embodying exceptions to the most-favoured-nation clause. In drafting the present articles, the Commission should take full account of State practice. The Special Rapporteur had noted in his report that no dispute had arisen over the question of whether, in the absence of a specific stipulation, the advantages granted in frontier traffic ought to be extended to a non-adjacent beneficiary State (A/CN.4/293 and Add.1, para. 39). Brazil had a number of special arrangements with the many countries on its frontiers and, so far as he was aware, there had been no case in which one of those countries had invoked a right to benefit from the advantages granted to another adjacent country under those special arrangements.

22. He strongly supported the position adopted by the Special Rapporteur. It would be extremely difficult to determine such matters as the extent of a frontier region and the type of relationships in those regions. At the same time, he had no objection to the course suggested by Mr. Martínez Moreno.

23. Mr. BILGE, referring to his remarks at the previous meeting,¹ said that he was now convinced that the draft should include a provision on the frontier traffic exception. The Commission could return to the matter when it came to consider article E, on the treatment extended to land-locked States. The draft which the Commission was preparing must be detailed, and difficulties might arise if some exceptions were mentioned and others not.

24. The CHAIRMAN said the Special Rapporteur had suggested that it might be possible, by means of a statement in the commentary, to elicit the views of Governments on the desirability of including an appropriate

provision in the draft articles; he would be glad to hear the views of members on that suggestion.

25. Sir Francis VALLAT said it would be of considerable assistance to the Commission if the Special Rapporteur would prepare a formulation relating to the frontier-traffic exception.

26. Mr. ŠAHOVIĆ said he supported the idea of including a passage in the commentary, but a special provision would have to be inserted in the future convention sooner or later. He hoped that the Commission would be able to return to the question during the present session and would manage to find a solution satisfactory to all.

27. Mr. USHAKOV said that it would be useful to refer the question to the Drafting Committee and then decide whether or not an article was required.

28. The CHAIRMAN said it was his understanding that the Special Rapporteur would prepare a text. The Drafting Committee could then consider that text and advise the Commission on the best course to follow. If there were no further comments, he would take it that the Commission agreed to that procedure.

*It was so agreed.*²

Mr. Reuter, First Vice-Chairman, took the chair.

THE CUSTOMS-UNION ISSUE

29. The CHAIRMAN invited the Special Rapporteur to introduce section 11 of chapter I of his seventh report, dealing with the Customs-union issue (A/CN.4/293 and Add.1, paras. 40-64).

30. Mr. USTOR, Special Rapporteur, said that the Customs-union issue had arisen in the course of the discussion at the twenty-seventh session, when it had been finally decided that he should prepare a statement of his views for inclusion in the Commission's 1975 report and that the Commission would postpone further discussion until the present session.

31. The Customs-union issue did not arise in connexion with most-favoured-nation clauses in general, but only with regard to such clauses in commercial treaties, especially those relating to Customs duties. It was dealt with in the commentary to article 15 (Irrelevance of the fact that treatment is extended under a bilateral or multilateral agreement).³ In fact, the question of Customs unions was not directly connected with article 15 as such but, in the course of the discussions on that article, some members had stated that they were prepared to accept the provisions of the article only for bilateral treaties, on the grounds that Customs unions were generally set up under multilateral treaties. In fact, examples could be given of Customs unions established bilaterally between two States only.

² For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 28-33.

³ See *Yearbook... 1975*, vol. II, pp. 144 *et seq.*, document A/10010/Rev.1, chap. IV, sect. B, paras. 28-71 of the commentary to article 15.

¹ See 1380th meeting, para. 41.

32. During the discussions in the Sixth Committee at the thirtieth session of the General Assembly, a number of statements had been made on the question whether Customs unions should be regarded as an exception to the operation of the most-favoured-nation clause. His own position, that no such exception could be presumed, had met with the support of some representatives but had been strongly opposed by the spokesman for EEC and by some representatives of EEC member States. A number of representatives of developing countries had also expressed concern that the draft articles should include an exception to the operation of the most-favoured-nation clause with regard to benefits granted within groupings of developing States.

33. It had been suggested by one representative that the implied exception rule should apply in the case where the Customs union had been established after the conclusion of the agreement containing the most-favoured-nation clause; in the case where the granting State was already a member of such a union at the time of the conclusion of the agreement, the clause would extend to union benefits unless otherwise agreed (*ibid.*, para. 43). In the latter case when the member of a Customs union entered into an agreement containing the most-favoured-nation clause, with an outside State the parties would as a rule specifically exclude the union benefits from the operation of the clause.

34. To come now to the case where two States concluded a treaty containing a most-favoured-nation clause, without mentioning either in the treaty itself or in any subsequent agreement the possibility of one of them entering into a Customs union: if one of the two States entered into such a union and gave a pledge that the union benefits would not be extended to outsiders under a most-favoured-nation clause, a conflict would inevitably arise. The State which had entered the union would find itself bound by two conflicting sets of obligations. The beneficiary State under the most-favoured-nation clause could plausibly argue that it had made sacrifices and possibly large investments in order to maintain its position as an exporter to the market of the granting State, and that it would be deprived of that advantage overnight by the lowering of Customs duties by the granting State to its partners in the Customs union. The beneficiary State could thus claim that the granting State had broken its promise under the most-favoured-nation clause. Should the granting State object that the Customs union implied reciprocal advantages for it from the other members of the Union, the beneficiary State could justly reply that the most-favoured-nation clause was unconditional.

35. The conflict between the two sets of obligations incumbent upon the granting State should, in his view, be settled on the basis of the general rule of interpretation laid down in article 31 of the 1969 Vienna Convention on the Law of Treaties.⁴ If the treaty embodying the

most-favoured-nation clause did not contain any exception, no such exception could be assumed to exist except under relevant unwritten rules of international law.

36. The question therefore arose whether there existed a general rule of international law that an unconditional most-favoured-nation clause was subject to an automatic restriction which said that the granting State was not obliged to extend to the beneficiary State the same treatment as to members of the Customs unions which the granting State had joined. Upholders of the existence of such a rule adduced in support of it the widely accepted practice of including in bilateral treaties an exception relating to Customs unions. The States parties to bilateral commercial treaties frequently specified that their reciprocal most-favoured-nation clause should not apply to benefits granted to third States under a Customs union.

37. Further support for that view was offered by article XXIV of the GATT, in which some 80 States, including developed and developing countries, as well as socialist and capitalist countries, participated. That article contained elaborate provisions on Customs unions and free-trade areas and stated an exception in their case to the most-favoured-nation clause embodied in article II of the GATT. The exception, however, did not apply to all such unions or areas; very strict conditions were laid down in article XXIV for the release of parties from their obligation to grant most-favoured-nation treatment upon becoming members of Customs unions of free-trade areas. Only those Customs unions or free-trade areas which were trade-creating rather than trade-diverting benefited from the exception allowed under paragraph 4 of that article, which read:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.⁵

That passage had given rise to conflicting interpretations because of the difficulty of distinguishing clearly between trade-diversion and trade-creation measures.

38. Under paragraph 5 of article XXIV of the GATT, the duties and other commercial barriers existing prior to the union in the individual States should be replaced by a common system of barriers which was not on the whole higher or more restrictive than the general incidence of the pre-existing systems. That provision involved the problem of determining the "general incidence" of the pre-existing individual trade barriers, and that was a problem of higher mathematics. It was not, however, a provision that was of any great assistance to an outside State which had previously exported a particular commodity to one of the States members of the union. For example, if that export was meat, and the common Customs duties were higher than the previous individual duties, the meat-exporting country which was adversely

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

⁵ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT-169-1), p. 43.

affected was not in any way compensated by the fact that the common barriers against another commodity, say fruit, were lower than the pre-existing individual barriers. The question of general incidence was totally irrelevant to an individual exporter concerned with the situation with regard to a particular product. That the conditions laid down in article XXIV were almost excessively strict was clear from the fact that the literature on the subject showed that no Customs union had yet been able to prove that it satisfied all of them. Article XXIV of the GATT was accordingly not a very strong argument in favour of the doctrine that there existed a general rule providing for an exception to the most-favoured-nation clause in the case of Customs unions.

39. Nor was there any decisive force in the argument that a great many bilateral treaties embodying the most-favoured-nation clause stated the exception explicitly. On the contrary, that practice rather supported the opposite view. The fact that contracting States should find it necessary to state the exception suggested that, in the absence of an express stipulation, no general exception existed.

40. In actual fact, in cases where a State was bound by two conflicting promises, one under a most-favoured-nation clause and the other under a Customs union, there was some justice in the demands of both States. The dispute was usually settled by bargaining leading to an arrangement to grant compensatory advantages.

41. With regard to the practice of States in the matter, it was of interest to refer to the provisions of article 234 of the Treaty establishing the European Economic Community, known as the "Treaty of Rome"; that article read:

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate step to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.⁶

He assumed that the reference in the second paragraph of article 234 to the duty of the member State or States concerned to "take all appropriate steps to eliminate any incompatibility found to exist" meant resort to legal means. The EEC member State concerned would have to settle its dispute with the beneficiary of the most-favoured-nation clause by resorting to the peaceful means of settlement indicated in Article 33 of the United Nations Charter. It was thus clear from article 234 of the Treaty

of Rome that the Customs union established by it did not of itself affect the obligations of one of its members under a most-favoured-nation clause.

42. Lastly, he would like to mention article 12 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly in 1974.⁷ That article proclaimed the right of all States to participate in any subregional, regional and interregional co-operation and imposed on all States engaged in such co-operation

the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.

That article thus recognized the sovereign right of States to enter unions and other groupings—subject, however, to the condition that those groupings were both outward-looking and consistent with the international obligations of their members and did not affect the legitimate interests of third countries, especially developing countries. He believed that to be a satisfactory statement of the existing law.

The meeting rose at 1 p.m.

⁷ General Assembly resolution 3281 (XXIX).

1382nd MEETING

Tuesday, 2 June 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

later: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Ros-sides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*)

(A/CN.4/293 and Add.1)

[Item 4 of the agenda]

THE CUSTOMS-UNION ISSUE (*continued*)

1. Mr. USTOR (Special Rapporteur) continuing his introductory remarks on the Customs-union issue, said that at the previous meeting he had referred to the view held in some quarters that there was a customary rule of general international law establishing an implicit exception to the application of the most-favoured-nation clause in circumstances arising from Customs unions. On that point, he drew attention to the 1969 judgment of the International Court of Justice discussed in the

⁶ United Nations, *Treaty Series*, vol. 298, p. 91.

commentary to article 15 of the draft.¹ The International Court of Justice had referred to the possibility of a rule of conventional or contractual origin becoming a customary rule of international law, but had added that such a result could not lightly be regarded as having been attained, since

an indispensable requirement would be that ... State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

2. In the light of that judgment, it could be safely asserted that no customary rule of international law had emerged which would except from the operation of the most-favoured-nation clause the favours granted under a Customs union. There was in fact strong evidence to the contrary, as he had mentioned at the previous meeting.

3. His views on that point were also supported by the Latin American practice referred to in his seventh report (A/CN.4/293 and Add.1, paras. 127-130). The Latin American States always inserted an appropriate exception relating to Customs unions and similar groupings in the most-favoured-nation clauses contained in all bilateral treaties concluded with States outside those unions or groupings. An undertaking to do so was actually embodied in two Central American integration agreements. That practice showed that the Latin American *opinio juris* strongly supported the view that if a State had obligations under a most-favoured-nation clause, those obligations would apply to benefits granted under a Customs union or similar grouping. It had accordingly been considered necessary to include in the treaties on Central American economic integration special provisions dealing with the matter in their multilateral relations.

4. Those who claimed that a rule of customary international law existed on the alleged implied exception would have to establish the existence of that rule. His own view on the legal effects of entry into a Customs union by a granting State was based on the rule laid down in article 30 (Application of successive treaties relating to the same subject-matter) of the 1969 Vienna Convention on the Law of Treaties.² The provisions of that article made it clear that where a State found itself bound by conflicting obligations under two successive treaties, its obligations under the earlier treaty were not diminished in any way. Before entering into a Customs union, therefore, the granting State would have to withdraw from the treaty containing the most-favoured-nation clause or come to an agreement with the other parties to that treaty on the non-extension to them of the benefits accruing under the Customs union.

5. It was for those reasons that he had not proposed the inclusion in the draft of a provision on the alleged

implied exception. Nor did he propose to include any article describing the present situation as he saw it.

6. It had been argued in some quarters that the entry of a granting State into a Customs union constituted a fundamental change of circumstances which it could invoke as a ground for terminating or withdrawing from the treaty containing the most-favoured-nation clause. That argument must be rejected because the change of circumstances was brought about by the interested party itself, and that party could not be allowed to invoke its own act as a valid ground for terminating the treaty containing the most-favoured-nation clause.

7. It had also been argued that a granting State which joined a Customs union, such as EEC, could not extend the same treatment to outsiders as to members of the union, because that would be precluded by the constitution of the union. That was true of EEC, the constituent instrument of which specified that Customs matters came within the competence of the appropriate EEC bodies. The answer to that argument was that the members of the Customs union were the authors of its constitution; if one of them became bound by a most-favoured-nation clause, it would thus be creating a situation in which it could not fulfil its obligations under the clause. It would therefore have to bear the consequences of the situation it had created.

8. As to the various suggestions which had been made for dealing with the Customs union issue in the draft, one possibility was that the matter should be considered as covered by the provisions of article C (Non-retroactivity of the present draft articles) whereby the draft articles would apply only to most-favoured-nation clauses embodied in treaties concluded after the entry into force of the future convention resulting from that draft. After its entry into force, the States parties to the convention would be able to plan ahead; if they intended to enter into a Customs union or similar grouping, they would have to insert an appropriate exception in any most-favoured-nation clause included in a treaty with an outsider, in order to avoid the application of the clause to benefits granted to members of the union or grouping.

9. Another way of dealing with the problem would be for the parties to exercise their freedom to draft the most-favoured-nation clause, and to restrict its operation, in accordance with the provisions of article D. A State which foresaw the possibility of joining a Customs union or similar grouping could, for example, specify that most-favoured-nation treatment would continue only until it entered into such a union or grouping.

10. The limited importance of the Customs-union issue should also be stressed. The bulk of international trade was carried on under the terms of the GATT, and the matter was settled by article XXIV of the GATT, to which he had referred at the previous meeting.³ Moreover, in most commercial treaties containing a most-favoured-nation clause, an appropriate exception was embodied in the clause.

11. Lastly, he wished to comment briefly on the attitude of the developing countries towards Customs unions and

¹ See *Yearbook... 1975*, vol. II, p. 151, document A/10010/Rev.1, chap. IV, sect. B, para. 58 of the commentary to article 15.

² For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

³ See 1381st meeting, para. 37.

other economic groupings. Of course, when a developing country was not a member of such a union, its situation was the same as that of any other outsider: its exports to the markets of the States members of the union could be adversely affected by the formation of the union. But if a group of developing countries themselves formed a Customs union, other developing countries which were outside the union would be adversely affected. It was therefore understandable that Latin American countries should adhere to the view that the rights of a beneficiary State under a most-favoured-nation clause were not affected by the entry of the granting State into a Customs union.

12. The situation was different in regard to developed countries which were not members of the union. It raised the broader question of the trend in favour of establishing a rule that a developed beneficiary State was not entitled, under a most-favoured-nation clause, to any treatment extended by a granting developing State to a third developing State (A/CN.4/293 and Add.1, paras. 120-121). That question would be dealt with at a later stage in connexion with the problem of the developing countries, under draft article 21.

13. Mr. HAMBRO said that he had not been altogether convinced by the Special Rapporteur's able and clear presentation of his views. From the outset of the Commission's discussions on the most-favoured-nation clause, he had had occasion to stress the fact that the topic involved two problems of much greater importance than any technical details: the first was that of the preferential treatment to be given to developing countries; the second was the Customs union issue.

14. At the twenty-seventh session, the members of the Commission had all provisionally accepted article 21, dealing with most-favoured-nation clauses in relation to treatment under a generalized system of preferences extended to developing countries. For his part, he might still be prepared to accept article 21; within the limits of the codification of international law, it was the Commission's duty to do all it could to help the developing countries. Nevertheless, he failed to see how the rule embodied in article 21 could be said to form part of customary international law when the same proposition was not accepted for the Customs union issue. The Special Rapporteur had not been able to convince him that the position with regard to Customs unions was different in any way from that regarding the preferential treatment of developing countries. The decision taken on article 21 amounted to the creation of new law; it was not codification of existing customary international law.

15. If the draft articles on the most-favoured-nation clause were to remain silent on the subject of Customs unions and free-trade areas, they would create enormous difficulties for any country joining such a union or area. The Commission could not ignore the fact that the Customs-union exception to the application of the most-favoured-nation clause formed part of the accepted practice of GATT. Paramount importance should be attached to what was actually done in GATT, and Customs unions had been considered in that organization as covered by article XXIV of the General Agreement.

It was true that, in the technical sense, GATT could be said not to constitute an international organization, but it nevertheless functioned like one in every respect and due attention should be paid to its practice in regard to Customs unions.

16. With regard to legal opinion, it should be noted that as early as 1936, the Institute of International Law had adopted a resolution specifying that the beneficiary State under a most-favoured-nation clause should not have the right to invoke it in order to obtain the benefits of treatment resulting from a Customs union.⁴

17. The Special Rapporteur had urged the need to deal with the legal aspects of the problem rather than with its economic and political aspects. That approach was appropriate where codification was concerned, but when the Commission was engaged in formulating rules of progressive development, it could not work in a vacuum and had to pay due attention to economic and political considerations.

18. For all those reasons, he thought the draft should deal with the Customs-union issue. He had the impression that the reluctance in some quarters to accept the exception applicable to Customs unions and free-trade areas was due to an underlying opposition to those groupings themselves. That opposition seemed to be based on a short-sighted view of those groupings as associations of prosperous European countries. In fact, economic regional integration was making progress all over the world. That integration could be of the greatest importance in strengthening the position of developing countries, and the Commission would only be weakening that position if it ignored the need of Customs unions and free-trade areas to develop freely.

19. As he saw it, the Commission could deal with the Customs-union issue in three possible ways. The first was to use the formula adopted by the Institute of International Law and to include in the present draft a provision to the effect that the most-favoured-nation clause did not confer the right to the treatment resulting from a Customs union or a free-trade area.

20. The second possibility was to deal with the Customs union issue in the same manner as the Commission had dealt with the question of the generalized system of preferences in article 21: a rule would be included in the draft to the effect that a beneficiary State was not entitled under a most-favoured-nation clause to any treatment extended by a granting State within a Customs union or a free-trade area.

21. The third possibility was to adopt an intermediate solution modelled on article B. The rule would be drafted to read:

The provisions of the present articles shall not pre-judge any question that may arise from a Customs union or a free-trade area.

22. He hoped that one of those three solutions would be adopted by the Commission at the end of its discussion on the Customs-union issue.

⁴ See *Yearbook... 1969*, vol. II, p. 175, document A/CN.4/213, annex II.

23. Mr. TAMMES said that, as already indicated by the Special Rapporteur, the Customs-union issue was of limited practical significance. The exception appeared to be very widely assured by express stipulations in bilateral treaties and mainly by article XXIV of the GATT. Under the circumstances, the Commission could concentrate on the general legal problem of the inclusion of the exception in some form within the framework of provisions of an otherwise residual nature.

24. At the twenty-seventh session, he had been among those who had found it difficult to accept the inclusion of the Customs-union exception in the draft on the most-favoured-nation clause. Since then, the only additional information received had been the report on the debates in the Sixth Committee, and he had not found anything in those proceedings to change his views.

25. He had been greatly impressed by the abundant material submitted by the Special Rapporteur. The first conclusion that could be drawn from that material was that there was no evidence of any consensus among States regarding the existence of an alleged rule of customary international law which would provide for an implied exception to the application of the most-favoured-nation clause in the case of Customs unions and similar associations of States. The absence of any such consensus meant that, despite the frequency of the exception in treaty practice, it could not be included in the draft as a matter of codification. The Commission could not claim to codify a rule that would be contrary to the terms of article 30 (Application of successive treaties relating to the same subject-matter) of the 1969 Vienna Convention.

26. For the purposes of applying the rule in article 30 of that Convention, the treaty containing the most-favoured-nation clause was the earlier treaty and the treaty setting up the Customs union was the later treaty. The rule in article 30 meant that the granting State could not, by the later treaty with other partners, go back on its promises to the beneficiary State which was not a party to that later treaty.

27. He could not accept the proposition that the Customs-union exception was implicit in any agreement extending most-favoured treatment simply because an explicit exception on the subject was usually included in such agreements. That proposition was reminiscent of the nineteenth century doctrine which had sought to introduce the *rebus sic stantibus* principle into international law in the guise of a fictitious clause which was presumed to be tacitly implied by the parties in their treaties.

28. The Commission could not possibly adopt that approach. Presumptions were based on the most probable case: the more frequently the Customs-union exception was explicitly included in agreements promising most-favoured-nation treatment, the less probable it became that the parties had overlooked that possibility. The *inclusio unius, exclusio alterius* principle, mentioned in the commentary to draft article 15,⁵ would apply. More-

over, to invoke the frequency of the Customs-union exception as an argument for regarding it as customary law would be tantamount to ignoring the possibility of a contrary will on the part of individual parties. The position in regard to the Customs-union exception was different from that regarding the exception for frontier traffic; there was some evidence of *opinio juris* in favour of the latter exception, although its exact scope was not clearly defined.

29. Should the Commission, as he suggested, discard those two approaches, it might consider using its statutory powers to present the Customs-union exception as a rule of progressive development of international law desired by the international community. But the Commission had so far only adopted that course when it had been acting in its own familiar field of the advancement of justice and the reliability of the law; in the field of economic controversy it would be placing itself in great difficulties if it made a choice of its own without any guidance from statements representing world opinion, as it had done in regard to the provisions adopted in favour of developing States.

30. His own conclusion was that, at the first reading of the draft, the time had not yet come for the Commission to take a firm position on the codification or development of international law on the effects of the most-favoured-nation clause on Customs unions and similar associations of States.

31. Mr. SETTE CÂMARA said that in his commentary to article 15 the Special Rapporteur had examined in detail the question whether the Commission should include in its draft a provision establishing an implied exception to the application of the most-favoured-nation clause in situations resulting from the creation of a Customs union or free-trade area. It was quite clear from his lengthy examination of State practice that States could, and often did, agree to exclude the benefits of a Customs union or similar association from the application of the clause. Indeed, R. C. Snyder, a writer quoted by the Special Rapporteur,⁶ had found 280 Customs-union-exception clauses in treaties concluded during the period between the two world wars. That situation had not changed. States found it necessary to include an explicit exception because there was no general rule of international law that would establish the exception as a presumption. Moreover, the abundance of written clauses, far from proving the existence of a general rule of customary law, afforded evidence that the exception was nothing more than a conventional exception.

32. Again, in situations resulting from the application of article XXIV of GATT, it was not possible to infer the existence of an implied exception—quite the contrary. It had to be remembered that the cornerstone of GATT was an unconditional most-favoured-nation clause. Consequently, article XXIV was merely another written clause establishing a specific exception whereby commitments entered into within GATT were made compatible with other commitments. As already pointed out by the Commission in 1975, not a single Customs union or

⁵ *Yearbook... 1975*, vol. II, p. 152, document A/10010/Rev.1, chap. IV, sect. B, para. 60 of the commentary to article 15.

⁶ *Ibid.*, p. 146, para. 41 of the commentary.

free-trade area agreement submitted to the Contracting Parties of GATT had conformed fully to the requirements of article XXIV.⁷ The Contracting Parties had resorted to the system of specific waivers for individual situations. In addition, the Special Rapporteur had emphasized⁸ that article 234 of the Treaty of Rome (Treaty establishing the European Economic Community), did not affect the rights and obligations resulting from pre-existing conventions, pending negotiations on the removal of any incompatibility, such as would result from an exception to the application of most-favoured-nation clauses.

33. After weighing up the discussion in the Sixth Committee, the Special Rapporteur, in his seventh report (A/CN.4/203 and Add.1, sect. 11), had maintained his earlier position, namely that there was no general rule of international law establishing an implied exception in respect of Customs unions and similar associations of States. The Special Rapporteur had also noted the surprising position adopted in the Sixth Committee by States within EEC, because, throughout the existence of that powerful economic unit, its members had abided by the traditional practice of inserting conventional exceptions in treaties. EEC was not the only Customs union, but no other union had adopted such a militant attitude on the question of an implied exception.

34. For those reasons, it would be preferable for the Commission not to attempt to draft a rule establishing a general exception for Customs unions and similar associations. States would continue to exercise their legitimate right to establish conventional exceptions whenever they considered it necessary to do so.

35. Mr. RAMANGASOAVINA stressed the difficulty of the problem under consideration. It had to be decided whether the draft articles should include a rule providing for an exception for Customs unions applicable to commercial treaties or treaties relating to Customs tariffs. Another question was whether, in the absence of an express exception in a treaty granting most-favoured-nation treatment, it should be understood that there was an implicit exception. Clearly, the problem differed according to whether the Customs union had been formed before or after the conclusion of the agreement containing the most-favoured-nation clause. Where the clause had been adopted after the establishment of the Customs union or free-trade area there was no problem, since the granting State had known where it stood when it had concluded an agreement granting special advantages to a beneficiary State. But where the granting State joined a Customs union after having granted another State most-favoured-nation treatment by the clause, the problem which arose was very difficult to solve because of the present development of Customs unions and free-trade areas. The formation of those unions and areas was nothing new, but their development was now likely to assume substantial proportions, especially among the young States which were trying to regroup their forces, the better to resist the external competition which threatened to curtail their possibilities of development.

36. Some States, of course, did not agree that there should be an implicit exception in favour of Customs unions. That attitude was easy to understand, for States attached great importance to the stability of the agreements they had concluded and did not wish to be surprised by subsequent agreements upsetting their long-term plans, which had sometimes required substantial investments. In an effort to solve that problem, the Special Rapporteur hinted at the possibility of resorting to mutual arrangements to rectify a situation which was affecting the estimates of some States. GATT had provided for the possibility of holding such negotiations to adapt situations to needs and to enable countries to form groups to fight against competition in order to accelerate their development.

37. The world today was characterized by two conflicting tendencies: on the one hand, a tendency of States to form groups to fight competition, in order to speed up their economic growth and development; and on the other hand, a tendency to liberalize trade, which was the basic trend in GATT. Moreover, the international community was now inclined to make a distinction between developed and developing countries and to favour developing countries as far as possible. That trend had been manifested, in particular, in the generalized system of preferences, which was intended to help developing countries. But those countries were not the only ones interested in forming groups: the developed countries, too, believed that in the present circumstances they needed to join together within a regional or subregional economic area. For the developing countries of Asia, Africa and Latin America, however, economic integration was not an end in itself, but a means of accelerating development.

38. The remedies proposed by the Special Rapporteur were not calculated to solve the problem. According to the Special Rapporteur, articles C and D could enable Customs unions and free-trade areas to take precautions against an obligation undertaken without all its possible consequences being foreseen, since article C provided for non-retroactivity of the draft articles and article D for the freedom of the parties to restrict the operation of the most-favoured-nation clause when concluding the treaty containing it. Articles C and D would thus make it possible to overcome the disadvantages of the most-favoured-nation clauses contained in future treaties and to avoid disputes. In this view, however, the most-favoured-nation clause was often no more than a provision of medium or long-term convenience, whereas economic integration was a much slower process, but one on which young States placed great hopes.

39. While commending the efforts made by the Special Rapporteur, he considered that the conclusion he had reached was not satisfactory, since it left many uncertainties. So far, the Commission had merely stated the problem and its difficulties without providing any clear solution. It was obviously difficult to lay down a very clear rule providing for an implicit exception, but the Commission should follow the example of GATT and find a formula enabling young States to conclude conventions containing a most-favoured-nation clause without hesitation, even if they hoped eventually to join regional or subregional groups. Those States might

⁷ *Ibid.*, para. 39 of the commentary.

⁸ See 1381st meeting, para. 41.

otherwise consider it dangerous to sign the convention which the Commission was preparing.

Mr. Reuter, First Vice-Chairman, took the chair.

40. Mr. USHAKOV congratulated the Special Rapporteur on his excellent statement and said that he entirely shared his view: there was no generally accepted rule, customary or otherwise, by which the application of the most-favoured-nation clause could be excluded in the case of a Customs union or similar group.

41. In fact, the question did not arise when the Customs union was formed after the conclusion of a most-favoured-nation clause containing an exception in favour of a possible future Customs union—although, incidentally, such a clause was not a most-favoured-nation clause within the meaning of the draft. On the other hand, the question did arise in the case of a true most-favoured-nation clause, in other words, when a State undertook to grant another State treatment no less favourable than the treatment it might grant to any third State whatever. If the granting State then became a member of a Customs union, could it invoke a general rule to exclude the application of the most-favoured-nation clause? There was no doubt that true most-favoured-nation clauses did exist in the modern world, and as envisaged in the draft those clauses did not admit of exceptions *ratione personae*. If they provided that a new treaty must be concluded in the event of the granting State becoming a member of a Customs union, that State was not automatically released from its obligations either: it had to enter into negotiations with the beneficiary State to agree on new conditions.

42. He had thus reached the same conclusions as the Special Rapporteur, albeit by another route. The fact that the most-favoured-nation clause did not admit of any exception *ratione personae* did not mean that States were obliged to conclude true most-favoured-nation clauses. If their interests required it, they could conclude any other clause, which would not be governed by the future convention.

43. Although true most-favoured-nation clauses were relatively rare, the draft articles would certainly be useful. States would know exactly what a true most-favoured-nation clause was, and if they considered that it was not in their interests to conclude one or they desired to make exceptions, they could conclude another clause in full knowledge of the position. Moreover, he was convinced that States which concluded clauses with exceptions would soon opt for true most-favoured-nation clauses, since they were the most profitable for the trade relations of all States.

44. Lastly, he wished to make it clear that some existing situations nevertheless justified exceptions: for example, exceptions in favour of developing countries, land-locked States and frontier zones. It was exceptions in favour of certain third States which were quite impossible, because of the nature of the most-favoured-nation clause, as conceived in the draft.

45. Mr. YASSEEN said that the question being considered by the Commission pertained to the contractual freedom of States, which were free to make exceptions

to the standard most-favoured-nation clause contemplated in the draft. It was not really essential to know whether those exceptions were justified, since there was no question of formulating a rule which would bind the parties against their will. It was necessary to determine what was meant when a treaty containing a most-favoured-nation clause was silent concerning the effect of that clause in regard to a Customs union or free-trade area. Would the clause apply, and would the treatment be that granted to the members of the Customs union? Like the Special Rapporteur and Mr. Hambro, he believed that there was no rule of international law establishing a presumption in favour of Customs unions and free-trade areas. He wondered whether the Commission should establish such a rule as progressive development of international law.

46. Two situations could be distinguished. If the clause was subsequent to the Customs union the question did not arise, since the parties could draft the clause in full knowledge of the facts. If the Customs union was subsequent to the clause, the existence of the clause could prevent the granting State from joining the union or participating in its formation. In such a case, the question arose whether to favour the granting State which wished to become the member of the union, or the beneficiary State. In his view, there was no reason to favour one rather than the other. It might be maintained either that the beneficiary State could have foreseen that the granting State would become a member of a Customs union, or that the granting State itself could have foreseen that possibility. In those circumstances, it would be better to resort to general rules: if granting States wished to restrict the scope of the most-favoured-nation clause, they must do so explicitly. The formation of Customs unions required lengthy preparation, and granting States could usually foresee the formation of such unions and include, in most-favoured-nation clauses they concluded, a provision permitting them not to extend to the beneficiary State the advantages they would grant to the members of a future union.

47. Referring to Mr. Hambro's statement, he said that there was indeed no positive rule in favour either of Customs unions or of developing countries, but that for purposes of the progressive development of international law, assistance should be given to the countries which had the greatest need of it. Today, the universal conscience recognized that it was imperative to assist developing countries to attain a decent level of development. Although he did not consider it necessary to establish a presumption in favour of Customs unions, he was not opposed to accepting, in certain cases, a presumption of an exception justified for sound reasons relating to international life, especially an exception in favour of developing countries.

48. The CHAIRMAN,* speaking as a member of the Commission, expressed his admiration for the moderation and skill with which the Special Rapporteur had presented his thesis. That thesis had been well argued and was no doubt in conformity with political thinking in the Special Rapporteur's country, but as one who held the

* Mr. Reuter.

opposite view, he had not been convinced by it. The question the Commission was discussing had a legal aspect, but it also involved the interests of States, so it was unlikely that the Commission would reach unanimity.

49. It was obvious that the interests of all States were not the same. There were at present only two very great Powers, but many candidates for that title. It was sometimes claimed that the great States of today had little sympathy for Customs unions because they did not need them, but he did not share that view. On the other hand, he agreed that it was the developing countries which particularly needed Customs unions and that they should be able to unite, since their frontiers were entirely arbitrary. There remained the European States, which were small countries, allegedly developed and lacking raw materials, and they were the countries which in the end would be prevented from uniting if the Commission adopted the solution proposed by the Special Rapporteur.

50. From the legal viewpoint the question was linked with several topics which had been or were still being studied by the International Law Commission: the law of treaties, State responsibility, and the question of the uniting of States, on which the Commission had taken a position in 1974.⁹ On that occasion, it had considered only the case of the merger of States, that was to say a "marriage" concluded with a view to forming a new State.

51. Like Mr. Yasseen, he thought it was necessary to consider the case in which the most-favoured-nation clause had been concluded, without exceptions, before the granting State became a member of a Customs union. If the treaty establishing the Customs union prevented compliance with the most-favoured-nation clause, it might be asked whether the conclusion of that treaty did not constitute an international delict. The Vienna Convention on the Law of Treaties was not of much help in answering that question. During the drafting of that Convention, the Commission had wondered whether it should deal with the whole question of contradictory treaties concluded with different States. The Special Rapporteur had even proposed a rule to cover the case in which two bilateral treaties were contradictory but, the Commission had not gone into all the aspects of the question.

52. In the context of the international responsibility of States it was impossible to evade that problem. Did a State commit an international delict if it placed itself, by a voluntary act, in a position in which it could not execute an earlier treaty? If so, the beneficiary State would then have a right of veto. Personally, he did not think an international delict was committed in such a case. It was not a case of fundamental change of circumstances or of *force majeure*, each of which must be external to the person who invoked it.

53. The justification lay in the draft articles on succession of States in respect of treaties, particularly article 30

(Effects of a uniting of States in respect of treaties in force at the date of the succession of States).¹⁰ In paragraph 3 of that article, the Commission had admitted that there were cases in which treaties concluded could no longer be applied when two or more States united voluntarily; but it had not deduced from that that such a union constituted a delict. It might be answered that a union of States was to marriage, what a Customs union was to concubinage.

54. In his opinion, the reason why the exception had been accepted was that there existed a fundamental right of States, which did not have the character of *jus cogens*, namely, the right to unite with other States unless it had expressly been agreed otherwise. It had indeed happened that, in the interests of peace, certain States, such as Austria, had agreed by treaty not to unite with another State. Such a renunciation was lawful when it was express, but it would be an extremely serious matter to prohibit a State from exercising its right to unite without an express renunciation. He did not conclude from that that the granting State was no longer bound by the most-favoured-nation clause; that State, or if not itself the system it had joined, remained under an obligation to provide certain benefits. Consequently, he supported the GATT solution, which was balanced and took account of modern society and its needs. The system which the granting State joined was under an obligation to renegotiate the treaty containing the most-favoured-nation clause. That situation had intentionally not been dealt with in the Vienna Convention on the Law of Treaties.

55. As the Special Rapporteur had pointed out, it was not the large States or the developing countries, but the small States which had an interest in maintaining the most-favoured-nation clause, for they were often prevented from entering a Customs union. An example was the case of Switzerland, which, for political reasons consistent with the interests of the international community, could not join the unions formed by the small or medium-sized States surrounding it.

56. A country which was the beneficiary of a most-favoured-nation clause granted by a State that was no longer able to extend to it the same advantages it gave to the other members of a Customs union which it had joined, was entitled to certain compensatory advantages that must be negotiated with the Customs union. There was thus an obligation to negotiate a new régime of economic relations. In that connexion, it would be idle to pretend that a duty to negotiate did not entail sufficiently precise obligations to be taken seriously. The obligation to negotiate on the basis of equity had now its place in contemporary international law, particularly with regard to the sharing of certain natural resources.

57. To sum up, he would favour a middle course. He found it inadmissible that, under cover of a Customs union, a State should be able to throw overboard all its obligations, including those deriving from a most-favoured-nation clause. On the other hand, he could not accept that certain States should be imprisoned by a rule

⁹ See *Yearbook... 1974*, vol. II (Part One), pp. 252 *et seq.*, document A/9610/Rev.1, chap. II, sect. D, draft articles on succession of States in respect of treaties, part IV.

¹⁰ *Ibid.*

which would give a right of veto to a State that was the beneficiary of a most-favoured-nation clause.

58. Mr. USHAKOV observed that in fact Mr. Reuter's comments did not relate only to treaties containing a most-favoured-nation clause, but to treaties in general. It was indeed open to question whether the existence of a Customs union did not render impossible not only the execution of a treaty containing a most-favoured-nation clause, but also that of other treaties. The question of the effect of Customs unions on the execution of treaties in general was so important that it could become a separate item on the Commission's agenda. In his view, the Commission would come to a dead end if it entered on that difficult course and again attempted to determine whether membership of a Customs union could constitute an international delict.

59. The CHAIRMAN, speaking as a member of the Commission, said that he did not question article 30 of the draft articles on succession of States in respect of treaties; he fully accepted that provision.

60. Mr. BILGE said he had no definite opinion on the advisability of providing for an exception in favour of Customs unions and other similar groups. In a previous statement he had pointed out that the Special Rapporteur did not seem to have taken into consideration Customs unions concluded between developing countries.¹¹ At that time, he had intended to propose an exception in favour of those countries, but he had since noted that the Special Rapporteur had dealt with the problem in chapter II of his report. He would therefore revert to the matter at a later stage.

The meeting rose at 12.55 p.m.

¹¹ See 1380th meeting, para. 42.

1383rd MEETING

Thursday, 3 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangsoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1) [Item 4 of the agenda]

THE CUSTOMS-UNION ISSUE (*continued*)

1. Sir Francis VALLAT said that, in his introduction, the Special Rapporteur had maintained that there was no customary rule of international law that an exception

in favour of a Customs union was to be implied in a most-favoured-nation clause.¹

2. Mr. Reuter, on the other hand, had advanced a cogent legal argument based on the analogy of the uniting of States² and had pointed out that the sovereignty of States in deciding their future could not be determined by the inclusion of a most-favoured-nation clause in a particular treaty. Mr. Hambro had adopted the middle course; he had agreed that no relevant rule of customary law existed, but he had endorsed the Customs-union exception.³ Other members of the Commission had also agreed that no relevant rule existed, but while some considered that none should be incorporated in the articles, others felt that the draft should include a provision for the developing countries. It was apparent, therefore, that fairly general agreement had emerged on the proposition that there was no rule of customary international law that embodied the Customs-union exception.

3. The Commission, however, was endeavouring to prepare articles which would provide a useful standard for interpreting and applying the clause in the future. He was inclined to follow the course advocated by Mr. Hambro. He could not accept the view of Mr. Ushakov that, if the treatment granted to a third State were excluded from the operation of the clause, then the clause ceased to be a most-favoured-nation clause.⁴ States frequently spoke of most-favoured-nation clauses even when they included exceptions *ratione personae*. Nevertheless, the point had been raised; it affected the scope and application of the articles and some clarification was indispensable if the present work was to progress, for its very foundations had, to some extent, been attacked.

4. Such clarification was indispensable because the draft, when adopted, would have considerable influence as a standard and would presumably be adopted in the form of articles incorporated in a Convention. The International Court of Justice repeatedly referred, for example, to the standard of the Vienna Convention on the Law of Treaties. But from the purely legal point of view, the articles would operate most effectively when incorporated in a convention.

5. He had thought, perhaps mistakenly, that the Commission was seeking to draft residual rules—rules which States could waive by agreement. It now seemed to be suggested that the articles should apply as peremptory rules, which were quite the opposite of residual rules. In that case, it had been suggested, the articles would operate exclusively in respect of a "pure" most-favoured-nation clause and their practical impact would be seriously limited. Parties to a convention containing such clauses would be prohibited from entering subsequently into any agreement containing a most-favoured-nation clause that excluded benefits granted to some third State. If that position was now being adopted, it should be

¹ 1381st meeting, para. 32. 1382nd meeting, para. 2.

² 1382nd meeting, para. 53.

³ *Ibid.*, para. 18.

⁴ *Ibid.*, para. 41.

reflected in the articles themselves. He could not accept the thesis of the "purity" of the clause, but the matter had to be clarified; otherwise, the Commission would be setting a trap for Governments in the same way as it appeared to have been setting a trap for itself.

6. It was possible to maintain that the Customs-union exception, although not embodied in law, was customary. A sufficient body of State practice—for instance, the 280 express exceptions found in treaties concluded between the two world wars and the exception provided for by article XXIV of GATT was there to justify the inclusion of the exception in the present articles. In any event, as in the case of frontier traffic, it would be prudent for the Commission to prepare a draft article and leave it to Governments to take what was, in the final analysis, a political decision on the question whether or not the article should be included. In his opinion, the present draft article could not properly be read as excluding future Customs-union exceptions in agreements between States. The Commission would damage its own reputation if it drafted articles which, on a strict interpretation, could be construed as preventing States from including such an exception in future agreements.

7. Mr. TSURUOKA said that a rule of implicit exception in favour of Customs unions or free-trade areas should not be included in the draft, for the reasons given by the Special Rapporteur. The Commission's purpose in preparing draft articles on the most-favoured-nation clause was to facilitate international co-operation and ensure the prosperity of the whole world. The concept of the most-favoured-nation clause had certain merits; it was based on ideas of free trade and universalism. The concept of a Customs union, on the other hand, was based on special arrangements for trade and regionalism.

8. The existence of a most-favoured-nation clause should not prevent the granting State from joining a Customs union, but neither should the beneficiary State be harmed by the fact that the granting State had become a member of a Customs union. In the latter case, the beneficiary State should receive fair and appropriate compensation. Renegotiation of the agreement between the granting State and the beneficiary State, as proposed by Mr. Reuter,⁵ could be a solution, but he was not sure how such renegotiation would take place in practice. It could be expected that the beneficiary State would not refuse the offer of negotiation, but the question arose as to how far it should make concessions. Should it give up all or part of the advantages to which it was entitled under the most-favoured-nation clause? Whatever the answer to that question, it seemed essential that the beneficiary State should receive fair compensation.

9. In the final analysis, the important problem was how to draft the future convention so that it might protect the legitimate interests of all members of the international community. That involved philosophic, economic and legal considerations. In the legal sphere alone, with which the Commission was dealing, such fundamental principles were at stake that the Commission could not embark on any progressive development of international law. Those

principles included the *pacta sunt servanda* principle and the principle of compensation for injury to the interests of others. And those principles could not be infringed without strong justification. As there was no such justification in the present case, he agreed with the Special Rapporteur's conclusion.

10. It should be stated in the commentary that the Commission had considered at length the arguments for and against and had reached the conclusion that it would be better not to include the rule of implicit exception in the draft.

11. Mr. MARTÍNEZ MORENO said that the problem of Customs unions was highly complex. The position of the Central American region, as reflected in the legal instruments signed by the Central American countries and in the statements of Central American representatives in the Sixth Committee of the General Assembly, was that the present articles should embody the implicit exception. The Central American countries had concluded agreements containing unrestricted most-favoured-nation clauses long before a Central American Common Market had ever been envisaged. In keeping with the principle of *pacta sunt servanda*, the key instruments establishing the Central American Common Market had contained provisions instructing the States Parties to renegotiate treaties containing most-favoured-nation clauses which had been entered into before the formation of the Common Market, to terminate them, where possible, and not to enter into further trade agreements without inserting the Central American exception clause.

12. If circumstances were such that a Central American country could not extend to an extra-regional State the special treatment granted to the members of the Central American Common Market, would it be committing an international offence entailing international responsibility? The Special Rapporteur considered that, for reasons of distributive justice, if a State failed to grant to a country from outside the region the same benefits as those applicable to members of the economic association, it would be obliged to compensate that country because it had refused to grant equal opportunities and because the act of so doing was discriminatory. However, he wondered whether the act would constitute a material breach under the terms of article 60 of the Vienna Convention on the Law of Treaties.⁶ The answer might be in the affirmative, for it was to some extent a violation of a provision essential to the accomplishment of the object or purpose of the treaty. On the other hand, there might, by analogy with penal law, be certain grounds under *jus gentium* for release from responsibility.

13. In the discussion on the topic of State responsibility he had raised the question whether, apart from the rules of *jus cogens*, there might not be other grounds for release from responsibility and other exceptions to the general rule,⁷ and had referred specifically to the case of

⁶ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

⁷ See 1369th meeting, para. 19.

⁵ *Ibid.*, para. 54.

the Central American countries which had concluded most-favoured-nation agreements before the formation of the Central American Common Market. Despite his conviction that the articles should embody an implicit exception, he was not opposed, at least in the first reading of the articles, to the view of the Special Rapporteur and of Mr. Sette Câmara that the exception should, for the moment, be regarded as conventional in the case of economic associations.

14. The reason was simply that there might be other equally important exceptions. For instance, a whole range of international instruments existed to govern the prices of certain commodities. He had in mind those instruments, concluded by many nations after lengthy negotiations between producers and consumers, which sought to establish a fair price for the producer without laying too great a burden on the consumer, such as the international agreements on coffee, sugar and wheat. The Special Rapporteur might consider the possible impact of commodity agreements on the most-favoured-nation clause.

15. It had been pointed out that the term "Customs unions" was being used to cover all types of economic associations. In fact, economic associations or groupings took various forms, such as free-trade areas, common markets, monetary unions or even combinations thereof, but the least common form was the Customs union. In Latin America, neither the Central American Common Market, nor the Latin American Free Trade Association nor the Cartagena Agreement (Andean Pact) constituted a genuine Customs union. Consequently it would be better, in the Commission's report, to speak of "economic associations".

16. Lastly, he fully endorsed the idea of inserting in the draft an exception in the case of developing countries. That was essential, for reasons of justice. The terms of trade between the industrialized and the developing countries were constantly deteriorating. The gap between the prices of manufactured goods and raw materials was continuing to grow wider, to the detriment of the poor nations. The Special Rapporteur fully recognized that situation and had realized the desirability of incorporating in the draft an appropriate provision in favour of developing countries.

17. Mr. Tabibi said that, in the Sixth Committee, the representatives of members of the European Economic Community had repeatedly argued for recognition of the Customs-union exception. At the same time, the representatives of the third world had forcefully argued that recognition of that exception, in the codification of the most-favoured-nation clause, would disrupt trade relations between Member States of the United Nations and discriminate against the economically weaker members of the world community. Many representatives had maintained that there was no customary rule of international law embodying the Customs-union exception and that the question did not relate to article 15 but should be studied in relation to article 7.⁸

⁸ For the text of the articles already adopted by the Commission, see *Yearbook...* 1975, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

18. It was apparent from the debate in the Sixth Committee and also from the Commission's discussion that the legal position on the issue was that described in paragraph 53 of the Special Rapporteur's seventh report (A/CN.4/293 and Add.1). Most-favoured-nation clauses, unless explicitly agreed otherwise, did attract benefits granted within Customs unions or associations like EEC. The only way to deal with the situation, if complications arose, was by means of mutually acceptable arrangements. The experience of EEC demonstrated that its members had lived in harmony and prosperity, and that the possibility existed for making any arrangements deemed to be necessary. At a time when the world was endeavouring to eliminate trade barriers, to establish the exception as a rule would only create additional barriers.

19. The Commission should promote the law of development in favour of all of the members of the community of nations, particularly the weaker nations, rather than protect the strongest. Mr. Hambro's statement that, if the draft was to incorporate rules in favour of the developing countries, it should also embody a rule of progressive international law in favour of Customs unions,⁹ was not acceptable. The problems facing the supporters of Customs unions were simply those of treatment of a minor ailment, while the problems of developing countries, which made up two thirds of the world community, were problems of poverty, disease, and starvation—problems of world concern.

20. Lastly, the arguments of advocates of Customs unions defended the economic interests of the members of such unions and conflicted with the interests of outsiders. In practice, they merely created further trade discrimination and further division based on political interests. It had been rightly observed that the purpose and the impact on world trade of an economic association like the Central American Common Market were entirely different from those of EEC.

21. He fully endorsed the position adopted by the Special Rapporteur and saw no need to include a rule on the Customs-union exception. Obviously, if a rule were inserted in the articles, the draft would be rejected by the great majority of States.

22. Mr. KEARNEY said that the experience of GATT demonstrated the great difficulties of deciding on the conditions that would justify a release from earlier commitments regarding most-favoured-nation treatment when a Customs union was formed and of determining compensation in such cases. If, in the light of that experience, the Commission were to uphold the thesis of an exception for Customs unions, could it in all conscience include a provision in the draft and proceed to ignore the whole range of problems that were bound to arise? For example, would a State entitled to most-favoured-nation treatment have the right to terminate the agreement or to require compensation? If so, would rules be drafted to govern the granting of compensation? Enormous technical knowledge would be required in order to deal with those problems.

⁹ See 1382nd meeting, para. 14.

23. Again, as Mr. Martínez Moreno had pointed out, there were considerable differences in the types of economic associations. Customs unions were merely one form of such associations. The difficult problem would arise whether distinctions would have to be drawn. It was not possible to include a provision to the effect that any type of economic association, regardless of its nature, was entitled to an automatic exception for its members in respect of most-favoured-nation clauses.

24. For practical reasons, it would not be advisable to include a provision concerning exceptions for Customs unions or other types of economic associations and nothing more. On the other hand, for the purpose of focusing attention on the problem, it would be possible to follow Mr. Hambro's suggestion¹⁰ to include a statement that the articles were not intended to determine the relationship of economic associations and most-favoured-nation clauses. The effect would be to relegate the problem to one of the application of the general law of treaties and, under the Vienna Convention on the Law of Treaties, the rules regarding successive treaties would operate. In that case, a State entering a Customs union would be under an obligation at least to provide some restitution to a prior partner under a most-favoured-nation clause.

25. In conclusion, he wished to point out that, if the European Economic Community became one State, the rules concerning State succession would apply, but the Commission should not concern itself with the result of the application of those rules at the present time, while EEC, or any other Customs union, still remained a group of independent States.

26. Mr. CALLE Y CALLE said that the Customs-union exception was a matter which had been mentioned by the Special Rapporteur in his earliest reports; it was one which the Commission could not ignore and leave in a kind of limbo of possible exclusions.

27. It was apparent from paragraph 45 of the Special Rapporteur's seventh report that the Sixth Committee had been divided in its views. At the present juncture, the question had been placed on the level of what might be termed the pure theory of the most-favoured-nation clause which held that it was a mechanism which admitted of no exceptions or even conditions. But there was a difference between the unconditionality of the clause and its application. The ultimate purpose of the clause was to place competitors on an equal footing; in other words, a third State was entitled to claim the treatment accorded to another third State. Clearly, if the member countries of the Andean Pact, which extended special treatment to one another, granted special treatment to the United States of America, which did not form part of that economic association, the Soviet Union, for example, could legitimately claim entitlement to the same treatment. The clause would place those two States on an equal footing.

28. However, nations formed associations for economic and political reasons, and to accelerate integrated devel-

opment. The Commission should ask itself if it was performing a service to States and accelerated integrated development, or if it was consecrating a clause which favoured equal competition. From a strictly logical standpoint, Mr. Ushakov was right. On the other hand, it was not possible to maintain that exceptions or limits lay outside the scope of the most-favoured-nation clause. The articles now being drafted did not relate exclusively to trade. States granted most-favoured-nation treatment in a number of areas, for instance the movement of individuals. Cases would arise in which the beneficiary State had to realize that special treatment could still be extended, despite the existence of an economic association or Customs union, but that other types of treatment would not be extended because, by their very nature, they lay outside the scope of the clause.

29. In his view, the commentary to article 15 should be strengthened to indicate that the exception could not be ruled out because of the absence of a customary rule. Sir Francis Vallat had pointed out that although the exception did not exist in the form of a rule of customary international law it was none the less very common, as could be seen from State practice. He had pointed out that 280 treaties concluded in the period between the two world wars had incorporated an express exception. Nevertheless, many other treaties, in which the exception was not expressly stipulated, would be interpreted in favour of the granting State, in view of the specific nature of the reciprocal treatment justifiably extended to partners in an economic association.

30. Mr. ŠAHOVIĆ said that, at the twenty-seventh session, in the discussion on the Special Rapporteur's earlier reports, he had supported the position taken by the Special Rapporteur that it was not necessary to adopt a general rule concerning the relationship between Customs unions and the most-favoured-nation clause.¹¹ At the same time, he had pointed out that the trend towards the establishment of Customs unions or economic associations in general was a fact which had to be taken into account in the draft articles. To-day, it was clear from the Commission's discussions and the views expressed by members of the Sixth Committee of the General Assembly, that the problem was still far from being solved. That did not mean that the views of the Special Rapporteur were not valid: on the contrary, at the present session he had succeeded in formulating still more forcefully than the previous year his basic idea that it was not necessary to include in the draft articles a special provision for economic associations.

31. The problem before the Commission was not new, but it had become broader. The discussions which had already taken place and the articles which still had to be considered showed that the basic problems had already been settled. The only outstanding problems were those relating to restrictions and exceptions—in other words, extra-judicial problems concerning the position of the draft articles in international law as a whole. The Commission therefore had two tasks to perform at the present session. It had to situate the draft articles in the general

¹⁰ *Ibid.*, para. 21.

¹¹ *Yearbook*. . .1975, vol. I, p. 197, 1342nd meeting, para. 20.

context of international law and to take account of the political and economic problems which arose in the day-to-day life of the international community. Those extra-judicial factors were particularly important because of the present economic crisis, and the Commission should take those circumstances into account and endeavour to find solutions.

32. With regard to the specific phenomenon of economic unions, the first task was to determine the influence which it could have on the operation of the most-favoured-nation clause in international law. A possible definition of the legal character of economic associations or Customs unions might be that they were associations of subjects of international law resulting from the will of a limited number of States which had decided to join together to solve certain problems of common concern in their mutual interest. Such associations were quite legitimate, but the question which arose was how the special rules governing them effected the general régime of the most-favoured-nation clause.

33. With regard to the exceptions to the clause, first it should be noted that there was a certain hierarchy in exceptions. The international community as a whole accorded absolute priority to exceptions in favour of the developing countries, but States were not in agreement on the importance which should be attached to economic associations or Customs unions. Exceptions in favour of Customs unions could therefore not be placed on the same footing as exceptions in favour of developing countries, which was what the generalized system of preferences was based on. Preferences in favour of developing countries were an exception accepted by all members of the international community. The Special Rapporteur had therefore been right to devote a separate article to that exception. Exceptions in favour of Customs unions, on the other hand, should not be made the subject of a general rule. The Commission should respect the sovereignty of States and their right to establish Customs unions, but it should not treat members of such unions in the same way as developing countries.

34. The problem then was therefore essentially a practical one: should the draft articles include a special provision concerning Customs unions and, if so, how should it be formulated? The Special Rapporteur had made a number of suggestions, and the situation was already mentioned in a number of articles, particularly articles 14, 15 and D. On the basic question, which was that of the relationship between obligations deriving from agreements on Customs unions and those arising from other agreements, the Special Rapporteur had also supplied a number of answers, based on the law of treaties and general international law. The members of the Commission had said that positive international law enabled those problems to be solved without difficulty. Perhaps some indication to that effect might be given in the draft articles.

35. The most-favoured-nation clause had a place in present economic law, which attached great importance to it, but it was only one of the instruments upon which international relations should be based. Thus, the Commission, while respecting the value of the clause, should

endeavour to adapt the draft to the needs of international life, bearing in mind the large number of economic associations now being formed. The clause should apply not only between developed and developing countries, but also between capitalist and socialist countries; in other words, between countries with different economic and social systems. That would mean taking account of intermediate and transitory situations, if the draft was to be accepted by all States. Or course, the Commission could make no proposal at all and leave it to States to decide, but he thought that it ought to try to find a solution in order to situate its draft articles in the general context of the present economic order and of general international law.

36. Mr. QUENTIN-BAXTER said that he wished to explain his position in relation to a number of points which had been raised by other speakers in the course of the debate. He would deal first with the thesis put forward by Mr. Ushakov that the very inclusion of a clause on the Customs-union issue in a most-favoured-nation agreement would be sufficient to take it out of the category of agreements covered by the present draft.¹² On that point, he had already briefly stated his position during the discussion on article D¹³ and he had not changed that position since. It would be fully recognized that States were free to contract in any way they wished; none of the rules in the present draft were intended to be of a peremptory character. Only a normative benefit was expected from the approach regarding exceptions of the kind now under discussion as not permitted by the scope of the present draft articles.

37. He did not believe that the view put forward by Mr. Ushakov was practicable. The notion of the most-favoured-nation clause was so well known in international practice that any attempt to align it differently could only lead to confusion among States and to a limitation of the practical application of the present set of draft articles. It was of the essence of the most-favoured-nation clause system not to limit the exclusions that States were entitled to make in their dealings with each other. What that system did was to control rigorously the impact upon third States of each agreement that they drew up. It therefore seemed to him that, if the Commission wished to avoid any confusion in its work it could not, without a new decision of principle, pursue the line suggested by Mr. Ushakov.

38. The present ambit of the draft articles was primarily defined in articles 1, 4 and 5. As he saw it, there was really no disagreement among members in their understanding of State practice in the matter of Customs unions. It was a well-known fact that, where States had pressing reasons of high policy for contracting special relations with each other, their need and their desire to do so would prevail to the extent necessary, even over general obligations that they had already contracted previously. State practice, however, also showed that, when such a situation arose, the State seeking to join the new system would regard itself—and should regard itself—as having

¹² See 1382nd meeting, para. 41.

¹³ 1379th meeting, para. 27.

an obligation to adjust its relationship with the other States which are already bound.

39. It seemed to him that the only question facing the Commission was whether, in drawing up residual rules, it could safely presume that where an agreement was silent, the States parties to it did—or did not—reserve to themselves the right to make exclusions. Despite the excellent discussion which had taken place, he found the greatest difficulty in concluding that the Commission was entitled to come down on one side or the other on that argument.

40. As occurred in the general course of treaty relationships among States, new situations would undoubtedly cause changes to be made: a State had to take an initiative to release itself from obligations it had accepted and the other States with which it had formed arrangements would in almost all cases recognize the necessity of adapting themselves to the new situation. State practice also showed that the solutions adopted were sometimes not based on principles and that they would often be related to a code of conduct established by a body such as GATT.

41. In the present subject more than in any other, it was necessary not to assume that any rules the Commission drew up would themselves automatically dispose of the problems that would arise in the complexity of international life. That principle was one which was becoming increasingly familiar. There were rules governing the demarcation of continental shelves between adjacent States, but when all the rules had been applied, there was still a need, in some topographical situations, for the States concerned to determine the effect of the rules and the manner in which they should be applied.

42. In the present set of draft articles, when dealing with the concept of material reciprocity, the Commission was very clear about the general nature of that concept; it nevertheless fully realized that in its practical application at different times and in different contexts, there had been conventions or understandings—and sometimes quite arbitrary rules of thumb—as to how the concept would be applied. As he saw it, that was one of the reasons for the difficulty in drafting a suitable rule or exception to deal with the Customs-union issue.

43. The rule would need to strike a balance between the notion of a State's freedom to determine its own affairs and that of a duty to negotiate with, and perhaps compensate, the other State affected. The efforts to draw up such a rule would take the Commission beyond the bounds of the present subject and perhaps into the area of State responsibility, setting a problem that was as difficult as any so far encountered in the discussion of that topic. Viewed in another way, the problem could extend to a primary rule situation with which it was hardly the purpose of the present draft to deal.

44. Over and above all those considerations, there was the difficulty—referred to by several speakers during the debate—of defining new terms. The Commission would have to decide exactly what it meant by a "Customs union" or a "free-trade area" or again, by the various situations of generalized preferences which could and did arise. In doing so, the Commission would have to take

due account of the fact that the practice of the most-favoured-nation clause in multilateral negotiation was constantly evolving at the very time at which the Commission was discussing it.

45. For those reasons, he was somewhat dubious of the possibility of constructing a suitable draft, even as a method of placing the Customs-union issue before the General Assembly in order to obtain the reaction of States. He would not go so far as to say that he was opposed in principle to the preparation of such a draft; that would be unreasonably dogmatic. Moreover, the Commission was considering other possible exceptions and it was perhaps not wise to close any door that might in the end make it easier to arrive at a balanced and acceptable answer.

46. He feared that the excellent debate which had taken place did not provide the Special Rapporteur with any very clearly defined path for drawing up any sort of article dealing with the Customs-union issue. It would perhaps be unreasonable to ask the Special Rapporteur to undertake that task until the Commission was much more certain of the general direction in which it wished him to move and of the possibility of arriving at a result within the time-limit of the present session of the Commission.

47. Mr. YASSEEN said he still thought that what was involved was merely a residual rule, a rule to fill the gap left by the unexpressed intentions of the parties. The freedom of the parties must be recognized, but a presumption in favour of one solution or the other must also be established. That was the real problem. Mr. Reuter had put it on a different plane by invoking the right of States to associate with each other, even in the Customs sphere, and concluded in favour of the presumption of an exception restricting the scope of the most-favoured-nation clause in the case of a Customs union.¹⁴

48. It could be argued that States were entitled to join together in any way they wished and that that was a prerogative of their sovereignty, but in international law, the exercise of one right could not infringe another right, unless it was accepted that the new right was a superior right. The most-favoured-nation clause was established by an agreement based on the rule of *pacta sunt servanda*. The fact that a granting State which became a member of a Customs union refused to grant the beneficiary State most-favoured-nation treatment would run counter to the general character of the clause, which could not be limited by invoking an implicit intention. That was a case of pure responsibility—not moral, but legal responsibility—because it involved a derogation from an international obligation.

49. In its draft convention on the succession of States in respect of treaties, the Commission had acknowledged the right of States to unite, but it had not referred to the consequences of the exercise of that right and had reserved the question of responsibility. In the present case, therefore, the existence of State responsibility was conceivable; the State which had not made any reserva-

¹⁴ See 1382nd meeting, para. 54.

tions and refused to grant most-favoured-nation treatment would be obliged to make reparation. The State might then not apply the treaty, but its responsibility would be entailed and it would have to accept the consequences. That was what happened when a State concluded a subsequent treaty which was incompatible with an earlier treaty.

50. Mitigating circumstances could perhaps be imagined, but they would not change the nature of the responsibility itself; they would, however, permit a solution to be reached by negotiation in good faith.

51. States had the right to unite, but if they exercised that right they must accept the consequences and not forget that there were other rights equally worthy of respect. Sir Francis Vallat had said that there was no rule in favour of an exception to the clause in the case of Customs unions, but that the exception was to be found in many treaties. The practice showed that States were generally in favour of such an exception. He therefore believed that, if the Commission wished to respect international practice, it should not establish a presumption in its draft articles in favour of an exception to the clause but leave States to make an exception if they so desired. It might perhaps emphasize that right by stressing the freedom of States in that matter. International practice required that States should be explicit if they wished to limit the scope of a most-favoured-nation clause. Thus, by not formulating any presumption, the Commission would be adopting a position that was more in conformity with practice.

The meeting rose at 1 p.m.

1384th MEETING

Friday, 4 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

THE CUSTOMS-UNION ISSUE (*concluded*)

1. Mr. USHAKOV said he wished to clarify certain points concerning the capacity of States to restrict the application of the most-favoured-nation clause by negotiation, in the case of a Customs union.

2. Clearly, *ratione materiae*, any limitation was possible, since the parties agreed on the subject-matter to be

covered by the clause. Thus a clause could apply to one matter only, without that limitation constituting an exception. *Ratione personae*, on the other hand, no limitation was possible. The granting State could not invoke its membership of a Customs union to deny the benefit of the most-favoured-nation clause to the beneficiary State, since the new situation created by the establishment of the Customs union in no way changed the pre-existing situation and the third State remained the third State. In his view, therefore, it was not possible to make an exception to the most-favoured-nation clause for Customs unions.

3. Mr. USTOR (Special Rapporteur), summing up the discussion, said it had shown that, subject to some reservations, there was virtual unanimity among members as to the position *de lege lata*: there was at present no general rule of customary international law that would exclude Customs-union benefits from the operation of the most-favoured-nation clause in the absence of an express stipulation in the treaty containing the clause. Some members, however, had drawn attention to the very many Customs-union exceptions contained in treaties and to the important exception embodied in article XXIV of GATT and had taken the view that those exceptions reflected the practice of States.

4. For his part he agreed with Mr. Yasseen that a general rule on the Customs-union exception could only be deduced from practice showing that States which had not stipulated an exception were prepared to admit the existence of an implied exception in regard to situations arising from a Customs union. Since no such practice existed, it was clear that the implied exception did not constitute a general rule of customary international law.

5. Approximately half the members of the Commission favoured the inclusion in the draft articles of a rule stating the implied Customs-union exception, but they agreed that it would be a rule *de lege ferenda*, so that its inclusion in the present draft would not constitute codification, but progressive development of international law.

6. The Statute of the Commission contained, in article 16, very detailed provisions on the progressive development of international law. Those provisions, which were of a procedural character, made the Commission's powers very much subject to the wishes of States. From the point of view of substance, however, the Statute did not place any limits on the powers of the Commission to propose changes in international law. With regard to such proposals, however, he agreed with Mr. Tammes that progressive development was desirable only if the proposed changes were in the direction of justice and of greater reliability of the law.

7. It had been suggested by some members, including Mr. Hambro, that since the Commission had been bold enough, in draft article 21, to accept considerable changes in the law for the benefit of the developing countries, it should be equally bold with regard to the Customs-union issue.¹ He could not accept that argument: the introduction of changes in the law to meet the needs of the

¹ See 1382nd meeting, para. 14.

developing countries was a response to compelling demands for justice expressed by the international community. The suggested Customs-union exception did not have the same ethical pressure behind it and was much less important.

8. With regard to the various tentative proposals that had been made, he would deal first with that based on the 1936 resolution of the Institute of International Law to which Mr. Hambro had referred. The resolutions of that Institute were not, of course, of a law-making character; they only expressed the wishes and opinions of its membership. He did not believe that an adequate solution to the Customs-union issue would be provided by Mr. Hambro's suggestion of a stipulation that the provisions of the draft articles would not prejudice any question that might arise from a Customs union or a free-trade area.²

9. Mr. Reuter had drawn attention to the fact that, in its draft articles on succession of States in respect of treaties, the Commission had included a provision on the effects of a uniting of States in respect of treaties in force at the date of the succession of States.³ Under that provision, certain treaties concluded by the predecessor States would lapse, because their application would be incompatible with the purposes of the union. The situation dealt with in that provision, however, was different from the one under discussion. If two or more States united, they ceased to exist as separate States, and the successor State formed by their union would not be responsible for certain treaties that they had previously concluded. In the case of a Customs union, however, the member States continued to exist and remained sovereign; they were still in a position to fulfil their obligations. If they renounced certain powers in their relations with other members of the Customs union, that did not relieve them of obligations previously undertaken vis-à-vis outsiders.

10. The argument derived from article 30 of the draft articles on succession of States in respect of treaties was, moreover, contradicted by another point which Mr. Reuter himself had stressed, namely that a granting State which entered into a Customs union had a duty to negotiate with the beneficiary State and to ensure that no injustice was done to it. The fact that the granting State was under an obligation to compensate the beneficiary State for any loss of most-favoured-nation benefits showed that there was no analogy with the case of the lapsing of certain treaties in the event of a uniting of States.

11. Looking at the problem realistically, the Customs-union situation appeared to be only one instance among many of a State finding it necessary, for economic reasons, to terminate its obligations under a treaty. From the legal point of view, however, the *pacta sunt servanda* rule applied; if one State granted most-favoured-nation treatment to another under a treaty, it was under an obligation to perform that treaty obligation. A situation

could of course arise, not only because of a Customs union but for other economic reasons, in which the granting State found itself unable to keep its promise.

12. The non-fulfilment of a promise to give most-favoured-nation treatment would thus represent, for the granting State, the breach of a treaty obligation. Since the obligation in question only affected economic interests, the breach would not constitute an international crime; it would simply engage the international responsibility of the granting State. Hence the matter came under the law of State responsibility, which was a separate topic on the Commission's agenda. Moreover, entry into a Customs union would not always have that effect. In the example given by Mr. Ushakov, the beneficiary State relied on the most-favoured-nation clause to protect its position in the granting State's market for a product which was not affected by the Customs union. Since the union had no detrimental effect on the exports of the beneficiary State, the entry into it of the granting State was not relevant.

13. The Commission now had to consider what course it would adopt. The question was of limited importance, because any provision on the Customs-union issue would have only a small field of application. The bulk of international trade was conducted by States that were Contracting Parties to GATT, which had its own rules and appropriate machinery for dealing with the matter. The Commission could neither modify those rules nor impose them on States which were not Contracting Parties of GATT; any attempt to do so would be fruitless. Moreover, States which were not Contracting Parties to GATT nearly always included a stipulation on the Customs-union exception in their bilateral treaties. Such stipulations were, of course, rather rudimentary compared with the elaborate provisions of GATT, but the fact remained that those States had found a means of dealing with the problem.

14. That being the present position, he saw no compelling reason to change it. The most-favoured-nation clause meant *prima facie* that the granting State would extend to the beneficiary State the same advantages as it gave to any other State in the world. States were well aware of that position and if they wished to make an exception for Customs unions, they could do so explicitly. It was an altogether unacceptable proposition to say that a pure most-favoured-nation clause was presumed to be qualified by an implied exception.

15. It was true that some representatives in the Sixth Committee of the General Assembly had drawn attention to the difficult position of a granting State that wished to join economic grouping. But he had been struck by the fact that most of them represented States that were Contracting Parties to GATT, under which the question was covered by article XXIV. If a Customs union conformed with the terms of that article, no problem would arise for those States. Moreover, he saw no reason why Contracting Parties to GATT should regard it as important to suggest rules for States which were not Contracting Parties and which had not accepted any general rule on the effects of a Customs union on the application of the most-favoured-nation clause.

² *Ibid.*, para. 21.

³ *Ibid.*, para. 53.

16. Apart from Mr. Hambro, none of the members who wished to include a rule on the Customs-union issue had suggested that the rule should release the granting State, on its entry into a Customs union, from its obligations to the beneficiary State. They had merely stressed the indisputable freedom of the granting State to enter a Customs union. The rule which those members advocated would release the granting State from its obligations under the most-favoured-nation clause only subject to its duty to compensate the beneficiary State for any loss of its market. That proposal was not very far removed from his own approach, which was to regard non-fulfilment of the promise of most-favoured-nation treatment as a breach of an international obligation, which engaged the international responsibility of the granting State. Should a case of that kind come before an arbitral tribunal, pecuniary compensation would be awarded to the beneficiary State. Most members would share his view that such a matter should be covered by the rules on State responsibility and that it had no place in the present draft.

17. As to developing States, their position would differ according to whether they were members of a Customs union or not. Developing States which formed a Customs union among themselves would, of course, wish to free themselves from most-favoured-nation obligations. Developing States which were outside an economic union would naturally wish to retain their most-favoured-nation rights or to obtain compensation for any loss of those rights.

18. His approach to the Customs-union issue had been described by Mr. Reuter as an eloquent plea for the view prevailing in his own region. He had tried to be as objective as possible and he was satisfied that he was advocating not only the prevailing view of one region, but also a position that adequately reflected contemporary international law and its progressive development. The existing situation in most parts of the world was that the Customs-union issue was adequately settled. There was no reason to change the existing presumption in favour of the *prima facie* meaning of the most-favoured-nation clause; neither the demands of distributive justice nor the need to make the law more reliable required such a change.

19. He was in the hands of the Commission but, as Mr. Quentin-Baxter had pointed out at the previous meeting, it would be difficult for him to draw up a provision on the Customs-union issue that went against his own views. He therefore suggested that the Commission should submit a detailed report to the General Assembly and to Governments, reflecting the views of its members. It would then be for States to decide on the course that should be adopted; for under the Statute of the International Law Commission, it was States which were the judges in all matters of progressive development.

20. Mr. HAMBRO said he wished to clarify his position, as stated earlier⁴ in reply to the comments by the Special Rapporteur, whose views he fully understood but with which he was unable to agree.

21. In the first place, throughout the Commission's discussions on the most-favoured-nation clause, he had never suggested that there was the same ethical right for Customs unions as there was for developing countries. Secondly, he wished to reiterate his full agreement with the exception for the benefit of the developing countries. Thirdly, he had not urged the Commission to be as bold on the Customs-union issue as it had been on the question of the developing countries. He had only stressed that one could not say that the rule in favour of the developing countries formed part of customary international law and at the same time adopt the opposite view in regard to Customs unions. In fact, the practice in regard to developing countries was more recent, and was not more general, than that relating to Customs unions. The provision on the developing countries was a matter of progressive development and he supported that development.

22. The question of Customs unions was not a minor matter. As he had already stressed, it was a question which concerned not only the developed countries, but also the developing countries, since they were equally interested in forming economic groups, which could be of great assistance to them.

23. Lastly, he reminded the Commission that he had suggested a number of possible solutions for the Customs-union issue and that one of his suggestions had been to deal with it by means of an article modelled on article B, which would read:

The provisions of the present articles shall not prejudice any question that may arise from a Customs union or a free-trade area.

24. Mr. REUTER said that the discussion had only confirmed his pessimism. He noted that the Special Rapporteur had described the matter under consideration as one of minor importance, and that he believed it would be fruitless to include an exception in favour of Customs unions in the draft articles. In his (Mr. Reuter's) opinion it was by no means a minor question. The future convention, even if it was only to serve as a model, would apply in the future and would certainly have an important influence on future negotiations. Moreover, the article proposed by the Special Rapporteur might even have effects on the past. The last-mentioned aspect of the problem seemed to have worried some members of the Commission, whereas others were more concerned with the most-favoured-nation clauses that would be included in future agreements.

25. The most important question now being examined by the United Nations was that of a new international economic order, so the Commission should consider what repercussions the draft articles might have on that question. In that regard, the point which the Commission was now studying was of considerable importance. Since he has adopted a very clear-cut position, he did not feel qualified to give an opinion on whether the discussion should be continued in the Drafting Committee or in the Commission itself. The views of members of the Commission would certainly be reported in the summary records and in the Commission's report on its present session, but those views were, for the most part, also very clear-cut.

⁴ *Ibid.*, paras. 13 *et seq.*

26. Unlike Mr. Tammes, he did not think the Commission should undertake progressive development of international law in the present case. It was called upon to determine, not how matters would stand in the future, but what was happening at present. The question which arose was the following: did a most-favoured-nation clause have the effect of automatically extending to the beneficiary State the advantages granted within a Customs union? Some members of the Commission had given an affirmative and others a negative answer; some had invoked the existence of a customary rule, while others had based their position on interpretation, observing that even in the absence of a customary rule it was normal to interpret a most-favoured-nation clause according to practice. Those who adopted that view should define what was meant by "practice" and whether, for example, it was a developing custom. He, too, based his position on interpretation, but under article 31 of the 1969 Vienna Convention on the Law of Treaties,⁵ a treaty must be interpreted taking into account, among other things, any relevant rules of international law applicable in the relations between the parties. For that reason he considered that, where a most-favoured-nation clause did not contain any provision in favour of Customs unions, account must be taken not only of practice, but also of the fundamental right of each State to become a member of such a union; a State could not be presumed, in the absence of an express provision, to have renounced that right.

27. Several members of the Commission, and the Special Rapporteur himself, appeared to reproach him for trying to transfer the question to the area of State responsibility. In that connexion, he protested against the Commission's method of work. In article 60 of the 1969 Vienna Convention, the Commission had indirectly dealt with a question of responsibility, but it had refrained from dealing with all other questions of responsibility. Similarly, in the draft articles on succession of States in respect of treaties, it had included a reservation on the question of responsibility. In his view, it was not possible always to reserve questions of responsibility, especially where a substantive rule was involved. That was why he had raised the question whether States were committing an international delict when they voluntarily joined together in a union which made the performance of prior treaties impossible.⁶ His view was that there was no international delict. He was willing to agree that the Commission should not settle that delicate question at present, but he wished to emphasize the importance of the views to be expressed on it in the commentary.

28. Not only had the Special Rapporteur maintained that the inclusion in the draft of an exception in favour of Customs unions would be fruitless, but some members of the Commission had made veritable funeral orations, in particular over GATT, which they held to be operating very badly. Although he did not share their concern, he agreed that it was open to question whether the prepara-

tion of draft articles on most-favoured-nation clauses that would be inapplicable in the future would be useful or not.

29. With regard to the developing countries, he wished to affirm his complete confidence that although they were not developed economically they were certainly developed politically, and that they would undoubtedly be able to defend their interests as required. He would unreservedly support any provision in their favour, even if it placed other States in a difficult position. The developing countries were not called upon to defend the interests of the European countries, which had exploited them long enough, and he would welcome their success. But, although he supported the thesis of the developing countries, it rather worried him, as a lawyer, that other countries should be excluded because they were not developing countries. It was unsatisfactory to draft a clause so strict that no one would approve of it and that the only States which accepted it would be those obliged to do so for other than legal reasons.

30. Mr. USHAKOV expressed astonishment that it could be thought that the draft articles might prevent States from forming Customs, political, economic, cultural or other unions. He wondered how a most-favoured-nation clause or any other clause contained in a bilateral or multilateral treaty could prevent States from establishing a union by common consent, whatever its sphere of activity. No other international instrument which the Commission had prepared or was preparing, including the draft articles on State responsibility, could have such a result. Nor could the draft under consideration prevent States from concluding treaties on a basis other than the most-favoured-nation clause. States had full freedom to include any clauses whatsoever in their treaties. That point might be stated in a separate article. Such a solution would certainly be a strange one, but he would be prepared to accept it.

31. With regard to the problem of retroactivity, he stressed that the future convention would not be retroactive, not only by reason of article C of the draft, but also because, as provided in article 28 of the 1969 Vienna Convention, a treaty was not retroactive unless a different intention appeared from the treaty or was otherwise established. That non-retroactivity, however, did not affect the concept of the most-favoured-nation clause itself, which remained the same. A most-favoured-nation clause containing an exception for a Customs union had never been and would never be a true most-favoured-nation clause. The draft was not intended for clauses of that type, though they were certainly valid, and the Soviet Union itself had accepted, in a great many of its trade agreements, clauses excluding the EEC countries from the category of third States.

32. The comparison between a Customs union and a State resulting from a uniting of two or more States was quite invalid. Moreover, the basic principle in the case of a uniting of States was that of the continuity of treaty obligations. Such a comparison would therefore mean that obligations contracted before the formation of a Customs union subsisted. The position of a Customs union might as well be assimilated to that of a newly independent State; it would then be the "clean slate"

⁵ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

⁶ See 1382nd meeting, para. 52.

principle that would apply. That comparison would be more valid, but such comparisons should be distrusted.

33. Mr. USTOR (Special Rapporteur) drew attention to article C, concerning the non-retroactivity of the present draft articles (A/CN.4/293 and Add.1, para.29), which had been intended to dispel the concern of members who strongly advocated recognition of an implied exception for Customs unions. The article had been submitted in the light of Mr. Tsuruoka's suggestion at the twenty-seventh session that the insertion of such a provision would show that the draft related exclusively to treaties containing most-favoured-nation clauses concluded after its entry into force.⁷ That would make it easier for the supporters of an implied Customs-union exception to adopt the draft articles in their present form, since future granting States would be in a position to include in their treaties a provision excluding benefits or advantages deriving from a Customs union.

34. The CHAIRMAN said that the Special Rapporteur was to be commended for bringing the whole problem to the attention of the Commission. Mr. Hambro was submitting written suggestions to the Drafting Committee, which could discuss the problem and advise the Commission on whether to include a provision in the draft or to insert an appropriate paragraph in its report. If there were no further comments, he would take it that the Commission agreed to that procedure.

*It was so agreed.*⁸

The meeting rose at 12.55 p.m.

⁷ See *Yearbook... 1975*, vol. I, p. 204, 1343rd meeting, para. 25.

⁸ For the decision of the Drafting Committee, see 1404th meeting, paras. 34-36.

1385th MEETING

Tuesday, 8 June 1976, at 3.15 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242) [Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE E (Most-favoured-nation clauses in relation to treatment extended to land-locked States)

1. The CHAIRMAN invited the Special Rapporteur to introduce article E, in his seventh report (A/CN.4/293 and Add.1, para. 82), which read:

Article E. — Most-favoured-nation clauses in relation to treatment extended to land-locked States

A beneficiary State, unless it is a land-locked State, is not entitled under a most-favoured-nation clause to any treatment extended by a granting State to a land-locked third State if that treatment serves the purpose of facilitating the exercise of the right of access to and from the sea of that third State on account of its special geographical position.

2. Mr. USTOR (Special Rapporteur) said that the question of an implied exception in respect of special treatment granted to land-locked States because of their special situation had first been raised at the United Nations Conference on the Law of the Sea, in 1958. In 1964, when dealing with the transit trade of land-locked countries, the United Nations Conference on Trade and Development had adopted a text which stated that the facilities and special rights accorded to land-locked countries in view of their special geographical position were excluded from the operation of the most-favoured-nation clause.¹ That principle had been reaffirmed in the preamble to the 1965 Convention on Transit Trade of Land-locked States of 8 July 1965,² article 10 of which specified that the facilities and special rights accorded by the Convention to land-locked States were excluded from the operation of the most-favoured-nation clause.

3. During the Third United Nations Conference on the Law of the Sea, an informal single negotiating text had been prepared to provide a further basis for negotiation of the special rights of land-locked States. Article 110 of that text stated that

Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.³

That provision was now embodied in article 111 (Exclusion of application of the most-favoured-nation clause) of a revised single negotiating text drawn up for the fourth session of the Conference.⁴ It was evident that there was wide agreement among States that such an exception should be adopted.

4. Article E was simply a translation of the proposed provision into the language employed by the Commission; it broadened the scope of article 10 of the 1965 Convention. The number of land-locked States now stood at 29, of which 20 were developing countries. The principle stated in article E could be regarded as a consolidation of the agreement emerging within the international community and as progressive development of international law.

¹ See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. E.64.II.B.11), p. 25, annex A.I.2, principle VII.

² United Nations, *Treaty Series*, vol. 597, p. 3.

³ See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10), p. 168, document A/CONF.62/WP.8, document A/CONF.62/WP.8/Rev.1/Part II.

⁴ *Ibid.*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 170, document A/CONF.62/WP.8/Rev.1, document A/CONF.62/WP.8/Rev.1/Part II.

5. Mr. PINTO said he noted that article E related to the right of access to and from the sea; but article 58 of the revised single negotiating text dealt with the possibly more important matter of the participation, as of right, of land-locked States in the exclusive economic zones of coastal States. If the Commission decided to deal with that problem in the draft articles, the wording of article E might need to be changed in order to reflect the distinction drawn, in article 58 of the revised single negotiating text, between developing and developed land-locked States. In his view, it might be preferable to incorporate in the draft a general article on the rights of land-locked States.
6. Mr. AGO stressed the special nature and diversity of the agreements by which some maritime States granted land-locked States facilities for access to the sea and for shipping. Such agreements were not normally based on reciprocity. One could thus imagine Switzerland, a land-locked State, concluding an agreement with Italy by which Italy undertook to provide a dock in the port of Genoa for Swiss merchant ships and Switzerland undertook to supply itself with oil brought through a pipeline from Genoa. He asked the Special Rapporteur whether article E should be interpreted to mean that any other European land-locked State could invoke a most-favoured-nation clause to claim dock facilities for its fleet in the port of Genoa without the balancing consideration provided for in the Italian-Swiss agreement.
7. Mr. USHAKOV said that he approved of article E in principle, but feared that it might raise practical difficulties. He asked the Special Rapporteur whether article E related to the special obligations which a maritime State could assume towards a land-locked State or to the general obligations of maritime States towards land-locked States imposed by international customary law or treaty law. Obligations of the second kind were the same for all maritime States; land-locked States could assert their corresponding rights on the basis not of a most-favoured-nation clause, but of generally accepted international law. As to the special treatment which a maritime State undertook to grant to a particular land-locked State, it was treatment on a higher level than the treatment which was mandatory under general international law.
8. He also asked the Special Rapporteur whether a granting State which had granted a land-locked State better treatment than that generally required by international law, was bound by the most-favoured-nation clause to grant the same treatment to other land-locked States. For example, if the Soviet Union had granted special treatment to Afghanistan, a land-locked State, must it grant the same treatment, under a most-favoured-nation clause, to a land-locked Latin American State? Two land-locked States, even if they were neighbours, could be in very different situations.
9. Mr. USTOR (Special Rapporteur), replying to the question asked by Mr. Ago, said that if Italy agreed to grant most-favoured-nation treatment for transit purposes to Switzerland, for example, Italy would necessarily have to take account of such an unconditional most-favoured-nation pledge if it decided, subsequently, to conclude treaties which granted advantages to other land-locked States. In agreeing upon a special advantage, earlier most-favoured-nation commitments always had to be borne in mind.
10. As to Mr. Ushakov's question, he did not think that Bolivia, for instance, could claim transit facilities from the USSR because the USSR was granting such facilities to Czechoslovakia. It was evident that article E should be more precise and that the phrase "unless it is a land-locked State" should be amplified.
11. With regard to Mr. Pinto's comment, it was true that rights to fishing and exploitation of the economic zone were also very important to land-locked States. At present, however, in regard to the most-favoured-nation clause, the revised single negotiating text referred only to transit rights.
12. Mr. AGO observed that, in reply to his question, the Special Rapporteur had referred to the transit of goods, but he himself had referred to the granting of special advantages going beyond what was required by general international law. It seemed that article E would have the effect of obliging Italy, if it reserved a dock in the port of Genoa for Swiss shipping, to open that port to the ships of all the other land-locked States to which it was bound by a most-favoured-nation clause.
13. Mr. USTOR (Special Rapporteur) replied that if Italy had given most-favoured-nation pledges to central European land-locked States before entering into an agreement with Switzerland on the establishment of port facilities, it would have to determine in what respects it was bound by its pledges to those other States. If the pledges were *ejusdem generis*, Italy, by granting special facilities, would be bound to grant similar port facilities to all of the countries concerned. If the pledges were more restricted, that situation would not arise. Mr. Ago had referred to special advantages, but it was precisely the role of the most-favoured-nation clause to generalize such special advantages.
14. Mr. USHAKOV said that the Special Rapporteur had not replied to his first question. If article E was to apply not only to special treatment granted by a maritime State to a land-locked State, but also to the minimum treatment that was mandatory under international law, the Commission would run the risk of infringing general international law. It was not for the Commission to determine the obligations of any maritime State towards any land-locked State under international law. The article must deal only with treatment which was more favourable than the mandatory treatment. It was only if a maritime State granted a land-locked State more favourable treatment than the mandatory treatment that the question arose of the extension of that treatment to another land-locked State under the most-favoured-nation clause.
15. Mr. PINTO said that if article E singled out the important matter of transit rights, but failed to establish an exclusion in the case of fishing rights (which was potentially an extremely difficult problem), the draft might lend support to the idea that fishing rights in the exclusive economic zone could in fact be transferred through the mechanism of the most-favoured-nation

clause. Such a result would be unfortunate, for the participation of land-locked States in the exploitation of the exclusive economic zone was opposed by many countries. The best course would be to draft a more general clause of principle, which did not refer solely to access to the sea. It must be remembered that in regard to fishing rights it was not possible to refer to land-locked as a whole, because a clear distinction was made between the rights of developing land-locked States and those of developed land-locked States.

16. Mr. TABIBI said that the Commission appeared to have lost sight of the original purpose of the article proposed by the Special Rapporteur. Admittedly, the Conference on the Law of the Sea had discussed fishing rights and exploitation of the economic zone, but the main problem was that of free access to the sea. Without such access, it would be impossible for land-locked States to engage in fishing in the economic zone or in its exploitation. The Commission should now deal with the question of access to the sea which, in his opinion, was already settled in international law, for it was covered in many bilateral and multilateral treaties, in the 1958 Convention on the High Seas⁵ and in the 1965 Convention on Transit Trade of Land-locked States.

17. He did not see why Mr. Ago had posed the problem of the facilities granted by Italy to Switzerland; plainly, not all land-locked States would claim such facilities from Italy. In article E, the Special Rapporteur was simply proposing recognition of the treatment that land-locked States were entitled to claim by virtue of the fundamental principle of the freedom of the high seas and because of their special geographical position. The main point was that such treatment related exclusively to land-locked States and could not be claimed by other States under a most-favoured-nation clause. If Governments wished to extend more privileged treatment to land-locked States, there was nothing to prevent them from doing so. A revised text of the article could clarify that point.

18. The Special Rapporteur was to be congratulated on a report which dealt ably with contemporary State practice in regard to restrictions on international trade, as reflected in articles XX and XXI of the General Agreement on Tariffs and Trade,⁶ and to be commended for complying with the unanimous request of the representatives of the land-locked countries in the Sixth Committee of the General Assembly that the Commission should deal with the matter.

19. The text of article 10 of the 1965 Convention on Transit Trade of Land-locked States was now embodied in the revised single negotiating text and there had been absolutely no controversy about it. Moreover, the principle had been adopted by the United Nations Conference on Trade and Development and was reflected in the preamble to the 1965 Convention. In his view, the preamble and the main body of a treaty, as well as any annexes thereto, were all equally important. In effect,

the Special Rapporteur had merely stated a principle that was entirely acceptable to the community of nations. Article E would indirectly assist the land-locked States, which represented one fifth of the international community and included countries that were among the least economically developed. It must always be remembered that the situation of European land-locked countries was completely different from that of land-locked States in the developing world—in Africa, in Asia and in Latin America.

20. Mr. YASSEEN said that the problem of land-locked States was one which arose in all spheres and must be taken into account in the codification of international law. A provision in favour of those States should therefore be included in the draft articles on the most-favoured-nation clause. The international conscience was prepared to take into consideration the problems of land-locked States—owing to the untiring efforts of the representatives of those States, in particular Mr. Tabibi—in numerous international forums. He himself fully understood those problems since he came from a country that was almost land-locked—Iraq had only about 30 kilometres of coast line.

21. The article to be formulated should take the true situation and real needs of land-locked States into account. The subject should first be confined to the problem of the classical freedom of the high seas—in other words, the right of access to and from the sea—since only land-locked States were deprived of that right. To speak of other privileges which land-locked States might hope for—such as the freedom to fish in certain zones and the right to exploit the living and non-living resources of the sea—the land-locked States would no longer be the only States concerned: there would be no reason not to extend those privileges to the other “geographically disadvantaged” countries.

22. The Special Rapporteur had rightly pointed out that, in making an exception to the general principle of the most-favoured-nation clause in favour of land-locked States, the Commission would be applying a well-established general rule concerning those countries. As Mr. Ushakov had quite rightly emphasized, the real problem was raised by the words “unless it is a land-locked State”, for land-locked States were not all in the same situation and, as the Special Rapporteur had pointed out, it was difficult to imagine that Bolivia, for example, would claim the advantages granted by the Soviet Union or China to countries contiguous to them. The absolute nature of the wording of article E should therefore be amended so as to bring out the very precise notion of the exception from which land-locked countries were to benefit. Above all, it should be remembered that the point at issue was not a minimum to which those countries were entitled under general international law, but generous treatment under a specific agreement.

23. Mr. HAMBRO said he was entirely in favour of including in the draft a special provision for the benefit of the land-locked States. He did not believe, however, that it would serve much purpose to consider the matter in terms of an injustice done by nature to countries without a sea coast. Nature was not always just and the

⁵ United Nations, *Treaty Series*, vol. 450, p. 82.

⁶ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), pp. 37-39.

position of the land-locked States was not unique in that respect.

24. He could not agree with Mr. Tabibi that article E was a simple text. The principle involved was certainly simple, but its formulation would undoubtedly prove very difficult. He did not think that the debate so far had shed much light on the issues involved and he would refrain from adding his own speculations. He would confine himself to expressing the hope and the conviction that the Drafting Committee would be able to extract all the useful material from the debate and refer back to the Commission a text that would meet with general approval.

25. Mr. USHAKOV said he was convinced of the need to make exceptions in favour of land-locked States: that was a generally accepted principle which should not be called in question. But the Commission was not required to establish that principle in its draft articles on the most-favoured-nation clause. Matters relating to land-locked States should be settled in the convention on the law of the sea which was in process of preparation. In its draft articles, the Commission should not concern itself with the generally accepted rules in favour of land-locked countries.

26. In paragraph 79 of his report (A/CN.4/293 and Add.1), the Special Rapporteur had quoted the articles on land-locked States proposed by the Second Committee on the Third United Nations Conference on the Law of the Sea at its third session. Those articles reflected the generally accepted position in regard to the rights of land-locked States and the duties of maritime States. The Commission's task was not to establish those rights and duties, some of which had already been defined in other conventions. The question of the mandatory treatment to be granted to land-locked States did not fall within the scope of the draft articles under consideration, since land-locked States were already entitled to certain treatment by maritime States under existing rules. It would therefore be very dangerous for land-locked States if the Commission were to touch on the question of the mandatory treatment reserved for them. That mandatory treatment did not fall within the scope of the draft articles: they were concerned with treatment that was more favourable.

27. If a maritime State had granted a land-locked State more favourable treatment than that to which it already was entitled, it was obvious that the maritime State was not required to grant the same treatment to another maritime State. But the question arose whether it was required to grant the same treatment to another land-locked State. The Special Rapporteur had given an affirmative answer to that question, maintaining that any land-locked State could claim the same treatment. He himself considered that no general rule of that kind could be laid down. In his view, if a granting State granted a land-locked State more favourable treatment than the mandatory treatment, it was not required to grant the same treatment to another land-locked State, for as Mr. Yasseen had pointed out, land-locked States were not all in the same situation. Consequently, no general obligation should be imposed and the question of the

operation of the clause in relation to land-locked States and to other maritime States should be raised. He thought a suitable article could be drafted on the basis of the Special Rapporteur's proposal.

28. He therefore proposed that article E should be referred to the Drafting Committee.

29. Mr. ŠAHOVIĆ supported the inclusion of an article on the treatment to be granted to land-locked States. It was clear from the comments made by the Special Rapporteur and Mr. Tabibi that an article of that kind met the requirements of international law and of economic relations between States. But some problems still had to be solved in order to arrive at a draft which would satisfy the wishes of the international community, the requirements of land-locked States and the general rules of international law.

30. In the article proposed by the Special Rapporteur he saw an attempt to include two rules in the same clause by formulating, first, an exception to the application of the most-favoured-nation clause and, second, a positive rule on the operation of the clause in the relations between granting States and land-locked beneficiary States. In his view, those were two separate problems which should be dealt with separately. He was prepared to accept the principle of an exception because, as the Special Rapporteur had shown, it involved a rule which derived from customary law and was well established in international treaty law. On the other hand, he wondered whether the positive rule contained in the words "unless it is a land-locked State" should be expressly stated in the draft. In his view, it was not necessary to state that rule, since it was not an exception, but the positive application of a principle. Article 109 of the informal single negotiating text proposed at the third session of the Third United Nations Conference on the Law on the Sea, showed that the privileges granted to land-locked States derived from agreements concluded between those States and maritime States.

31. He therefore supported the solution suggested by Mr. Ushakov, namely, that those two problems should be separated and that a separate article should be drafted to deal with the problem raised by the words "unless it is a land-locked State". But it would also be possible to retain the article with those words deleted.

32. Mr. MARTÍNEZ MORENO said that he strongly supported not only the principle of the exception in favour of land-locked States, but also the inclusion in the draft articles of an explicit provision on that exception. International instruments were sometimes the expression of an awareness of the international community and sometimes the result of international negotiations. From both points of view, he believed it desirable to include in the draft the text of article E as proposed by the Special Rapporteur.

33. When the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction had been considering the agenda for the Third United Nations Conference on the Law of the Sea, it had been faced with a number of extremely difficult problems, two of which had attracted particular

attention. The first had been that of the right of innocent passage, which countries bordering on straits wished to maintain in a strict form, and freedom of transit, which was of particular interest to the large maritime powers, partly for reasons connected with the safeguarding of world peace. The second major problem had been that of the land-locked States, some of which had taken an extreme position and had advocated that the proposed 200-mile economic zone should be neither exclusive nor preferential, but should constitute a sort of condominium for the exploitation of the living and non-living resources of the sea. A less radical position had emerged from the negotiations, however, and was reflected in the formula now under discussion, which recognized the indisputable right of the land-locked States to access to the sea.

34. It was thus clear that, in international negotiations, an agreement along those lines was close at hand. The right in question, however, was also supported by strong arguments of equity and justice. The freedom of the high seas and recognition that they constituted a *res communis* had been upheld even before Grotius, by his forerunners Vitoria and Vásquez de Menchaca. The sea-bed and the ocean floor beyond the limits of national jurisdiction had now been recognized by the General Assembly as the common heritage of mankind, and it was therefore logical to acknowledge the right of the land-locked States to have access to the sea and thus be able to enjoy their share of that common heritage.

35. He was in favour of recognizing that principle, which had behind it the conscience of the world community, and he believed that it should not be weakened in any way by the adoption of language which might make it more acceptable to the majority, but which could have the effect of nullifying it. The drafting of article E could, of course, be improved, but it should be noted that it was close to the wording of article 110 of the informal single negotiating text prepared at the 1975 session of the Third United Nations Conference on the Law of the Sea. He urged that the wording adopted should not weaken in any way a rule which constituted progressive development of international law and related to a matter of major contemporary interest.

36. Mr. SETTE CÂMARA said he fully agreed with Mr. Yasseen that in the last 10 or 15 years the international community had become increasingly aware of the problem of the land-locked States. To that awareness an outstanding contribution had been made by Mr. Tabibi, who had been a crusader on behalf of the land-locked States.

37. The Special Rapporteur was to be commended for including the provisions of article E in the draft articles. The exception made in that article for the benefit of the land-locked States was necessary, and corresponded to the realities of contemporary life. Moreover, it already formed part of existing treaty law, since the 1965 Convention on Transit Trade of Land-Locked States was now in force. The preamble and article 10 of that Convention contained the principle which had since been incorporated in the text of article 110 of the informal single negotiating text prepared for the third session of the Third United Nations Conference on the Law of the Sea. All those

developments confirmed that the principle underlying article E had the support of the international community.

38. Unlike some other members, he believed that the Special Rapporteur's text of article E was well-balanced. As Mr. Šahović had pointed out, it contained a negative part and a positive part, but he did not believe that the latter could have the effect of extending to any and every land-locked State, anywhere in the world, the right to invoke the benefit of the article. The words "unless it is a land-locked State" had to be read together with the remainder of the article, in particular its last part, which referred to treatment facilitating the exercise of the right of access to and from the sea of the land-locked third State concerned.

39. Special attention should be paid to the concluding words "on account of its special geographical position". For example, it was clearly out of the question for Czechoslovakia or Switzerland to invoke benefits accorded by Brazil to Bolivia and Paraguay. Nevertheless, two land-locked States could benefit from a similar treatment because of their special geographical position: in fact, Bolivia and Paraguay had treaties with Brazil concerning access to and from the sea, and one of those countries might well invoke a most-favoured-nation clause in order to claim benefits accorded to the other. That being so, he found the drafting of article E very ingenious.

40. He could accept the suggestion by Mr. Šahović that the words "unless it is a land-locked State" might be deleted, but he saw no objection to their being retained. He was entirely in favour of including an article on the lines of article E and felt certain that the Drafting Committee would be able to solve the problems raised during the discussion.

The meeting rose at 6.00 p.m.

1386th MEETING

Wednesday, 9 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Welcome to Mr. Njenga

1. The CHAIRMAN welcomed Mr. Njenga among the members of the Commission and congratulated him on his election.

2. Mr. NJENGA thanked the members of the Commission for the honour they had done to him. As a representative in the Sixth Committee of the General Assembly at its recent sessions, he had been much impressed by

the high quality of scholarship of the work of the Commission; he hoped that he would be able to make a constructive contribution to the tasks before it.

Most-favoured-nation clause (continued)
(A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (concluded)

ARTICLE E (Most-favoured-nation clauses in relation to treatment extended to land-locked States)¹ (concluded)

3. Mr. RAMANGASOAVINA noted that all members of the Commission agreed that the rule laid down in article E was well founded. Even those who had expressed reservations on the article had not contested the principle, but had questioned the need to formulate a rule which was already laid down in the 1965 Convention on Transit Trade of Land-locked States² and in article 110 of the informal single negotiating text prepared at the third session of the Third United Nations Conference on the Law of the Sea.³ That rule was already accepted by the international community and resulted from a realization of the solidarity of States—an awareness that maritime States should take positive measures to remedy the disadvantage of land-locked States regarding access to the sea.

4. It was necessary to emphasize, however, as the Special Rapporteur had done in his report, that the Commission was not called upon to state a rule concerning the status or rights of land-locked countries, which were already set out in the 1965 Convention and in the proposed draft convention on the law of the sea. The latter convention had not yet been adopted, and even if it had, a similar and complementary rule should be stated in the draft articles on the most-favoured-nation clause. Those were two aspects of the same question: in the draft articles, the rule was formulated as a main rule, whereas elsewhere it was only stated incidentally. Moreover, a maritime State and a land-locked neighbouring State could conclude a more general convention on various subjects as part of their arrangements for economic, cultural or other co-operation, and such a convention might contain provisions on the right of transit, which would then be merely one chapter of the convention. Hence it was natural that draft article E should cover only that aspect of the matter. What should perhaps be given greater emphasis was that the beneficiary States could not claim, under a most-favoured-nation clause, a special right of transit—the right of access to and from the sea—granted to a land-locked State.

¹ For the text, see 1385th meeting, para. 1.

² United Nations, *Treaty Series*, vol. 597, p. 3.

³ See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10), p. 168, document A/CONF.62/WP.8, document A/CONF.62/WP.8/Part II.

5. He would therefore suggest that article E should be drafted to read:

Most-favoured-nation treatment granted by a granting State to a land-locked third State shall not be extended to a beneficiary State, unless it is a land-locked State, if that treatment serves the purpose of facilitating the exercise of the right of access to and from the sea of that third State on account of its special geographical position.

By that wording he meant to emphasize that the beneficiary State, if it was not a land-locked State, could benefit under the most-favoured-nation clause from the advantages granted to a third State, unless they were specific advantages concerning the right of access to the sea which had been granted to that third State on account of its geographical position.

6. The obligation of the granting State to grant access to the sea to a neighbouring land-locked State was not only a treaty obligation, but also an obligation under international law resulting from the practice of States. It was not, of course, a preemptory obligation imposed on the granting State in the same way as a rule of *jus cogens*, but a conventional servitude. A beneficiary State which was not land-locked could not claim the same right. It was the special position of the land-locked State which was the source of the compensatory advantages granted to it.

7. Mr. AGO said that, as Mr. Ushakov⁴ and Mr. Ramangasoavina had pointed out, a principle was taking shape in treaty law and, gradually, in customary law itself, according to which maritime States should grant certain transit and other facilities to neighbouring States which had no maritime frontier. That was a general principle, which had nothing to do with the most-favoured-nation clause, but which made the principle stated in article E even more serious. The article was clearly not intended to ensure that the beneficiary State of the most-favoured-nation clause would receive that general treatment which every maritime State must grant to land-locked States; the purpose was to grant it much more favourable special treatment, which was not granted to all neighbouring land-locked States, but only to some States. Those special facilities were usually accorded because the granting State had special relations with the beneficiary State and because the position of the beneficiary State was different from that of other land-locked States.

8. The Special Rapporteur had said that the most-favoured-nation clause was very dangerous. That was true, but it might be asked what the result would be if the Commission loaded its draft articles with clauses like those in article E. Either States would not conclude any more treaties containing a most-favoured-nation clause or, if they had already done so, they would denounce them as soon as possible; or else, if a maritime State was prepared to grant a land-locked State certain exceptional facilities because of its special position or because of the very friendly relations between them,

⁴ See 1385th meeting, para. 7.

it would refrain from doing so through fear of being obliged to grant the same advantages to other States.

9. Thus article E raised not only a problem of drafting, but also a problem of substance. If the principle stated in that article was dangerous, its result was open to question. For his part, he did not believe that by adopting the standpoint proposed by the Special Rapporteur the Commission would in the end promote that extension of the most-favoured-nation clause which it had in view in codifying the principle.

10. Mr. USTOR (Special Rapporteur) said that the problem raised by Mr. Ago related not to article E as such, but only to the clause “unless it is a land-locked State”, which excluded land-locked States beneficiaries of most-favoured-nation clauses from the exception provided for in the article. It really concerned the operation of the most-favoured-nation clause itself; the problem could arise in any situation in which the granting State promised special rights to a third State on special grounds. The case of a beneficiary land-locked State was only one example of such a situation.

11. The solution to that problem depended on the terms on which the most-favoured-nation pledge was given. He himself had not seen any example of a most-favoured-nation clause which was broad enough to cover access to the sea in general. Usually, the granting State promised most-favoured-nation treatment in respect of such specific matters as Customs or charges for transit by rail or road. He knew of no clause so vague that it could be interpreted as covering such privileges as a special area in a seaport or the use of warehouses.

12. The Secretariat had undertaken, in 1972, a study which would be ready for the second reading of the present draft and which would contain a survey of the most-favoured-nation clauses embodied in treaties published in the United Nations *Treaty Series*.⁵ He hoped that survey would show in which fields the most-favoured-nation clause was used and what exceptions were placed upon it.

13. Mr. KEARNEY said that, largely owing to the efforts of Mr. Tabibi, a movement had taken shape to include in all conventions a clause dealing with the land-locked States. He himself favoured preferential treatment for those States, but he doubted whether there were many instances in which such facilities as a free port, access to the sea by rail or road, or special trading facilities extended by the granting State to a land-locked State had also been claimed by a beneficiary State under a most-favoured-nation clause. If any such instances existed, an article on the lines of article E would be necessary in the present draft. If not, the article might still be included as a precaution, despite the lack of legal necessity.

14. Bearing in mind the point raised by Mr. Ago concerning the general relationship of that problem to the rules of most-favoured-nation treatment, he was concerned about the best way of drafting the exception embodied in article E. There could be problems of inter-

pretation concerning the application of some types of standard most-favoured-nation clause and some thought had to be given to that matter. For example, a clause promising most-favoured-nation treatment in regard to trade could lead to a dispute as to whether it covered the port facilities given to a third State which was land-locked; a clause covering the right of establishment might be invoked to claim certain manufacturing facilities extended to a land-locked State. Article E, as proposed by the Special Rapporteur, did contain a number of safeguards, but he thought the language should be sharpened in order to reduce the possibility of disputes.

15. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's commentary and the statement made by Mr. Tabibi⁶ indicated that the international community wished to consolidate a branch of the law which would grant certain rights to the land-locked States because of their geographical position. That branch of the law was based both on the freedom of the seas—the *mare liberum* of Grotius—and on the concept of the high seas as *res communis*, which had been elaborated upon by the General Assembly when it had recognized the notion of the “common heritage of mankind”.⁷

16. With regard to Mr. Ushakov's remarks on the lack of precision of the term “treatment”⁸ used in article E, he agreed that the Drafting Committee should attempt to find a more precise term. For his part, he took the word “treatment” to refer, as in the expression “treatment of aliens”, to a whole body of rights which constituted a legal status.

17. The principle underlying article E was in fact a simple one. The purpose of the article was to state that, if a certain treatment was given to a land-locked State, that treatment had to be excluded from the operation of a most-favoured-nation clause granted to another State, unless that other State was itself land-locked.

18. Article E dealt with the question of access to the sea, which clearly did not arise for countries which were not land-locked—the wording proposed by the Special Rapporteur made that point perfectly clear. In his commentary, the Special Rapporteur had also made it clear that he was dealing with the rights of land-locked countries not in general terms, but only with specific reference to the most-favoured-nation clause.

19. With regard to the problem of other land-locked States which, as explained by Mr. Ushakov, might give rise to some ambiguity, he believed that the reference to the exercise of “the right of access to and from the sea” and the qualification “on account of its special geographical position” established a presumption that the land-locked State invoking the most-favoured-nation clause had to be in a geographical position similar to that of the State to which the favourable treatment was extended by the granting State. In particular, it should require passage through the granting State to gain access

⁵ See *Yearbook... 1973*, vol. II, p. 324, document A/8710/Rev.1, para. 75.

⁶ 1385th meeting.

⁷ Resolution 2749 (XXV).

⁸ 1385th meeting.

to the sea. That being so, the wording of article E would have to be adjusted. But the problem involved more than the drafting; it related to the substance of the article itself. Article E would have to specify that the exclusion of the right of access to the sea from the operation of the most-favoured-nation clause did not apply to those land-locked States which were geographically in a position to benefit from that right of access.

20. Even if there was no extensive State practice in the matter, he was inclined, like Mr. Kearney, to favour the inclusion of article E in the draft as a precautionary measure, subject to sharpening the text in order to avoid the difficulties pointed out during the discussion.

21. Mr. TABIBI referring to Mr. Hambro's remarks,⁹ said that when he himself had described the subject-matter of article E as simple, he had meant that the rule embodied in it was clear, since it was no more than an expression of established law, as shown by article 110 of the informal single negotiating text which had been prepared for the Third United Nations Conference on the Law of the Sea at its third session. In reasserting that view, it was not his intention to minimize in any way the drafting difficulties involved: he agreed with Mr. Hambro that the wording should be carefully reviewed by the Special Rapporteur and the Drafting Committee.

22. He welcomed the reference by Mr. Martínez Moreno¹⁰ to the early Spanish writers on international law, who had been the forerunners of Grotius. Vitoria, in particular, had recognized the high seas as *res communis* and *res publica*. He had thus expressed a view contrary to the policy of his own country—unlike Grotius, who had been working for the Dutch East India Company. The important point for the land-locked States was that Grotius had recognized, as a limitation of territorial sovereignty, the right of innocent passage not only through the territorial sea, but also over land. On that point Grotius had written:

... even over land which has been converted into private property either by States or individuals, unarmed and innocent passage is not justly to be denied to persons of any country, exactly as the right to drink from a river is not to be denied.¹¹

That right of passage both through the territorial sea and over land was based on concepts of natural law which had been recognized at all times, not only by legal writers but also by religion and custom. The Old Testament could be cited on that point, and so could Justinian's *Digest* in which, under *jus gentium*, the use of shores was acknowledged to be just as public as the use of the sea itself.

23. His own views on the right of innocent passage through the territorial sea and overland through transit countries had met with the approval of Mr. François, formerly the Commission's Special Rapporteur for the law of the sea, and as a result of the discussions in the

Sixth Committee of the General Assembly the question of free access to the sea of land-locked countries had been placed before the first United Nations Conference on the Law of the Sea under paragraph 3 of General Assembly resolution 1105 (XI).

24. With regard to the example given by Mr. Ago¹² of the special facilities granted to Switzerland by Italy, which clearly could not be extended to other land-locked States, it was necessary to keep separate two questions which could be confused: first, the right of free access to the sea on the basis of the fundamental principle of the freedom of the seas and of the special geographical problem of land-locked States and, second, the general right of transit, covered by the 1921 Convention and Statute on Freedom of Transit,¹³ which dealt with the question of transit as a whole, and by the 1923 Convention and Statute on the International Régime of Maritime Ports.¹⁴ Switzerland had an exclusive right to the treatment accorded to it by Italy if that treatment was more favourable than the treatment legally required for all land-locked States.

25. That point was covered by article 10, paragraph 2, of the 1965 Convention on Transit Trade of Land-locked States which referred to the granting to a land-locked State of "facilities or special rights greater than those provided for in this Convention",¹⁵ which could be limited to the particular land-locked State concerned. The concluding proviso of that paragraph reserved the right of another land-locked State to invoke a most-favoured-nation clause to claim the same facilities or special rights. Another land-locked country of the region would thus be able to benefit from those facilities, but that result could be avoided by making a suitable reservation in the treaty containing the most-favoured-nation clause.

26. In any case, there was no doubt about the treatment which all land-locked States were entitled to by virtue of their right of free access to the sea, and the Commission could retain article E. He found the text proposed by the Special Rapporteur acceptable, but if any clarification were needed the Drafting Committee might consider making use of the wording of article 10, paragraph 2, of the 1965 Convention.

27. Mr. PINTO reiterated his view that a provision on the lines of article E should be included in the draft, but that it should cover, in general terms, the whole issue of land-locked States, and not be restricted to the question of the right of access.

28. He therefore suggested the following redraft of article E for the consideration of the Special Rapporteur:

A beneficiary State is not entitled under a most-favoured-nation clause to any treatment accorded to a third State by virtue of the fact that it is land-locked or otherwise geographically disadvantaged, unless the beneficiary State is itself so land-locked or otherwise

⁹ *Ibid.*, para. 24.

¹⁰ *Ibid.*, para. 34.

¹¹ Grotius, *Mare Liberum*, chap. V (trans. by R. Van Deman Magoffin for Carnegie Endowment edition (New York, Oxford University Press, 1916).

¹² See 1385th meeting, para. 6.

¹³ League of Nations, *Treaty Series*, vol. VII, p. 11.

¹⁴ *Ibid.*, vol. LVIII, p. 285.

¹⁵ United Nations, *Treaty Series*, vol. 597, p. 54.

geographically disadvantaged and belongs to a category of such States which, because of their level of economic development and geographic relationship to the granting State, would be entitled to claim such treatment from the granting State.

29. He agreed with Mr. Hambro that the drafting of article E was not at all easy. He also realized that his own suggested redraft, by broadening the scope of the article to cover matters other than right of access and States that were geographically disadvantaged as well as land-locked States, would lead the Commission into difficult areas, but he thought it went to the root of the problem. The latter part of his text would limit the category of States which could benefit from the exception to the rule stated in the first part of article E. The words "geographic relationship to the granting State" would confine the scope of the exception to countries in the same region or subregion.

30. Mr. BILGE said he was in favour of article E. He thought the Commission should not try to determine the rights and facilities to be granted to land-locked States; it should leave that task to the relevant conventions. Moreover, the conditions and modalities for the granting of such rights and facilities were governed by bilateral agreements, as indicated in articles 109, 110 and 112 of the informal single negotiating text prepared at the third session of the Third United Nations Conference on the Law of the Sea. Similarly the Commission was not required to determine which States would benefit from the advantages granted to land-locked States, since the beneficiary States were determined by the relevant bilateral agreements. Hence the draft articles should provide for a general exception to the most-favoured-nation clause, covering the rights and facilities to be granted to land-locked States.

31. He therefore suggested the following simpler text:

Exception for land-locked States

The rights and facilities established in favour of a land-locked State on account of its special geographical position cannot be extended to other States by the operation of the most-favoured-nation clause.

32. That text defined neither the rights and facilities granted to land-locked States, nor the beneficiary State. The words "unless it is a land-locked State", in the article proposed by the Special Rapporteur, might imply that all land-locked States should benefit from the same transit and other rights; but the question of those rights and facilities must be settled by bilateral agreements. The article should cover only the case in which the granting State and the land-locked beneficiary State were closely linked.

33. Mr. USTOR (Special Rapporteur) said that the text suggested by Mr. Pinto broadened the scope of article E. He had no wish to adopt a conservative attitude, but the question did arise whether the Commission had unlimited powers in regard to the progressive development of international law. The principle of access to the sea for land-locked States had been considered by international bodies for a long time, and in view of the near unanimity reached, it could now be embodied in the draft articles. But Mr. Pinto's text, by encompassing other

matters such as fishing rights and exploitation of the economic zone, entered a domain in which it was difficult to determine whether exceptions were warranted by State practice. More particularly, the words "or otherwise geographically disadvantaged" would present a formidable problem of definition. The idea underlying the proposal was extremely logical and might well come to form a rule of international law, but it would be premature to incorporate it in the draft at the present time.

34. It had been pointed out, quite correctly, that it was not the task of the Commission to deal with the objective rights to be granted to land-locked States by the international community. Article E simply consolidated the special, but nonetheless basic rights of land-locked States under general international law. The most favoured-nation clause would apply only when a coastal State granted greater privileges to a land-locked State. For example, if one of two land-locked States bordering on a coastal State was accorded extra privileges, the other neighbouring land-locked country would be entitled to claim them under a most-favoured-nation clause. It was true, as Mr. Kearney had noted, that problems of interpretation would arise, but that was an inherent difficulty in the application of the most-favoured-nation clause and the Commission could do little more than state the *ejusdem generis* rule, which was already embodied in article 11.¹⁶

35. He was gratified to note that members endorsed the principle set out in article E. Obviously, some redrafting was necessary and it might well prove easier to break the text down into two or possibly three separate articles. Mr. Bilge had suggested a simpler wording, but the more elaborate versions prepared by the Drafting Committee would doubtless meet with his approval.

36. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article E to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹⁷

PROVISIONS IN FAVOUR OF DEVELOPING STATES: MOST-FAVOURED-NATIONS CLAUSES IN RELATION TO TREATMENT UNDER A GENERALIZED SYSTEM OF PREFERENCES (ARTICLE 21)

37. The CHAIRMAN invited the Special Rapporteur to introduce chapter II of his report (A/CN.4/293 and Add.1) on provisions in favour of developing States, beginning with sections 1 to 3, which dealt with article 21, provisionally adopted at the twenty-seventh session.

38. Mr. USTOR (Special Rapporteur) said that the Commission was not in a position to establish rules under which the developed States would make greater efforts to assist the developing States and to redress the wrongs they had suffered before they became inde-

¹⁶ For the text of the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 120 *et seq.*, document A/10010/Rev.1, chap. IV, sect. B.

¹⁷ For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 12-27.

pendent. Its endeavours to incorporate a general rule in favour of the developing countries in the draft would be only a modest contribution to the law of development.

39. Article 21 (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences) had been adopted tentatively because of some hesitancy as to whether a provision of that kind, dealing to some extent with economic matters rather than law, was in harmony with the remainder of the draft. However, the rule embodied in the article had been adopted by consensus by UNCTAD, and it was only appropriate that the subject of such agreement should become a rule of international law.

40. In the Sixth Committee of the General Assembly, at its thirtieth session, many representatives had welcomed article 21 as progressive development of international law and as a token of the fact that the Commission sought, within its recognized limits, to heed the interests of the developing countries. One objection had been that the generalized system of preferences was, by its very nature, of limited duration. But the idea had already been advanced that the system should continue, at least until such time as the very notion of a "developing country" disappeared. Another objection had been to the wording of the article: it had been maintained that there was no clear dividing line between the concepts of developed and developing countries. However, the problem of distinguishing between those two categories of countries did not arise in regard to article 21. The generalized system of preferences was a compromise system and the donor States themselves determined the countries to which the preferences would apply. A trend had emerged in UNCTAD to urge donor States to broaden the preferences *ratione personae*, so that the preferences would be as universally applicable as possible, and *ratione materiae*, so that the product coverage of the generalized system of preferences would be as wide as possible.

41. Some representatives in the Sixth Committee had held that the Commission was not the most appropriate body to deal with such a technical question, and that article 21, which was closely connected with economic matters, had no place in draft articles of a legal character. In his opinion, it was essential to include an article containing provisions in favour of developing countries and, in the light of the majority view expressed in the Sixth Committee, article 21 should not be deleted. Naturally, since the article referred to the generalized system of preferences, it was concerned with international trade. Up to the present, the question of preferences in such matters as establishment and consular relations had not been raised. The article would indirectly foster the tendency to grant preferential rights to developing countries, because donor States would be free to do so without having to accord the rights to developed countries.

42. Mr. BILGE reminded the Commission that Mr. Hambro had proposed several alternatives for the exception relating to Customs unions and free-trade areas (A/CN.4/L.242). He asked the Special Rapporteur what he thought of those proposals; he himself intended to supplement the proposed texts so that they would also

meet the needs of associations of developing countries. Thus amended, those texts might be considered by the Drafting Committee.

43. Mr. USTOR (Special Rapporteur) said that he found the proposed texts unacceptable.

The meeting rose at 12.55 p.m.

1387th MEETING

Thursday, 10 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martinez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

PROVISIONS IN FAVOUR OF DEVELOPING STATES: MOST-FAVOURLED-NATION CLAUSES IN RELATION TO TREATMENT UNDER A GENERALIZED SYSTEM OF PREFERENCES (ARTICLE 21) (*concluded*)

1. Mr. USTOR (Special Rapporteur) said that the Commission was fully aware of the situation with regard to article 21, which had been considered at length and tentatively adopted at the twenty-seventh session.¹ In view of the discussion in the Sixth Committee of the General Assembly at its thirtieth session, the draft on the most-favoured-nation clause should not neglect a matter of such importance and interest to the developing countries. Article 21 should therefore be definitively adopted on first reading, and it could now be referred to the Drafting Committee for any changes in wording considered necessary before its adoption.

2. Mr. HAMBRO said it was true that considerable discussion had already taken place on article 21. He was entirely in agreement with the principle embodied in the article and agreed that it should be referred to the Drafting Committee.

3. Mr. YASSEEN said that article 21 was acceptable and could be referred to the Drafting Committee. The international community was now endeavouring to provide developing countries with a means of overcoming their economic difficulties. Several such means had been devised, including the establishment of a non-discriminatory and non-reciprocal system of preferences. It was logical that the most-favoured-nation clause should not hinder the application of that system.

¹ For the text of the article, see *Yearbook... 1975*, vol. II, p. 121, document A/10010/Rev.1, chap. IV, sect. B.

4. Mr. SETTE CÂMARA said he fully agreed with the Special Rapporteur's views on article 21 and his suggestion that it should be referred to the Drafting Committee. The wording could be improved, to make a more effective statement of the exception in favour of the developing countries.

5. The generalized system of preferences practised by developed States derived from the principle of preferential tariff treatment approved by UNCTAD in 1968.² In 1975, the Commission had had an opportunity to discuss the characteristics and limitations of the system, and the modest results it had achieved. Clearly, it was not for the Commission to discuss the substance of the system, but some recent developments should be taken into account. In setting out the basis for the current multilateral trade negotiations, the Tokyo Declaration, adopted by the GATT Ministerial meeting in September 1973,³ had confirmed a new principle for securing additional advantages for the developing countries, namely, the principle of "differentiated or more favourable treatment". In paragraph 5 of the Declaration, the Ministers also recognized the importance of the application of differential measures to developing countries in ways which would provide special and more favourable treatment for them in areas of the negotiations where that was feasible and appropriate. The concept of "differentiated treatment" was broader than that of preferential treatment, which had been confined to tariffs; it would apply to a wide range of areas in economic co-operation between developing and developed States, and should be reflected in the draft.

6. Article 21 could specify that a beneficiary State was not entitled under a most-favoured-nation clause to any treatment of a preferential or differentiated nature extended by a developed granting State to a developing third State.

7. Mr. ŠAHOVIĆ said that he too was in favour of referring article 21 to the Drafting Committee, which should try to clarify certain questions of interpretation that might be raised by the application of that provision. The Committee should take account, in particular, of the new rules governing international trade, which were not without effect on the operation and even on the nature of the most-favoured-nation clause. It was clear that there was now a certain duality in the rules applied by States, and it was precisely in order to take account of that duality that the Commission had drafted article 21.

8. He was not sure, however, that the contents of that provision really met the needs of the international community and, more precisely, those of developing countries. There was some contradiction between the interpretation the Special Rapporteur gave to article 21 in paragraphs 85 *et seq.* of his seventh report (A/CN.4/293 and

Add.1) and the views expressed by certain representatives of States in the Sixth Committee of the General Assembly at its thirtieth session concerning the effect of that provision. The Special Rapporteur considered that article 21 applied only to international trade in the strict sense, whereas in the Sixth Committee, the idea had been advanced that it might apply to other branches of economic relations. Personally, he did not think it possible to restrict the application of article 21 to international trade, not only because certain Governments considered that the article should have a wider scope, but also because the Commission itself had stated on several occasions, that the draft articles did not apply only to trade relations. The Drafting Committee should therefore consider article 21 in a broader context, in order to facilitate its interpretation by States. It would probably be enough to amend the wording slightly, without having to insert a new paragraph.

9. He observed that the matter dealt with in chapter II, section 4 of the report under consideration (A/CN.4/293 and Add.1) entitled "Most-favoured-nation clauses in relation to trade among developing countries", would have to be considered later, independently of the problems raised by article 21.

10. Mr. REUTER said he was in favour of referring article 21 to the Drafting Committee. The text could no doubt be improved, but it should not be expected that the Committee could arrive at rigorous and perfect wording.

11. In his opinion article 21 did not relate only to the generalized system of preferences, but also to the principles which would govern the new international economic order. The draft articles were thus being prepared subject to the general reservation that none of their provisions would affect the general principles in process of formation, which related not only to the generalized system of preferences, but also to matters such as the raw materials régime. Those principles were still too uncertain to be considered as being widely accepted. Thus the principle of self-selection was, for the time being, only an empirical principle, which could be understood in several ways. Similarly, the developing countries were not a simple category, since some of them were more underprivileged than others.

12. The Commission did not have to take a stand on those questions; it should confine itself to introducing into its draft a *renvoi* to the new law, without trying to define the principles applicable or to decide, for example, the raw materials régime, the classification of developing countries, the relations between those countries or the extension of article 21 to matters other than international trade. Hence the Commission should rest content with a general provision, but make its intentions perfectly clear in the commentary.

13. Mr. USHAKOV said he was in favour of article 21, as he had been at the twenty-seventh session. Like Mr. Reuter, he wished to stress that it was not the Commission's task to establish the rules of the new international economic law. The only purpose of article 21 was to show that the existence of a most-favoured-nation clause should not prevent a developed State from grant-

² See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38, annex IA, resolution 21 (II).

³ See GATT, *Basic Instruments and Selected Documents: Twentieth Supplement* (Sales No.: GATT/1974-1), p. 19.

ing preferences to a developing State, in accordance with a generalized system such as that of UNCTAD.

14. As the Special Rapporteur had stressed in his commentary, the scope of that exception depended on the contents of the generalized system of preferences. If that system covered economic relations in general, article 21 would have the same scope. If it applied to other spheres, the scope of article 21 would be similarly widened. It was not for the Commission to settle the content of the generalized system of preferences; it should merely indicate that neither the development nor the application of that system could be obstructed by the existence of most-favoured-nation clauses. A developed beneficiary State could not invoke a most-favoured-nation clause to claim preferences granted by another developed State to all the developing States it had chosen; it was the granting State which chose the developing countries to which it intended to grant preferences. As the Special Rapporteur had pointed out, the circle of developing countries was not necessarily the same for all developed countries.

15. Another characteristic of the system was that the preferences in question were granted without reciprocity. By excluding the application of the most-favoured-nation clause between two developed States, article 21 would facilitate the application of the generalized system of preferences, but its usefulness would depend directly on the content of that system.

16. Mr. PINTO said that article 21 would of course be of some assistance to the developing countries, at least indirectly. At the twenty-seventh session he had objected to the reference to a generalized system of preferences, and he would prefer the tentative formulation in paragraph 121 of the Special Rapporteur's report which read:

A developed beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a granting developing State to a third developing State for the purpose of promoting the expansion of their mutual trade.

The objections mentioned in subsequent paragraphs of the report were not, in his opinion, entirely persuasive, and it would have been preferable for the Commission to have adopted that formulation, despite the absence of State practice in support of it.

17. Article 21 in its present form spoke of "a generalized system of preferences", and it was questionable whether that expression had any precise meaning. References were sometimes made to "the generalized system of preferences" and also to "general schemes of preferences", although the latter were almost exclusively bilateral in character. It seemed that the relationships under such systems or schemes were not legal or binding. He wondered whether the most-favoured-nation clause would apply if a country did not receive preferences under the system or scheme as of right. Article 15 of the draft seemed to indicate that treatment should be extended under a bilateral or multilateral agreement—in other words, a form of legal obligation should exist between the granting State and the third State. Again, article 13

established the irrelevance of the fact that treatment was extended gratuitously or against compensation. It was important to determine whether the recipient of the treatment accorded under a generalized scheme of preferences was entitled to demand such treatment and whether the clause operated in such cases. He feared that, while the Commission might be unanimous in its view of the purpose of article 21, others could well regard it as irrelevant.

18. Mr. RAMANGASOAVINA said he agreed that article 21 should be referred to the Drafting Committee. It was essential for the draft articles to contain a provision making it clear that most-favoured-nation clauses must not prevent developed States from granting preferences to developing countries as part of international assistance designed to speed up their economic growth and promote their development. Although it was true that the idea expressed in article 21 could be developed further, the provision was nevertheless quite satisfactory in its present negative form. It constituted some kind of means of action under the International Development Strategy for the Second United Nations Development Decade, as presented in General Assembly resolution 2626 (XXV).

19. The Special Rapporteur had tried to state a rule relating to a field which was constantly evolving, and in which there was still much uncertainty. It was the first time that the notion of a generalized system of preferences had appeared in a text produced by the Commission. Article 21 related to the international law of development, which was in the process of formation and which had certain repercussions on the operation of the most-favoured-nation clause. The effectiveness of the article would depend on the maintenance, development and improvement of the generalized system of preferences and, in particular, on the increase in the number of products covered by that system and on the easing and unification of rules of origin and other aspects of national schemes.

20. It was quite certain, however, that article 21 would not suffice to allay all the fears which might be felt about the proper functioning of the generalized system of preferences. The Special Rapporteur himself had emphasized the potential threat represented by multilateral trade negotiations (A/CN.4/293 and Add.1, paras. 97-100).

21. As to the principle of self-selection, he thought it quite normal that granting States should have the right to decide not only what products they would include in the generalized system of preferences, but also the identity of their future partners. That principle, however, made the operation of the system even more uncertain. It was nevertheless gratifying to note the good will of both the market-economy countries and the socialist countries, which had shown themselves willing to apply the generalized system of preferences and to renounce claims to most-favoured-nation treatment. GATT had also encouraged the granting of preferential treatment and the renunciation of rights deriving from the most-favoured-nation clause.

22. With regard to the scope of article 21, he maintained that in the present circumstances it applied

essentially to international trade, but that it might apply to other matters, since the generalized system of preferences could be expanded.

23. Mr. TABIBI said that when two thirds of the world was experiencing hunger and calling for assistance, the needs of the developing countries were such that the Commission should certainly endeavour to assist them—and it was clear that all the members favoured the adoption of article 21, subject to improvements in the wording.

24. The generalized system of preferences had serious limitations; for example, it did not cover manufactures or semi-manufactures. As the Special Rapporteur had pointed out, however, article 21, while it would not remedy all the ills of the developing countries, would none the less constitute a step forward. It had been warmly supported in the Sixth Committee, and many representatives had called upon the Commission to go further and not to confine itself to that one article in favour of the developing world. Some representatives had even maintained that the Commission should seek to improve the Charter of Economic Rights and Duties of States,⁴ so that it could become an enforceable legal instrument.

25. He fully supported the definitive adoption of article 21 on first reading, and was grateful to the Special Rapporteur for proposing it.

26. Mr. KEARNEY said that he endorsed article 21, hoping that it would serve as a useful contribution to the expansion of international trade between developed and developing countries and recognizing that it was a modest step, but one that the Commission should take.

27. If it was to go beyond the scope of article 21, however, the Commission would have to deal, as in the case of Customs unions and economic associations, with complex questions that could not be answered on a factual basis. UNCTAD had issued a number of reports on the generalized system of preferences, pointing to problems inherent in that system—problems which related not so much to law as to the functioning of the world economic system and which could not easily be solved by general legal rules. Further legal developments could probably be expected as a result of the findings of those reports, but it was too early at the present stage to attempt to formulate new principles.

28. With regard to a point raised by Mr. Pinto,⁵ he had assumed that, because of the terms of article 5, it was not necessary for the draft to incorporate any requirement to the effect that the treatment accorded to a third State must be extended on the basis of a legal obligation. It was possible, however, that the wording of article 15 might be misinterpreted as a limitation on article 5. It would be advisable to state in the commentary that such was not the intention of the Commission and to reconsider the matter during the second reading.

29. Mr. MARTÍNEZ MORENO said that he supported the adoption of article 21; it should be referred to the

Drafting Committee in order to determine whether the wording could be improved.

30. As to the substance of the article, he would have preferred a broader rule which was not confined to a generalized system of preferences. The system, although intended to enhance the trade of the developing States and to improve the terms of trade, did not keep pace with the needs of the developing countries. To begin with, the application of the system was of limited duration and it was by no means certain that it would be extended. Again, it was voluntary in character and the fact that the granting State could at any time alter the system or terminate its application, meant that the position of the beneficiary State was insecure. For example, a beneficiary State might decide to increase its output of commodities in the hope of broadening its markets as a result of receiving preferential treatment under the generalized system of preferences in the industrialized countries, only to find itself in an extremely difficult situation because the application of the system had suddenly been terminated unilaterally.

31. The fact was that in international commerce the terms of trade were constantly deteriorating and the prices of manufactured articles from the industrialized countries were getting higher in relation to the prices of the raw materials supplied by the developing countries. Consequently, if the aim was to establish a rule that would make for a more equitable system, the text should be on the lines suggested in paragraph 21 of the Special Rapporteur's report. He agreed with Mr. Kearney that the Commission could not solve such complex economic problems by means of general rules of law, but a set of draft articles on the most-favoured-nation clause could certainly incorporate a broader principle establishing more equitable treatment for the developing countries in the sphere of international trade.

32. At the present juncture, however, he was prepared to agree to article 21, which would doubtless meet with unanimous approval in the Sixth Committee.

33. Mr. QUENTIN-BAXTER said that he had no difficulty with article 21, which had its obvious and inescapable place in the draft. He wished, however, to point out how much the views of members had developed in the past year. At the previous session it had seemed to them a formidable matter to speak in terms of an exception of some generality relating to preferences and affecting the system of strict rules on the most-favoured-nation clause. Since then, the article had been discussed in the Sixth Committee and the Special Rapporteur was to be commended for placing before that Committee a rich body of information which had made for a useful discussion.

34. The provisions of article 21 were not in a real sense trail-blazing. They had been aptly described by Mr. Reuter as a system of cross-referencing (*renvoi*), but they nevertheless remained very important. They would serve to relate the aged and respected institution of the most-favoured-nation clause to new developments in international organizations.

35. The perceptions of the members of the Commission, and those of representatives in the Sixth Committee,

⁴ General Assembly resolution 3281 (XXIX).

⁵ See para. 17 above.

regarding the nature of the Commission's task in the matter had also developed considerably, and they had done so in a desirable manner. There was no longer any unspoken anxiety that the most-favoured-nation clause was in itself an institution of which new countries and developing countries should be suspicious. A more balanced view was now taken on that point. The most-favoured-nation clause was recognized as being still alive and was acknowledged as being useful in certain cases to the new and developing countries themselves; in such matters as international trade, the clause could secure for those countries what they could not secure in an interminable round of bilateral negotiations.

36. The Commission now had to decide whether article 21 should be widened and if so in what manner. Should it take a negative decision, the Commission would have to decide what explanation to give to the Sixth Committee in response to the view—echoed in the present discussion—which favoured the introduction of supplementary rules into article 21. It would be helpful to remember that the present draft represented a set of residual rules which would be of great help to States when framing international agreements containing the most-favoured-nation clause. The rules which would be included in the draft would not bring about any considerable changes in the interpretation of old agreements containing the clause, or for that matter in any new agreements of that kind.

37. The set of rules embodied in the draft was such that States would not take them for granted, but would tend to incorporate them in their international agreements. It would be a long time before States became parties to the convention which would emerge from the present draft articles, and there would for some time be a certain element of doubt regarding their authority—hence the need to strengthen that authority by introducing specific provisions in bilateral agreements.

38. At the same time, the Commission should not be tempted to take a wrong view of the scope of the rule in article 21. Trade questions and economic questions were a major preoccupation of a great many bodies in the United Nations family. There was therefore a natural tendency in those bodies to urge that every available forum—including the International Law Commission—should press on with the development of the law on those subjects. In the circumstances, the Commission should bear carefully in mind the limited character of its experience and, still more, of its influence in the particular field of trade agreements. The Commission's task was to note the developments which had occurred rather than to lead those developments in a way which was unlikely to receive acceptance.

39. The discussion had not revealed any very settled views on which to base further articles to supplement article 21. Accordingly, he believed that the Commission should not undertake that task, but should clearly show the General Assembly that it felt both understanding and sympathy for the demand for such supplementary provisions. In its report, the Commission should stress that it was only completing the first reading of the draft articles and that, at the second reading, it would un-

doubtedly have occasion to examine contemporary developments with great care; at that point, it would be possible to discern whether a more definite trend emerged in favour of covering matters that were at present outside the scope of article 21 as drafted by the Special Rapporteur.

40. If the Commission adopted that approach, it would be able to persuade the General Assembly that it had acted wisely in leaving article 21 as it stood on the first reading. When the time came for dealing with matters now outside the scope of the article, however, the Commission should not be unduly influenced by developments which were of a topical character; it should remember that it was drafting a text that would have to stand the test of time for many years.

41. The CHAIRMAN, speaking as a member of the Commission, said that at the twenty-seventh session he had unfortunately been unable to attend the few meetings at which the Commission had discussed the then article 0 proposed by the Special Rapporteur to deal with the exception to the generalized system of preferences.⁶ He therefore wished to state his opinion on that problem, which the present article 21 was intended to regulate.

42. At its twenty-seventh session, the Commission had provisionally adopted article 21 "subject to further consideration and possible improvement on first reading" at the present session.⁷ The Special Rapporteur had stressed that the article was in the nature of progressive development, and concern had been expressed that the Commission might possibly be entering into economic questions which were within the competence of other bodies. That being the situation, the Commission should be guided by considerations of theoretical validity and practical attainability.

43. There could be no doubt about the validity of the theoretical basis of the article. The United Nations Charter itself rested on the assumption that the international community would strive to create the necessary conditions for economic and social progress. The Preamble to the Charter called not only for the establishment of "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained", but also for the promotion of "social progress and better standards of life in larger freedom". Chapter IX of the Charter, on international economic and social co-operation, began with Article 55 which expressly recognized that "the creation of conditions of stability and well-being" were "necessary for peaceful and friendly relations among nations". The consolidation of the branch of law now under discussion therefore answered a basic purpose of the Charter, since it would help developing countries to extricate themselves from a system which had placed them at a disadvantage before the adoption of the Charter.

44. With regard to practical attainability, it was worth remembering that draft article 21 was the outcome of a

⁶ See *Yearbook... 1975*, vol. I, pp. 190 *et seq.*, 1341st to 1344th meetings.

⁷ *Ibid.*, vol. II, p. 121, document A/10010/Rev.1, foot-note 414.

very thorough study of the work of international bodies. In his report, the Special Rapporteur had cited the relevant provisions of the International Covenant on Economic, Social and Cultural Rights, in particular those of article 2, paragraph 3, which contained an exception in favour of developing countries that was comparable to the one under discussion (A/CN.4/293 and Add.1, para. 123). The Special Rapporteur had also based his work on the considerable body of law being evolved by UNCTAD. In his oral introduction of article 0 at the twenty-seventh session he had rightly concluded that "the need of developing countries for preferences in the form of exceptions to the [most-favoured-nation] clause in international trade could be given expression in legal rules".⁸

45. As early as 1973, the Commission had stressed that it did not intend to deal with matters not included in its functions, but that it wished to devote special attention to the manner in which exceptions to the most-favoured-nation clause in the field of international trade could be given expression in legal rules.⁹ That approach had been endorsed by the General Assembly, which had given a good reception to article 21 in its provisional form. It should now be adopted on first reading, on the same basis as the other articles, on the understanding that the Commission would have an opportunity to reconsider it on second reading.

46. With regard to the scope of article 21, at the twenty-seventh session the Special Rapporteur had said:

It was true that that system [the generalized system of preferences] was rather limited and that it did not fully meet the expectations of the developing countries; but it did represent a compromise reached within the framework of UNCTAD. He believed it was valuable to translate the results of that compromise into a legal rule...¹⁰

Following the comments made by some members during the present discussion, the Drafting Committee should consider the possibility of broadening the scope of the exceptions in favour of the developing countries by adding further articles to article 21.

47. He did not think it was necessary to adopt a definition of the term "developing countries" in the present draft articles: its use in the United Nations and in UNCTAD showed a consistent pattern.

48. He believed that article 21 should endorse, as a rule of law, the principle that the most-favoured-nation clause should not operate to the detriment of developing countries. The modalities of application of that principle were a matter for *renvoi* as Mr. Reuter had pointed out.

49. Mr. AGO said that, in article 21, the Commission was in the process of formulating a general rule of international law. In doing so, however, it had to refer to a notion which was neither general nor stable: the notion of a generalized system of preferences, which, as the Special Rapporteur had stressed, was not an inter-

national system, but an aggregate of national systems which differed from one another. That system was further complicated by the principle of self-selection, which relied on decisions taken at the national level, not at the international level.

50. The Special Rapporteur had said that that system of preferences should not be reciprocal; but if there was any element of reciprocity in an agreement of that kind, should it be excluded from the system referred to in article 21? In other words, if there was any element of reciprocity in a system of preferences, was that enough to enable a State benefiting from the most-favoured-nation clause to claim that the system should be applied to it?

51. The Special Rapporteur had also said that the system of preferences should not be discriminatory; but was that really possible in the case of national systems? Since each State had some freedom of choice, any system of preferences necessarily contained an element of discrimination. That being so, it would be useless to try to draft a perfect article. He was therefore in favour of requesting the Drafting Committee to do its best in the matter.

52. With regard to the question of the settlement of disputes, it was obviously of primary importance in the present context, as the Special Rapporteur had stressed. Hence it was hardly sufficient merely to observe, as the Special Rapporteur had done in paragraph 132 of his report, that "As the articles on the most-favoured-nation clause are conceived as a supplement to the Vienna Convention [on the Law of Treaties], the relevant provisions of that Convention will also apply when a dispute arises in connexion with a most-favoured-nation clause". It was, indeed, by no means certain that those provisions would apply automatically.

53. Mr. USTOR (Special Rapporteur) said that the very enlightening discussion had shown that there was general agreement on the contents of article 21, though some doubts had naturally been expressed about its complex nature.

54. The useful drafting improvements suggested by Mr. Sette Câmara should be referred to the Drafting Committee.

55. Several members, including Mr. Šahović, Mr. Pinto, Mr. Ramangasoavina and Mr. Martínez Moreno, shared his own concern regarding the possibility, and the manner, of broadening the exception stipulated in article 21, so as to improve the position of the developing countries. In chapter II, section 4 of his seventh report, he had dealt with the question of improving trade between developing countries and had explained what ideas could be introduced into the draft articles for that purpose. At the next meeting, he would introduce his suggestions on that point. Article 21 itself, however, dealt with the generalized system of preferences, which was clearly a system applying to Customs matters and nothing else.

56. It had been suggested by Mr. Šahović that preferential treatment, in the form of an exception to the most-favoured-nation clause, should be extended to

⁸ *Ibid.*, vol. I, p. 190, 1341st meeting, para. 2.

⁹ *Yearbook... 1973*, vol. II, p. 211, document A/9010/Rev.1, para. 114.

¹⁰ *Yearbook... 1975*, vol. I, p. 206, 1343rd meeting, para. 55.

developing countries in matters other than international trade.¹¹ It was true that the developing countries required help in matters other than trade: they needed cheap credits or soft loans, outright money grants, technical assistance and know-how. Those matters, however, did not lend themselves to the operation of the most-favoured-nation clause and there was no occasion to establish any exception for them on the lines of article 21. He had not seen the most-favoured-nation clause in any agreement on matters other than trade which would lend themselves to such an exception. Establishment treaties often contained most-favoured-nation clauses, but the developing countries were not particularly interested in their nationals being given easier conditions of establishment, or the right to practise certain professions in the developed countries. Another example was that of consular conventions, which often contained a most-favoured-nation clause. The developing countries were not in any way interested in a preferential treatment in that respect; they were quite satisfied with the level of consular facilities, privileges and immunities granted to all countries.

57. As far as he knew, there had not been any desire expressed by developing countries, either in international organizations or elsewhere, for preferential treatment in matters other than international trade. There was perhaps one field in which such a desire was conceivable, namely that of shipping: developing countries might well wish to have special advantages for their merchant fleets, over and above those which were obtained by other countries. It should be noted, however, that if such preferential treatment was extended to the shipping of developing countries, its benefit might really go to multinational companies using the flags of these countries as flags of convenience.

58. A similar situation could arise in regard to international trade itself. It was only where a foreign trade monopoly operated under strict State supervision—as in socialist countries—that the benefit of the preferential treatment was certain to go to the developing country itself and not to outside interests which had set up companies under its laws.

59. The point raised by Mr. Pinto had been answered by Mr. Kearney;¹² it could be suitably dealt with in the commentaries to articles 5 and 15.

60. He would refer to article 21 again when he introduced, at the next meeting, section 4 of chapter II of his report, "Most-favoured-nation clauses in relation to trade among developing countries".

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 21 to the Drafting Committee for consideration in the light of the suggestions made during the discussion.

*It was so agreed.*¹³

The meeting rose at 1 p.m.

¹¹ See para. 8 above.

¹² See para. 28 above.

¹³ For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 9-11.

1388th MEETING

Friday, 11 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

PROVISIONS IN FAVOUR OF DEVELOPING STATES: MOST-FAVOURLED-NATION CLAUSES IN RELATION TO TRADE AMONG DEVELOPING COUNTRIES

1. The CHAIRMAN invited the Special Rapporteur to introduce section 4 of chapter II of his seventh report (A/CN.4/293 and Add.1).

2. Mr. USTOR (Special Rapporteur) reminded the Commission that in discussing article 21, he had concluded that in the present state of economic relations in the world it was only in the sphere of trade that the draft articles could establish special rights for developing countries in the form of exceptions to the operation of the most-favoured-nation clause.¹ He now wished to put forward some thoughts on further provisions to assist developing countries which might be considered at a later stage. The Commission would have to consider, in particular, whether a rule could be framed establishing an exception to the operation of the most-favoured-nation clause in regard to advantages granted by developing countries to each other, a question which had been raised by the representative of Yugoslavia in the Sixth Committee of the General Assembly.²

3. As explained in his report, he had found a considerable number of instruments, resolutions and declarations which expressed the wish that developed countries should help to promote co-operation among developing countries and, to that end, waive the benefit of the most-favoured-nation clause in regard to favours accorded by one developing country to another. An important example was the "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" adopted at the second session of UNCTAD in 1968, which contained "declarations of support" by the developed market-economy countries and the developed socialist countries.³ In GATT, it had been established that, in certain very strictly defined circumstances, the developed countries could be asked to waive their most-favoured-nation rights with regard to

¹ See 1387th meeting, para. 56.

² See A/CN.4/293 and Add.1, para. 108.

³ *Ibid.*, para. 114.

preferential treatment granted by one developing country to another. A consensus was thus gradually developing in favour of an exception to the operation of the most-favoured-nation clause in the case of advantages granted by developing countries to each other.

4. There were, however, two main obstacles to the acceptance of a rule on those lines. The first was the absence of any precise definition of the terms "developing country" and "developed country". The second, and more important one, was that, unlike the situation regarding article 21, no consensus on such an exception had developed in international organizations, owing to the great difficulties it involved.

5. In addition to the various decisions mentioned in his report, he wished to draw attention to resolution 3362 (S-VII) of the General Assembly, part VI of which dealt with co-operation among developing countries and called for further studies on that subject to be carried out both by the United Nations and by such bodies as UNCTAD and UNIDO. Those further studies might ultimately provide a basis for the suggested exception but the Commission could not adopt a rule on it in the absence of clear support from the international economic community, such as the rule in article 21 had attracted.

6. In his report he had put forward tentative wording for the exception stipulating that:

A developed beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a granting developing State to a third developing State for the purpose of promoting the expansion of their mutual trade.⁴

That wording, however, was only intended to give a rough indication of the kind of provision that might be adopted, and of the safeguards required; it could certainly not be accepted at present as the expression of a legal rule.

7. An example of the kind of situation the Commission had to consider was provided by Brazil, a developing country with a large market in which other developing countries competed with their exports. If Brazil granted some exceptionally favourable treatment to an export from Mali, for example, it might well be said that a developed country should not be allowed to claim that treatment in order to compete with Mali in the Brazilian market. But the rule should not exclude competition between Mali and other developing countries for the Brazilian market. The position was different in the case of a developing country like Yugoslavia, which exported industrial products to Brazil and obtained tariff concessions on the ground that Yugoslavia was a developing country. He did not believe there was a common understanding in the international community that Hungary, which was a developed country, should not be allowed to invoke the most-favoured-nation clause in order to obtain from Brazil similar benefits for the same industrial products.

8. Problems of that kind could be settled within the framework of the institutionalized system established in

GATT, which enabled the countries concerned to bargain for the exchange of reciprocal facilities. For the time being, however, a rule on the lines he had indicated could not be included in the draft articles because, unlike the rule embodied in article 21, there was no unanimous understanding in favour of it in the international community. All the relevant documents showed that there was only a desire that, where possible, developed countries should waive their most-favoured-nation rights in the interests of co-operation among developing countries.

9. Trade between developing countries themselves was only a very small fraction of world trade, so that the matter was not of the highest importance to the developing countries. Their main concern was to expand their exports to the large markets of the developed countries, so that they could build up their infant industries.

10. His conclusion was, therefore, that the Commission should state in its report that it had examined the matter, as proposed in the Sixth Committee, but that it was not in a position to draft a rule similar to that in article 21 because, in contradistinction to the situation dealt with in that article, it could not rely on general agreement among States. General Assembly resolution 3362 (S-VII) showed that the question was under study, and if a common understanding on it was reached at a later stage in the international organizations concerned, the Commission would be in a position to propose a text erecting that understanding into a binding legal rule.

11. Mr. TABIBI said he believed that the issue of co-operation among the developing countries themselves was just as important as that of co-operation between developed and developing countries. Experience in the United Nations had shown that great efforts were needed to solve the problems created by the needs of the developing world, especially in view of the population explosion. All the evidence showed that the flow of assistance from the developed countries to the developing countries was extremely slow by comparison with the needs of the developing world, which was faced with formidable problems of starvation, disease and lack of housing. At the fourth session of UNCTAD, held at Nairobi, there had been prolonged discussion concerning aid amounting to \$5 billion, which would have represented only a drop in a big ocean; even that amount, however, had not been obtained.

12. It was thus quite understandable that, in the Sixth Committee, the representative of Yugoslavia should have raised the question under discussion. At the many meetings held by the non-aligned States, increasing importance was now being attached to economic problems, because of the realization that even the peace and security of the world depended on their solution. Since the flow of assistance from the developed countries was extremely slow, other ways would have to be found to help the developing countries, and one way was through co-operation among the developing countries themselves. It should be borne in mind that those countries were at different stages of development: Brazil, Yugoslavia and India, for example, had reached what economists called the "take-off" stage, and co-operation between them and other developing countries which were still a long way

⁴ *Ibid.*, para. 121.

from that stage, could provide a remedy for the ills from which the latter group of countries suffered.

13. The Special Rapporteur had mentioned the desire of the developing countries to secure markets for their products in the developed countries, but the fact remained that in some cases the markets of other developing countries were of great importance. For example, Afghanistan, his own country, had for centuries carried on a prosperous trade in fresh and dried fruit with the Indian sub-continent; that trade accounted for approximately one third of its foreign exchange earnings. If no restrictions were placed on Afghanistan's reports, the traditional trade would continue. Countries which had previously been united and were accustomed to consuming each other's food products had a similar interest in maintaining traditional patterns of trade.

14. It was not only in the text adopted at the second session of UNCTAD, in 1968, but also in the pronouncements of experts from both developed and developing countries, that the need to devise means of promoting co-operation among the developing countries themselves had been emphasized. Co-operation among the Caribbean countries, which were following on a smaller scale the example of EEC, owed much to the advice of IMF experts, including a leading French expert whose advice was now being sought by Asian countries anxious to establish co-operation among themselves.

15. There were many ways in which the developing countries could fruitfully co-operate among themselves. One was to establish a clearing union through which countries of the third world could settle their trade balances in their own currencies instead of using the United States dollar or the pound sterling as the unit of account. The present practice of settling accounts in Western currencies led to the appreciation of those currencies and the depreciation of the currencies of the third world countries. At the fourth session of UNCTAD, the developing countries had been asking for aid at a time when the wealth derived from oil was being deposited in Western banks. It was estimated that two or three oil-producing countries of the third world could accumulate some \$10 billion a year between them. The Western banks were actually lending that money to other developing countries at high rates of interest. If the developing countries were to use their own currencies in their reciprocal transactions, and if those which had surplus funds were to lend them to the others, there would be no need to beg for assistance, and the development of the third world would be speeded up.

16. The need to promote co-operation among developing countries and to give additional momentum to trade between them had been stressed in the Kabul Declaration of December 1970,⁵ and the same ideas had since found

expression in General Assembly resolution 3362 (S-VII), adopted in September 1975.

17. He proposed that the Commission's report should contain not only the elements indicated by the Special Rapporteur, but also the text tentatively put forward in paragraph 121 of his seventh report, without committing the Commission to that draft. The purpose would be to obtain the views of the Sixth Committee on that text, so that the Commission could, at a later stage and in the light of those views, reach a decision on a question which, as he saw it, was more important than that dealt with in article 21.

18. Mr. PINTO expressed his deep appreciation of the Special Rapporteur's efforts to take account of the vital problems of the developing countries in his search for new provisions to complete the draft within the limits of the topic of the most-favoured-nation clause. The formula which the Special Rapporteur had put forward, as a possible exception clause for benefits granted by one developing country to another, seemed to him to constitute the best approach for the next logical step to be taken.

19. He believed it was quite feasible to adopt that text at the present time and had not been at all convinced of the contrary, either by the obstacles mentioned by the Special Rapporteur in his seventh report (A/CN.4/293 and Add.1, paras. 122-126) or by the example given by him at the present meeting. He could, however, accept the suggestion that the text in question should merely be included in the Commission's report to the General Assembly, so as to obtain the views of the Sixth Committee.

20. He agreed with Mr. Tabibi about the great importance of trade between the developing countries. He understood that roughly half the exports of his own country (Sri Lanka) went to such countries as Pakistan and the Arab States. He did not believe it was accurate to describe the developing countries as constantly trying to break into the markets of the developed countries. Their essential aim was to increase co-operative self-reliance among themselves.

21. He wished to revert for a moment to article 21, which established an exception to the most-favoured-nation clause where the granting State was a developed country and the third State a developing country. He did not know whether the point had been raised during the earlier discussions, but he thought that, logically, the provisions of article 21 should be limited to cases in which the beneficiary State was itself a developed country. He could accept the article if it were amended to read: "A developed beneficiary State is not entitled under a most-favoured-nation clause ...".

22. The purpose of article 21 should be to establish an exception for favours granted by one developing State to another and all developing States should be able to take advantage of that exception. Only a developed beneficiary State should be excluded from the benefit of favours granted under a generalized system of preferences. Equality should be maintained among developing countries in regard to the promotion of trade. Developed countries should not be encouraged to give special

⁵ Kabul Declaration on Asian Economic Co-operation and Development, adopted at the Meeting of the Council of Ministers for Asian Economic Co-operation (Fourth Session). For text, see ECAFE, *Regional Economic Co-operation in Asia and the Far East: Report of the Meeting of the Council of Ministers for Asian Economic Co-operation (Fourth Session)* (United Nations publication, Sales No. E.71.II.F.21), appendix II.

treatment to selected developing countries. That situation arose in practice, but it should not be erected into a rule.

23. He had been greatly impressed by the remarks made by the Chairman, when, speaking as a member of the Commission, he had stressed that the Commission should rely not only on the practice of States, but also on considerations of theoretical validity and practical attainability.⁶ Those two sets of considerations should be the principal criteria to be borne in mind by the Commission in its work on codification and progressive development.

24. Mr. USTOR (Special Rapporteur) replying to Mr. Pinto, said that the opening words "A beneficiary State" had been used intentionally in article 21, in order to avoid making any distinction between developed and developing beneficiary States. The generalized system of preferences was based on the idea of self-selection; that idea might not attract much sympathy, but it was the basis of a compromise reached in UNCTAD. Donor countries wished to give certain preferences to many developing countries, but not to all those countries; they should therefore be permitted to make exceptions on political or economic grounds in the granting of special favours within the generalized system of preferences.

25. There was thus some built-in element of discrimination, but that element had been agreed upon as part of the system. Benefits thus accrued only to specified recipients and other developing countries would not be entitled to receive those same benefits under most-favoured-nation clauses they might have with donor countries. The element in question was not his idea; it was based on the existing system.

26. Reference had been made during the discussion to the export of agricultural products by developing countries. In point of fact, however, the interest of developing countries in co-operation among themselves and in exceptions to the most-favoured-nation clause related mainly to industrial products. Lower tariffs in the developed countries and preferential treatment in the developing countries would expand the market for those industrial products. As to the export of such products as fruit, it did not present any problem for the developing countries, because those products were usually allowed to enter free of duty.

27. He had mentioned in his report the possibility of some relevant new development at the fourth session of UNCTAD (A/CN.4/293 and Add.1, para. 131). He could now inform the Commission that enquiries made by the Secretariat had shown that no resolution on the question under discussion had been adopted at that session.

28. Mr. USHAKOV said he fully agreed with the Special Rapporteur's conclusion as to the impossibility of introducing a general rule concerning economic relations between developing countries. It was not a matter of establishing primary rules for trade between developing countries, since it was for those countries themselves to adopt rules concerning their mutual relations; it was

only a matter of a possible exception to the operation of the most-favoured-nation clause.

29. The exception provided for in article 21 excluded from the operation of the clause one particular system, namely, the generalized system of preferences, and if such a system was established between developing countries, it would be possible to exclude it from the operation of the clause. But at present there was no such system between the developing countries. Hence the legal rule proposed by the Special Rapporteur in paragraph 121 of his report was absolutely impossible. In his opinion, that rule amounted to discrimination against the developing countries; for if one developing State granted preferential treatment to another developing State, such treatment amounted to discrimination, not only against developed States, but also against all the other developing States which were excluded from it. Among those other developing States; only beneficiaries of the most-favoured-nation clause would be able to obtain the same preferences, while the developing States which did not benefit from the clause would be at a disadvantage compared with the State which enjoyed preferential treatment. Thus the preferences granted by one developing State to another would benefit a single developing State at the expense of the others.

30. A strictly bilateral system of preferences would therefore be against the interests of the developing countries. But the whole purpose of the system of preferences was to benefit all developing States without discrimination. It was for the developing States to establish a generalized system of preferences among themselves to promote their mutual development. Such a system could be set up at the regional or the subregional level, but it must apply to all developing countries without discrimination. If a system of that kind came to be established, it could be excluded from the operation of the most-favoured-nation clause. But such a system did not yet exist. Hence it was impossible, for the time being, to formulate an exception to the operation of the most-favoured-nation clause in respect of it.

31. Mr. TABIBI said he wished to explain that, in his earlier statement,⁷ he had referred to agricultural products exclusively in the context of co-operation between the developing countries. He did not disagree with the view of Mr. Ushakov that a generalized system of preferences should be established by the developing States themselves in order to make it universally acceptable. The Commission should suggest in its report that a broader understanding of the problem could be reached through a debate in the Sixth Committee, in which most of the countries of the third world would be represented.

32. Mr. HAMBRO endorsed Mr. Tabibi's suggestion that the Commission should expressly invite comments from the Sixth Committee. He appreciated Mr. Pinto's call for a more expeditious approach, although the limitations imposed by the task of progressive development of international law should not be forgotten. Moreover, the Commission was now considering the most-favoured-

⁶ See 1387th meeting, para. 42.

⁷ See para. 13 above.

nation clause; unlike UNCTAD, it was not dealing with the problems of international trade in general. In view of the Commission's terms of reference, he was not convinced of the soundness of the principle of establishing a rule which would make a definite and permanent distinction between law for the developing countries and law for other countries. It was essential at all times to preserve the unity of international law.

33. He fully supported the Special Rapporteur's appeal for co-operation among the developing States; but it would be in the interests of those States to work towards regional integration, which meant that Customs unions and free-trade agreements would be of greater importance to them in the future. Consequently, he failed to understand why his modest proposal to include some kind of general reference to Customs unions and free-trade areas had met with a nearly unanimous hostile reaction.

34. Mr. REUTER said that the reason why the problem of the developing countries was constantly being raised was that those countries often had the impression that they were not being taken seriously, and that the problem really did arise in almost every context. He well understood that attitude and would accept any solution to which the developing countries could agree. Moreover, all the members of the Commission had agreed that a reservation concerning Customs unions and free-trade areas should be introduced into the draft for the benefit of the developing countries; it was in regard to such a reservation in favour of the developed countries that many members of the Commission had raised objections. Similarly, all the members had welcomed article 21 relating to the generalized system of preferences. He was not sure, however, that the exceptions the Commission was prepared to accept in favour of developing States were sufficient. It was obvious that the generalized system of preferences was based on a commendable idea, but that it was not enough. The Commission was not called upon to decide what constituted discrimination in that sphere, or to what extent discrimination could be allowed.

35. In connexion with Customs unions and free-trade areas, he drew attention to the currency problem, which was fundamental for the developing countries. Customs duties lost all significance when quantitative restrictions were imposed. The problem of prices was also of fundamental importance to the developing countries. But the Commission did not have time, and was probably not competent, to examine those matters seriously. It might be better for the Drafting Committee to discuss them a little.

36. Personally, he would be in favour of a special article, drafted in the form of a saving clause, stipulating that none of the provisions of the draft articles on the most-favoured-nation clause would be an obstacle to more specific general measures in favour of the developing countries. With regard to the description of such general measures, Mr. Ushakov had emphasized the word "system". One could certainly not speak of "rules", since the generalized system of preferences was really only a recommendation. In using the word "system", Mr. Ushakov seemed to have in mind a set of general provisions having at least the value of directives or

recommendations formulated by competent bodies. A general expression of that kind would have the advantage of indicating that exceptions relating to Customs unions, free-trade areas and the generalized system of preferences were not sufficient, and that the Commission did not rule out other measures in favour of the developing countries. If the Commission used an expression such as "general measures", the specific meaning of which would be clear from the summary records of the present session, the General Assembly and UNCTAD would understand that the Commission was aware of certain very important matters which it could not pass over in silence.

37. Mr. ŠAHOVIĆ stressed that the question under consideration was a new one which the Commission had not considered at its previous session and which arose from non-legal matters. Since it was not possible to cure the economic crisis at the world level, it was natural that developing countries were combining their efforts at the political and economic levels. The Commission should take that into account in its study of other questions, too.

38. The Special Rapporteur's suggestion that a special provision be drafted was an excellent one. It was clear from his presentation that there was some consensus, but that practice had not developed to the point at which there were any real rules accepted by the international community. That being so, the Commission should have recourse to the method of progressive development of international law.

39. He agreed with Mr. Tabibi and Mr. Reuter on how the study of the question should be pursued.

40. Mr. MARTÍNEZ MORENO said that there were universally accepted norms for distinguishing between developed and developing countries, in particular the criterion of *per capita* income. It was true that some developing countries, like Brazil, exported capital goods, but certain regions of those countries were extremely backward. Hence *per capita* income was an important criterion in determining whether a State constituted a developing country. According to recent statistics, *per capita* income in several developed countries stood at over \$7,000 compared with a figure of less than \$100 in some newly-independent States. In view of that enormous difference, it was only just to try to formulate rules that would establish more equitable economic relations.

41. He considered the tentative formulation contained in paragraph 121 of the report to be entirely justified. The developing countries could establish a system of preferences, but they had often been urged to participate in GATT, so that they would not organize such a system. For example, the Central American countries had been denied certain tariff preferences unless they became contracting parties to GATT. It had been decided, by a regional resolution, not to do so. Nicaragua, already a Contracting Party at that time, had remained within GATT, and had subsequently experienced some difficulty in securing approval for its entry into the Central American Common Market.

42. The generalized system of preferences was certainly inadequate. However, the Commission was not in a position to establish a comprehensive rule and he therefore supported Mr. Reuter's suggestion. The Drafting

Committee should endeavour, within the context of international law and of the most-favoured-nation clause, to produce a formulation that would make for more equitable international trade relations.

43. Mr. PINTO said it had been suggested that an exception could be established only if a system in favour of developing countries was involved. In his opinion, the generalized system of preferences could not rightly be called a "system" and, indeed, he did not see why a system should be required for the exception to apply. One system did exist, namely the preferential treatment extended by several ESCAP countries under the Bangkok Agreement⁸—treatment which related not only to raw materials and primary products, but also to manufactures. It was perhaps only the first of many such systems. But even so, it was unnecessary to mention a system in the draft.

44. The best course would be to insert a provision of principle regarding an exception in favour of the developing countries. That provision should take account of the following points: (1) the favours must be favours granted to a developing country as such, in order to promote its economic development; (2) there must be no discrimination between developing countries in receiving those favours under the most-favoured-nation clause; and (3) a developed State must not benefit under the clause to obtain those favours. His objection to article 21 was simply that it was confined to "a generalized system of preferences" a vague term for an arrangement which depended upon the will of the granting State and which could not be truly described as a system.

45. Mr. RAMANGASOAVINA said that he could agree to submission to the Sixth Committee either of the formula proposed by the Special Rapporteur or of a broader formula, such as Mr. Reuter had proposed.

46. He paid a tribute to the objectivity of the Special Rapporteur, who had taken into account the trends which had emerged in the General Assembly, GATT and UNCTAD. In the interests of objectivity, however, the Special Rapporteur had pointed out certain obstacles. From the terminological point of view, use of the expression "developing country (State)" should not raise any difficulty, since it had already been used in article 21. The word "system" was rather vague, as Mr. Pinto had pointed out. Lastly, the absence of any clear practice did not appear to be a serious obstacle, since a trend was appearing and UNCTAD itself had unanimously advocated regional integration among developing countries.

47. Any provision which the Commission might draft on the model of the text proposed by the Special Rapporteur (A/CN.4/293 and Add.1, para. 121) would really be no more than a supplement to article 21. If all the market-economy countries and socialist countries were willing to help the developing countries by a generalized system of preferences, they should all support the expansion of trade between developing countries.

Personally, he did not see how a provision of the type proposed by the Special Rapporteur could involve discrimination against some developing countries, since the treatment was the same for all countries, even though their levels of development were not the same. The granting of certain kinds of treatment between developing States could, moreover, lead to a generalized system of preferences between them.

48. Mr. QUENTIN-BAXTER said that Mr. Reuter's suggestion merited careful consideration, for it might be the best course to take at the present juncture. The Commission was none the less confronted with a drafting problem, namely, the problem of dealing with exceptions and of specifying that the draft enunciated general rules, if not residual rules, under which the parties to a treaty enjoyed full contractual freedom.

49. One way of assessing the difference between the Special Rapporteur's formulation and the text of article 21 was to bear in mind the condition tentatively incorporated in article 16: "Unless the treaty otherwise provides or it is otherwise agreed".⁹ Article 21 posed no problem in that respect, since it referred to a system which had the authority to adopt its own rules and to govern its own situation. If the same conditions were attached to the Special Rapporteur's formulation, however, it would be counter-productive—it would merely be an invitation to States to derogate from the principle being established, which was not the Commission's intention. The force of a rule like the one under consideration must be derived from something external to the present work and the Commission would do well to point to that fact in its report.

50. Mr. KEARNEY said that the problem was extremely complex and the best approach might be that suggested by Mr. Reuter. An exception to the rules on the most-favoured-nation clause was in some sense negative, for it meant that the clause would apply only in certain cases. It was difficult to make exceptions and then proceed effectively to establish positive rules on such matters as discrimination, which entailed the introduction of exceptions to those exceptions.

51. Mr. SETTE CÂMARA said he fully appreciated the difficulties encountered by the Special Rapporteur in proposing a concrete rule, within the framework of the most-favoured-nation clause, to deal with the problem of special benefits granted by a developed State to a developing third State. Unfortunately, the rule could not be set within a specific context, like that provided for article 21 by the generalized system of preferences. Nevertheless, the spirit underlying article 21 could serve as a guide in the present instance. A formulation on the lines of that contained in paragraph 121 of the report would certainly elicit the opinions of Governments; and Mr. Reuter's suggestion, if adopted, might provoke a fruitful debate in the Sixth Committee.

52. It should be emphasized that trade between the developing countries was not as unimportant as the

⁸ First Agreement on Trade Negotiations among Developing Countries of the Economic and Social Commission for Asia and the Pacific, signed at Bangkok on 31 July 1975.

⁹ For the text of article 16, see *Yearbook... 1975*, vol. II, p. 121, document A/10010/Rev.1, chap. IV, sect. B.

Special Rapporteur appeared to suggest. Although it represented only a very small fraction of the world figure, it was growing precisely because of the deterioration in the terms of trade with the industrialized countries. Brazil, for example, had greatly increased its exports of manufactures to other developing countries. They now accounted for a considerable percentage of its exports and would doubtless continue to do so in the future.

53. The best course would be to seek the views of the Sixth Committee by inserting an appropriate statement in the report.

54. Mr. BILGE said that he, too, was in favour of an exception or a saving clause in favour of developing countries. All the indications were that such a provision was necessary, but opinions differed on its wording. Unlike the Special Rapporteur, who seemed to think that associations of developing countries could hinder the expansion of international trade, he believed that they should serve the interests not only of their members, but also of other States. An example was provided by EEC. Associations of developing countries should create new trade and new demand for capital goods.

55. The first solution he would recommend would be to include in the draft an exception in favour of developing countries which joined together by way of economic integration. The second would be to draft a general formula, such as that proposed by the Special Rapporteur, and to add anything which seemed necessary in the light of the views expressed in the Sixth Committee. The third would be to draft a saving clause on the lines proposed by Mr. Reuter. The fourth would be to accept a general exception, as proposed by Mr. Hambro. It was to be feared, however, that such correction of a past injustice might one day bring about injustice to the developed countries.

56. The difficulties to which the Special Rapporteur had drawn attention in his report should not prove insurmountable. In particular, the term "developing countries" had often been used before and should not give rise to any controversy. While it was true that the Commission ought not to go into economic questions, it could not entirely ignore reality.

57. Mr. YASSEEN said that the internationalization of the campaign for development was relatively recent and had taken shape mainly through the work of UNCTAD. At first, it had been thought that assistance from the developed countries was necessary to combat underdevelopment. Several remedies had been proposed, including the establishment of a generalized system of non-discriminatory and non-reciprocal preferences. That system had not worked very well, however, as UNCTAD had noted more than once. Subsequently, it had been thought that developing States themselves could do something to improve their situation and they had been advised to co-operate among themselves. That co-operation had produced some results, as Mr. Sette Câmara had pointed out.

58. In the draft articles, the Commission had taken account of the generalized system of preferences applicable to the relations between developed and developing

countries. It could not remain silent on co-operation between developing countries, which had been strongly recommended by international bodies such as UNCTAD. After making an exception for the generalized system of preferences, the Commission should make one for co-operation between developing countries, since that co-operation could produce much more effective results than the generalized system of preferences, which was tainted.

59. As to the procedure to be followed, the Commission could submit to the General Assembly either the text proposed by the Special Rapporteur or that proposed by Mr. Reuter, which had the advantage of referring to all possible measures in support of the campaign against underdevelopment.

60. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those members who wished the problem to be brought to the attention of the Sixth Committee. While he would have preferred the formulation contained in the Special Rapporteur's report, he was none the less ready to accept Mr. Reuter's suggestion. Mr. Sette Câmara had rightly pointed out that the spirit underlying article 21 should guide the Commission in dealing with the present complex problems. The Special Rapporteur was not in favour of including an article parallel to article 21, but with commendable objectivity he had furnished an extremely rich commentary as a basis for the Commission's exchange of views.

61. It should not be forgotten that some rules were of a transitional nature. He had in mind Chapter XI of the Charter: with very few exceptions, the former Non-Self-Governing Territories had now attained political independence. It was also to be hoped that the developing countries would soon reach what might be termed a minimum of economic equality with the industrialized countries. Nevertheless, it was necessary to bear in mind Mr. Hambro's comment that it was essential at all times to preserve the unity of international law.

62. Mr. USTOR (Special Rapporteur) said he was very appreciative of the discussion that had taken place. Nevertheless, the realities of international trade had to be taken into account. The Contracting Parties to GATT were committed to granting most-favoured-nation treatment to each other, and the Commission should not adopt rules which were contrary to those of GATT or which had not been adopted by economic bodies such as UNCTAD. He was entirely in favour of measures to assist the developing countries, but the adoption of rules for which there was no basis in the economic life of the international community would not enhance the prestige of the Commission.

63. He did not in any way contest the right of States to enter into Customs unions. Moreover, Mr. Reuter's suggestion to some extent represented less than what had already been adopted in article 21, despite the shortcomings of that article.

64. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer the Special Rapporteur's tentative formulation

(A/CN.4/293 and Add.1, para. 121), and Mr. Reuter's suggestion¹⁰ to the Drafting Committee, for consideration in the light of the discussion.

It was so agreed.

The meeting rose at 1.10 p.m.

¹⁰ See para. 36 above.

1389th MEETING

Monday, 14 June 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

SETTLEMENT OF DISPUTES

1. The CHAIRMAN invited the Special Rapporteur to introduce the paragraph of his report relating to settlement of disputes (A/CN.4/293 and Add.1, para. 132).

2. Mr. USTOR (Special Rapporteur) said that, in the first sentence of paragraph 132 of his report, he had mentioned the obvious fact that questions connected with the application of most-favoured-nation clauses might lead to international disputes. He now wished to withdraw the second sentence of that paragraph, because the set of draft articles was considered to be autonomous and not very closely connected with the Vienna Convention on the Law of Treaties. He thought the Commission should not adopt special measures for the settlement of disputes concerning most-favoured-nation clauses, because the general rules of international law and, more particularly, Article 33 of the United Nations Charter would be applicable. Moreover, it was not the Commission's practice to include provisions on the settlement of disputes in its drafts.

3. Mr. KEARNEY said he agreed with the Special Rapporteur that the second sentence of paragraph 132 of the report was inappropriate. On the other hand, the Commission had sometimes included provisions on the settlement of disputes in the draft conventions that it had prepared.

4. The logical consequence of the statement contained in the first sentence of the paragraph would be that the Commission should concern itself with disputes that might arise regarding the application of the draft articles. Ar-

ticle 65 of the Vienna Convention on the Law of Treaties¹ established the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty; but the type of dispute which commonly arose in connexion with a treaty containing a most-favoured-nation clause—in other words, a commercial treaty that was of great importance to the two parties to the dispute—did not usually result in termination or suspension of the treaty. Even where a State considered that one of its nationals had been wronged and that the other State was not interpreting the treaty correctly, it would not, generally speaking, wish to see the treaty suspended or terminated. Consequently, the system adopted in the Vienna Convention was not the best one to apply in disputes relating to a most-favoured-nation clause.

5. Another aspect of disputes involving considerable economic advantages or disadvantages was that they were usually dealt with by courts or tribunals of one or other of the parties and, if the dispute was sufficiently serious, dealt with almost invariably by courts or tribunals at a very high level. Great difficulties arose, and high-level political decisions were usually required if a State sought to differ with the decision reached by its own supreme court or high-level tribunal on the interpretation of the clause in dispute because of international considerations—when the disagreement would injure the interests of an internal economic group. Cases of that type could best be handled by international judicial settlement because, in a situation where, in the interests of settling a dispute, the decision of a State's own supreme court or tribunal was not followed, an adverse ruling by an international tribunal provided the most reasonable grounds for that State to make the necessary changes in its interpretation, its internal legislation or its administrative regulations.

6. For that reason, a provision should be included in the draft specifying that, failing settlement by any other means, a party to a dispute arising out of a most-favoured-nation clause involving the interpretation or application of the draft had the right to refer the matter to the International Court of Justice. He was fully aware of the objections that could be raised, but he believed that that was by far the best means of settlement available and that the Commission should adopt it for disputes arising out of a set of articles on the most-favoured-nation clause.

7. Mr. USHAKOV said he thought that there was a misunderstanding about the first sentence of paragraph 132, which referred to international disputes arising out of the application of most-favoured-nation clauses. The Commission was not called upon to deal, in its draft articles, with disputes arising out of the application of particular most-favoured-nation clauses; it was only concerned with disputes which might result from the application of certain general rules relating to the most-favoured-nation clause.

8. It was necessary to distinguish between two types of possible disputes; those which might arise in connexion

¹ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

with the application of a most-favoured-nation clause contained in a particular treaty, and those which might arise from the interpretation of the general rules stated in the draft articles. In the first case, the dispute would be between the parties to the treaty containing the clause, whereas in the second, it would be between the parties to the future convention resulting from the draft articles. Those were two entirely separate matters which should not be confused. Only the second matter, that of disputes relating to the application of the future convention, concerned the Commission. He believed that the measures provided for in general international law could be applied to it.

9. Mr. YASSEEN said that the question of the settlement of disputes relating to treaties had been settled once and for all by the 1969 Vienna Convention. In his opinion the system of settlement provided for in the Vienna Convention should apply to all disputes arising out of treaties, including treaties containing a most-favoured-nation clause. The convention on the most-favoured-nation clause would itself also be subject to that system of settlement. It might not be ratified by the same States as the Vienna Convention, but the Commission must be consistent and should not forget that it was working to build an international legal order. If the system of the Vienna Convention was acceptable, it must apply to the present draft and to all treaties containing a most-favoured-nation clause. Consequently, there was no need to add an article on the settlement of disputes regarding the present draft.

10. Mr. HAMBRO said he agreed with the view expressed by Mr. Kearney. Although impressed by the arguments advanced by Mr. Yasseen, he did not see why the Vienna Convention should be regarded as preventing the Commission from making other arrangements for a particular set of articles.

11. Mr. REUTER said that the question of the settlement of disputes was a very delicate one, for in every treaty there was a clause on the settlement of disputes which might arise out of the application of that treaty. Where the rules of the Vienna Convention came into conflict, in that regard, with the rules of a particular treaty, the Commission could not rest content with a simple reference to a system of judicial settlement or compulsory arbitration: it would have to introduce rules on conflict of treaties.

12. One could distinguish, as Mr. Ushakov had done, between the application of a particular treaty and the interpretation of a general convention. The Vienna Convention had provided a system for the settlement of disputes without going into details of how the general rules it had established for that purpose might combine with the rules applicable to particular treaties. It had carefully avoided that problem and had provided only for a system of conciliation. Even if a dispute relating to the application of a treaty arose between States which were parties both to that treaty and to the Vienna Convention, it was not certain that the mode of settlement embodied in that Convention would raise no problems. In that case too, it might perhaps be necessary to say, adopting the distinction made by Mr. Ushakov, that the

conciliation machinery provided for in the Vienna Convention would apply to the interpretation of the rules of that Convention relevant to the dispute, but not necessarily to the application of those rules to concrete cases.

13. He therefore considered that at the present stage in the Commission's work, it would be very unwise to propose a text on the settlement of disputes. It would be better merely to state in the report that the Commission had thought it useful to study a means of settling disputes within the framework of its draft convention, and that many of its members had expressed their confidence in a system of judicial settlement and arbitration. He personally would prefer judicial settlement.

14. Mr. SETTE CÂMARA questioned the advisability of undertaking the formulation of rules for the settlement of disputes. Experience in that matter was by no means encouraging. On previous occasions the Commission had been divided in its views and it had been necessary to submit alternative texts to the General Assembly. Subsequently, conferences had sometimes considered the topic from an entirely political viewpoint, and no weight had been attached to the Commission's suggestions. In the present instance, the problem of the relationship between the draft articles and the Vienna Convention would also have to be solved.

15. Moreover, if provisions were to be adopted on the settlement of disputes arising out of most-favoured-nation clauses, the same would have to be done with regard to succession of States in respect of treaties, a matter which had been referred to the Commission by the General Assembly, but one on which the Commission had not made any concrete proposals.² It was difficult to formulate new provisions on the settlement of disputes; such provisions tended to be of a standard type. He therefore agreed with Mr. Yasseen that the matter should be set aside for the time being.

16. Mr. YASSEEN said that he wished to explain his views on the settlement of disputes. In his opinion, even if the draft articles contained no provision on that subject, it would be the system of settlement provided for in the Vienna Convention that would apply to disputes arising out of their application. That system could, he thought, be described as a progressive one in view of the general political situation and the attitude of States to means of settling conflicts which involved the intervention of a third party. The United Nations Conference on the Law of Treaties had, indeed, accepted the principle of compulsory conciliation and of resort to the International Court of Justice on certain matters. Could the Commission go further and provide for compulsory arbitration or judicial settlement? He did not believe so. The question was a highly political one it would be reasonable for the Commission to ascertain the views of the General Assembly on it.

17. Mr. USHAKOV emphasized that the question which concerned the Commission was not the settlement of

² See *Yearbook... 1974*, vol. II (Part One), p. 172, document A/9610/Rev 1, para. 75, and General Assembly resolution 3315 (XXIX), section II, para. 2.

disputes about the application of most-favoured-nation clauses as such, but the settlement of disputes regarding the application of the future convention resulting from the draft articles.

18. Mr. CALLE Y CALLE said it was obvious that the commentary should refer to the settlement of disputes, for any set of rules always gave rise to questions of interpretation and application.

19. It should not be forgotten that the convention which might result from the draft articles would cover the entire range of most-favoured-nation clauses and would not deal exclusively with economic matters. The expression "settlement of disputes" appeared to refer both to disputes arising out of the application of the most-favoured-nation clause and to disputes arising out of the draft articles. The means of settling disputes should be established by the will of the parties, however, as it was in practice in most trade treaties, which usually provided for arbitration. The Commission should not undertake the difficult and complex task of elaborating a specific system for the settlement of disputes concerning the application of the most-favoured-nation clause. As Mr. Yasseen had pointed out, the matter would in any event be dealt with by the conference adopting the future convention.

20. Mr. KEARNEY said that his earlier statement appeared to have led to some misunderstanding. He had not suggested the insertion of an article applicable to the settlement of disputes relating to provisions contained in treaties on most-favoured-nation treatment as between two States. He was merely proposing that a settlement procedure should be established for disputes over a most-favoured-nation clause which involved the present draft articles, in the sense that the latter were used to determine the treatment to which a State was entitled under a most-favoured-nation clause. Consequently, his proposal related exclusively to the application of the draft articles.

21. His sole reason for suggesting a procedure different from that specified in the Vienna Convention was that it would be preferable to obviate the need for suspension or termination of a treaty. Disputes arising out of a most-favoured-nation clause were precisely the type of dispute in which it should not be necessary to suspend or terminate a treaty in order to arrive at a third-party decision on the merits of an interpretation of a given clause.

22. If most of the members of the Commission did not wish to advocate third-party settlement, that was understandable; in recent years, the Commission had not shown any strong inclination to do so. In his opinion, one of the weaknesses of the Commission was a belief that it could propose codification of law without having to consider how the law was to be interpreted or how disputes were to be settled; it would function at far less than full efficiency until it took those matters into consideration.

23. Mr. RAMANGASOAVINA said he agreed with Mr. Yasseen and Mr. Calle y Calle. Every treaty had a margin of uncertainty and could raise a problem of interpretation. Thus the convention the Commission was preparing could raise problems of interpretation concerning its own terms or its relationship with the Vienna

Convention and with treaties between States containing most-favoured-nation clauses. Since the Commission had prepared a general convention which settled the problem of the interpretation of treaties, there was no need to include in the present draft a provision on disputes which might arise over its interpretation, especially as it was closely linked with the Vienna Convention.

24. The first sentence of paragraph 132 of the Special Rapporteur's report seemed to show some scepticism about the usefulness of the draft articles. But any convention, however perfect, could give rise to disputes over its interpretation and its practical application. In his view, any disputes which might arise over the present draft articles should be settled in accordance with the Vienna Convention. There was thus no need to provide for a special system, and it would be wiser not to mention the question of settlement of disputes in the draft articles.

25. The CHAIRMAN observed that the discussion had revealed divergent views, but the balance was clearly in favour of the Special Rapporteur's position that the draft should not include a provision on the settlement of disputes and that the question should be discussed by the General Assembly or by a conference convened to adopt the draft articles in the form of a convention. In dealing with the topic of succession of States in respect of treaties, the Commission had decided not to incorporate a proposed article on the settlement of disputes, but to include a substantive statement on the matter in the introduction to the draft articles.³

26. If there were no further comments, he would take it that the Commission agreed to instruct the Special Rapporteur to follow a similar course by including, in the introduction to the draft articles on the most-favoured-nation clause, an account of the discussion which had taken place and the suggestions made.

It was so agreed.

Succession of States in respect of matters other than treaties (A/CN.4/292)

[Item 3 of the agenda]

27. The CHAIRMAN invited the Special Rapporteur to introduce his eighth report (A/CN.4/292).

INTRODUCTORY STATEMENT BY THE SPECIAL RAPPORTEUR

28. Mr. BEDJAoui (Special Rapporteur) said that his eighth report on the succession of States in respect of matters other than treaties reflected a new choice of method as compared with the previous report. The present report still dealt with State property—excluding communal, parastatal and other property—but it no longer referred, as the seventh report⁴ had done, to particular categories of State property such as currency, treasury, and public funds, State archives and libraries.

³ *Ibid.*, p. 173, document A/9610/Rev.1, paras. 79-81.

⁴ *Ibid.*, p. 91, document A/CN.4/282.

29. There were several ways of approaching the question of succession of States in respect of State property. First, the approach could be based on the type of succession and draft articles containing rules appropriate to each type could be formulated. He had covered the three types of succession which the Commission had already adopted in its draft articles on succession of States in respect of treaties: succession relating to part of territory, succession relating to newly independent States and succession relating to the uniting or separation of States. It was also possible to consider the specific nature of the property in question—currency, archives, treasury, public funds, etc.—and make a special rule for each of those types of property. Again, a distinction could be made on the basis of the category of property under consideration, separating movable property from immovable property. Finally, State property could be distinguished according to its location and be given different treatment depending on whether it was in the territory to which the succession of States related or outside it, in the territory of the predecessor State or of a third State.

30. In the five earlier reports which he had devoted to succession of States in respect of public property, he had tried to combine several of those approaches. In his seventh report, submitted in 1974, he had referred to particular types of property, considered *in concreto*, such as currency, archives and public funds, but that had raised extremely complex technical problems. In none of the previous reports, however, had he distinguished between movable and immovable property.

31. In his eighth report he had, for the first time, made a distinction based on categories of property, between movable and immovable property. He had abandoned distinctions based on the specific nature of the property—currency, archives, treasury, etc.—with separate rules for each type, and had preferred to submit general articles. He had thus combined three possible methods by making a triple distinction based on the type of succession, the category of property and the location of the property. Consequently, for each of the three types of succession of States adopted by the Commission in its draft articles on succession in respect of treaties,⁵ the Commission would have to examine the nature of the succession of States according to whether the property in question was movable or immovable and whether or not it was situated in the territory to which the succession of States related.

32. The new articles 12 and 13 which he was submitting (A/CN.4/292, chap. III) accordingly referred to succession in respect of part of territory; article 12 related to State property situated in that territory and article 13 to State property situated outside it.

33. The question arose why legal writings, judicial precedents and the practice of States all recognized that State property passed from the predecessor State to the successor State in the vast majority of cases. The reason

was that, when a successor State took possession of a territory, it took possession not only of the territory itself, but also of everything in the territory. Obviously, the predecessor State could not remove from the territory fixed “installations” such as roads, railways, airports, barracks, military bases, public buildings, etc. But even in the case of movable property, the predecessor State could not transmit a territory to the successor State having previously removed all such property. The territory must be ceded as a going concern, and any withholding of property by the predecessor State which would impair the viability of the territory would be unacceptable. That was the basic moral and political principle underlying the legal principle of the transfer of State property.

34. The reason why property must pass to the successor State was rooted in the principle of the attachment of the property to the territory and the principle of equity. To determine whether property should pass to the successor State or not, it was therefore necessary to apply a material criterion: that of the relationship which existed between the territory and the property because of the origin, nature and geographical situation of the property. In the Sixth Committee of the General Assembly, Mr. Lauterpacht, the representative of Australia, had said on 16 October 1975 that a general principle should be formulated acknowledging the right of the successor State to such assets as were attributable to or associated with the administration of the territory to which the succession of States related.⁶ That meant property “allocated” to the territory before the succession of States, in other words, property linked by its nature to the territory—and hence directly attached to it—or property permanently situated in the territory. That principle of the allocation or attachment of the property to the territory was only the expression of the principle of viability of the territory to which the succession of States related.

35. Movable property, on the other hand, was impossible to localize. Hence the problem it raised could only be solved by the principle of equity. The application of that principle underlay all the articles, particularly article 17 (Succession to State property in cases of separation of parts of a State).

36. As he had explained in paragraphs 16 to 27 of his eighth report, he had abandoned the presentation he had adopted the previous year in his seventh report, in which the nature of the property—currency, treasury, archives, etc.—had been considered *in concreto*; he had been induced to give up that method not so much because it could involve artificial, arbitrary or inappropriate choices but rather because of the excessively technical nature of the articles which he would have had to propose on such complex subjects as currency, treasury, public funds and archives. In the present report, therefore, he had reverted to a method which he had already adopted in previous reports, when he had tried to find general rules that could be applied to all kinds of property, whatever its specific nature.

⁵ *Ibid.*, p. 174, document A/9610/Rev.1, chap. II, sect. D.

⁶ *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1541st meeting, para. 5.*

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned)

37. Mr. BEDJAOUI (Special Rapporteur) introduced article 12, for which he proposed the following wording:

Article 12. Succession in respect of part of territory as regards State property situated in the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State: *

(a) the ownership of immovable property of the predecessor State situated in the territory to which the succession of States relates shall, unless otherwise agreed or decided, pass to the successor State;

(b) the ownership of movable property of the predecessor State which, on the date of the succession of States, is situated in the territory to which the succession of States relates, shall also pass to the successor State:

(i) If the two States so agree, or

(ii) If there is a direct and necessary link between the property and the territory to which the succession of States relates.

* *Variant*: When part of the territory of a State, or when any territory not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State....

38. That provision was the first of those relating to the particular type of succession of States constituted by succession in respect of part of territory. The definition it gave of succession in respect of part of territory was that adopted by the Commission on first reading of the draft articles on succession of States in respect of treaties.⁷ As a variant, he was also proposing the definition adopted by the Commission on second reading.⁸

39. Article 12 comprised a subparagraph (a) and a subparagraph (b) referring to immovable and movable property respectively. Subparagraph (a) called for application of the principle of the passing of State property, as formulated in article 9.⁹ Since that subparagraph dealt with immovable property, it was not absolutely necessary to add the words "on the date of the succession of States", which were much more important in subparagraph (b), because it referred to movable property. As was shown in paragraphs 5 to 16 of the commentary to the article, the content of subparagraph (a) was confirmed both by international legal theory and judicial decisions

and by State practice. The examples he had provided in his report often went beyond what it was necessary to establish for the purposes of that subparagraph; often, the devolution of property was decided upon without any distinction being made according to the nature of the property and the place where it was situated. It could therefore be concluded that, for the category of immovable property situated in the territory to which the succession related, the principle of the passing of property was generally accepted. The words "unless otherwise agreed or decided" made it possible for States to agree on a different arrangement and did not preclude a judicial decision against the passing of State property.

40. With regard to movable property (subparagraph (b)), it might be asked whether it was realistic to state a legal rule when the predecessor State could easily remove property in that category from the assets of the succession. Nevertheless, to refrain from stating such a rule although the property involved was often very extensive, would be an admission of failure on the part of jurists. Despite its mobility, he wished such property to be covered by a legal rule, and he had therefore followed the principle of the viability of the territory and the principle of equity. The movable property of the predecessor State passed to the successor State because it was necessary and equitable that it should be so. The geographical location of the property was thus of little importance: the fact that it was situated in the territory on the date of the succession of States did not make devolution to the successor State absolutely certain even though there was a rebuttable presumption in favour of the passing of the property. Conversely, the fact that the property was situated outside the territory, in the remaining part of the predecessor State or in a third State, did not mean that it remained the property of the predecessor State, although there was also a rebuttable presumption in favour of the predecessor State. As stated in paragraph 19 of the commentary to article 12

... the mere fact that movable property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. In order for the predecessor State to retain or the successor State to acquire property, other conditions besides the too simple and easy one of where the property is situated must be fulfilled.

41. What criterion should, then, be adopted to determine that the movable property belonged to the successor State, even if the predecessor State had transferred it to its own territory? In his opinion, the predecessor State could not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory which it was handing over and of jeopardizing its viability. There were natural limits beyond which the predecessor State could not go without seriously failing in an essential international duty. That raised the question of the viability of the territory and whether the property concerned was or was not necessary to it. Some movable property had a direct and necessary link with the territory. Thus, currency could circulate only in a certain territory, and that implied the full withdrawal of the predecessor State from the territory in question

⁷ *Yearbook... 1972*, vol. II, p. 249, document A/8710/Rev.1, chap. II, sect. C, article 10.

⁸ See *Yearbook... 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, article 14.

⁹ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

and the replacement of the predecessor State by the successor State in its monetary prerogatives and authority. A territory of some size could not be transferred without metallic cover for the currency. The situation was obviously not the same in the case of mere frontier rectifications. The notion of a necessary and direct link between certain movable property and the territory to which the succession related was also found in regard to State funds and State archives. On that point, he referred the Commission to paragraphs 41 to 65 of the commentary to article 12.

42. Lastly, he pointed out that it would probably be necessary to add definitions of movable and immovable property to article 3 (Use of terms).

Co-operation with other bodies

[Item 9 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

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

44. Mr. RUIZ-ELDREDGE (Observer for the Inter-American Juridical Committee) said that, over the years, the Committee had had the honour of welcoming several observers for the International Law Commission, the most recent one being Mr. Tabibi, who had informed it of the Commission's recent work.

45. World society was going through a grave crisis caused by the injustice from which the majority of the peoples of the world were suffering. The poor, the oppressed and the humble were hoping for a better future, and the efforts of international bodies like the Commission would contribute to the process of equitable change in response to deep social needs.

46. Under the impact of the demand for justice, such important economic-legal institutions as property, contracts and companies, and politico-legal institutions such as the State itself, were acquiring new dimensions which would place them at the service of mankind and make for the progress of peoples. The utilitarian values of the present time, which had sometimes been called "anti-values" should give way to ethical and logical values, without the important religious values being relegated to the background.

47. The peoples of the third world were animated by a sincere and deep desire for harmony and peace with justice; because they were engaged in a dramatic struggle for liberation, they realized that the dynamic action of a renovated law based on social and humanistic ideas was the only alternative to confrontation and insurrection, with the consequent sacrifice of young lives. It was against that background that the Inter-American Juridical Committee was making a contribution, in the realm of law, to the elimination of all forms of colonialism. The independence of the United States of America, the bicentenary of which was being celebrated, had been the first triumph

against colonialism. In the eighteenth and nineteenth centuries, the other peoples of America had fought successfully for freedom, justice and independence; together with the great European, African and Asiatic revolutions, they had traced the inevitable course of justice, which it was the task of the law to facilitate.

48. The Committee, at its two most recent sessions (July-August 1975 and January-February 1976), had dealt with two subjects connected with the decolonization process: the Panama Canal and the Falkland Islands (Malvinas). On 8 August 1975, the Committee had adopted a resolution which recognized the sovereignty of the Republic of Panama over the "canal zone" and had proclaimed that the relations established by the existing treaties between the United States of America and Panama were legally in the nature of a concession relating to an international public service, in which the grantor of the concession was Panama and the beneficiary the United States, until such time as Panama took over control of the canal. He had communicated to the secretariat of the Commission the full text of that resolution and of the supporting statement of reasons, together with the separate opinions of the Argentine and Uruguayan members of the Committee.

49. On the problem of the Falkland Islands (Malvinas), the Committee had approved a Statement,¹⁰ the full text of which he had also submitted to the Commission. In that Statement, after examining the geographical and historical background of the case, the Committee had declared that the Republic of Argentina had an undeniable right of sovereignty over the Malvinas Islands; that the unilateral action taken by the United Kingdom Government in dispatching the "Shackleton Mission" was in contradiction to General Assembly resolutions 2065 (XX) and 3160 (XXVIII); that the presence of foreign warships in waters adjacent to the American States constituted a threat to the peace and security of the continent; and that the hostile conduct intended to silence the claims of the Government of Argentina were obstructing the course of the negotiations recommended by the General Assembly.

50. The General Assembly had declared that any attempt to disrupt the national unity or the territorial integrity of a country was incompatible with the purposes and principles of the United Nations, which was thus concerned to eliminate all forms of colonialism, direct or indirect, preferably by legal means. The Committee had been working strenuously to that end.

51. The question of transnational undertakings had been discussed at length by the Committee, which had already adopted a decision on it. In 1972, when the Committee had been preparing the agenda for the Inter-American Specialized Conference on Private International Law, that question had been examined by a Working Group consisting of Mr. Rubin, the United States member, Mr. Aja Espil, the Argentine member, and Mr. Galindo Pohl of El Salvador, the Chairman of the Committee.

¹⁰ See *OAS Chronicle* (Washington, D.C.), vol. II, No. 2 (February 1976), p. 7.

Reports had been submitted by Mr. Caicedo Castilla, the Colombian member, Mr. Aja Espil, and himself as Peruvian member; at the July-August 1975 session a report had been submitted by Mr. Gómez Robledo, the Mexican member. In August 1975, the Committee had adopted a resolution transmitting those reports to the Secretary-General of OAS, together with the analytical report prepared by Mr. Prado Kelly, the Brazilian member. It had requested that the reports should be distributed to Governments, and to other entities or groups of experts studying the subject. The Committee had agreed that at its forthcoming session it would adopt a decision taking into account the views expressed in those reports, and had appointed Mr. Galindo Pohl as Rapporteur. Lastly, it decided to prepare for its forthcoming session a draft convention containing a number of urgently needed rules on the conduct of transnational undertakings; he had himself been appointed Rapporteur for the preparation of that convention.

52. At the Committee's most recent session in January-February 1976, its Chairman, Mr. Galindo Pohl, acting as Rapporteur, had submitted a draft decision on transnational undertakings; because of its importance, he had submitted a full text of that draft to the Commission. The Committee had decided to describe as "transnational" those undertakings which, organized as corporations, carried out operations in a number of different countries, with interdependent interests and with uniform criteria as to planning, business practices and administrative and economic policies. Transnational undertakings were recognized as bearing responsibilities in keeping with their economic and administrative possibilities, in all matters relating to bankruptcies or violations of the law. They were subject to the sovereignty, and hence to the laws and the decisions of the competent courts and authorities, of the country where they carried out their operations; they could not claim any preferential treatment because of their transnational character or because they represented foreign interests. They had a duty to carry out their activities in conformity with State policies governing such matters as investment, credit, taxation, prices and the transfer of profits. They also had a duty to supply full information on their activities. They were strictly prohibited from interfering in political affairs or with the sovereignty of States. In addition to enacting all the necessary internal legislation on the subject, States should take joint action to prevent and punish abuses by transnational undertakings.

53. Transnational undertakings and the corporations comprising them were not subjects of international law and had no right of direct access to international tribunals. The American States should refrain from becoming parties to conventions which provided for such direct access, including access to arbitration tribunals, which would give transnational undertakings an unwarrantable advantage over national undertakings. Cases relating to transnational corporations could be brought to international courts only as a result of an agreement between States on the settlement of disputes.

54. States should supervise the transfer of technology by transnational corporations, and could prohibit the payment of royalties for such transfers within a trans-

national undertaking. Co-operation between States to ensure uniform and efficient action in the economic area covered by a transnational corporation was a priority objective; such co-operation should take place through the machinery of the United Nations and OAS, with a view to the formulation of general rules and the consideration and settlement of disputes.

55. An inter-American Centre on transnational corporations was to be set up in order to carry out continuing studies on their contributions to development and on the abuses they committed. An important report on international economic and commercial offences had been submitted to the Committee at its last session by Mr. Ricaldoni, the Committee's Uruguayan member; a discussion would be held on the subject at the next session in July-August 1976. At that same session, he would himself submit the draft convention on rules to govern the conduct of transnational corporations. He had also appeared as observer for the Committee before the Commission on Transnational Corporations of the United Nations Economic and Social Council, held at Lima from 1 to 12 March 1976.

56. At its meeting on 29 July 1975, the Committee had approved a report submitted to it by Mr. Caicedo Castilla on the revision, modernization and evaluation of the inter-American convention on industrial property. On the basis of that report, the Committee had decided to request the Secretary-General of OAS to make arrangements for a further meeting of the Group of Government Experts on Industrial Property and Technology applied to Development. It had also requested the Secretary-General to ask Governments which had not yet done so to reply to the Group's questionnaire. On that basis, the Committee would prepare one or more draft conventions on industrial property, for the purpose of revising and bringing up to date the international instruments at present in force.

57. The Committee had also dealt with the immunity of States from jurisdiction, on the basis of a report which he had submitted at the January-February 1975 session. In its decision, the Committee had invited Governments to supply it with information on the existing rules and practices in the matter and had requested the Rapporteur to submit a draft convention taking into consideration the comments made by the members of the Committee on his preliminary report and the comments by Governments.

58. Mr. Rubin, the United States member of the Committee, had submitted a report on the function of law in social change, in which he explored the possibilities of formulating positive programmes that would contribute to the development of the western hemisphere with the aid of legal instruments, and described some of the measures taken in Latin America and elsewhere. The author of the report cited the view of Friedman that legal systems were clearly a part of political, social and economic development, and that many basic questions concerning the relations between law and social change were being completely ignored.

59. At its July-August 1973 session, the Committee had prepared a draft convention on the protection of the

archaeological, historical and artistic heritage of the American nations, which had been examined by the Inter-American Council for Education, Science and Culture at a meeting held at Mexico City from 27 January to 1 February 1975. The Council had entrusted the Committee with the preparation of a final draft, taking into account the comments received from a number of member States. That draft, which had now been prepared by the Committee, would be submitted to Governments: its provisions on the identification, registration, protection and supervision of the American heritage were similar to those of the relevant UNESCO conventions.

60. The excellent results achieved at the Inter-American Specialized Conference on Private International Law, held at Panama in January 1975, had led the General Assembly of OAS to convene a second conference on the same subject; the Inter-American Juridical Committee had been entrusted with the drafting of the provisional agenda, the rules of procedure and draft conventions for that conference. Mr. Caicedo Castilla, had been appointed Rapporteur. The provisional agenda for the conference, which had been approved by the Permanent Council of OAS, included the following items: recognition and execution of foreign judgments; evidence of foreign law; conflict of laws and uniform law on cheques in international circulation; international sale of goods; international maritime transport with special reference to bills of lading, and general rules of private international law.

61. The General Assembly of OAS, taking note of the excellent results obtained by the first and second courses of study on international law organized by the Committee, had entrusted it with the organization of a third course of four weeks to be held at Rio de Janeiro, starting on 19 July 1976 and covering the following subjects: multinational corporations and transnational undertakings; the reform of the inter-American system; the law of the sea, and private international law.

62. On 12 July 1976, the Committee would begin its regular session for the second half of the present year and would deal with two priority items: the draft inter-American convention on extradition and the draft conventions for the Second Inter-American Specialized Conference on Private International Law. The other ten items on the agenda included: the draft convention on transnational undertakings; the possibility of classification of economic and commercial offences; the nationalization and expropriation of foreign property in international law; the immunity of States from jurisdiction; the settlement of disputes relating to the law of the sea; the evaluation of the international conventions on industrial property; the principle of self-determination and its field of application; territorial colonialism in America; legal aspects of harmonization of the educational systems of the American countries; and the function of law in social change.

63. In a remarkable passage, Blaise Pascal had emphasized how small man was in the face of nature and its forces, which could so easily destroy him; man, however, was more noble than the physical elements which destroyed him, because he had the power to think. Another great

French thinker, Descartes, had said, *Je pense, donc je suis*. In the struggle for liberty and justice which had taken place in recent centuries, however, the disproportion was not between man and nature, but between men themselves—between powerful States and underdeveloped States, between powerfully armed countries and countries which were victims of aggression, between oppressors and oppressed. Perhaps man, in search of his dignity, should now say: "I fight, therefore I exist". For his part, he thought one might well hope for a new era in which men could say that they existed because they loved each other as brothers.

64. The international bodies entrusted with shaping the legal order were at present shouldering a great responsibility in their efforts to establish links between nations, to promote a new order respectful of the human person and to uphold the principle of the legal equality of States in a realistic manner, so that inter-State relations could fully conform with it.

65. The CHAIRMAN, speaking on behalf of all the members of the Commission, thanked the observer for the Inter-American Juridical Committee for his excellent statement on the valuable work being performed by that Committee. The Commission's outgoing Chairman, who had attended the January-February 1976 session of the Committee at Rio de Janeiro, had submitted a report on the work of that session (A/CN.4/296). The Commission was gratified to note that its work was followed with such interest by the Inter-American Juridical Committee.

66. Latin America had played an outstanding part in the development of international law. Among the great Latin American authors of the past were Calvo of Argentina, Bustamante y Sirvén of Cuba and Alejandro Alvarez of Chile, as well as the Argentine statesmen Drago and Saavedra Lamas. In the United Nations era, the names of Ricardo Alfaro of Panama, Gilberto Amado and Vicente Roa of Brazil, and Alberto Ulloa of Peru, would be remembered. Latin America had contributed to the development of international law not only through the work of its jurists, but also in the field of action. Among the many conventions adopted by Pan-American meetings, he would mention only the Convention Regarding Consular Agents and the Convention Regarding Diplomatic Officers adopted by the Sixth International Conference of American States and signed at Havana on 20 February 1928, and the Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Pact), signed at Rio de Janeiro on 10 October 1933, which constituted landmarks in the codification of international law.

67. The nations of Latin America had led the struggle for the independence of former colonial peoples, a struggle which had been taken up in the present century by the peoples of Africa and Asia. Thus the world community had expanded and international law, which had once been called *le droit public de l'Europe* had become the universal law of nations.

68. He asked the observer for the Inter-American Juridical Committee to convey to that Committee the greetings of the International Law Commission, which

continued to attach great importance to co-operation between the two bodies.

The meeting rose at 6 p.m.

1390th MEETING

Tuesday, 15 June 1976, at 10.5 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR (*continued*)

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)¹

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned) (*continued*)

1. Mr. BEDJAOUI (Special Rapporteur), continuing his presentation, said that he proposed the following wording for article 13:

Article 13. Succession in respect of part of territory as regards State property situated outside the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State,* [movable or immovable] property of the predecessor State situated outside the territory to which the succession of States relates shall, unless otherwise agreed or decided:

(a) remain the property of the predecessor State;

(b) pass to the successor State if it is established that the property in question has a direct and necessary link with the territory to which the succession of States relates; or

(c) be apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property.

* *Variant:* When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State....

¹ For the text, see 1389th meeting, para. 37.

2. As stated in paragraph 2 of the commentary to article 13 (A/CN.4/292), that article complemented article 12. Whereas article 12 related to State property situated in the territory to which the succession of States related, article 13 related to property situated outside that territory. Moreover, article 13 covered only State property of the predecessor State: it did not apply to property belonging to the territory to which the succession of States related, and situated outside that territory. For example, a province might pass under the sovereignty of another State and might possess property of its own in the capital of the predecessor State. Such property would not be recovered by article 13, first because the succession related, by definition, to the property of the predecessor State; secondly, because the property in question was not State property, but the property of the province; and thirdly, because, never having owned that property, the predecessor State would not be entitled, merely by reason of the succession, to acquire new rights in property belonging to the province.

3. Property situated outside the territory to which the succession of States related could be either in a third State or in the territory remaining to the predecessor State. In article 13, he had made no distinction between movable and immovable property. The reason why he had placed the words "movable or immovable" in square brackets, was merely to indicate that the article applied without distinction to both categories of property; there would be no objection to deleting those words.

4. In the territory remaining to the predecessor State, there were two categories of property. The first category comprised movable and immovable property which had always belonged to the predecessor State and which had probably always been situated in the part of the territory remaining to that State. It was quite obvious that such property—referred to in subparagraph (a) of article 13—was not affected by the succession and remained the property of the predecessor State. It would thus be an aberration for the successor State to be able to claim the State property of the predecessor State situated in the part of its territory remaining to it. The solution based on principle in subparagraph (a) was therefore quite natural.

5. The second category of State property situated in the territory remaining to the predecessor State comprised property which the predecessor State might have removed from the ceded territory just before the succession of States. Since it was difficult to determine whether such property had been removed fraudulently or in good faith, or whether it had always been situated outside the ceded territory, he had relied, in article 13, subparagraph (b), on the criterion of the direct and necessary link between the property and the territory to which the succession related. That criterion should make it possible to determine what property should normally revert to the successor State.

6. Subparagraph (c) covered the case in which the territory to which the succession related had contributed to the creation of the State property. For that case, he was proposing an equitable apportionment between the predecessor State and the successor State. In the *North Sea*

Continental Shelf cases,² the International Court of Justice had drawn a distinction between equity, as a matter of abstract justice, and equitable principles, but that distinction did little to clarify the concept of equity.

7. The wording of article 13 might not be perfect. Subparagraph (a) stated such an obvious principle that it could be deleted; it was only for the sake of clarity that he had drafted it. Alternatively, subparagraph (a) could be supplemented by the words "except in the situations referred to in subparagraphs (b) and (c)" and those two subparagraphs could be taken as exceptions to the principle stated in subparagraph (a).

8. To illustrate the exceptions provided for in subparagraphs (b) and (c), he had cited, in his commentary, mainly examples relating to archives, a subject on which State practice was much richer than on other matters. As indicated in paragraphs 5 to 17 of that commentary, a distinction had sometimes been made between archives which had been removed from the ceded territory and archives which had been constituted outside that territory but which related to it. Since the arrangements adopted by States had often been embodied in peace treaties, which necessarily reflected a particular balance of power, excessive importance should not be attached to them. As far as legal theory was concerned, it had been rather hesitant, out of respect for a judgment rendered by the Court of Nancy in 1896,³ which was really quite an isolated case.

9. Mr. KEARNEY observed that in articles 12 and 13 the Special Rapporteur relied on general statements of law to produce a division or transfer of property of the predecessor State on an equitable basis. The drafting of the articles followed the methods of the French Civil Code, in which general propositions were moulded in order to bring about a just situation.

10. In order to arrive at an equitable result the criterion proposed in both articles was that of a "direct and necessary link" of the property in question with the territory. He found the principle acceptable, but thought that the general terms in which it was drafted could lead to deadlocks between States when it was applied in practice. For instance, a predecessor State would be able to hold on to the property claimed by the successor State on the grounds that it did not have any direct and necessary link with the territory; and a successor State would be able to claim that movable property in dispute was outside the territory for temporary or fortuitous reasons.

11. If the Commission were to adopt the proposed wording of the articles, it would have to give some thought to the manner in which the principle embodied in them would be applied in practice. It was, of course, too early, at the present stage, to consider what procedures could be adopted for that purpose, but it was clear that unless such procedures were provided for, problems of interpretation were bound to arise.

12. Similar considerations applied to the provision in article 13 that State property situated outside the territory concerned should be "apportioned equitably" between the predecessor State and the successor State. That rule of substantive law required procedural provisions to be attached to it for the settlement of disputes as to whether the retention by the predecessor State of property outside the territory was compatible with the principle of equitable apportionment.

13. The Special Rapporteur would have to bear in mind that articles 12 and 13 should serve the purpose of settling problems rather than of shifting them; as the articles now stood, a dispute regarding succession to State property situated outside the territory was likely to lead, more often than not, to an argument about the meaning of "equitable apportionment". The problem was one with which he was familiar because, in the matter of international rivers, the major problem regarding water uses was that of equitable apportionment; if no procedures were established for consultation between States and the settlement of disputes, it was not possible to get the water apportioned properly.

14. The method adopted by the Special Rapporteur undoubtedly had the advantage of avoiding the problems which inevitably arose from entering into excessive detail. The Commission would recall the difficulties it had faced at the previous session when it had discussed the question of currency in connexion with State succession. With regard to archives, however, he intended at a later stage to propose more specific provisions taking into account modern means of reproduction of documents.

15. Lastly, for the opening phrase of articles 12 and 13 he preferred the variant proposed by the Special Rapporteur, which used the criterion of transfer of responsibility for the international relations of the territory concerned instead of the criterion of sovereignty or administration. He preferred that language not just for reasons of consistency, because it had been used in the draft articles on the succession of States in respect of treaties,⁴ but also because the present draft might later become part of a larger body of law.

16. Mr. USHAKOV said he was aware of the enormous amount of work that had gone into the Special Rapporteur's eighth report, which was admirable in every respect. Whereas it had been possible to base the draft articles on succession of States in respect of treaties on only two principles—namely the principle of continuity and the clean slate principle—it was far more difficult to derive from judicial precedents, legal theory and State practice which were both less rich and less homogeneous, the principles applicable to succession of States in respect of matters other than treaties. The approach adopted by the Special Rapporteur in his eighth report was much more general than that adopted in his previous reports; it was, indeed, important for the Commission to establish general rules and to leave it to predecessor and successor States to settle the details in special agreements. Those

² *I.C.J. Reports 1969*, p. 47.

³ See A/CN.4/292, chap. III, paras. 10 and 11 of the commentary to article 13.

⁴ See *Yearbook... 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D.

general rules should facilitate the conclusion of such agreements, which were absolutely necessary: it was not, for example, enough to state that ownership of the property of the predecessor State passed to the successor State. If the predecessor State was not willing to cede the property, it did not automatically pass to the successor State; consequently, an agreement between the States concerned was essential.

17. The general approach adopted in the eighth report involved a division of State property into two main categories: movable property and immovable property. With regard to that distinction, the Special Rapporteur had referred, *inter alia*, to Soviet law. In paragraph 37 of his report, he had quoted Jean Carbonnier, who observed that with the abolition of private ownership of the land in the Soviet Union, the distinction between movable and immovable property had also been abolished. That statement was incorrect, for in the Soviet Union a distinction was made between immovable property, which was attached to the land, and movable property, which was not. That distinction had no effect on the ownership of the land, but it existed nevertheless.

18. He was entirely in favour of drafting general provisions based on the definition of State property given in article 5.⁵ Articles 12 and 13 did, however, raise a question of typology of succession. In paragraph 13 of his eighth report, the Special Rapporteur had said that, with a view to harmonizing the draft relating to succession of States in respect of treaties and the draft which was in process of formulation, he had decided to adopt the three types of succession already chosen by the Commission, namely, succession in respect of part of territory, succession in the case of newly independent States and succession in the case of the uniting and separation of States. Although the two drafts were to some extent parallel, it could not be denied that that typology had been established specially for the topic of succession of States in respect of treaties. Referring to article 14 of the draft articles on succession of States in respect of treaties,⁶ he pointed out that the title of that provision, "Succession in respect of part of territory", did not correspond to its contents. In the wording adopted on second reading, that provision referred both to the transfer of part of the territory of a State to another State and to the decolonization of a dependent territory which united with a pre-existing State. In the first case, there was necessarily an agreement between the States concerned, since contemporary international law could not allow another mode of transferring part of a territory. The second case was that of a dependent territory which became independent otherwise than by constituting itself a newly independent State. That second case was obviously not covered by the title of article 14, because it related to a whole territory, not part of a territory which united with an existing State. The reason why the Commission had put those two cases together in the same provision, was

that a single principle, that of moving treaty-frontiers, was applicable to both of them.

19. Articles 12 and 13 of the draft ought each to be divided into two provisions dealing, respectively, with the case in which part of the territory of a State became part of the territory of another State, and the case of decolonization of a territory by union with a pre-existing State. He was not sure, however, that the Commission should now concern itself with questions of decolonization or, more particularly, with the fate of State property when a dependent territory united with a pre-existing State. When the Commission had begun its study of succession of States in respect of treaties, in 1967, there had still been a number of Non-Self-Governing Territories in existence, but such Territories had now become very rare. Consideration would also have to be given not only to State property, but also to property belonging to the Non-Self-Governing Territory—or to its people—which was not really State property. The question might become more complicated, for example, when the Non-Self-Governing Territory had previously been an independent State possessing genuine State property. As the Special Rapporteur had pointed out in his report (A/CN.4/292, foot-note 18), he (Mr. Ushakov) had suggested, in 1975, an article 12 dealing only with the case in which part of the territory of a State became part of the territory of another State. He had, indeed, then already taken the view that the case of a dependent territory which united with an existing State came under the heading of decolonization and should be dealt with separately.

20. In draft articles 12 and 13, as proposed by the Special Rapporteur, the term "territory", which was used in the opening phrase, could apply to the whole of a territory, especially in the variant proposed by the Special Rapporteur. In his opinion, those provisions should relate only to the case of transfer of a small part of the territory of one State to another State by mutual agreement between the two States. Cases of self-determination by referendum should be excluded. The cases he had in mind were those in which economic, social or other reasons led to the transfer of a small part of the territory of one State to another, without any need to consult the population. Generally, the inhabitants of the transferred territory could opt for the nationality of either State, and measures were taken to compensate them for any loss of property they might suffer.

21. If the transfer of part of a territory was made by mutual agreement between the predecessor State and the successor State, there was no reason why questions relating to the passing of State property should not also be settled by mutual agreement between the two parties. He thought it preferable to leave it to the two States to settle all questions relating to the passing of State property; besides, that was the most prevalent practice. That was why, as the Special Rapporteur had indicated in his report, he (Mr. Ushakov) had suggested an article 12 in which paragraph 1 provided that:

If part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to the successor State shall be settled by agreement between the predecessor and successor States.

⁵ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

⁶ See *Yearbook... 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D.

Thus, if there was agreement between the predecessor State and the successor State, no problem arose; it was only in the absence of agreement between the two States that there was a problem. For that case, certain general rules could be established, which would help the two States to conclude an agreement on the passing of State property. That was the situation contemplated in paragraph 2 of his suggested article 12.

22. He did not know why the Special Rapporteur had not followed the same method in article 13 as in article 12, where he made a distinction between movable and immovable property. The condition for the passing of State property rested on the link between that property and the territory to which the succession of States related. In the case of immovable property, the link was both physical and legal, since immovable property was physically attached to the land. But article 13, as proposed by the Special Rapporteur, dealt with the question of immovable property in quite a different way. For subparagraph (b) of that article provided that immovable property situated outside the territory to which the succession of States related, should pass to the successor State if it was established that the property had "a direct and necessary link" with that territory. The question arose what that "direct and necessary link" consisted in. Could there exist between the immovable property and the territory any link other than the physical and legal link of attachment to the land? It was difficult to imagine such a link, except perhaps in the case of archives which, incidentally, were not in his opinion State property in the strict sense of the term. It was, indeed, difficult to see what direct and necessary link could attach to a territory a factory or an airport which was not situated in it.

23. Article 13 introduced another distinction by providing, in subparagraph (c), that immovable property should

be apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property.

It might be asked why that distinction was not also made in article 12, subparagraph (a), for if a certain criterion was adopted for the passing of State property, it must be applied to all State property, whether it was situated in the territory to which the succession of States related or not. That criterion was not valid, moreover, for where real State property was concerned, it was the whole society of the State that had contributed to its creation. It would therefore be necessary to apportion all State property—which was not possible in the case of immovable property.

24. Lastly, article 13, subparagraph (a), provided that movable or immovable property of the predecessor State situated outside the territory to which the succession of States related "shall . . . remain the property of the predecessor State". But the Commission's task was to determine the property which passed to the successor State, not that which did not pass. In his opinion, only immovable property situated in the transferred territory should pass to the successor State. Other immovable property, which was not physically and legally attached to the land

of that territory was not affected by the succession of States. That was why, in the text of article 12 which he had submitted to the Special Rapporteur, he had suggested saying, in paragraph 2 (a), that in the absence of the agreement referred to in paragraph 1 of that article,

the immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

25. In the case of movable property, the situation of the property was of little importance. What was the link which must attach to the transferred territory property situated outside that territory? According to article 13, subparagraph (b), that link was again a "direct and necessary" one. But as in the case of immovable property, it might be asked what that link consisted in. For example, what link could there be between wagons outside the territory and a railway operating in the territory? Perhaps a more precise criterion should be applied. That was why, in paragraph 2 (b) of his draft of article 12, he had suggested saying that

the movable property of the predecessor State connected with the activity of the predecessor State in the territory to which the succession of States relates shall pass to the successor State.

It was indeed possible to take as the criterion, what was necessary for the activity of the State. For example, the equipment necessary for the operation of a mine situated in the transferred territory passed to the successor State.

26. In his opinion, the same criteria should be used in both article 12 and article 13, and it was not necessary to make a distinction between property situated in the territory and property situated outside the territory. It would be preferable to replace articles 12 and 13 by a single article covering all State property whatever its concrete nature, as the Special Rapporteur had done, distinguishing only between immovable property and movable property, and taking as the criterion for the passing of the former its physical link with the land of the territory, and as the criterion for the passing of the latter its link with the activity of the State in the territory.

27. He therefore proposed that articles 12 and 13 should be referred to the Drafting Committee for merging into a single article if appropriate.

28. Mr. MARTÍNEZ MORENO said he was glad to note that in dealing with enormously complex problems which were something new in the codification of international law, the Special Rapporteur had skilfully arrived at a synthesis and, in seeking to harmonize different systems of law, had established a distinction between movable and immovable property. On that point, the Commission's work would certainly be facilitated by Mr. Ushakov's statement that a clear distinction between movable and immovable property did exist in Soviet law.

29. The formulation of articles 12 and 13 took account of a number of interesting factors, such as the location of the property, the "direct and necessary link" between the property and the territory, and more particularly, considerations of equity. He wondered, however, why the last factor had not been incorporated in article 12,

as it had been in article 13 (c). In some cases it might, for reasons of equity, be useful to divide movable property—for example, archives or documents—between the predecessor and the successor States, bearing in mind any “direct and necessary link” or the contribution made by the predecessor State to such property.

30. Voluntary agreement between the predecessor and successor States was clearly necessary, but it was none the less desirable to establish principles and rules as guidelines for reaching a voluntary agreement. Failure to reach such an agreement sometimes led to great injustice. For instance, after the division of Central America into five countries, El Salvador had experienced great difficulties, not only in recovering, but even in examining certain documents which had remained in the archives of a neighbouring country.

31. The objective was obviously to solve problems, not to create them. It would accordingly be desirable to follow Mr. Kearney’s suggestion that the Special Rapporteur should consider rules for the settlement of disputes arising in connexion with succession of States in respect of matters other than treaties.

32. Mr. NJENGA congratulated the Special Rapporteur on his extremely useful and comprehensive report on a difficult topic, for which there were few precedents in international law. He endorsed the method of laying down general guidelines, since it would be a formidable task to establish detailed rules covering the great variety of situations that might arise. Such guidelines would also be of much assistance in the settlement of disputes, for they would provide a basis for conciliation, further negotiation or arbitration—means of settlement that were not precluded by the draft articles. Modern States, large or small, very rarely agreed automatically to a procedure for compulsory settlement of disputes.

33. He too considered that the element of equitable apportionment in article 13 (c) should also be incorporated in article 12, since it might well prove to be even more important than the “direct and necessary link”.

34. In addition, he would like to know whether the two conditions specified in article 12 (b), namely “if the two States so agree” and “if there is a direct and necessary link between the property and the territory to which the succession of States relates”, were alternatives or must both be fulfilled. The purpose of the articles was to ensure that the property passed to the party to which it belonged. In his view, it was not really necessary to specify the first of those conditions, unless it was linked with the question of ownership—in other words, of the “direct and necessary link”. For example, if a member country of the East African Community kept a number of railway wagons in its territory in anticipation of a separation or break-up of the common railway service, article 12 in its present form would establish a presumption that the wagons belonged to that country. That example was not truly one of succession of States, but the same type of problem would arise, for there would be a direct and necessary link between the property and the territory of all of the countries in the Community. Hence, article 12 would be greatly strengthened by the introduction of the element of equitable apportionment.

35. In conclusion, he thought the Special Rapporteur might well consider the useful proposal that articles 12 and 13 be merged.

The meeting rose at 12.55 p.m.

1391st MEETING

Wednesday, 16 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šaković, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/XN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)¹

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned)² (*continued*)

1. Mr. YASSEEN said that articles 12 and 13 related to the fate of immovable and movable State property after a succession in respect of a part of territory. Such property could be situated in the territory to which the succession related, but it could also be situated elsewhere, either in the territory remaining to the predecessor State or even in the territory of a third State. It was therefore necessary to find a rule which would make it possible to determine where such property belonged.

2. According to the solution proposed by the Special Rapporteur in article 12, immovable State property situated in the territory to which the succession related passed to the successor State. Movable property passed to the successor State “if the two States so agreed” or if there was a “direct and necessary link” between the property and the territory to which the succession of States related. In the latter case, it was a matter of formulating residuary rules which would apply when the States had not expressed their intentions. In subparagraph (b), it would therefore be better to use the same wording as in subparagraph (a), “unless otherwise agreed or decided”, and to delete the words “if the two States so agree”. The residuary character of the rule stated

¹ For text, see 1389th meeting, para. 37.

² For text, see 1390th meeting, para. 1.

would thus be emphasized and the solution given to the problem would stand out more clearly.

3. According to the criterion proposed by the Special Rapporteur, State property situated in the territory to which the succession of States related passed to the successor State because the territory must not be stripped of the resources it needed in order to be viable. That was a logical rule, for a territory was not only an area of land, but also an organized social entity, which must be able to function after the succession of States as it had functioned under the sovereignty of the predecessor State. It was therefore logical to provide that State property passed to the successor State, since such property was an element essential to the viability of the territory. He considered that the criterion proposed by the Special Rapporteur was acceptable, but a little too strict. In his opinion, for property to pass to the successor State it was not indispensable that the link between the property and the territory should be "direct and necessary": it was enough for it to be "reasonable". He felt that, in addition to the notion of what was "reasonable", it would be useful to refer explicitly in article 12 to the notion of "good faith". The notion of good faith, which dominated the whole of international law, was directly applicable in that case and could add a positive element to the rule stated in article 12. With these comments for consideration, article 12 could be referred to the Drafting Committee.

4. Article 13 did not pose any problem, for it was merely the application of the general principle on which article 12 was based. State property might not be situated in the territory of the successor State, but that physical fact should not change the dispositions required by law. Property which belonged to the territory and which had been moved before the succession, must be returned to the territory. The principle of good faith applied in that case too: when there was, in good faith, a reasonable link between the territory and the State property, that property must be returned to the territory, even if, at the time of the succession, it was in the territory of the predecessor State or of a third State. As the Special Rapporteur had shown, that rule was based on social and political facts and on the principle of equity.

5. Mr. TAMMES commended the Special Rapporteur on his admirably clear and scholarly report, in which he had made a valuable comparative study of the concepts of movable and immovable property in the main legal systems and, from the findings in the *North Sea Continental Shelf* cases,³ had adapted the principle of equity to the problems now under discussion.

6. The distinction between movable and immovable State property had proved to be feasible in international law and if it were incorporated in the draft, the various categories of movable property could be dealt with in the commentaries. It was understandable that, in view of the numerous precedents in State practice, much attention had been paid to archives, but it had been asserted that, because of the existence of sophisticated reproduction techniques, the question of the ownership

of archives had lost much of its original significance. Archives were perhaps no longer property at all, but simply a source of information. If that was so, he wished to point out that there was a kind of movable State property which did not meet the Special Rapporteur's criteria of utility for, or viability of, the territory to which the succession related. He had in mind what was often termed the historical and cultural heritage. It was certainly discussed in the report, but should also be mentioned in the commentary as something separate from archives—an item in which it remained almost hidden as a technical matter, instead of appearing as an emotional one of the greatest importance. Under the heading of "archives", only libraries and similar collections fell roughly within the category of historical and cultural property.

7. The requirement of a "direct and necessary link" between the property and the territory appeared to be quite appropriate, for it met the Special Rapporteur's criteria of utility and viability. That link had to be tested first, and if it was found not to apply, considerations of equity would be involved. In his opinion, the formulation was as sound as the "genuine link" specified in connexion with the nationality of ships in article 5 of the Convention on the High Seas,⁴ which was now generally accepted. However, the formulation might be amplified by incorporating the elements suggested by Mr. Ushakov (A/CN.4/292, foot-note 18) and the elements mentioned by Mr. Yasseen, namely, good faith and a reasonable link.

8. As to the drafting of the articles, the residual nature of the rules appeared to be expressed in different ways. For example, article 9⁵ used the phrase "unless otherwise agreed or decided", but under the terms of article 12 (b), agreement between the predecessor and successor States seemed to rank equally with the existence of a direct and necessary link; and article 14 gave the impression that besides agreement between the predecessor and the successor States, the passing of property was subject to other conditions.

9. Mr. HAMBRO said he was grateful to the Special Rapporteur for having succeeded in reducing an extremely complex topic to reasonable dimensions and for having simplified the problems that arose. He fully endorsed the method followed by the Special Rapporteur, who had emphasized in his report the need to avoid the danger of making statements that were too general and the danger of becoming lost in technical details when dealing with extremely complicated matters such as currency and archives. The Special Rapporteur had made a very commendable effort to avoid those two extremes and had found a satisfactory compromise between too much generality and too much detail. It was not possible to rely entirely on States to settle questions relating to the passing of State property and the Commission must formulate rules to be applied when the parties did not agree.

⁴ United Nations, *Treaty Series*, vol. 450, p. 84.

⁵ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

³ *I.C.J. Reports 1969*, p. 3.

10. With regard to the wording of articles 12 and 13, he was in favour of retaining the text proposed by the Special Rapporteur. He recognized the usefulness and wisdom of some proposals, such as those made by Mr. Yasseen, but thought it should be left to the Drafting Committee to improve the present text. Mr. Ushakov had been right in saying at the previous meeting, that the period of decolonization was almost a thing of the past and that the Commission should rather think of the future. Mr. Kearney had also been right in reverting at the same meeting, to questions of procedure and the settlement of disputes, for those questions could acquire great importance. But he thought it would be difficult to incorporate Mr. Kearney's observations in an article and that it would be better to mention in the commentary that a member of the Commission had wished to draw the attention of States to the questions of procedure and settlement of disputes which could arise.

11. He fully agreed with the Special Rapporteur that it was necessary to stress the importance of the principle of equity. He was glad to note that the Commission tended to attribute increasing importance to that principle in all its work on the progressive development of international law.

12. Mr. QUENTIN-BAXTER expressed his appreciation of the great scholarship displayed in the Special Rapporteur's eighth report and of the idea of formulating simplified and more general articles. Nevertheless, although the best course might be to adopt a general approach, it was necessary for the Commission to consider whether its task was being made easier at the expense of the content of the articles, for it was essential to consider their scope.

13. The rules embodied in the draft articles did not in any sense inhibit the freedom of contract or the sovereignty of States in regard to their territory. They related to the consequences in law of the fact that a State had, for some time, exercised sovereignty over a territory and used its sovereign power in ways that engaged its responsibility with regard to the treatment of certain types of property. It had to be remembered that the rules would operate within the framework of power, since a sovereign State had control over the property within its territory and any set of rules which failed to heed the primary importance of power was not likely to be honoured in practice.

14. At the same time, the Special Rapporteur had rightly emphasized the principle of equity, which tempered power. In fact, the Commission was required to suggest the manner in which a State should deal with property in which another sovereign State had real, substantial and perhaps overriding interests. Consequently, the basic classification established by the Special Rapporteur was not only right, but inevitable. A distinction had to be made between movable and immovable property and between property situated inside and outside the territory concerned.

15. As Mr. Ushakov had pointed out, the draft articles were designed mainly to deal with the moving treaty-frontier situation. They would, in their present form, cover only one aspect of decolonization, namely, cases in which a former colonial territory chose to become

part of an existing sovereign State. He had not yet formed a clear view as to the need for a distinction between decolonization and the case of newly independent States, which was covered by articles 14 and 15. A difference in emphasis was to be seen in the rights established under articles 12 and 13 on the one hand, and articles 14 and 15 on the other. In the matter of movable property, under article 12 ownership was said to pass to the successor State if a direct and necessary link existed; under article 14, ownership of such property was said to pass to the successor State unless the property had no direct and necessary link with the territory. That difference in emphasis was difficult to assess and he wondered whether the rules set out in article 12 might not be rather too severe. He questioned whether it was right that property situated in the territory concerned should pass to the successor State only if there was a direct and necessary link between the property and the territory. Should not the primary assumption be that the property would pass, with the qualification that it would not do so if there was a sufficient link with the predecessor State?

16. It was difficult to obtain clear guidance from the drafting of articles 12 and 13 and of articles 14 and 15. He was not in any way seeking to arrive at a firm conclusion regarding the need for different articles to deal with those different situations. Obviously, however, there was a vital difference between the moving treaty-frontier situation, when property passed from the territory of one existing State to that of another existing State, and the situation in which a new State was created. In the first of those situations, it was to be assumed that, where territory was transferred from one existing State to another, the terms of the transaction would usually be settled beforehand, and little use would be made of the draft articles. In the case of the creation of new States, on the other hand, the rules stated in the articles would be extremely important. Nevertheless, articles 12 and 13 related to the transfer of property between existing States, in other words, to the least problematical case of State succession. He therefore considered, as did other members, that those articles could now be referred to the Drafting Committee.

17. Mr. RAMANGASOAVINA said that, in the various reports he had submitted, the Special Rapporteur had always tried to find the best possible formula, sometimes even at the expense of his personal convictions. Thus, in his sixth⁶ and seventh⁷ reports, taking account of the comments of the International Law Commission and the Sixth Committee of the General Assembly, he had, for the sake of greater clarity, introduced distinctions between types of State succession and between types of State property, according to whether or not such property was situated in the territory to which the succession of States related, while at the same time referring specifically to particular items of property such as currency, archives, treasury and public funds, which were of major importance for young States. In his eighth report (A/CN.4/292), however, the Special Rapporteur

⁶ *Yearbook... 1973*, vol. II, p. 3, document A/CN.4/267.

⁷ *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

had abandoned the distinction based on the specific nature of State property, because he had realized the difficulties and even the danger that would be involved in going into the details of technical and extremely complex questions which went beyond the competence of the Commission. With the new articles 12 and 13, he had therefore submitted general articles which took into account the existence of different categories of State property, according to whether that property was situated in the territory or outside the territory to which the succession of States related, and according to whether it was movable or immovable. That distinction between movable and immovable property was not made in all legal systems and was understood in different ways. The Special Rapporteur had tried to clarify the situation in his report and had shown that, in regard to State property affected by a succession of States, the meaning given to the terms "movable property" and "immovable property" was almost uniform.

18. Article 12, which dealt with property situated in the territory to which the succession of States related, was an application of article 9, which stated the general principle of the passing of State property. Article 12, subparagraph (a), merely repeated and developed the principle stated in article 9, affirming that immovable property situated in the territory to which the succession of States related passed to the successor State, unless otherwise agreed. Movable property passed to the successor State if the two States so agreed. In the absence of a spontaneous agreement between the two States, there had to be a "direct and necessary link" between the property and the territory to which the succession of States related. The criterion thus used to justify the passing of property to the successor State was a very fair one. The Special Rapporteur had said that, in that connexion, two essential elements should be taken into account: the principle of the viability of the territory and the principle of equity. It was not really necessary for the property to be attached to the territory by a physical or legal link; in his opinion a patrimonial link would be enough to justify the passing of State property to the successor State.

19. When property was situated in the territory of the successor State on the date of the succession of States, its passing to the successor State was practically automatic. The problem of the date of the succession of States was thus very important and presupposed a minimum of good faith, especially in the case of movable property, since such property could be moved between the time when the succession was decided on and the time when it actually took place. If the date of the succession was not set in good faith, the interests of the successor State could thus be seriously injured. He regretted that the general formulation of articles 12 and 13 had not allowed the Special Rapporteur to go into details regarding some particular types of property, such as currency and archives, which were essential to the viability of the territory and were of prime importance to young States.

20. In article 13, which referred to State property situated outside the territory to which the succession of States related, the Special Rapporteur had not made any distinction between movable and immovable property,

because the criterion for the passing of such property did not relate to its location, but to its "belonging" to the territory. He considered that subparagraph (a) was unnecessary, since it was merely a reminder. The criteria set out in subparagraphs (b) and (c), on the other hand, were fully justified.

21. He endorsed the principles stated in articles 12 and 13, but was not satisfied with the way in which the problem was approached in those articles. He would have preferred the method adopted by the Special Rapporteur in his previous report, which consisted in devoting special articles to certain matters that were very important for young States, such as currency and archives. He appreciated the technical difficulties such articles involved, however, and thought that general articles such as articles 12 and 13 could cover the matters in question. He therefore proposed that articles 12 and 13 should be referred to the Drafting Committee.

22. Mr. TABIBI said that the Commission should be grateful to the Special Rapporteur for the manner in which he had approached a complex and delicate problem: it was not easy to find rules that would satisfy the predecessor State, the successor State and even third States whose interests were involved. The method adopted by the Special Rapporteur in his eighth report was more logical, and he himself found it more acceptable, than that followed in the previous reports. The Special Rapporteur was to be commended for the flexibility he had shown in taking full account of the views of members of the Commission.

23. The Special Rapporteur had submitted rules couched in general terms, for application to any type of State succession, and had supplied three "reference keys" (A/CN.4/292, para. 3) which made for a clearer approach and would make draft articles 12 and 13 easier to accept. He (Mr. Tabibi) suggested that, in addition to those keys, other factors of prime importance should be taken into account, such as physical, social and economic links, and the need for procedures for the settlement of disputes, freely chosen by the parties. In view of the fact that, as pointed out by Mr. Njenga at the previous meeting, separation and independence were now often brought about by violent means, procedures for the settlement of disputes on the passing of State property were especially necessary.

24. He had no objection of principle to Mr. Ushakov's suggestion that articles 12 and 13 should be combined and that the distinction between movable and immovable property should be dropped.⁸ For the purpose of presenting the proposed rules to the General Assembly, however, he thought it would be more satisfactory to keep the two articles separate for the time being; they could be merged on second reading.

25. With regard to the distinction between movables and immovables, he had been particularly impressed by the study of comparative law made by the Special Rapporteur (A/CN.4/292, paras. 30-40). He agreed with the Special Rapporteur that in Islamic jurisprudence (*fiqh*) separate terms were used for movables (*manqul* or *ghavi*)

⁸ See 1390th meeting, para. 26.

and immovables (*asl* or *aqar*), but that both were recognized as pertaining to the unified concept of the patrimony (*al mal*). All four great schools of interpretation of Islamic law adopted that approach, particularly the Hanafi school of Iman Abu Hanifa. He mentioned in that connexion the extensive treatise on the rules to be applied to property, written by the theologian Abu-l-Fazl, Prime Minister of the Mogul Emperor Jalal-ud-din Akbar.

26. He supported both the method followed by the Special Rapporteur and the régime provided for in articles 12 and 13, subject to some clarification of the wording by the Drafting Committee.

27. Mr. SETTE CÂMARA said that the Commission should be particularly grateful to the Special Rapporteur for reviewing and adapting his earlier proposals, which had been based on State property considered *in concreto*, and for introducing a most useful distinction between movable property and immovable property. While article 12 dealt separately with movable and immovable property, article 13, for obvious reasons, did not. Nevertheless, it would be advisable to remove the square brackets in the text of article 13 in order to indicate clearly that it covered both types of property.

28. The criterion of the linkage between the property and the territory concerned was very sound. Moreover it was balanced by two further concepts, namely, the viability both of the territory to which the succession of States related and of the predecessor State, and the principle of equity in the apportionment of the property. In regard to the principle of equity, however, he urged some caution, because States mistrusted it. For instance, article 13, paragraph 2 of the Statute of the International Court of Justice, which provided that the Court could decide a case *ex aequo et bono* if the parties agreed thereto, had never gained acceptance by States. Equity was, in effect, the absence of law. It represented natural justice, as opposed to legal justice. If the concept of equity was to be incorporated in the draft articles, great care should be taken, for the misgivings of States would certainly become apparent when the draft came to be submitted to the General Assembly. Moreover, it was not clear who, in the absence of a written agreement, would decide what was equitable and what was not, and who would decide whether the territory was in fact viable.

29. Article 13, in its present form, related to property situated outside the territory concerned, but inside the predecessor State. However, the property might be situated in a third State. He did not see why subparagraph (c), relating to equitable apportionment between the predecessor and the successor States, should apply to property situated in a third State if, in addition, the territory itself had contributed to the creation of that property. The most appropriate solution in that case would be for the property to pass to the successor State.

30. In general, however, he endorsed the text of articles 12 and 13 and considered that they could be referred to the Drafting Committee.

31. The CHAIRMAN, speaking as a member of the Commission, associated himself with the tributes paid to the Special Rapporteur, who had willingly followed the

directives the Commission had given him at its previous session. The Special Rapporteur had chosen to study some particular questions thoroughly, which seemed to him (Mr. Reuter) to be a good method of work. The Commission, however, had asked the Special Rapporteur to follow an entirely different course, so it was the Commission which must now assume responsibility for the difficulties to which the new approach might give rise.

32. Referring to the comments Mr. Ushakov had made at the previous meeting regarding types of succession,⁹ he said that those remarks indirectly concerned the draft articles on succession of States in respect of treaties and that personally he would refrain from giving an opinion on a set of draft articles which the Commission had already adopted. With regard to the draft articles under study, the Commission would in any case have to decide whether it intended to treat cases of decolonization separately. The fact that the process of decolonization was nearing its end militated against the drafting of special articles on decolonization in so far as that term was used in the sense given to it in the United Nations, namely, "European" or "Western" decolonization. None the less, it was probable that all the effects of such decolonization had not yet disappeared. In the draft articles on succession of States in respect of treaties, the Commission had never used the term "decolonization", even though all the articles dealing with newly independent States in fact referred to cases of decolonization. Moreover, the reason why the General Assembly had long ago asked the Commission to study the question of succession of States in respect of treaties was precisely because that question arose in an acute form in cases of decolonization. In that connexion, he pointed out that it had been at the moment of completing its draft articles on succession of States in respect of treaties that the Commission had decided to add a paragraph 3 to article 33, providing that:

... if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded... in all respects as a newly independent State.¹⁰

The Commission had thus shown great caution. It had avoided using the term "decolonization" and it had, stated that the rules which in fact applied to cases of decolonization were also applicable to other cases without specifying, what other cases. In his view, those cases comprised all the applications of the principle of the right of peoples to self-determination other than cases of Western decolonization.

33. In the draft articles under study, the Commission could state common general rules and then special rules derogating from them, which would cover cases of what might be termed "doubtful succession". Personally, he was in favour of following the method the Commission had adopted for the other draft, since that draft would be submitted to a conference of plenipotentiaries in the near future; but he could agree to the Commission's envisaging

⁹ See 1390th meeting, para. 18.

¹⁰ *Yearbook... 1974*, vol. II (Part One), p. 260, document A/9610/Rev.1, chap. II, sect. D.

a special category of doubtful successions. In that case, the situation dealt with in article 12 could cover the case of a change resulting from the application of the principle of the right of peoples to self-determination. That solution would seem rather rash, however; for although the right to self-determination had won full recognition so far as Western decolonization was concerned, it was not established at the universal level by general public international law. In drafting articles defining the general régime of succession of States, however, the Commission should not allow itself to be unduly influenced by the problems raised by doubtful successions. It was probable that the Special Rapporteur had himself been marked by the painful experience of decolonization and that certain articles he was presenting as general articles contained rather severe rules, which would be appropriate for cases of decolonization in the strict sense or of doubtful succession, but not for cases of neutral succession. If the Commission decided not to treat cases of decolonization separately, it should not make the general régime stricter than was necessary. It would be better to formulate a strict régime for decolonization and make the general régime more neutral. For the moment, he would assume that articles 12 and 13 did not refer to cases of decolonization or to doubtful successions.

34. In his eighth report, the Special Rapporteur had clearly indicated that articles 12 and 13 concerned general cases, with the exception of decolonization, and not some particular case, such as succession in the event of transfer of parcels of land. He also considered that those provisions did not concern only successions "born" of an international agreement. The problems dealt with in article 12 might arise from a treaty, for example, when two States agreed on the rectification of a frontier, but not on certain consequences of that rectification. The problems covered by articles 12 and 13 could also originate, not in a treaty, but in a judicial or arbitral decision entailing a transfer of territory liable to raise questions of State succession. They could also result from a unilateral act by a State; for instance, when a State decided to hold a referendum in a small part of its territory and the referendum resulted in a secession, but questions of State succession were left unsettled. Thus international agreements could provide a solution of the problems contemplated in articles 12 and 13, but they might also themselves be the source of those problems.

35. Following the directives given him by the Commission on that subject, the Special Rapporteur had made a laudable effort to draft general provisions. That method of work should lead the Commission to illustrate in the commentary, by three or four examples, each of the general principles it was to lay down. Some of the expressions used in the draft should also be explained by examples: for instance, it should be made clear in which cases there was a "direct and necessary link", and in which cases there was not.

36. Referring more particularly to articles 12 and 13, he observed that, in conformity with draft article 5, the notion of ownership should be understood according to the internal law of the predecessor State. On the other hand, he had the impression that in regard to the distinction between movable and immovable property, the

draft did not refer to internal law, but that it was general principles of law which were decisive. If that was the Special Rapporteur's position, it should be made clear.

37. On reading subparagraph (c) of article 13, he noted that the Commission was called upon to take a course which he himself considered inevitable in modern international law, and which led to the application of the principle of equity, failing any other solution. During the discussion of the most-favoured-nation clause, he had already drawn attention to certain situations demanding recourse to equity. He was also convinced that the Commission should resort to the notion of equity in certain matters such as the sharing of natural resources.

38. The notion of equity made a timid appearance in subparagraph (c) of article 13. He would like to know whether the Special Rapporteur intended to indicate some legal criteria in articles 12 and 13 and to introduce equity as a residuary means reserved for special cases or, on the contrary, to make equity a general criterion. In the latter case, it would be necessary to clarify the notion of a direct and necessary link, which might be of a legal, economic or other nature. It seemed that the notion of a direct and necessary link included that of equity when reference was made to the viability of the territory or of the reasonable nature of the link. If the Commission decided to invoke considerations of equity, it would be necessary to qualify that notion by referring to more precise data. It would then be advisable to be rather more explicit than the International Court of Justice had been in the *North Sea Continental Shelf* cases. In its commentary, the Commission might even mention the case in which the subject-matter of the succession was not part of the territory of a State, but a public establishment which had property of its own in the predecessor State. In short, the Commission must either limit the application of the notion of equity and define that of a direct and necessary link, or erect the latter notion into an essential legal criterion, associating it with a residuary element of equity; or else it must give equity a more important place, making the notion of a direct and necessary link an application of the principle of equity, and try to clarify the idea of equity in various ways. If the Commission still considered that decolonization should be the subject of special rules, equity would in that case be assessed in the light of the injustice which a particular solution would entail, or might entail, for the territory which was the subject of the succession.

39. Mr. ŠAHOVIĆ observed that the articles proposed by the Special Rapporteur at the twenty-seventh session had given rise to lively discussion, and he was convinced that the Commission had now entered on a much more productive phase of its work. He congratulated the Special Rapporteur on the way in which he had sought to apply the Commission's directives. He endorsed his conclusions and thought that articles 12 and 13 should be approved in principle and referred to the Drafting Committee.

40. The main question raised by the articles under consideration was that of types of succession, with, in particular, reference to cases of decolonization. As he saw it, the most important point to consider was the purpose of the work of codification and progressive development of

the rules on succession of States in respect of matters other than treaties. That work formed part of a general process of evolution marked by several stages : that of the peace treaties which had followed the First World War; that of the successions of States after the Second World War; and that of decolonization, which in fact was merely one stage among others. Hence, the fact that the decolonization process was approaching its end should not affect the formulation of the draft articles.

41. It did not seem necessary to change the general trend of the Special Rapporteur's study. True, problems might arise in specific cases, as some members had pointed out. In preparing the present draft articles, there was no need to depart from the types of succession adopted by the Commission for the draft articles on succession of States in respect of treaties, but the particular case of a dependent territory uniting with a pre-existing State would have to be taken into account.

42. With regard to the criteria for the attachment of State property to the territory, those proposed by the Special Rapporteur in articles 12 and 13 were perhaps a little too rigid, having regard to the legal solutions adopted by States in practice. He emphasized the need to adopt criteria which corresponded as closely as possible to practice, and to take account of the great variety of situations that might arise. Careful attention should therefore be devoted to finding suitable language to define those criteria. The notion of a reasonable link, proposed by Mr. Yasseen,¹¹ deserved particular attention.

43. As to the notion of equity, the Special Rapporteur should give his own interpretation of it and specify the limits within which he thought the principle should be applied. In any event, it should not be forgotten that equity could only come into play when international law provided no adequate rule.

44. Both the criteria for the attachment of property and the notion of equity should be studied more thoroughly by the Commission and by the Drafting Committee. Furthermore, recourse to those criteria and to that notion should be convincingly justified in the commentary. For it was only when the Commission had ascertained the reactions of Governments, that it would know whether it had really found solutions which met the existing needs.

45. In his report, the Special Rapporteur had made a study of the distinction between movable and immovable property in the main national systems of law, from which it appeared that that distinction was generally accepted. But the Commission would nevertheless have to define movables and immovables sooner or later.

46. He would not go into details of the drafting of articles 12 and 13, but would merely observe that article 13, subparagraph (a), might not be necessary or could be replaced by different wording.

47. Mr. CALLE Y CALLE said that the Special Rapporteur had shown in his eighth report the same remarkable intellectual rigour as in his seven previous reports. He was to be commended for having taken account of

the difficulties encountered by the Commission at the twenty-seventh session, an obvious example of which was provided by the very technical problem of currency. If the Commission had continued to consider property *in concreto*, it would constantly have come up against technical difficulties. The Special Rapporteur was now leading the Commission towards the formulation of general rules, while avoiding excessive generality which would prejudice the solution of real problems. Between the general approach and the specific approach there was a third possible course, to which the Special Rapporteur himself had referred; that of leaving the way open for the introduction of further rules which might later prove necessary. It was much easier to derive particular rules from a good general rule than vice versa.

48. With regard to the question of types of succession, it was true to say that the process of decolonization was coming to an end. Consequently, certain rules which would have been of great help to the decolonized peoples would now come rather late. The whole work of the Commission looked towards the future, in accordance with the principle of non-retroactivity; nevertheless, when the rules it formulated applied to past situations, they would very often serve to show the soundness of the position taken before their formulation by the peoples concerned and the justice of restoring their rights. The Commission should retain the tripartite classification of types of succession adopted for the draft articles on succession of States in respect of treaties. If the conference of plenipotentiaries which examined that draft decided on an additional subdivision, the Commission would have to consider whether to adopt it or to retain the tripartite classification in the present draft.

49. With regard to the drafting of articles 12 and 13, he had comments to make on the Spanish text which had some bearing on the substance. In the text of both articles, as it appeared in chapter III of the Special Rapporteur's report (A/CN.4/292),* the formula *a menos que se haya convenido o decidido lo contrario* was used to render the proviso "unless otherwise agreed or decided". In the text appearing in the informal document ILC (XXVIII)/Conf. Room Doc. 2, a different formula was used, namely *salvo que se acuerde o decida otra cosa al respecto*. The wording in the report would mean simply that the property did not pass to the successor State, whereas the second formula seemed to refer to the possibility of attaching certain conditions to the passing of the property, or of stipulating some form of compensation. He suggested that in article 13, subparagraph (b), the opening words of the Spanish text should be amended to read *Pasarán a ser propiedad del Estado sucesor*, so as to indicate that it was the ownership of the property which passed to the successor State. The present formula *Pasarán al Estado sucesor* could be taken to mean that the property passed into the physical possession of the successor State, but remained in the ownership of the predecessor State.

50. He believed that the distinction between movables and immovables was already implicitly recognized in article 5, under which it was the internal law of the

¹¹ See para. 3 above.

* Mimeographed version.

predecessor State which determined the legal status of the property, with all the consequences resulting therefrom.

51. Article 12 covered two cases: that in which the predecessor State exercised sovereignty over the territory; and that in which the predecessor State administered the territory, without having sovereign rights over it. When actual sovereignty over a territory was transferred from a predecessor State to a successor State, it was easier for the two parties to come to an agreement on the fate of State property. In the second case, if a reasonable link existed between the property and the territory concerned, it was essential from the legal standpoint, that the property should be transferred to the successor State along with the territory previously administered by the predecessor State. With regard to the criterion of a "direct and necessary link", he proposed that in the Spanish text the word *vínculo*, which meant a legal link, should be replaced by the word *vinculación*, which rendered the idea of connexion or relationship and was more in keeping with the notion of equity. He also proposed that that word should be qualified by an adjective such as *razonable* (reasonable), since equity was a principle which must always be construed within reason.

The meeting rose at 1.5 p.m.

1392nd MEETING

Thursday, 17 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)¹

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned)² (*continued*)

1. Mr. AGO, after congratulating the Special Rapporteur on his excellent report, said that he wondered whether

articles 12 and 13 related to all types of succession, as the Special Rapporteur claimed, or whether they covered only the classical case of the passing of part of a territory from one State to another, as some members of the Commission seemed to wish. He noted that, in any case, the title of the sub-section under consideration, namely, "Succession in respect of part of territory" was too vague and that it would have to be amplified, particularly if articles 12 and 13 were to apply to all types of succession.

2. To determine whether different rules should be formulated for the different types of succession, reference should be made to specific cases. Special rules should be formulated only if cases of succession other than the classical cases warranted them. He referred first to a treaty by which a country ceded a province to a neighbouring State. That was a classical case covered by the draft articles. Some members of the Commission considered that cases of decolonization should be dealt with separately. It was certain that the case of a territory which separated from the State under whose colonial domination it had been placed and became independent, was entirely different from the case in which part of a territory passed from one State to another. The attainment of independence, however, was not the only conceivable case. It could happen that Belize, a territory now administered by the United Kingdom, but coveted by Mexico and Guatemala, might finally be attached to those two States. It was not necessary to establish special rules in a case of that kind, which really differed little from that of the cession of a province by one State to another. It did not involve the creation of a new State, as did the accession to independence of a territory under colonial domination. Surinam, for its part, had moved towards independent status in that way. The Netherlands possessed a number of islands, including Curaçao, in the West Indies; that island had not yet opted for attachment to the metropolitan country or to Surinam. If, now that Surinam had acceded to independence, Curaçao decided to become attached to that new State, the situation would be different from that of the attachment of Belize to the pre-existing States of Mexico and Guatemala. In his opinion, however, that particular situation would not justify the formulation of special rules. In the Caribbean, the Netherlands also possessed the island of Aruba, whose future was not yet decided: it might become a small independent State, unite with Curaçao, be attached to Venezuela or be annexed by Colombia. That variety of possibilities showed that it was difficult to establish a régime for the classical cases of succession and a régime for all cases of decolonization.

3. As to the variant proposed by the Special Rapporteur for the opening phrase of articles 12 and 13, which was nothing more than the text adopted by the Commission for the beginning of article 14 of the draft on succession of States in respect of treaties,³ that wording could give the impression that the phrase "for the international relations of which that State is responsible" related to the word "State" and not to the word "territory".

¹ For text, see 1389th meeting, para. 37.

² For text, see 1390th meeting, para. 1.

³ See *Yearbook... 1974*, vol. II (Part One), p. 203, document A/610/Rev.1, chap. II, sect. D.

4. Several members of the Commission had stressed that the rules stated in the draft articles were only of a residuary nature and should apply only in the absence of agreement between the States concerned. The position was not quite so simple. In a classical case of succession, an agreement between the two States concerned would be sufficient; but if Belize was attached to Guatemala and Mexico, a tripartite agreement would be necessary, and it was not impossible to imagine even more complicated situations. For instance, if Aruba and Curaçao decided to constitute a new State, there could be no genuine international agreement between Aruba and Curaçao before the formation of that new State, since neither of them would be a subject of international law.

5. With regard to immovable property, the Special Rapporteur was proposing the rule that, unless otherwise agreed or decided, all immovable property passed automatically to the successor State. Apart from its location, however, a piece of immovable property might not have any direct and necessary link with the country in whose territory it was situated. He wondered whether bases which might be established in Curaçao for Netherlands submarines would not have a more direct and necessary link with the metropolitan country than with that territory. Moreover, there could be other installations which were even more closely linked with the metropolitan country. He therefore proposed that it should be indicated in the commentary that the rule on the passing of State property was not necessarily as absolute as it seemed.

6. With regard to movable property, the Special Rapporteur had provided that it passed to the successor State if it had a direct and necessary link with the territory to which the succession of States related. That criterion was rather arbitrary. It might be asked who would judge the link between the property and the territory. Did the gold and foreign exchange cover for the currency have a direct link with the territory? In his view, such cover might perhaps be linked with the country, but it was not really localized. Ships could have a direct link with the territory if they were engaged in regular traffic with it, but there was no such link when they served only for the metropolitan country's trade. It really seemed that the criteria proposed by the Special Rapporteur all involved an idea of equity, as expressed in article 13, subparagraph (c). Personally, he was in favour of the principle of equity, but he was not sure how it could be developed in the absence of an international authority. Of course, equity could be reflected in an international agreement; but it was precisely in the absence of agreement that it was necessary to prevent the abuses which could be committed, both by the successor State and by the State in whose territory the State property was situated. In the countries with a Roman law tradition, the concept of equity had been developed by the ordinary courts. In the common law countries, there were special courts, the courts of equity, which developed that concept. Although the idea of having such courts at the international level might seem audacious, it should not be ruled out if such vague criteria were to be applied.

7. Mr. USTOR said he would only speak on the question of archives, which was dealt with at length by the Special

Rapporteur in his report. Archives, being movables, were covered by the provisions of article 12, subparagraph (b) and of article 13. The question had been raised whether those articles should cover decolonization as well as the classical cases of transfer of a territory from one country to another. For his part, he considered those provisions as referring to the classical cases of succession in respect of part of a territory.

8. Because documents could be easily distinguished as having a relationship with the territory transferred, the Special Rapporteur had reached the conclusion that archives in the ownership of the predecessor State had to pass to the successor State wherever such a relationship existed. Furthermore, the Special Rapporteur had found that there was no need to include in the draft a provision explaining the notion of archives because, regardless of how that term might be defined, all kinds of documents having a link with the territory would have the same fate. The Special Rapporteur had acknowledged, however, that a different opinion was held by certain writers on that point. For example, P. Fauchille drew a distinction between documents that were necessary for the administration of the territory to which the succession of States related and documents that were of a purely historical character. He himself believed that that was a valid and sound distinction. Obviously, such documents as the land register and registers of births, deaths and marriages would follow the territory to which they related. Whether they were situated in the territory in question or elsewhere, they belonged to that territory, because they were needed for its current administration. The position was quite different in regard to centuries-old documents which were of purely historical interest.

9. According to the Special Rapporteur there was no need to draw such a distinction, so he had not included in the draft any special rule on archives and documents; hence they would have the same fate as other movables in the cases contemplated in articles 12 and 13. The Special Rapporteur's reasoning was based almost exclusively on peace treaties. But peace treaties did not provide a sufficient basis for a general rule, because their provisions included measures which were closer to sanctions than to agreed clauses. Moreover, the position in regard to peace treaties was not as simple as the Special Rapporteur had suggested. Some of those treaties did, in fact, make a distinction between documents according to their age. For example, article 11 of the 1947 Peace Treaty between the Allied Powers and Hungary⁴ imposed on Hungary the duty to hand over to Yugoslavia and Czechoslovakia the archives relating to certain territories. That provision, however, was limited to the archives which had come into being during a specified period which, for most of the provinces concerned, was 1848 to 1919. Thus, although the treaty of 1947 had been more or less imposed on Hungary, it had not required that country to transfer to the successor States all the archives relating to the provinces ceded to those States, regardless of their age. The province in question had belonged to Hungary for some 800 years before they had become

⁴ United Nations, *Treaty Series*, vol. 41, p. 178.

part of Czechoslovakia and Yugoslavia in 1919, but the clause on the transfer of archives related to documents going back only one century.

10. If the situation was considered *in abstracto*, the same conclusion would be reached. Because of the continuing relations between States, every State had in its archives historical documents which related to other States. There was no rule of international law laying down that France, for example, had an obligation to transfer to Hungary all documents in its possession which had some bearing on that country. That being the normal position, it was difficult to see why it should be any different in the case of peace treaties. When part of the territory of the predecessor State was transferred to the successor State, the separation took place at a certain moment, after which the territory would be administered by that State. The successor State was obviously entitled to receive all the documents and archives relating to the territory in question. But since the territory had for a long time been part of the predecessor State, the documents and archives relating to it belonged to the history of the predecessor State. Hence he could not agree that simply because they had a link with the territory in question, the documents and archives must necessarily be transferred to the successor State.

11. The Special Rapporteur had also drawn attention to new developments in the technique of reproduction of documents and had suggested that those developments would facilitate the solution of the problem. He recommended that the predecessor State should transfer all documents which had a link with the territory and retain copies of them for itself. His own preference was for the opposite arrangement. The documents in the predecessor State's archives constituted its historical records; that State should, under certain conditions admit research workers from the successor State to peruse the documents and make such copies as they required. It was necessary, however, to consider the cost of that research and of making the copies. In his view, the successor State should bear all such costs if it wished to obtain the contents of the documents.

12. He therefore believed that whatever improvements might be made in the drafting of articles 12 and 13, those provisions would not suffice to solve all the problems raised by archives. The least that should be done was to specify that the provisions of those articles covering movable property did not apply to archives, which should come under different rules.

13. The Special Rapporteur had said that the transfer of archives concerning the part of territory ceded was justified by the application of the "principle of territorial origin" and the "principle of pertinence".⁵ He had also quoted a resolution adopted by the General Conference of UNESCO at its sixteenth session (1970), which recommended Member States to return manuscripts and documents "to the countries of origin".⁶ The Special Rapporteur had interpreted the expression "country of

origin" to mean the successor State in cases of succession in respect of part of a territory. His own view was that the "country of origin" was clearly the predecessor State, since the documents came from that State.

14. Mr. TSURUOKA said he would support the view of the majority of the members of the Commission on the question whether the case of decolonization should be dealt with separately or not. Although questions of decolonization were of such importance that they warranted separate treatment, the process of decolonization would probably have ended when the instrument now in preparation came into force. Would it not be strange for the Commission to have worked on drafting provisions which were no longer of any use to the international community?

15. If the Commission confined itself to general provisions, they would, of course, cover all cases, but in an abstract way; on the other hand, if it went into details, the provisions would be easier to apply. Both solutions had advantages and disadvantages. Personally, he would prefer the Commission to formulate general provisions, even if it had to overcome application difficulties by drafting a detailed commentary and providing for application procedure and for the establishment of a body to apply the general provisions. He endorsed the principles on which articles 12 and 13 were based and, in particular, the notions of the direct and necessary link, the viability of the territory and equity.

16. After emphasizing the considerable amount of work which had gone into the Special Rapporteur's eighth report, he asked for two points to be clarified. Could it really be said that, under draft article 5,⁷ the distinction between immovable and movable property must be made according to the internal law of the predecessor State? Was the notion of a direct and necessary link a legal, economic, social or political notion or did it belong to all those spheres?

17. Mr. USHAKOV said he wished to explain his conception of the transfer of part of a territory from one State to another. In successions of States in respect of treaties, it made no difference whether a small part of a territory was ceded or a territory changed sovereignty in accordance with the principle of self-determination. An example of the first situation was the cession by France of a small part of its territory to Switzerland, for the enlargement of the Geneva-Cointrin airport. The second would occur if the Canton of Geneva, after consulting its population, decided to unite with France. For the purposes of the articles under consideration, those two situations were not assimilable. In the first, there was an agreement between two States, whereas in the second, the people of the Canton of Geneva would also take part; it would not be a mere transfer, but a case of application of the principle of self-determination. It might also be necessary to take the property of the Canton into account. Unlike the Special Rapporteur, he therefore considered that a distinction should be made between those two types

⁵ A/CN.4/292, chap. III, para. 50 of the commentary to article 12.

⁶ *Ibid.*, para. 65 of the commentary.

⁷ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

of situation. He stressed that succession of States in respect of matters other than treaties was much more complex than succession of States in respect of treaties; the draft articles on the former topic could reflect those on the latter only to a limited extent.

18. The CHAIRMAN, speaking as a member of the Commission, said that in the light of his own experience, he fully supported the Special Rapporteur's method of work and the principles underlying articles 12 and 13.

19. He approved of the commendable efforts made by the Special Rapporteur to bring the presentation of the draft articles into line with that of the draft on succession of States in respect of treaties, and to conform to the Commission's decision to consider three types of succession: the transfer of part of territory, the case of newly independent States and the uniting, dissolution and separation of States. That approach served to harmonize the draft dealing with the two parts of the topic of State succession.

20. The rules in articles 12 and 13 were based on State practice, on which the Special Rapporteur gave extensive information in his eighth report. In the present instance, State practice should be construed in a broad sense so as to cover treaty law, decisions and resolutions. The rules stated in article 12 regarding succession to State property situated in the territory concerned were in harmony with the principle laid down in article 9, that State property situated in the territory to which the succession of States related passed to the successor State. The question of the title of the sub-section containing articles 12 and 13, which had been raised by Mr. Ago,⁸ could be left to the Drafting Committee.

21. He disagreed with Mr. Ustor's interpretation of the expression "country of origin",⁹ used in the UNESCO resolution quoted in the Special Rapporteur's report, which recommended the return to that country of certain original manuscripts forming part of its heritage. That resolution referred to a rather different case from the one under consideration, but it had some bearing on the question of archives and documents in so far as that class of property came under articles 12 and 13. There was no reference to a "country of origin", either in the present set of draft articles or in the draft on succession of States in respect of treaties; those drafts spoke only of the "predecessor State" and the "successor State" and defined the meaning of those terms. As to the expression "country of origin", referring to archives and documents it could only mean the country to whose history and culture they belonged; the test to be applied was certainly not a purely material one.

22. He supported the proposal that articles 12 and 13 should be referred to the Drafting Committee for consideration in the light of the discussion.

23. Mr. AGO said he wished to ask the Special Rapporteur two questions. First, the Special Rapporteur had mentioned, as movable property, only currency and

archives. In order to avoid giving the impression that they were the only property to be taken into consideration, would it not be advisable to mention other kinds of property, such as ships? Secondly, since the concept of equity necessarily included an arbitrary element, it would be desirable for States to reach agreement by treaty. That being so, would it not be advisable to introduce an obligation to negotiate in good faith on the basis of the criteria proposed by the Special Rapporteur?

24. Mr. KEARNEY said that, as he had already indicated earlier in the discussion,¹⁰ archives raised special problems which were different from those arising in regard to other types of property. Those problems, however, could now be solved more easily, because of the comparatively inexpensive modern methods of reproduction.

25. The question was to determine which of the two States concerned would retain the original documents and to what extent the other party was entitled to copy them. The latter issue mainly concerned the successor State, since the predecessor State, if it had to part with an original document, could always make a copy first.

26. Under the provisions of article 13, subparagraph (b), if the archives were in the capital of the predecessor State, any documents which had a link with the successor State should be transferred to that State. That rule, however, raised a more complicated issue: some documents might have a more direct and necessary link with the successor State than with the predecessor State. Obviously, the test of the direct and necessary link could not be framed in absolute terms; all rules had to have some degree of relativity.

27. Another problem was that of the decision-making process in the apportionment of archives. Since the predecessor State, unlike the successor State, had actual control over the documents, it was bound to have a greater range of decision in the matter. It would have to have some latitude to eliminate certain documents in the interests of good future relations with the successor State.

28. It was precisely in order to deal with those delicate problems that he believed that certain procedures for the settlement of disputes should be provided for. He was not thinking essentially in terms of judicial or arbitration procedures, but rather of machinery for screening by a third party, to decide what papers were so delicate that they could affect relations between States and therefore should not be transferred. He hoped that the Special Rapporteur would take into account the need for some such machinery, apart from standard procedures for the settlement of disputes.

29. Mr. ŠAHOVIĆ pointed out that, if the Commission decided to delve deeper into the question of archives, it would have to take account of peace treaties as a source of the rules to be enunciated. In recent times, State practice in that matter had been based mainly on peace treaties.

⁸ See para. 1 above.

⁹ See para. 13 above.

¹⁰ 1390th meeting.

30. Sir Francis VALLAT said that the commentaries to articles 12 and 13 were highly instructive. More particularly, they contained very pertinent observations on the problem of archives.

31. With regard to the form of the draft articles being prepared, it would be advisable, wherever possible, to follow the format and wording of the draft articles on succession of States in respect of treaties. To use a different form of language in a set of articles that dealt essentially with the same kind of situation would be confusing. He had in mind the variants suggested for the opening phrase of articles 12 and 13, which exactly reproduced the wording used in the draft on succession of States in respect of treaties. Needless to say, the Special Rapporteur should not be constrained at all times to propose provisions that corresponded to those of that draft.

32. It was true that a wide range of situations might arise as a result of a change in the status of part of a territory. At one extreme, if Northern Ireland were to become part of Ireland, the situation would be similar in many respects to that of a newly independent State—if the change took place otherwise than by agreement, which was perfectly possible. Indeed, it was because of the possibility of changes in the status of part of a territory that the Commission had adopted the type of language contained in article 14 of the draft articles on succession of States in respect of treaties. However, in what might be loosely termed the transfer of territory, it would be extremely difficult to distinguish between the different types of situation that might arise, and he very much doubted whether it would be possible to cover them all and to identify them with sufficient clarity.

33. In view of the wide variety of situations possible, the Commission was faced with an extremely difficult choice: either to resort to extreme generalization or to become enmeshed in a mass of fragmented detail. Nevertheless, in practice, the element of agreement did exist in most cases of transfer of part of a territory from one State to another. While it might be worth considering the inclusion of a rule specifying an obligation to negotiate, articles 12 and 13 should, in any case, emphasize the idea of agreement. States should be encouraged initially to reach agreement and it should be clearly indicated that, in the absence of any agreement, the draft articles would apply.

34. In his opinion, the Commission should pay special attention to the question of archives and devote a separate article to it. Archives were not simply property, but instruments which related to the history of a territory or to its administration, and they were of great practical importance to new or transferred territories. One difficulty lay in determining whether a particular document was only of historical value or whether it affected the administration of the territory in question. For instance, a treaty concerning cession of territory concluded in the seventeenth century and held by the State transferring the territory might be regarded as of historical interest, but it was quite likely that it established certain conditions relating to the territory and, even after some hundreds of years, a dispute might arise regarding the application

of those conditions. In such a case, the archives were vital to the life of the territory concerned. If the Commission was to formulate rules on that matter, it must be careful not to arrange for a rigid test of the value or interest of archives which would prove unworkable.

35. He shared the view that articles 12 and 13 could now be referred to the Drafting Committee.

36. Mr. BEDJAOUI (Special Rapporteur) noted that the members of the Commission were unanimous in proposing that articles 12 and 13 should be referred to the Drafting Committee. On the question of the choice of method, some members had referred to the methods he had followed in his previous reports. In his third,¹¹ fourth¹² and fifth¹³ reports, he had submitted general articles applicable to all kinds of State property. The articles submitted in his third report had, indeed, been so general that they had not referred to types of succession and could have applied to every type. In his seventh report,¹⁴ he had followed a more analytical method, examining particular kinds of property, such as currency and archives. In his eighth report (A/CN.4/292), he had returned to more general articles and intended to adhere to that new method, which had met with the unanimous approval of members of the Commission, although five of them had expressed regret at his abandoning the consideration of State property *in concreto*.

37. Mr. Ramangasoavina considered that the study of concrete questions such as currency or archives would be useful, particularly for newly independent States,¹⁵ and he shared that view.

38. Mr. Kearney, although of the same opinion as all the other members of the Commission, hoped that, in the case of article 12, it would be possible to deal with at least one kind of State property considered *in concreto*—archives—and that that would be done as often as possible.

39. Sir Francis Vallat had said that, in view of the exceptional importance of archives, a separate article should be devoted to that question,¹⁶ which might possibly be taken from the seventh report.

40. Mr. Calle y Calle, although he approved of the method now being followed, had pointed out¹⁷ that paragraph 27 of the report left it open to the Commission to choose a third approach, which was to “formulate for each type of succession one or two articles of a general character, perhaps adding one or two more relating to specific kinds of State property”.

¹¹ *Yearbook... 1970*, vol. II, p. 131, document A/CN.4/226.

¹² *Yearbook... 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

¹³ *Yearbook... 1972*, vol. II, p. 61, document A/CN.4/259.

¹⁴ *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

¹⁵ See 1391st meeting, para. 21.

¹⁶ See para. 34 above.

¹⁷ See 1391st meeting, para. 47.

41. Mr. Reuter, who had approved of the earlier reports, had endorsed the new method¹⁸ and had called on the Commission to approve it once and for all.

42. Thus the members of the Commission seemed to be unanimous in approving the new method and he was accordingly determined to adhere to it.

43. The question of types of succession had raised numerous difficulties. There, too, the members of the Commission, with the exception of Mr. Ushakov,¹⁹ had all endorsed the typology adopted at their request. He regretted that Mr. Ushakov had not raised his objections to the typology at the twenty-seventh session, so that he could have taken them into account in his last report. The Commission's work was now far advanced and it would be a pity to call in question again everything that had already been done. The draft articles had already suffered from the delay in preparing them—to the extent that they would come too late to regulate decolonization, which was nearing its end. It would therefore be better not to re-open typological problems; otherwise, the Commission's work might be delayed indefinitely.

44. Mr. Ushakov seemed to be reproaching him for having abided, against his will, by the Commission's choice of types of succession, although he (Mr. Ushakov) had been the first to insist that the Special Rapporteur should follow as closely as possible the typology adopted by the Commission in the draft articles on succession of States in respect of treaties, and the first to deplore the fact that he had deviated from it. He (Mr. Bedjaoui) had always expressed doubts about the advisability of using the typology adopted for succession of States in respect of treaties, which he did not consider perfect, and he had only complied with the Commission's wish under duress. Consequently, he should not be held responsible for a choice which had been imposed on him by the Commission itself.

45. The typology chosen by the Commission certainly raised many problems, regarding which he was almost inclined to believe that Mr. Ushakov was right. It did not take account of cases of decolonization by integration, that was to say, cases in which a newly independent State merged with a neighbouring State other than the administering Power. Those cases usually related to very small territories which were not capable of becoming separate States, such as the French trading posts and the Portuguese settlements in India, and the territory of Ifni in the South of Morocco. Other instances might be Gibraltar or Djibouti. Mr. Ushakov was right in saying that that type of succession of States could not be assimilated to succession in respect of part of territory, which was one of the types adopted by the Commission in its draft articles on succession of States in respect of treaties. For his part, he had always expressed doubts about the typology chosen, for he thought it impossible to reduce all cases of State succession, of which there was a very wide range, to only three or four types. For example,

the case of the disappearance of the Austro-Hungarian Empire could be described as the extinction of a State, the dismemberment of a State, the dissolution of a union or a separation of States. It was also possible to speak of the emergence of new States or even of the resurrection of vanished States, or the partition of territory between old and new States. As which type of succession of States should the disappearance of the Austro-Hungarian monarchy then be identified? That example, and many others, proved that there were types of succession which were impossible to classify.

46. Thus, the cases of decolonization by integration covered by articles 12 and 13 did not correspond to any of the types of succession adopted by the Commission. The Commission had therefore tried to incorporate those cases into the type of succession in respect of part of territory. Mr. Ushakov had rightly said that two different types of succession were involved; he fully agreed with him on that point, but must point out that it was not he (Mr. Bedjaoui) who had wished to place those two types on the same footing. As Mr. Ushakov had observed, it was not the title of articles 12 and 13 that was at fault, but the assimilation of two different types of succession. Mr. Ushakov would like to separate those two types, and he was willing to meet him on that point, but he had not said whether the treatment should be different in each case. In fact, Mr. Ushakov was proposing four articles instead of two—two articles on succession in respect of part of territory and two on succession in respect of decolonization by integration. But he was also proposing the deletion of articles 14 and 15, which related to newly independent States, on the ground that decolonization was nearly completed. Thus he was proposing, on the one hand, to increase the number of articles relating to decolonization and, on the other, to delete articles 14 and 15—which might seem contradictory.

47. Moreover, if, as Mr. Ushakov asserted, the cases covered by articles 12 and 13 amounted simply to frontier rectifications, the type of succession of States referred to in those articles was nothing more than a kind of commercial transaction concerning a parcel of land. If that was so, the Commission should not waste its time in codifying the rules applicable to such minor cases, in which there was always an agreement between the States parties. In that case, it could even be said that there was no longer any typology of succession to adopt. For if the Commission was to eliminate succession in respect of part of territory, because it involved only an insignificant area of territory, and succession in respect of newly independent States because decolonization was coming to an end, there would be nothing left of the typology envisaged.

48. Mr. Ushakov had said that the integration of a territory into a neighbouring State was related to separation of States. But those two situations were not quite the same, for in cases of separation a State was created, whereas in integration that did not occur. It could thus be seen that it was extremely difficult to establish a typology of succession, because the situations varied so widely.

¹⁸ *Ibid.*, para. 31.

¹⁹ See 1390th meeting, para. 18.

1393rd MEETING

Friday, 18 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED
BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)¹

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned)² (concluded)

1. Mr. BEDJAOUÏ (Special Rapporteur), continuing his statement of the previous meeting, pointed out that in assimilating to succession of States in respect of part of territory the case of a non-self-governing territory which was decolonized by integration into a neighbouring State, he had only been following the Commission's instructions. To reduce succession in respect of part of territory to a mere rectification of frontiers or sale of land—for example, to enlarge an airport adjoining a frontier—as Mr. Ushakov proposed,³ would be to reduce that type of succession of States to its simplest form. The peculiarity and also the difficulty of succession in respect of part of territory lay in the fact that the part of the territory transferred might be great or small in size or importance. Of course, if the transfer involved only a few hectares, as in the case of a frontier adjustment, the problems of currency, State funds and archives did not arise. But when a larger piece of territory was transferred those problems arose *in concreto*.

2. Mr. Ushakov had tried to reduce that type of succession of States to a mere frontier adjustment, arguing that the transfer of a relatively large part of a territory was inconceivable, since contemporary law prohibited any forced cession of part of a territory.⁴ That was perfectly true, but a large province might be transferred to a neighbouring State on the basis of self-determination

for its inhabitants. The right of peoples to self-determination must be taken into account and that right did not apply only in cases of decolonization: it applied to all peoples, including those already independent.

3. In the *Western Sahara* case,⁵ Mr. Georges Vedel, representing Morocco before the International Court of Justice, had maintained that if there was a higher principle partaking of *jus cogens*, it was not the right of peoples to self-determination, but decolonization. In his view, decolonization was the higher principle, whereas self-determination was only a means of achieving decolonization. It was perfectly possible for a country to gain independence by means other than self-determination, for since the principle of self-determination was not *jus cogens*, it was not necessary to consult the population. He (Mr. Bedjaoui), representing Algeria before the Court in the same case, had argued the opposite view, maintaining that self-determination was the higher principle and decolonization merely one of its applications. The right of peoples to self-determination pertained not only to colonized States, but also to independent States; that was clear from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁶ which affirmed that all peoples had the right to choose whatever political, economic and social system they wished. The right of peoples to self-determination was now recognized for Non-Self-Governing Territories, but it undoubtedly still needed to be more firmly established for States which were already independent. That right held good for all peoples, whether colonized or independent.

4. Mr. Ushakov had proposed that articles 14 and 15, concerning newly independent States, should simply be deleted, rightly observing that the process of decolonization was practically finished and that in dealing with the problem of newly independent States the Commission would be regulating a type of succession of States that was likely to vanish in the near future. However, if the Commission decided not to consider cases of succession involving newly independent States, it would be jeopardizing the typology of succession it had adopted for succession of States in respect of treaties. Besides, although decolonization had already been largely effected, it had unfortunately not yet been completed. The 1975 report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁷ showed that many Non-Self-Governing Territories remained. Admittedly, they included territories of small area—small islands and about a score of archipelagos; but there were also larger territories such as Bermuda, Puerto Rico, Brunei and Belize, to which might be added Gibraltar, the enclaves in northern Morocco which were still under Spanish domination, French

¹ For text, see 1389th meeting, para. 37.

² For text, see 1390th meeting, para. 1.

³ See 1392nd meeting, para. 17.

⁴ See 1390th meeting, para. 18.

⁵ Advisory Opinion of 16 October 1975, *I.C.J. Reports 1975*, p. 12.

⁶ General Assembly resolution 2625 (XXV), annex.

⁷ *Official Records of the General Assembly, Thirtieth Session, Supplement No. 23 (A/10023/Rev.1)*.

Somaliland and Djibouti, and even the Comoros, whose status was not yet quite settled. In Africa, especially, there were large areas in which decolonization had not yet been effected—the western Sahara, where the principle of self-determination had not yet been applied, and above all, Rhodesia and Namibia.

5. It should also be borne in mind that the Commission had received a precise mandate from the General Assembly, which had requested it to study the problem of decolonization and newly independent States. The Assembly had even requested it to examine the problems of succession of States taking into account the interest in them of newly independent States. In particular, in its resolution 1765 (XVII) of 20 November 1962, the Assembly had requested the Commission to study the question of succession of States “with appropriate reference to the views of States which have achieved independence since the Second World War”. The question of succession of States could therefore be said to be of considerable interest to the developing countries, as the Sixth Committee had affirmed at the twenty-second session of the General Assembly.⁸

6. It was true that decolonization was almost completed, which was certainly a cause for rejoicing, but the Commission had not yet codified the part of succession of States relating to matters other than treaties; and that was regrettable, because by doing so, it could have assisted in the process of decolonization. It could still do so, if it made haste to complete the draft articles in preparation. For that aim to be achieved, it must not stop to reconsider problems of the typology of succession, which might mean calling the whole draft in question again.

7. It might also be asked whether in 1970, in 1965—or even in 1960—it had not already been known in advance and with certainty, that the part of succession of States whose codification would be the least durable would be that relating to decolonization. It had already been well known that decolonization would take only a few more years, since the day in October 1960 when Khrushchev had denounced colonialism in resounding terms from the podium of the United Nations, and since the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁹ which called for immediate independence. Thus even before work had begun on the codification of succession of States, it had been known that the part relating to decolonization would age fastest. It must be accepted that it was aging quickly, but not that it would be stillborn.

8. What did “decolonization” mean? If it was taken to mean the end of a political relation of domination, the process was very far advanced. But as he had noted as long ago as 1968, in his first report, the marks of domination were much less quickly erased from economic than from political relations.¹⁰ In that report, he had pointed

out that “political independence is not true independence and that new States often remain under *de facto* domination for long periods of time because their economies are dependent on that of the former metropolitan country, to which they remain firmly bound by the ties of State succession”, adding that “Ultimately, political independence itself often seems an illusion”.¹¹

9. It was thus difficult to deny the potential usefulness of the draft articles under consideration, not only for countries such as Rhodesia and Namibia, which were still dependent, but also for countries such as Angola, Mozambique and Guinea-Bissau, which had already achieved political independence, and even for countries which had attained political independence 15 or 20 years ago, such as Chad, which, although independent for the last 16 years, had only a few weeks previously secured the transfer of all the State property to which it was entitled by succession. It was that idea—namely, that the elimination of past and present colonialism should pave the way for the future development of newly independent States through the application of rules on State succession—that the representative of the Byelorussian Soviet Socialist Republic to the Sixth Committee had meant to emphasize in 1963 in stating that “the twentieth century had been characterized by the elimination of colonialism and the appearance of a large number of new State whose development depended upon the solution adopted in the question of the succession of States”.¹²

10. In the same line of thought, he attached much importance to Mr. Šahović’s remark concerning the purpose of the codification and progressive development of international law.¹³ In his opinion, that task of codification should be viewed as part of a dialectical movement; the codification of succession of States would thus be marked by successive stages in history, in particular the peace treaties concluded after the First and Second World Wars and the period of decolonization.

11. In the draft articles on succession of States in respect of treaties, which were soon to be submitted to a conference of plenipotentiaries, the Commission had dealt very fully with newly independent States. It could not now, in a complementary draft on the same topic of succession of States, wipe newly independent States off the slate, as it were. When it had adopted the draft on succession of States in respect of treaties on second reading, two years ago, had the Commission not already known that decolonization was in process of completion? A few months previously, all the representatives in the Sixth Committee of the General Assembly had mentioned the natural link between the two drafts; some had even said that they should be combined in a single text. The representative of France had said that the study on succession of States in respect of matters other than treaties would complement the study on succession of States in respect of treaties and help

⁸ *Ibid.*, Twenty-second Session, Annexes, agenda item 85, document A/6898, para. 83.

⁹ General Assembly resolution 1514 (XV) of 14 December 1960.

¹⁰ See *Yearbook... 1968*, vol. II, p. 102, document A/CN.4/204, para. 52.

¹¹ *Ibid.*, p. 105, para. 73.

¹² *Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 791st meeting*, para. 11.

¹³ 1391st meeting, para. 40.

to clarify its scope.¹⁴ As Mr. Reuter had observed, the draft articles on succession of States in respect of treaties had even, by the provisions of article 33, paragraph 3, created a new category of newly independent States.¹⁵ If, as Mr. Ushakov had suggested, the Commission deleted all reference to newly independent States from its present draft, it would be calling in question the typology of succession it had adopted in its draft articles on succession of States in respect of treaties, which was bound to have an adverse effect on the future of that draft.

12. With regard to the criterion to be adopted for the passing of State property, the great majority of members of the Commission favoured the requirement of a "direct and necessary link" between the property and the territory, but they had asked him to clarify that idea so as to avoid all ambiguity. He had already tried to define the criterion in his previous reports, without ever being personally satisfied with the formulas he had proposed, because they might not be understood in the same way in the different legal systems, owing to the extreme diversity of those systems. In his third report, he had discarded the expression "property in the public and private domain of the State" because some countries did not distinguish between the public and private domains of the State; he had referred instead to "Property appertaining to sovereignty over the territory".¹⁶ In his following reports, he had used successively the expressions "property necessary for the exercise of sovereignty over the territory"¹⁷ and "property connected with the State's "exercise of its sovereignty or its activity in the territory".¹⁸ Mr. Ushakov has chosen the notion of "activity in the territory" in his suggestion for article 12 (A/CN.4/292, foot-note 18). It was for the Drafting Committee to choose the most satisfactory wording.

13. The criterion he had proposed for the passing of State property had been enriched in the course of the debate. Mr. Yasseen had referred to a "reasonable" link and to the requirement of "good faith" which was the rule in public international law, maintaining that a direct reference to those criteria would add a positive element to the draft articles.¹⁹ Mr. Tammes considered that the wording proposed by the Special Rapporteur was no less valid than the expression "a genuine link" applied to the nationality of ships in article 5 of the Convention on the High Seas.²⁰ Mr. Tabibi had said that other factors of prime importance, such as physical, economic and social links, should be taken into account.²¹ Mr. Tsu-

ruoka had raised the question whether the criterion proposed took all those factors into account or was of a purely legal character.²² Mr. Ushakov had proposed that, in regard to movable property, it should be provided that property "connected with the activity of the predecessor State in the territory... shall pass to the successor State"²³ and had cited the example of railway wagons. But whereas railway wagons were State property in the Soviet Union, that was not the case in all countries. Mr. Reuter had asked that examples should be given in the commentary to clarify the precise meaning of the expression "direct and necessary link" in each article.²⁴

14. Other members of the Commission had proposed that the criterion of a "direct and necessary link" should be clarified by reference to procedural law. In that connexion, Mr. Ago, Mr. Kearney, Mr. Hambro, Mr. Sette Câmara, Mr. Tsuruoka, and Mr. Martínez Moreno had raised the question of the settlement of disputes, and he thought it would indeed probably be necessary to consider that question. Mr. Hambro had made at the 1391st meeting the practical suggestion that it should be stated in the commentary that some members of the Commission recommended States to make provision for the settlement of disputes.

15. In that connexion, he pointed out that the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947 had given an opinion on the concept of property "necessary for the viability" of a local territorial authority in a dispute relating to the apportionment of the property of local authorities in a frontier area, mentioned by him in his sixth report.²⁵

16. Recourse to the principle of equity had been approved unanimously by the members of the Commission. Some of them even thought that special attention should be devoted to that principle in order to balance and clarify the notion of a "direct and necessary link". Mr. Šaković had asked²⁶ how he interpreted the concept of equity, while Mr. Reuter had wondered what place that concept should occupy in the draft articles.²⁷ Mr. Hambro and other members believed that the Commission should give some prominence to the principle of equity, maintaining that it would be the basis of future international law.

17. He himself did not think that that principle could be given a pre-eminent position in the draft articles, since everything would then be reduced to the rule of equity. As the limit, that rule would make any attempt at codification unnecessary, and all that would be required would be one article stating that the rule of equitable apportionment of property must be applied in all cases. In fact, the principle of equity was not a basic element, but a balancing element, a corrective factor designed to prevent

¹⁴ *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1549th meeting, para. 37.

¹⁵ See 1391st meeting, para. 32.

¹⁶ *Yearbook... 1970*, vol. II, p. 143, document A/CN.4/226, part II, article 2.

¹⁷ *Yearbook... 1972*, vol. II, p. 66, document A/CN.4/259, para 39; and *Yearbook... 1973*, vol. II, p. 22, document A/CN.4/267, part IV, article 9.

¹⁸ *Yearbook... 1973*, vol. II, p. 28, document A/CN.4/267, part IV, article 11; and *Yearbook... 1974*, vol. II (Part One), p. 98, document A/CN.4/282, chap. IV, article 11.

¹⁹ See 1391st meeting, para. 3.

²⁰ *Ibid.*, para. 7.

²¹ *Ibid.*, para. 23.

²² See 1392nd meeting, para. 16.

²³ See 1390th meeting, para. 25.

²⁴ See 1391st meeting, para. 35.

²⁵ *Yearbook... 1973*, vol. II, p. 24, document A/CN.4/267, part IV, para. 12 of the commentary to article 9.

²⁶ 1391st meeting, para. 43.

²⁷ *Ibid.*, para. 38.

States from deviating from the “reasonableness” referred to by Mr. Yasseen. Equity made it possible to interpret the concept of a “direct and necessary link” in the most judicious fashion and to give it an acceptable meaning. That was, in a sense, what Mr. Quentin-Baxter had meant when he had said that the principle of equity should serve to temper the concept of State power.²⁸ Equity could not be assigned the main role, because there was also a material criterion concerning property situated in the territory and also because, as Mr. Sette Câmara had said,²⁹ States mistrusted equity, as was shown by the experience of the International Court of Justice. That criterion might be amplified by providing, as Mr. Ago had requested,³⁰ that States were under an obligation to negotiate an agreement in good faith. That was what the International Court of Justice had attempted to do in the *North Sea Continental Shelf* cases.³¹

18. Some members of the Commission, in particular Mr. Njenga,³² had asked why the principle of equity had not been uniformly applied in articles 12 and 13. But the situation dealt with in article 12 and article 13 were different and therefore required different treatment. The explanations he had given showed that the rule of equity was a residuary rule which should only be resorted to in case of need. Article 12, which applied to property situated in the territory, was based on two main criteria: that of the physical situation of the property, which applied especially to immovable property; and that of a “direct and necessary link” between the property and the territory, which applied to movable property. The criterion of equity was more important in article 13 than in article 12, because article 13 referred to property situated outside the territory.

19. The problem of equity arose in particular in connexion with article 13, subparagraph (c), which provided that State property should be “apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property”. At the 1390th meeting, Mr. Ushakov had criticized that rule, pointing out that, in the Soviet Union, the whole population contributed to the creation of all State property, whether it was situated in Moscow or in ceded frontier territory, which made any application of the principle of equity impossible. His own hypothesis was nevertheless quite simple: in the case of a frontier province ceded by one State to another, for example, a cultural institute representing the folklore of that province might have been built in a third State with contributions from the province and the predecessor State. That was a case which might very well occur.

20. Should consideration of State property *in concreto* be abandoned altogether? The problem of archives had frequently been raised, but as Mr. Ago had observed at the 1392nd meeting, there was other State property

besides archives, currency and public funds. Mr. Ago had raised the problem of ships, which he himself had mentioned in his third report. He had cited in that report the case of the cession of vessels for navigation on the Danube,³³ in which the Allied Powers had been opposed to Germany, Austria, Hungary and Bulgaria after the First World War, and which had been the subject of an arbitral award in 1921. He had also cited the case of the Baltic ships which had been in United States and United Kingdom ports at the time of the incorporation of the Baltic States in the USSR, and which the United States and United Kingdom Governments had refused to hand over to the Soviet Union.³⁴ But in the course of his researches, he had found very few cases relating to questions other than those of archives, currency and public funds, discussed in his seventh report:³⁵ that was easily explained, for one could conceive of a State without ships (the case of a land-locked State), but hardly of a State without currency or archives.

21. The problem of archives occupied a very important place in the life of nations and in succession of States. All the members of the Commission recognized its importance and he understood the concern expressed about that problem by Mr. Ustor. Mr. Ramangasoavina regretted the deletion of the articles devoted to archives in his seventh report;³⁶ Mr. Kearney wished a separate paragraph on archives to be added in articles 12 and 13; and Sir Francis Vallat would like a special article to be devoted to that problem.³⁷ Only Mr. Ushakov considered that archives were not even State property.³⁸

22. Mr. Ustor would prefer it to be expressly stated that articles 12 and 13 did not apply to the case of archives,³⁹ whose extremely complex character he had emphasized. But he (the Special Rapporteur) could not agree with him on that point, because the “direct and necessary link” which must exist between the archives and the territory was, in the present case, reflected in two cardinal principles, which had been formulated by international conferences of archivists: the principle of the territorial origin—or territoriality—of archives, according to which archives originating in the territory to which the succession of States related must pass to the successor State; and the principle of pertinence, according to which archives must pass if they related to the activity of the territory, regardless of where they were kept. It was that “archives-territory” link which he had defined in his third report when he had enunciated the principle of the handing over to the successor State of archives “relating directly or belonging to the territory”.⁴⁰

²⁸ *Ibid.*, para. 14.

²⁹ *Ibid.*, para. 28.

³⁰ See 1392nd meeting, para. 32.

³¹ *I.C.J. Reports 1969*, p. 3.

³² See 1390th meeting, para. 33.

³³ See *Yearbook... 1970*, vol. II, p. 166, document A/CN.4/226, part II, paras. 27-28 of the commentary to article 8.

³⁴ *Ibid.*, p. 169, para. 41 of the commentary and foot-note 222.

³⁵ *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

³⁶ See 1391st meeting, para. 21.

³⁷ See 1392nd meeting, para. 34.

³⁸ See 1390th meeting, para. 22.

³⁹ See 1392nd meeting, para. 12.

⁴⁰ *Yearbook... 1970*, vol. II, p. 155, document A/CN.4/226, part II, para. 16 of the commentary to article 7.

And that amounted to having recourse, there again, to the principle of equity.

23. Mr. Ustor had referred to the UNESCO resolutions which called for the handing over of archives to the country of origin,⁴¹ and Mr. El-Erian had also mentioned the problem of the country of origin.⁴² In the case of Hungary, the peace treaty had not imposed on that country the transfer of its cultural heritage. Indeed, article 11, paragraph 2, of the Treaty of Peace with Hungary, of 10 February 1947 very rightly laid down that the successor States, Yugoslavia and Czechoslovakia, would have no rights in archives or objects "acquired by purchase, gift or legacy" or in "original works of Hungarians".⁴³ Paragraph 1 of the same article stipulated that Hungary should hand over to the successor States only objects constituting their cultural heritage which had originated in the territory of those States.

24. A distinction should be made between administrative archives, which were used in the daily activities of the territory, and historical archives, which represented a cultural heritage. Historical archives which belonged to the territory should not be surrendered to the predecessor State, since they represented a very important cultural heritage for newly independent States, of which they should not be deprived. Within administrative archives, a distinction could be made between current archives, which were used for daily activities, and political archives, which were connected with sovereignty. Mr. Kearney had observed that, having regard to future relations between the two States, it might not be desirable to surrender political archives to the successor State.⁴⁴

25. Above all, however, a distinction should be made between archives removed from the territory and archives constituted outside the territory, but relating to that territory. Archives constituted outside the territory were not affected by the succession of States, but archives removed from the territory should return to the successor State, in accordance with the criterion of the country of origin. Thus, the criterion of origin applied in that case, in addition to the criterion of pertinence of the archives.

26. Mr. Tammes had rightly spoken of the cultural heritage which archives represented.⁴⁵ It would indeed be a serious error to regard archives as mere material property; they constituted patrimonial assets of inestimable value. In his various reports, he had given examples relating to such cultural and historical heritages. In his third report, he had mentioned the restitution by Italy to Ethiopia of an obelisk which had been erected in a square in Rome,⁴⁶ and in his fourth report, he had referred to articles 245, 246 and 247 of the Treaty of Versailles, which had laid upon Germany the obligation to return archives, historical souvenirs and works of

art.⁴⁷ Mr. Tammes had rightly referred to the resolutions adopted on that subject by UNESCO and other international organizations. The most recent was resolution 3391 (XXX) adopted by the General Assembly of the United Nations on 19 November 1975 and entitled "Restitution of works of art to countries victims of expropriation". That resolution, which mainly concerned cases of decolonization since, in its preamble, it recalled the Declaration on the Granting of Independence to Colonial Countries and Peoples, stressed that "the cultural heritage of a people conditions the flowering of its artistic values and its over-all development, which are tokens of its authenticity".

27. He noted that the members of the Commission had unanimously endorsed the distinction between movable property and immovable property. Three of them—Mr. Reuter, Mr. Calle y Calle and Mr. Tsuruoka—had raised the question how such property was to be defined. Was article 5⁴⁸ applicable and should reference be made to the internal law of the predecessor State? Personally, he thought it should; since the Commission had chosen, in article 5, to refer to the internal law of the predecessor State, it should continue to do so.

28. In comparing articles 12 and 13 with articles 14 and 15, Mr. Reuter had said that the two latter articles introduced a rule which was severe though fair in the case of decolonization, to the advantage of the successor State. He did not wish that rule to be transferred to articles 12 and 13, for he feared that while it was fair in the régime of decolonization covered by articles 14 and 15, it would be unfair, because of its severity, in a "neutral" régime of succession such as that covered by articles 12 and 13. He (the Special Rapporteur) wished to reassure Mr. Reuter about his intentions, which were the contrary of what was supposed, and about the solutions he had arrived at. The régime provided for in articles 12 and 13 was, indeed, much less strict and much less severe for the predecessor State; that was shown by the fact that at least three members of the Commission—Mr. Yasseen, Mr. Quentin-Baxter and Mr. Šahović—had found that, in article 12, he had been too hard on the successor State. Mr. Šahović had spoken of somewhat unduly rigid criteria which should be made more flexible;⁴⁹ Mr. Yasseen had said that it was sufficient for the link to be "reasonable" without having to be "direct and necessary";⁵⁰ and Mr. Quentin-Baxter had gone so far as to suggest that the rule in paragraph 12, subparagraph (b), should be reversed and that the principle underlying the whole of article 12 should be that of the transfer of property to the successor State, unless it was proved that some particular property had a direct and necessary link with the predecessor State.⁵¹

⁴¹ See 1392nd meeting, para. 13.

⁴² *Ibid.*, para. 21.

⁴³ United Nations, *Treaty Series*, vol. 41, p. 178.

⁴⁴ See 1392nd meeting, para. 28.

⁴⁵ See 1391st meeting, para. 6.

⁴⁶ *Yearbook... 1970*, vol. II, pp. 165-166, document A/CN.4/226, part II, para. 22 of the commentary to article 8.

⁴⁷ *Yearbook... 1972*, vol. II, p. 68, document A/CN.4/259, para. 46.

⁴⁸ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

⁴⁹ See 1391st meeting, para. 42.

⁵⁰ *Ibid.* para. 3.

⁵¹ *Ibid.*, para. 15.

29. Several members of the Commission had emphasized the prominence that should be given to agreement between the parties and had stressed the necessarily residuary character of the rules stated in articles 12 and 13. Mr. Ago and Sir Francis Vallat had even proposed at the 1392nd meeting that the obligation of States to negotiate should be placed at the beginning of those articles. He wished particularly to thank Mr. Ushakov, Mr. Njenga, Mr. Quentin-Baxter and Mr. Yasseen for their comments on that point and he assured them that the Drafting Committee would take those comments into consideration.

30. Many members of the Commission, including Mr. Calle y Calle, Mr. Ushakov and Mr. Šahović, had proposed that subparagraph (a) of article 13, should be deleted because, in their opinion, it merely stated an obvious fact. That subparagraph had been included mainly for the sake of clarity; it was, as Mr. Ramangasoavina had rightly said at the 1391st meeting, a simple reminder intended to strengthen subparagraphs (b) and (c). He was not opposed to its deletion. He was, on the other hand, strongly opposed to the merging of articles 12 and 13 proposed by Mr. Ushakov;⁵² for he considered that the balance between the criterion of the direct and necessary link and the criterion of equity was necessarily different in articles 12 and 13, since the notion of good faith and equity was more important in article 13 than in article 12.

31. Mr. USHAKOV said he had not meant to call in question the typology of succession adopted by the Commission. He had simply asked whether it was necessary, at the present time, to deal with decolonization and the case of newly independent States. He was now convinced that it was necessary to deal with those matters, but he still believed that the case of decolonization and the case of the separation of States should be treated separately, and not in the sub-division of succession of States in respect of part of territory. In his opinion, sub-divisions could very well be adopted in the present draft which differed from those adopted in the draft articles on succession of States in respect of treaties. The Commission should begin by dealing with the case of decolonization and the case of the separation of States under different headings from those of articles 12 and 13. If it was subsequently found that the same rules applied to those different cases, they could be brought together under the same heading. It would be for the Drafting Committee to decide that point.

32. Mr. BEDJAOU (Special Rapporteur) said he had always considered that the case of succession of States in respect of part of territory and the case of non-self-governing territories decolonized through integration were not assimilable, because the second case did not relate to part of the territory of the predecessor State. But the Commission had wished to assimilate those two cases and had obliged him to do so. He would be very pleased if that assimilation was abandoned, and would submit a separate draft article on the case of integration.

The Commission would then see whether the rules applicable to that case were the same as those which applied to succession of States in respect of part of territory.

33. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 12 and 13 to the Drafting Committee for consideration in the light of the suggestions made by members of the Commission.

*It was so agreed.*⁵³

Mr. Calle y Calle, second Vice-Chairman, took the Chair.

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State)

34. The CHAIRMAN invited the Special Rapporteur to introduce articles 14 and 15, appearing in his eighth report, reading as follows:

Article 14. Succession to State property situated in newly independent States

1. Unless otherwise agreed or decided, the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State.

2. Movable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent shall pass to the successor State unless:

(a) the two States otherwise agree;

(b) such property has no direct and necessary link with the territory, and the predecessor State has claimed ownership thereof within a reasonable period.

3. Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.

Article 15. Succession to State property situated outside the territory of the newly independent State

Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State, unless:

(a) the two States otherwise agree; or

(b) it is established that the territory which has become independent contributed to the creation of such property, in which case it shall succeed thereto in the proportion determined by its contribution; or

(c) in the case of movable property, it is established that its being situated outside the territory of the newly independent State is fortuitous or temporary and that it has in fact a direct and necessary link with that territory.

35. Mr. BEDJAOU (Special Rapporteur), introducing draft articles 14 and 15, said that those provisions concerned a particular type of succession of States which

⁵² See 1390th meeting, para. 26.

⁵³ For consideration of the text proposed by the Drafting Committee, see 1405th meeting, paras. 10-19.

occurred when a dependent territory acceded to independence and established itself as a State. Article 14 dealt with State property situated in the newly independent State and article 15 with State property situated outside the territory of that State.

36. Article 14 did not apply to property belonging to the Non-Self-Governing Territory which had become independent. Generally speaking, colonies enjoyed a special régime under what had been termed legislative and conventional speciality. They possessed a certain international personality, so that they could own property inside and outside their territory. Consequently, there was no reason why succession should cause colonies to lose their own property. Another class of property to which article 14 did not apply was property situated outside the territory of the newly independent State.

37. The succession dealt with in articles 14 and 15 was characterized by the fact that it concerned a non-self-governing country, whose people, territory and sovereignty were different from those of the administering Power. According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States already quoted.⁵⁴

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self determination . . .

38. Article 14, paragraph 1, confirmed the well-established rule that all immovable property passed to the successor State. That rule was, however, limited to immovable property belonging to the predecessor State and situated in the newly independent territory, at the time of the succession of States. That provision was really only an application of article 9, which established the general principle of the passing of State property.

39. At the theoretical level, the situation described in article 14, paragraph 1, had not raised serious difficulties. The solution proposed in that provision was commonly accepted by legal writers and international judicial opinion, although immovable property as such was seldom mentioned. Reference had often been made to broader categories of property, such as property within the public and private domains. If general transfer was the rule, however, the passing of the more limited category of immovable property must be accepted *a fortiori*.

40. The role of agreements between the parties might appear at first sight to be preponderant, because the rule stated in article 14, paragraph 1, was a residuary rule, as was clear from the use of the words "Unless otherwise agreed or decided". Paragraph 3 of the article nevertheless introduced an innovation in the codification of the topic. In his opinion, the principles of decolonization and self-determination partook of *jus cogens*. To appraise the role of devolution agreements and, in particular, of those

which limited the rights of peoples to self-determination and to control of their natural resources, it was not sufficient to refer to the law of treaties. The Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, which was annexed to the Final Act of the United Nations Conference on the Law of Treaties,⁵⁵ marked a step forward but it was necessary to envisage further steps to establish whether such agreements should be considered void *ab initio*.

41. Article 14, paragraph 2, settled a problem which seemed to be particularly dense and accentuated in cases of decolonization: that of movable property. The fact that such property was often removed from the patrimony of the dependent territory at the time of the succession of States must be ascribed to human frailty. In his eighth report,⁵⁶ he had given several examples of such action, relating to currency, treasury and public funds, and State archives and libraries. With regard to archives, he pointed out that, in resolution 3391 (XXX), the General Assembly had called for the "restitution of works of art to countries victims of expropriation". In that text, the Assembly had affirmed that

the prompt restitution to a country of its *objets d'art*, monuments, museum pieces and manuscripts by another country, without charge, is calculated to strengthen international co-operation . . .

and had invited the States Members of the United Nations to ratify the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference of UNESCO in 1970.

42. With regard to archives, articles 14 and 15 required the same distinctions to be made as in articles 12 and 13. A distinction should be made between living archives, which were current administrative archives and political archives or those relating to sovereignty, and dead or historical archives, which were archives removed from, or established outside, a dependent territory. Those distinctions, again, relied on the notions of viability, equity and a direct and necessary link, which could be combined. The efforts of the countries of the third world to combat their under-development were many-sided and, in addition to their economic and financial aspects, concerned cultural heritage and State archives. Both at the Conference on International Economic Co-operation (North-South conference) and in UNCTAD, the notion of equity had gained ground as a means of development of the third world countries. Some speakers had expressed the hope that certain property would be regarded as common property and shared equitably between States. Before any share-out was considered, however, the developing countries must receive what was due to them; it was in that context that it was important to give the countries of the third world their share of cultural heritage and archives.

⁵⁵ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285.

⁵⁶ See document A/CN.4/292, chap. III, paras. 24-53 of the commentary to article 14.

⁵⁴ See para. 3 above.

43. Referring to article 14, paragraph 3, he emphasized that colonization was an intrinsically unlawful phenomenon and that, to have any meaning, decolonization must be complete. In particular, the transfer of State property to newly independent States should be effective and complete. In matters relating to decolonization, equity must be assessed in a special way: it must compensate the delays attributable to domination and exploitation. In the case in question, equity consisted in giving the newly independent State more than would be given to any other State. Hence the legal value of devolution agreements which did not transfer all property should be interpreted according to their degree of conformity with the right of self-determination. Those considerations led him to wonder whether the rules stated in article 14 were really residuary rules.

44. It must not be forgotten that the Commission's task was to codify the topic under study, taking due account of the objectives and needs of the developing States; nor should members forget the context in which decolonization and the re-evaluation of relations between the industrialized countries and the developing countries were placed. That context was becoming increasingly incompatible with any conventional restriction of the rule of the integral transfer of State property, which might be situated either on the soil or in the subsoil of the territory to which the succession related. In that connexion, he referred to paragraphs 56 to 62 of his commentary to article 14, in which he had shown how the permanent sovereignty of States over their natural resources had been affirmed in increasingly forceful terms. All the norms of conduct thus established proved to be incompatible with agreements which restricted the nature and scope of the transfer of property from the predecessor State to the newly independent State, and which were not designed to overcome the special difficulties of the developing countries.

45. In his report, he had outlined a new theory of the sovereign equality of States, according to which State sovereignty must be defined not only on the basis of its political elements, as had been done so far, but also on the basis of its economic elements. Equality among States, as conceived by traditional international law, would be mere hypocrisy and deception so long as the political and economic independence of a weak State remained purely fictitious. State sovereignty must therefore be given a new formulation capable of restoring to the State the fundamental bases of its national economic independence. He had examined those questions in detail in paragraphs 66 to 76 of his commentary and hoped that the members of the Commission would express their views on them. It should be noted that the Charter of the United Nations condemned infringements of the political sovereignty of States, but not of their economic sovereignty. In order to remedy that deficiency, the General Assembly had uttered increasingly forceful condemnations of infringements of the economic sovereignty of States. In his opinion, it was from that standpoint that devolution agreements and the rules stated in article 14 should be regarded.

46. Article 15 related to State property situated outside the territory of the newly independent State and dealt

mainly with the problem of property removed from the territory before independence. It did not cover property belonging to the territory, whether it was situated in the predecessor State or in a third State, but only the property of the predecessor State. Obviously, that property remained the property of the predecessor State, unless the newly independent territory had contributed to its creation or it had been removed from the newly independent territory. Judicial precedents and State practice, which dealt only with certain categories of property, such as archives, justified those rules.

47. With regard to the contribution of the successor State to the creation of property situated in a third State, he observed that the countries created by decolonization did not appear to have claimed part of the subscription of the States which had been responsible for their international relations in international or regional financial institutions. Having found no precedent on that point, he merely submitted it to the Commission for consideration.

48. The CHAIRMAN thanked the Special Rapporteur for his lucid oral introduction of articles 14 and 15, in which he had outlined a new conception of sovereignty. It was only with difficulty that sovereignty had been attained by certain peoples and it had not been fully realized by those which had acceded to independence under precarious conditions. The Special Rapporteur had brought out the economic aspects of sovereignty and the principles of economic independence and international economic security. He had given the Commission food for thought concerning the new economic order, which would constitute a genuine order only when the rules of international economic law and of the law of development were formulated as branches of international law.

49. Mr. USHAKOV said he wished to ask the Special Rapporteur four questions. First, should a distinction be made between Non-Self-Governing Territories in general and protectorates or trusteeship territories, although such a distinction had not been made for the topic of the succession of States in respect of treaties? Second, should a special provision, like article 29 of the other draft articles,⁵⁷ be devoted to newly independent States formed from two or more territories, or should that question be dealt with in articles 14 and 15? Third, should one speak of property belonging to the newly independent territory, since such property was similar to State property, though it did not belong to a State? Fourth, did not the phrase "unless otherwise agreed" (in article 14) presuppose the conclusion of an international agreement between the administering Power and the Non-Self-Governing Territory, which was impossible, because the latter did not have the status of a subject of international law?

The meeting rose at 12.55 p.m.

⁵⁷ See *Yearbook... 1974*, vol. II (Part One), p. 248, document A/9610/Rev.1, chap. II, sect. B.

1394th MEETING

Monday, 21 June 1976, at 3 p.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Casteñeda, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

**Succession of States in respect of matters
other than treaties (continued) (A/CN.4/292)**

[Item 3 of the agenda]

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR
(continued)**

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State)¹ (continued)

1. The CHAIRMAN invited the Special Rapporteur to reply to the four questions put to him by Mr. Ushakov at the end of the previous meeting.²

2. Mr. BEDJAOUI (Special Rapporteur) said that Mr. Ushakov had asked him, first, whether the articles under consideration covered newly independent States in general or whether certain Non-Self-Governing Territories such as protectorates and Trust Territories should be given separate treatment. In theory, there were differences between colonies and protectorates. The sovereignty of the protected State continued to exist, but the protecting authority acted on behalf of the protected State. In Morocco, for instance, under the French protectorate, the Resident-General of France at Rabat had acted as a kind of Foreign Minister for His Sharifian Majesty. In practice, there was little difference between a protectorate and a colony. Moreover, there had been many forms of protectorate, and some of them, such as Madagascar and Indo-China, had gradually become colonies. Both in protectorates and in colonies there had been State property belonging to the administering Power which it had used in administering those territories. In view of those facts, he had considered it unnecessary to treat the case of protectorates separately. If the Commission considered it advisable, however, he would try to draft provisions on that particular case.

3. With regard to Mr. Ushakov's second question, the reason why he had not dealt separately with the case of newly independent States formed from two or more

territories, as the Commission had done in the draft articles on succession of States in respect of treaties,³ was that he had not found any substantial information on State property situated in or outside the territory of such States. That explanation might be given in the commentary to articles 14 and 15. He saw no reason to deal separately with the case of newly independent States formed from two or more territories.

4. Replying to Mr. Ushakov's third question, he said that legal writings were generally silent on the question of property belonging to Non-Self-Governing Territories. It was quite certain, however, that Non-Self-Governing Territories had always had property of their own. Even under the old colonial law, colonies had enjoyed some degree of personality in public law. They had been subject to colonial law, which differed from metropolitan law; agreements applicable solely to the colonies had been concluded and the question had often arisen whether a particular treaty was applicable to a certain colony. The special régime applied to colonies had been based on the principles of legislative and conventional specialization. There had thus been institutions, a budget and property belonging to the colony—property which had been acquired with the colony's own money. The legal status of such State property had not always been clear, however. In legal systems which distinguished between the public and the private domain, there had, moreover, been a multitude of legal régimes. In French Indo-China, for instance, there had been no less than eight co-existing domains: a "colonial" public domain and private domain of the French State in Indo-China; a "general" domain comprising the public and private domains of the former Federation of Indo-Chinese States; local domains belonging as of right to the five protectorates or colonies composing the Federation, with distinctions between the public and the private domain; and public and private domains coming under the provincial, local and communal authorities in each protectorate or colony of the Federation. There were also the difficulties of legal definition which had been raised by the property of the Special Committee of Katanga. Those difficulties had been increased by the existence of a treaty, concluded on 28 November 1907, between the "Independent State of the Congo" and the Belgian State, by which the Congo had ceded all its property to Belgium. In fact, King Leopold II had ceded his Congolese possession to Belgium and, by a curious duplication of functions, had acted as both parties to the treaty. A distinction had, however, been made in that case between the metropolitan patrimony and the colonial patrimony. With regard to the *habous* or *waqf* property which had existed in Algeria prior to 1830, he referred members to his third report.⁴ That had been inalienable religious property and in no sense State property.

5. It was clear that property belonging to a Non-Self-Governing Territory was not affected by a succession of States. Only the metropolitan patrimony in the colony

¹ For texts, see 1393rd meeting, para. 34.

² See 1393rd meeting, para. 49.

³ See *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev. I, chap. II, sect. D.

⁴ See *Yearbook... 1970*, vol. II, p. 138, document A/CN.4/226, part II, para 19 of the commentary to article 1.

formed part of the succession. Hence there was no reason to speculate on the fate of property belonging to the non-self-governing territory. It would be an aberration if decolonization caused the territory acceding to independence to lose its property. It would also be an aberration if the colonizing State, by the mere fact of the succession, acquired the ownership of property which could not have belonged to it before. The reason why the question of property belonging to a dependent territory sometimes arose, was that the predecessor State often agreed to the "transfer" of that property only, thus excluding its own State property from the transfer.

6. Referring to the fourth question put by Mr. Ushakov, he said that, in his first report,⁵ he had examined at length the question of the nature and validity of agreements concluded between an administering Power and a dependent territory prior to decolonization. Generally speaking, it was in the interest of the colonial Power to regard such instruments as genuine international agreements. At the Congress of Berlin, the agreements between colonizers and African tribal chiefs had been considered, contrary to the international law of the time, as genuine international agreements. There were also agreements concluded after decolonization which raised no difficulty as to the status of the contracting parties as States, but which might never enter into force, be denounced, lapse or be replaced by other treaties. In cases of decolonization, moreover, a succession of States could take place when the dependent territory concerned did not yet enjoy full international capacity. Conservely, a succession of States might involve countries recovering their full international sovereignty. Before regaining their full independence, those countries had been regarded in theory and in practice as States.⁶ To sum up, agreements concluded on the eve of independence were agreements between an actual State and a potential State.⁷

7. Mr. HAMBRO said he endorsed the general principles set out in articles 14 and 15. Paragraph 1 of article 14 provided that the newly independent State "shall exercise a right of ownership" of immovable property, whereas paragraph 2 provided that movable property of the predecessor State "shall pass" to the successor State. He wondered whether that difference in wording reflected a difference in substance or whether it was merely a stylistic variation. In the latter case, it would be better to use a single, identical formula.

8. The Special Rapporteur had probably been right to adopt a general approach and not to deal separately with State property such as currency, State funds, treasury or archives. Nevertheless, State archives were often so important that a special provision might be devoted to them. In his view, there was no such thing as "dead" archives. All archives, even historical archives, were part of living history. For instance, the Norwegian and Icelandic archives in Denmark had been considered extremely important. The importance of archives could not be over-

estimated, and newly independent States deserved special protection in that regard.

9. Perhaps it was because the Special Rapporteur had lived through his country's struggle for independence that he had come to formulate certain general theories. While he did not disagree with him on those theories, he thought the Commission should not take up questions such as the sovereign equality of States. Referring to that concept, as understood in classical international law, the Special Rapporteur had spoken of "hypocrisy". On that point, it should be remembered that, although it had long been hypocritical to proclaim the sovereign equality of States, it was nevertheless because that principle had been tirelessly repeated that it had finally become fact; hypocrisy had given way to habit, and habit to reality. In studying succession of States, the question of sovereignty was not of capital importance. The Commission had better not try to formulate a new theory of sovereignty which might be superficial and by which it might one day be held captive.

10. With regard to paragraph 3 of article 14, he was all in favour safeguarding the sovereignty of States over their wealth and natural resources, but that principle did not come under succession: it was a general principle valid for all States. He doubted whether matters not directly concerning succession of States should be dealt with in the draft articles. Personally, he would not like the Commission to engage in a campaign against colonialism, neo-colonialism or imperialism. Rather than dwelling on past situations, it would be better to provide that in case of doubt the interest of the newly independent States must prevail.

11. Mr. TAMMES said he had found that the Special Rapporteur had given convincing reasons for retaining provisions on the type of succession relating to newly independent States. The problem of newly independent States would continue to arise for some time and there would still be a number of cases to be counted as decolonization, for which the convention that would emerge from the present draft articles could be useful.

12. At the same time, it should also be considered whether that future convention could not be made even more useful by bringing under the régime of articles 14 and 15 a category of comparable cases. It would be recalled that the Commission had proceeded in that way in its 1974 draft on succession of States in respect of treaties. Article 33, paragraph 3 of that draft equated to a newly independent State, for purposes of application of the draft, the case in which "a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State".⁸ That formula covered cases of accession to independence which would probably occur in the more distant future, whereas the cases to which the Special Rapporteur had referred in his oral introduction lay in the immediate future.

⁵ See *Yearbook... 1968*, vol. II, pp. 103 *et seq.*, document A/CN.4/204, paras. 33 *et seq.*

⁶ *Ibid.*, p. 102, para. 55.

⁷ *Ibid.*, p. 104, para. 66.

⁸ *Yearbook... 1974*, vol. II (Part One), p. 260, document A/9610/Rev.1, chap. II, sect. D.

13. Two questions arose in that connexion. The first was whether the reasons that had prompted the Commission to give similar privileged treaty régime to newly independent States and certain other new States would also apply to succession to State property. In the case of succession of States in respect of treaties, the privileged régime related to such matters as the clean slate principle. In the case of State property, the privileged régime would relate mainly to the burden of proof in regard to movable property which passed from the predecessor State to the successor State; article 14, paragraph 2 placed the burden of proof on the predecessor State. The second question to be considered was whether the problem of equating the régimes of the newly independent State and the comparable new State was best dealt with under article 14 or under article 17, the present text of which left the whole problem unsolved.

14. In answering those two questions, it should be borne in mind that the same conditions could prevail in cases of separation as those described in the part of the Special Rapporteur's eighth report dealing with the economic content of the concept of sovereignty.⁹ He had studied that part of the report with great sympathy. The 1974 Charter of Economic Rights and Duties of States,¹⁰ on which the Special Rapporteur relied, had already had a certain impact on the Commission's work, particularly in regard to the exceptions to the most-favoured-nation clause. Moreover, the norms of that Charter had been put into practice in recent cases, in which not only had State property been transferred to newly independent States, but additional assistance had been given to them on a large scale.

15. The problem for the Commission was that of translating those new norms into reliable legal terms which could pass the test of application by a court of law. The question arose whether the principle of economic independence was rich enough in itself to generate the desired legal rules. States were so unequal in many respects, economic and other, that it was only through additional principles of mutual compensation that the imbalance could be remedied. The old idea of distributive justice thus emerged in the form of economic interdependence. The difficulty of expressing in legal language thoughts such as those developed in the economic part of the commentary to article 14 was shown by paragraph 3 of that article, the provisions of which could only be interpreted fully with the aid of the commentary.

16. In his sixth report, the Special Rapporteur had quoted the statement by the Secretary-General of the United Nations, in one of his annual reports, that "Sovereignty over natural resources is inherent in the quality of statehood and is part and parcel of territorial sovereignty".¹¹ In that context, the concept of sovereignty was relevant to the subject of State property; but if article 14, paragraph 3, was read in conjunction with the

commentary—particularly paragraph 75—the sovereignty in question appeared to relate to the treaty-making power of the State. It seemed to him that the special succession régime of the newly independent State was already fully protected by the law of treaties and by the law of succession in respect of treaties, particularly by the principle of consent, the exclusion of coercion, the irrelevance of devolution agreements and the clean slate principle.

17. He had no comments to make on article 15 and suggested that both articles should be referred to the Drafting Committee.

18. Mr. ŠAHOVIĆ said he found the rules stated in articles 14 and 15 generally acceptable, and consistent with the main lines of the draft on which the Commission had already reached agreement.

19. With regard to sovereignty, he shared the view of the Special Rapporteur, who had emphasized the economic content of that concept. In the absence of economic content, sovereignty would be an empty word and the sovereign equality of States would be meaningless. Although the questions of sovereignty and the sovereign equality of States went beyond the scope of succession of States, the Special Rapporteur had been right to examine them, for they required clarification. It was necessary, however, to determine how the ideas developed by the Special Rapporteur were to be expressed. The rule stated in article 14, paragraph 3, certainly applied especially to newly independent States, but it was applicable to all States. When viewed in historical perspective, the principle of the permanent sovereignty of the State over its natural resources could be seen to have begun to triumph with socialism and the application of the principle of self-determination in the internal order. He therefore suggested that paragraph 3 of article 14 should be incorporated in another provision of the draft.

20. As to the wording of the articles under consideration, he observed, first, that paragraph 1 of article 14 began with the reservation "Unless otherwise agreed or decided", which appeared in other provisions of the draft. He wondered whether it would not be preferable to draft a general provision emphasizing the residuary character of the rules in the draft and reserving the faculty of States to settle their problems by special agreements.

21. Like Mr. Hambro, he wondered whether the expression "exercise a right of ownership" should be understood as meaning something different from other expressions used in the draft. In addition, he doubted whether it was correct to speak of a "right of ownership" at the international level. In international law, the concept of a "right of ownership" varied widely from one legal system to another. In Yugoslavia, for instance, the concept of the State's right of ownership was not the same as in other socialist countries; it derived from the concept of social ownership which in turn was based on the notion of self-management, according to which the State did not occupy such an authoritarian position in internal legal relations that everything covered by the concept of social ownership belonged to it. He feared therefore, that when transposed to the international level, the concept of the right of ownership would give rise to

⁹ See document A/CN.4/292, chap. III, paras. 54-76 of the commentary to article 14.

¹⁰ General Assembly resolution 3281 (XXIX) of 12 December 1974.

¹¹ See *Yearbook...* 1973, vol. II, p. 27, document A/CN.4/267, part. IV, para. 13 of the commentary to article 10.

misunderstandings. It would be better merely to say "ownership".

22. As to the conditions stated in article 14, paragraph 2, he thought it should be specified whether they were cumulative or alternative. He noted that all the comments made on the concept of a "direct and necessary link", during the discussion on articles 12 and 13, also applied to articles 14 and 15.

23. He approved of the provisions proposed by the Special Rapporteur in article 15. That article appeared, however, to apply to all property of the predecessor State situated outside the territory of the newly independent State, whereas article 13 applied to property situated outside the territory "to which the succession of States relates". He wondered whether that qualifying phrase should not be added to article 15. Moreover, the conditions set out in article 15, subparagraphs (b) and (c), needed to be made more precise for purposes of their application. In particular, the Commission might consider formulating a procedure for the settlement of disputes arising out of the application of those conditions.

24. Mr. SETTE CÂMARA said he agreed with the Special Rapporteur on the need to include articles 14 and 15 in the draft. The speed at which decolonization was taking place was a matter for satisfaction, and the end of the colonial era was in sight. Nevertheless, despite all the progress made since the adoption of General Assembly resolution 1514 (XV), there were still some Non-Self-Governing Territories which had yet to achieve independence. Moreover, independence left many problems unsolved. The Special Rapporteur had given the example of the transfer of State property to the Republic of Chad which had only taken place in 1976, over 15 years after independence.¹² The rules embodied in articles 14 and 15 would thus be very useful in settling problems of that kind which arose in the future. Besides, the inclusion of those articles in the draft would show the Commission's awareness of the whole problem of newly independent States. It should be noted that the Commission's draft on succession of States in respect of treaties, adopted in 1974, not only dealt with the matters in question, but treated the problem of the newly independent State as the cornerstone of the draft.

25. Article 14 had the same structure as earlier articles of the draft. It dealt with property belonging to the predecessor State and not with property belonging to the territory itself. It should be remembered that colonial territories sometimes had their own movable and immovable property, which was outside the scope of the succession. He found the Special Rapporteur's treatment of the questions of movable and immovable property acceptable, and approved of the proposed wording.

26. He fully approved of the inclusion of paragraph 3 in article 14. Several resolutions of the General Assembly had proclaimed the permanent sovereignty of States over their natural resources. The wording of paragraph 3 had been drawn from Economic and Social Council resolution 1956 (LIX) and from the resolutions adopted by the

General Assembly at its sixth special session. There were, perhaps, some verbal inaccuracies in that paragraph: for instance, the "wealth" of a country, to which reference was made, included the property mentioned in the previous paragraphs. Again, it was not easy to see how permanent sovereignty could be exercised over "economic activities". Nevertheless, since the wording in paragraph 3 had been used in a number of decisions and resolutions of the United Nations, the Commission should adhere to it.

27. It could also be contended, to use the Special Rapporteur's own argument, that the attributes of sovereignty mentioned in paragraph 3 already belonged to the territory before independence. Nevertheless, the provisions of that paragraph were still needed, because history showed that the attainment of independence was far from being peaceful and easy. History also offered many examples of devolution agreements of a leonine character. A saving clause such as paragraph 3 of article 14 was therefore necessary.

28. He approved of the wording of article 15 and had no special proposal to make on it. He suggested that both articles should be referred to the Drafting Committee.

29. Mr. QUENTIN-BAXTER said that the Special Rapporteur had demonstrated conclusively that the draft articles must deal with self-determination, which lay at the forefront of United Nations doctrine. Therefore, it was perfectly plain that in dealing with newly independent States or other new States, the rules should not be qualified by the phrase "unless otherwise agreed or decided" or words to that effect. The rules now being drafted related to the moment at which a change of sovereignty occurred and it was hoped and expected that the general principles they enunciated would guide States in drawing up the detailed agreements that followed changes of sovereignty. In particular, those rules could provide guidance when a succession of States occurred with something less than complete agreement or harmony between the predecessor and successor States. Consequently, the articles should be drafted in the light of past and contemporary experience. They should not be so narrow as to fail to discern problems of the immediate future, but they should always respect international life in its present form.

30. The Special Rapporteur had made highly pertinent references to economic sovereignty, a question which had arisen in connexion with each of the items discussed so far. In the present instance, however, while it was possible to grasp the basic idea of the concept of economic sovereignty at once and to concede that it was valid, great care should be exercised, in formulating legal rules, not to move inconsistently between the strict legal notions that were the normal subject of the Commission's work and the deeper political or legal principles that might motivate those rules.

31. Like other speakers, he experienced some difficulty with regard to article 14, paragraph 3, not because of its content, but because of its juxtaposition with the other paragraphs of the article. It referred to sovereignty in the traditional sense—the sense that sovereign States

¹² See 1393rd meeting, para. 9.

were free to deal with matters in their own territory and were masters of their own law. However, he was disturbed by the argument that, whenever the text failed to mention the consequences of State sovereignty, it might be inferred that the Commission was seeking to establish obligations which conflicted with that sovereignty. In addition, the Commission might be led to believe that it was performing a practical service for newly independent States when that was not, in fact, the case.

32. The same sort of difficulty arose in connexion with the opening words of article 14, paragraph 1. He realized that the Special Rapporteur was simply pointing out that, in conformity with the doctrine of self-determination, a Non-Self-Governing Territory was the owner of its resources and was entitled to them *ab initio*. If the property in question was privately owned, it would, upon a change of sovereignty, retain its legal character. But the Commission was concerned with another element, namely, that if the owner of the property, recognized in internal law, happened to be the predecessor State itself, then some process of transmission had to occur at the level of internal law and it had to occur in accordance with rules of international law. Therefore, if, as it was agreed, the Commission was to recognize particularly the situations that followed upon an act of self-determination, and was to give some preference to the rights of newly independent States, the solution lay not in adopting article 14, paragraph 3, or the special language found in article 14, paragraph 1, but in constructing the draft as had been done in the case of succession of States in respect of treaties—in other words, with complete respect for the principle of self-determination, with no attempt to enunciate it, but with every care to ensure that the rules contained in the draft did not flout that principle.

33. To that end, it was essential to give effect to the letter of the doctrine of self-determination. A Non-Self-Governing Territory, no matter how small, was an entity that must exercise the right to self-determination and, even if it decided to merge with another State, such a course fell within the category of State succession to which special respect was shown by the Commission; it could not simply constitute another case of a moving treaty frontier. Similarly, full respect must be shown for the spirit of the doctrine of self-determination. Since the principle involved could not be captured and enunciated in strict rules, the draft should leave room for it to operate. As had been done in the draft articles on succession of States in respect of treaties, it had to be recognized that there were cases in which a succession not involving the creation of a newly independent State might still present essentially the same characteristics as a situation which gave birth to a newly independent State. In the other draft, the Commission had had in mind the case of Bangladesh and had realized that treatment less generous or special than that applied in the normal case of decolonization would hardly be acceptable to the Government and people of that country. Another example was that of territories which decided to enter a free association with an existing State. Subsequently, they might wish to become fully independent—in other words, they might wish, once again, to exercise

their right to self-determination. It was the duty of the world community and of individual States not to encourage schism within the territory of any sovereign State. Changes did and would occur, however, and it had to be appreciated that in the future some of them would doubtless involve, in the broadest possible fashion, the right to self-determination.

34. He was prepared to follow and amplify slightly the precedent of the draft articles on succession of States in respect of treaties and to recognize that there might be cases of separation of parts of a State—a matter now covered by article 17—which came under the rules applicable to newly independent States. Similarly, it should be recognized, in connexion with articles 12 and 13, that those same rules could apply, exceptionally, in the transfer of territories that were administered by the predecessor State, but did not form part of its own national territory.

35. Articles 12 to 15, and even article 17, reflected the basic principle that immovable property should pass to the ownership of the territory in which it was situated. Articles 13 and 15, however, did not draw a distinction between property situated in the territory of the predecessor State and property situated in a third State, nor did they even contemplate the possibility that ownership of immovable property situated in the predecessor State or a third State might pass to the territory to which the succession related. On the other hand, the notion of linkage with the successor State appeared to suggest that even the place, or situation, of the property would not provide the final answer. As the Special Rapporteur had pointed out, in general, a Non-Self-Governing Territory had a fairly well-defined relationship with its property and, consequently, it was hardly necessary and possibly even dangerous to qualify in any way the notion that a newly independent State was the owner of the immovable property situated in its territory. However, the Commission was formulating guiding principles. Was it right, therefore, to establish an absolute rule and affirm that the situation factor alone would govern the disposition of immovable property within the territory, but that the rule might be qualified in the case of property situated in the predecessor State? One great merit of the rules embodied in the articles might be to suggest that there were circumstances in which, for reasons of fairness, the rule on the situation of the property had to be tempered.

36. Again, a State's natural resources might be located in one area of vital importance to the country as a whole and substantial investment might have been made in those resources. If the area became independent, the circumstances would have all the features normally associated with the birth of a newly independent State, but the economic loss to the other parts of the country might well have to be considered. In his view, it would be advisable to state explicitly that the doctrine of sovereignty over natural resources was not questioned in any way. A general article could be incorporated in the draft especially for that purpose. Nevertheless, since guidance was being given to States on the way in which property within their territories should be classified, importance should be attached to the notion of equity.

37. With regard to movable property, he had no objection to the notion that the presumptions should operate more firmly in favour of newly independent States or States in similar situations. Nevertheless, it was difficult to avoid a fairly distinct hierarchy of factors—the situation of the property, the linkage between the property and the predecessor or the successor State, and the economic contribution made to the property.

38. Mr. USHAKOV said that, in principle, he fully agreed with the Special Rapporteur about succession to State property situated in newly independent States. He was not sure, however, what was meant by the expression “newly independent State”. Article 3 of the draft did not define that expression, though the Commission had defined it in article 2, paragraph 1 (f) of the draft on succession of States in respect of treaties. Before dealing with succession to State property situated in newly independent States, it would therefore be necessary to define the concept of a newly independent State.

39. Should Trust Territories be included in that definition? The Special Rapporteur has assimilated the idea of a newly independent State to that of a Non-Self-Governing Territory; for in paragraph 2 of the commentary to article 14, the Special Rapporteur said that the type of succession under consideration involved “a ‘Non Self-Governing Territory’, which means, in accordance with the United Nations Charter, a territory having a certain international status”. But he referred only to Chapter XI of the Charter (Declaration regarding Non-Self-Governing Territories), whereas reference might also be made to Chapter XII, on the International Trusteeship System. It could therefore be asked why the Special Rapporteur had confined himself to the Non-Self-Governing Territories covered by Chapter XI of the Charter and why he had departed from the definition the Commission had given in article 2, paragraph 1 (f) of the draft on succession of States in respect of treaties. According to that definition, the expression “newly independent State” meant a successor State the territory of which, immediately before the date of the succession of States, had been a dependent territory. It therefore included all dependent territories, that was to say, not only Non-Self-Governing Territories, but also Trust Territories. It was obvious, however, that that definition could not apply to newly independent States formed from several territories. That was why the Commission had had to include in its draft on succession of States in respect of treaties, a separate article on newly independent States formed from two or more territories (article 29). It should do the same in its present draft.

40. He thought that it was also necessary, in articles 14 and 15, to cover the case of a newly independent State which united with another State. The Special Rapporteur had said that the cases of integration covered by articles 12 and 13 related only to enclaves. But it was quite conceivable that a Territory such as Namibia, which was not an enclave, might unite with a neighbouring State after gaining independence, by the process of self-determination. That possibility should therefore be taken into account.

41. He was not sure what the expression “State property” meant in the context of articles 14 and 15. The

definition of State property given in article 5 did not apply to cases of decolonization: that definition referred to the internal law of the predecessor State, whereas in cases of decolonization, it was not necessarily the internal law of the predecessor State which applied, as the Special Rapporteur himself had said. The definition of State property given in article 5¹³ would therefore have to be amplified, so that it could apply to cases of decolonization.

42. He fully agreed on the need to establish rules providing for the passing to the newly independent State of the State property of the administering Power situated in the territory of that State. Like the Special Rapporteur, however, he thought that if the Commission dealt exclusively with succession to State property situated in newly independent States, it would be leaving aside property belonging to a Non-Self-Governing Territory which was about to become a newly independent State. As the Special Rapporteur had pointed out in paragraph 1 of his commentary to article 14

Such property is not affected by the succession of States, firstly because, by definition, it does not belong to the predecessor State, whose property alone is affected by the succession of States, and secondly because it does not in any case qualify as State property, since the Non-Self-Governing Territory does not acquire statehood until the day on which the succession of States occurs.

It was, however, the property belonging to the Non-Self-Governing Territory which was most important for newly independent States—but that property did not automatically pass to the successor State. Consequently, it was not enough to say in the commentary that the property belonging to the territory must pass to the newly independent State; it was necessary to state rules to that effect in the draft articles.

43. Referring to subparagraph (a) of articles 14 and 15, he said he was not sure of the significance of an agreement between two States, one of which did not yet exist. It was possible, *in concreto*, that an agreement might exist between a newly independent State and the former metropolitan country and be recognized as valid by both parties. But such an agreement was of no value in itself if the two parties had not recognized its validity. In its draft articles on succession of States in respect of treaties, the Commission had recognized the existence of agreements of that kind, but it had affirmed that such agreements had no value as far as succession of States in respect of treaties was concerned. Thus, paragraph 1 of article 8, on agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State, provided that

The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties in consequence only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.¹⁴

The meeting rose at 6 p.m.

¹³ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

¹⁴ *Yearbook... 1974*, vol. II (Part One), p. 182, document A/9610/Rev.1, chap. II, sect. D.

1395th MEETING

Tuesday, 22 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State)¹ (continued)

1. Mr. USHAKOV, continuing the statement he had begun the previous day, reiterated his opinion that, as a general rule, provision could not be made for an agreement between two States when one of them did not yet exist. In practice, two parties—the administering Power and a State which was not yet a State—could agree to conclude devolution agreements, since that depended on their reciprocal will to do so, but the Commission could not assume that that possibility existed as a general rule and provide expressly, in the case of newly independent States, for the possibility of agreements between the predecessor State and the successor State.

2. He was also in doubt about the meaning of the word “decided” in the phrases “Unless otherwise agreed or decided” at the beginning of article 14, paragraph 1. By whom and for whose benefit was the decision taken? It was clearly not the newly independent State which decided, so it might be asked whether the decision was taken for its benefit or to its detriment. He believed that it was contrary to the interests of the newly independent State to raise the possibility of a decision taken by another authority.

3. With regard to movable property, he wondered why the Special Rapporteur had distinguished between movable property situated in the territory of the newly independent State (article 14) and movable property situated outside that territory (article 15). State practice, of which the Special Rapporteur had cited some examples, showed that all State property, movable and immovable alike, that was situated in the territory to which the

succession of States related, passed to the successor State. Although it could be provided in specific cases that property situated in the territory passed to the successor State even if it was movable property (since the States concerned knew where the property was and could draw up an inventory of movable property in the territory), it was not possible, in formulating general rules, to make a distinction between movable property in the territory and movable property outside the territory, for the criterion of the location of the property no longer played any part, since it was not known where the movable property was. The general rules on the passing of movable property should be based on a criterion other than that of the property’s location. Instead of movable property situated in the territory, reference should be made to movable property necessary for the activity of the predecessor State in the territory, or to movable property belonging to the dependent territory. It would therefore be necessary to define property belonging to the dependent territory in such a way that the definition would be valid in all cases.

4. With regard to article 14, paragraph 3, he observed that the rule of the permanent sovereignty of States over their natural resources was valid for all members of the international community, not only for newly independent States. To limit that rule to newly independent States would reflect on the permanent sovereignty of other States over their natural resources. The rule should therefore be enunciated for all States without distinction. Sovereignty was an attribute of every State and the sovereignty of States was a reality of the contemporary world. The question of the economic independence and dependence of States had been posed by famous revolutionaries, in particular by Lenin, whom he had quoted in his book, on sovereignty in contemporary international law and who had clearly demonstrated the correlation between the sovereignty of States and their economic independence.

5. The Special Rapporteur had chosen to cast article 14, paragraph 2 (b), in negative form by providing that the movable property of the predecessor State situated in the territory passed to the successor State unless “such property has no direct and necessary link with the territory...”. The direct and necessary link between the movable property and the territory could be very tenuous, however, and it was dangerous to use negative wording, which ruled out any intermediate cases.

6. It would be necessary to consider the question of property belonging to dependent territories and to supplement the definition of State property given in article 5² so that it could apply to newly independent States. In the light of those comments, articles 14 and 15 could be referred to the Drafting Committee.

7. Mr. TSURUOKA said that the Special Rapporteur had convinced him of the need to devote two separate articles to the case of newly independent States. In articles 14 and 15, as in articles 12 and 13, the Special

¹ For texts, see 1393rd meeting, para. 34.

² For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev. 1, chap. III, sect. B.

Rapporteur had rightly confined himself to stating general rules. But as they were residuary rules, it might be well to provide for a procedure to ensure their just and equitable application in all cases.

8. With regard to article 14, paragraph 1, he agreed with Mr. Ushakov that the notion of a newly independent State should be defined. He understood that that notion would apply only to States which became independent after the entry into force of the draft articles as a convention, but he would like the Special Rapporteur to confirm that point. Like Mr. Šahović,³ he thought the words "right of ownership" should be avoided, and he was confident that the Drafting Committee would find a suitable expression. As to the distinction between immovable property (paragraph 1) and movable property (paragraph 2), he understood that it was the internal law of the predecessor State which would determine whether the property was movable or immovable, but on that point, too, he would like to have the Special Rapporteur's opinion.

9. He approved of the idea expressed in article 14, paragraph 2, but wondered whether it should not be worded differently, for in his opinion it was practically impossible to prove the absence of a link. Because of the negative formulation of the condition it laid down, subparagraph (b) gave the impression that the burden of proof rested entirely on the predecessor State, whereas subparagraph (b) of article 12, which stated the same condition in positive form, did not give the impression that the whole burden of proof fell on one of the parties.

10. He certainly had no objection to the idea expressed by the Special Rapporteur in article 14, paragraph 3, but that idea had already been the subject of draft article 10 submitted by the Special Rapporteur in his seventh report.⁴ The Commission had reserved its position on that draft article and had pointed out in its report on the work of its twenty-seventh session that

as regards article 10 it considers it unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of succession of States.⁵

There would have to be a compelling reason for the Commission to go back on the decision it had taken at that session. In any case, it would be necessary to find a more appropriate place than article 14 in which to state the principle of the permanent sovereignty of the State over its wealth and natural resources, since such sovereignty was recognized as appertaining not only to newly independent States, but to all sovereign States. Moreover, if the Commission wished to formulate that principle (which had no direct connexion with the law of succession of States) it should be guided by existing instruments, in particular by article 1, paragraph 2, of the International Covenant on Economic, Social and

Cultural Rights,⁶ which affirmed that "All peoples may, for their own ends, freely dispose of their natural wealth and resources" and that "In no case may a people be deprived of its own means of subsistence".

11. He endorsed the principle stated in article 15, subparagraph (b), but thought that its practical application would be difficult. In his opinion, the Commission should consider a procedure for the settlement of disputes on that point. It should also provide for recourse to equity, for when the application of rules was difficult, equity could be invoked, as the Special Rapporteur had said.

12. With regard to article 15, subparagraph (c), he wondered whether it was really necessary to refer to the "fortuitous or temporary" location of property outside the territory, and whether the criterion of a direct and necessary link between the property and the territory would not be sufficient.

13. He agreed with the Special Rapporteur that separate articles should be devoted to cases of succession involving newly independent States and that only general rules should be formulated; but he thought the Commission should consider establishing a procedure to ensure the just and equitable application of those rules in all cases.

14. Mr. THIAM congratulated the Special Rapporteur on his clear and full report, which attested to personal experience of the process of decolonization. Articles 14 and 15 raised questions both of principle and of law. First of all, it was open to question whether articles on newly independent States were necessary. The same question had arisen during the preparation of the draft articles on succession of States in respect of treaties, and the Commission had then decided that it should devote a few articles to the case of newly independent States. Succession of States was not a new topic, but since 1960, with the emergence of a considerable number of newly independent States, it had come to be of particular interest: that was why the Commission had been asked to study the subject. Although decolonization was already far advanced, the problem of newly independent States had not yet been completely solved, and the Special Rapporteur had given many examples of States which were not yet independent or which, if they were independent, still had problems of State succession. It was therefore necessary to study the question of succession in relation to newly independent States. The Drafting Committee would have to determine when a State could be considered to have become independent.

15. It was obvious that the idea of sovereignty had not only a political, but also an economic content. Political decolonization had often been wrongly considered as completing the process, and economic decolonization had only followed much later. UNCTAD had examined that question and the United Nations had decided to pay greater attention to the economic sovereignty of States. The Second Ministerial Meeting of the Group of 77 (Algiers, February 1975), had also stressed that principle. It was therefore necessary to adopt in the draft articles

³ See 1394th meeting, para. 21.

⁴ See *Yearbook... 1974*, vol. II (Part One), p. 98, document A/CN.4/282, chap. IV.

⁵ See *Yearbook... 1975*, vol. II, p. 108, document A/10010/Rev.1, para. 66.

⁶ General Assembly resolution 2200 A (XXI), annex.

provisions affirming not only the political, but also the economic, sovereignty of States. It had rightly been pointed out that that principle was valid not only for newly independent States, but for all States. There were, however, States whose economic sovereignty was not threatened and other, weaker States, whose economic sovereignty should be protected. Newly independent States were particularly vulnerable in that respect, so it was well to stipulate in article 14 that the great Powers had no right to infringe the economic sovereignty of those States.

16. In article 14, the Special Rapporteur had made a distinction between immovable property and movable property. The concise wording he had used in regard to immovable property was justified, as was his fuller and more flexible treatment of movable property. He had also been right to distinguish between immovable property which did not belong to the territory—and was not affected by the succession of States—and immovable property which belonged to the territory as such and passed to the successor State. It sometimes happened that property situated in the territory of a newly independent State and belonging to the administering Power had not been acquired with the funds of that Power. Thus, in Africa, administering Powers had been able to appropriate by means of a simple registration procedure, property owned by traditional communities. Cases of that type justified the strictness of the rule on the passing of immovable property proposed by the Special Rapporteur.

17. In the case of movable property, it was well to make the rule less strict by providing that when the property had no direct and necessary link with the territory, the predecessor State could claim it within a reasonable period, as was stipulated in article 14, paragraph 2 (b).

18. The saving clause “unless . . . the two States otherwise agree”, in paragraph 2 (a), raised the problem of devolution agreements mentioned by Mr. Ushakov.⁷ It was, indeed, difficult to imagine any agreement between a sovereign State and another State which was not yet independent. But in that context a distinction must be made between law and practice, and concrete cases must be taken into consideration. In fact, newly independent States had often negotiated agreements on economic and financial matters with the former metropolitan country. Should that fact be ignored by denying the existence of devolution agreements, or should it be taken into account? In theory, the validity of devolution agreements could be denied on the ground that they were concluded between a dominating Power and a dominated country. Moreover, newly independent States were free to denounce such agreements later. But in practice, countries which had signed devolution agreements usually preferred not to denounce them, because those agreements gradually evolved and were not always harmful to the interests of newly independent countries. In the case of military agreements, for example, it was sometimes the newly independent State itself which asked the predecessor State for military assistance and which, in return, agreed that certain military installations in its territory should remain the property of the predecessor State. Similarly,

with regard to currency, some newly independent States had preferred not to introduce a national currency immediately and had requested that the monetary *status quo* should be maintained. Thus certain west African countries had been able to establish a monetary and Customs union. Consequently, although devolution agreements had no value in international law, they might have certain advantages in practice, because they often appeared to constitute necessary stages in the process of decolonization. What the Special Rapporteur had said on that question in his commentary was thus quite right, but perhaps the Commission should find a formula better adapted to international law.

19. Mr. RAMANGASOAVINA said that articles 14 and 15 were the counterpart, for newly independent States, of articles 12 and 13. Articles 12 and 13 dealt with two internationally equal States, whereas articles 14 and 15 dealt with a nascent State which did not yet possess international personality. Some members of the Commission had expressed doubt about the advisability of using, in the articles under consideration, terms already defined in the draft. For instance, the definition of State property in article 5 referred to the internal law of the predecessor State. That definition was satisfactory where two independent States were concerned; but in the case of a newly independent State, a definition referring to the internal law of the predecessor State might give rise to abuses. Thus the same terms, used in different cases, could have different meanings.

20. The expressions “Unless otherwise agreed or decided” and “unless . . . the two States otherwise agree”, which appeared in paragraphs 1 and 2 (a) respectively, of article 14, reflected an unchallenged principle: the autonomy of the will of the parties to a treaty. In view of the inexperience of newly independent States and the fact that they might not yet possess international personality at the time when a treaty was concluded, the scope of those reservations could vary very widely. There were two possible cases. When the French-speaking African States had acceded to independence, agreements had sometimes been concluded before independence or at the moment of accession to independence. It had happened that States acceding to independence had allowed themselves to be defrauded through lack of experience. Sometimes, the agreements had not been concluded until after the granting of independence.

21. In the case of Madagascar, agreements relating to the apportionment of immovable property situated in the whole Malagasy territory had been concluded before the granting of independence (1960). Not only had France had the best of the bargain, but it had been rather tactless in reserving for itself the former residence of the High Commissioner, in other words the former Governor-General, in which it had established its embassy. That arrangement might be justified historically, because the residence had been built when Madagascar had been a French protectorate, but in the eyes of the Malagasy people, the residence was the embodiment of colonial Power. It was not until 1974 that Madagascar had been able to obtain the revision of the co-operation agreements with France. That two-stage solution had finally been advantageous to Madagascar.

⁷ See 1394th meeting, para. 43; see also para. 1 above.

22. With regard to the article in *The New York Times* of 15 January 1976, quoted by the Special Rapporteur in his eighth report⁸ in which France's attitude to the Comoros had been compared with its attitude to Guinea at the time of that territory's accession to independence, he observed that statements in the press should be treated with caution and not referred to in commentaries to articles. In the case in question, the facts were correct, but the way they were reported was clearly tendentious: it gave the impression that General de Gaulle had himself ordered the action criticized in the article. With regard to the situation in the Comoros, there was a contradiction between what the Special Rapporteur had said in paragraph 20 of his commentary and the second paragraph of the press excerpt quoted.

23. It thus appeared from practice that it was difficult for newly independent States to decide whether to conclude agreements before or after independence. That was why the Special Rapporteur, although he had reserved the principle of autonomy of the will of the parties, had drafted a provision on the permanent sovereignty of newly independent States over their wealth and natural resources, and over their economic activities. Thus it should not be possible to take advantage of the weakness or neediness of a newly independent State to alienate part of its natural resources under the terms of a treaty. With regard to article 15, he observed that, before independence, Madagascar had formed part of the French Republic and had had an agency for the sale of vanilla in New York. Naturally, at the time of accession to independence, that agency had reverted to Madagascar. Both article 14 and article 15 had been drafted in general terms, in accordance with the instructions the Commission had given the Special Rapporteur in 1975. In view of the general character of those provisions, numerous examples should be given in the commentary, relating to currency, public funds and archives, which were of very great importance to newly independent States.

24. Mr. MARTÍNEZ MORENO said he believed that it was necessary to include articles 14 and 15 in the draft for a number of reasons. The first was that there were still some cases of colonialism in the world; the Special Rapporteur had given many examples of territories that still had some form of colonial tie. Moreover, problems concerning State property still arose in regard to newly independent States themselves; for instance, the Special Rapporteur had mentioned that there were some questions of State property outstanding between his own country, Algeria, and the former metropolitan Power.

25. The reference by the Special Rapporteur, in his commentary, to Non-Self-Governing Territories, should not be construed in the narrow sense of Chapter XI of the Charter which, as Mr. Ushakov had pointed out⁹ would exclude Trust Territories and protectorates. He understood the Special Rapporteur to have used the

expression "Non-Self-Governing Territory" to cover all territories which had not yet attained independence.

26. In article 14, paragraph 1, he thought that some of the difficulties caused by the use of the expression "right of ownership" could perhaps be overcome by substituting the legal concept of "eminent domain", which was familiar in French, Italian and Spanish legal literature. In non-socialist countries, a reference to "ownership" might lead to confusion with private property. It would therefore be preferable to recognize, in paragraph 1, the existence of a right of eminent domain by which the successor State could claim immovable property situated in its territory.

27. He urged the Special Rapporteur to consider Mr. Yasseen's proposal¹⁰ made in connexion with articles 12 and 13, that the unduly restrictive formula "direct and necessary link" should be replaced by the words "reasonable link", which could be used in all the articles of the section 2 of the draft. In the case of documents, however, it could happen that some of them were of interest both to the predecessor State and to the successor State. It was therefore desirable to introduce the concept of priority of interest and to allow for the fact that a particular item of movable property might be more closely linked to one of those States than to the other.

28. Bearing in mind the fact that the Special Rapporteur had been given certain instructions by the Commission and had followed them admirably, he thought it was desirable to mention certain specific questions in the commentary, subject to the Special Rapporteur's approval.

29. He was thinking, in the first place, of the privilege of issuing currency. As the Special Rapporteur had pointed out, that privilege was an attribute of sovereignty and could give rise to a number of problems in connexion with State succession. Reference to those problems had been made by Mr. Kearney, who had proposed at the twenty-seventh session a very technical draft article on the subject (A/CN.4/292, para. 25). For his part, he wished to refer to a specific point. For the privilege of issue of currency to have any meaning for the successor State, that State would have to receive all the gold, foreign exchange and other reserves which constituted the backing of the currency. The question of a new international monetary system was at present under discussion and a number of different formulas had been put forward. It was not known whether the future international currency unit would consist of an average value of a number of strong international currencies or, as the majority seemed to favour, of what were called "special drawing rights". In the latter case, IMF would have an important role to play. Those were, of course, technical matters which could not be the subject of a draft article, but he wished to place on record, for the purposes of the commentary, that newly independent States had an indisputable right to issue their own currency and to benefit from any decision regarding "special drawing rights" taken at the international level.

⁸ See A/CN.4/292, chap. III, para. 20 of the commentary to article 14 and foot-note.

⁹ See 1394th meeting, para. 39.

¹⁰ See 1391st meeting, para. 3.

30. Another specific question which deserved to be mentioned in the commentary was that of archives. The experience of Latin America was of interest in that regard; most of the Latin American States had been unable to obtain all the archives of interest to them when they had attained independence. The bulk of the documents relating to the Spanish colonial era had remained in the Archivo General de Indias, at Seville. His own country—El Salvador—had practically no archives relating to the original administration of its territory. Most of the old documents were in Spain and others were in the Archivo Central de Guatemala, because they had remained in that country after the breaking up of the union of the five Central American States. In view of those facts, the commentary should indicate that the successor State, and also the predecessor State, had the right to consult the archives and to obtain certified copies of the documents in them. A passage to that effect would usefully supplement the 1974 UNESCO resolution calling for the return to the newly independent States of documents relating to their history.¹¹

31. He found the concept of economic sovereignty, referred to in article 14, paragraph 3, very interesting. Every people had an inherent right ultimately to exercise sovereignty over its natural resources and peoples which were struggling for their independence indisputably had that right. As he saw it, those peoples could be regarded as subjects of international law and could enter into devolution agreements, even though they did not yet constitute States. There were many schools of thought on the legal problem of subjects of international law, and the leader of one of them, the Italian writer Mancini, had maintained that it was the nation rather than the State which was the real subject of international law. According to that view a people, consisting of a group of persons united by such ties as history, race and language, could be regarded as capable of entering into international agreements.

32. He himself had always favoured the view that States were not the only subjects of international law. That position was consistent with the legal tradition of El Salvador; it was a matter for pride that individuals had had access to the former Central American Court of Justice. That being so, he saw no difficulty in accepting the conclusion of international agreements by entities which had not yet attained the status of States, but which could, like belligerents, be regarded as subjects of international law. He shared the Special Rapporteur's views on sovereignty in economic matters. The notion of sovereignty had changed considerably since the early writings on the subject; sovereignty was no longer regarded as absolute, but rather as limited by law. Similarly, sovereignty now had its economic as well as its political aspects. In order to develop freely, a State had to have the right to use its wealth and its natural resources and to carry out its economic activities without restriction. He agreed with Mr. Ushakov that all States—both new and old—had that right. It was nonetheless true that the

issue was a crucial one in cases of succession of States, in which it had given rise to grave problems and serious injustices. Unless a provision on the lines of article 14, paragraph 3, were included in the draft to cover questions of economic independence, the real problems that arose today would not have been faced.

33. The newly independent State entered international life with something of a handicap. It occurred to him that a remedy could perhaps be found by introducing a provision on the question of burden of proof, to which Mr. Tsuruoka had referred.¹² It would be recalled that in labour legislation, the burden of proof was invariably placed on the employer; from the outset, labour law had moved in that direction in order to remedy the injustice imposed by civil law on workers who did not have the means of defending their rights. He suggested that, in the same way, the predecessor State should bear the burden of proving that the property did not have a link with the territory. The predecessor State was better equipped to defend its rights than a newly independent State which was struggling for survival.

34. The Special Rapporteur's ideas were both fair and founded on fact. Nevertheless, the proposed provisions would undoubtedly raise problems in their application. Disputes would arise over such matters as determining whether a link—"direct and necessary" or "reasonable"—existed between the property and the territory. He therefore agreed with Mr. Kearney's suggestion that some provision should be made for a procedure for the settlement of disputes.¹³ The Special Rapporteur was to be commended for his great efforts to ensure that the articles would serve the essential purpose of ensuring the greatest measure of justice and fairness in a succession of States.

35. Mr. NJENGA said that articles 14 and 15 were of the greatest importance in the draft. The Special Rapporteur had made a very convincing case for retaining them, and had replied conclusively to the doubts expressed by those members who had argued that, since decolonization was virtually completed, there was no need for the articles. The excellent reasons given in the commentary in support of the articles had been supplemented by some points raised during the discussion. For instance, Mr. Quentin-Baxter had mentioned at the previous meeting the case of certain small territories which were not yet in a position to assume full statehood; they might wish to become fully sovereign in the future and that possibility should be covered, even if decolonization had already been completed, which was not yet the case.

36. The report mentioned many instances in which the process of succession of States was still continuing long after decolonization. Some of the settlements entered into by newly independent States on attaining independence were having to be renegotiated. In that context, the provisions of articles 14 and 15 were vitally important.

37. With regard to the text of the two articles, he did not think there was any need to include a definition of

¹¹ UNESCO, *Records of the General Conference, Eighteenth Session*, vol. I, *Resolutions*, resolution 3.428.

¹² See para. 9 above.

¹³ See 1390th meeting, paras. 11 and 12.

the term “newly independent State”. The meaning of that term was obvious. Besides, an attempt to define it would be almost like trying to define the concept of a State itself. The Commission should not delay its work by making any such attempt.

38. He entirely agreed with Mr. Quentin-Baxter’s criticism of the opening clause of article 14 (“Unless otherwise agreed or decided”).¹⁴ Reference had been made during the discussion to devolution agreements concluded in the past, but he did not believe that the terms of those agreements should be hallowed in the present draft articles just because they had in fact been concluded. The question of devolution agreements had been discussed at length, both in the Commission and in the Sixth Committee in connexion with the topic of succession of States in respect of treaties. The conclusion reached had been to disavow those agreements for purposes of succession of States.

39. The Special Rapporteur had given very cogent reasons for viewing devolution agreements with suspicion. He had pointed out the “unequal and unbalanced legal and political relationship between the two parties” to those agreements and had stressed the need for the successor State to “enjoy favourable provisions because, as it enters international life, it needs as solid a foundation as possible in order to guarantee its sovereignty and consolidate its independence, and also because the predecessor State will tend not to ‘play fair’ in transferring property”.¹⁵

40. Experience showed that in many instances devolution agreements were really a device for giving unfavourable treatment to the State acceding to independence. In the long run, most of those agreements had had to be renegotiated and the Commission should not set its seal of approval on them. His own proposal was therefore that the opening clause “Unless otherwise agreed or decided” should be deleted from paragraph 1 of article 14. The remaining text would then constitute a clear statement of the factual situation and would provide the newly independent State with the best guarantee that it would receive its immovable property without being obliged to grant special privileges to the former colonial Power.

41. Fortunately, his own country had not been obliged to enter into a devolution agreement giving such special privileges, although some attempts had been made to exert pressure on it to do so. The kind of pressure that could be exerted by the former colonial Power was well illustrated by the examples of Guinea and the Comoro Islands, which had been mentioned during the discussion. The State aspiring to independence could find itself obliged to sign an unfavourable devolution agreement, because it was offered as an alternative either the refusal of independence or independence under the unfavourable conditions experienced by those two countries.

42. In paragraph 2 of article 14, he would favour dropping subparagraph (a), for the same reasons as he had

given in proposing the deletion of the opening clause of paragraph 1. Two States could, of course, reach any agreement they wished, and that fact raised no problem if they were of equal strength. In the present context, however, that was not the case, and he suggested that the only exception to the rule stated in the opening clause of paragraph 2 should be that now stated in subparagraph (b), namely the exception relating to the case in which the property had no direct and necessary link with the territory.

43. He sympathized with the views expressed by Mr. Tsuruoka concerning the negative form in which subparagraph (b) was cast.¹⁶ That presentation, however, served to create a presumption that if the property was in the territory, it belonged to the successor State. If the predecessor State wished to claim the property, it would have to produce convincing evidence that the property had no direct and necessary link with the territory.

44. He fully agreed with the Special Rapporteur’s approach in paragraph 3 of article 14, on the permanent sovereignty of a newly independent State over its wealth, its natural resources and its economic activities. It would be unthinkable for the Commission to ignore the reality of that permanent sovereignty in the light of the 25 years of United Nations practice so well described by the Special Rapporteur in his commentary.

45. He could not accept Mr. Šahović’s suggestion that a separate article should be included in the draft affirming the permanent sovereignty of all States over their wealth and natural resources.¹⁷ The concept in question had been developed to protect newly independent States against depredations by stronger Powers or multinational corporations. Other States were also entitled to permanent sovereignty over their wealth and natural resources, but in their case it would be superfluous to recognize that right expressly. The need to assert the principle existed only in regard to newly independent States.

46. As far as article 15 was concerned, he had no objection to its wording and agreed that it should be referred to the Drafting Committee.

47. Mr. YASSEEN said he noted that the Special Rapporteur had taken great pains to ascertain whether the criteria specified in the draft could be applied. He had, for example, pointed out that movable property could be transferred by the predecessor State to its own territory and that it was then difficult for the successor State to recover that property. The Commissioner’s task, however, was to formulate rules on succession of States, and if the criteria it specified were not applied effectively, that would be attributable to the international legal order. Certainly, the international legal order had its own means of enforcing legal rules, but those means were never as effective as those of internal law. International law was law in process of development. The Commission should not hesitate to establish certain criteria, even if their application promised to be difficult, for it was not concerned at present with the more general

¹⁴ See 1394th meeting, para. 29.

¹⁵ See A/CN.4/292, chap. III, paras. 7 and 8 of the commentary to article 14.

¹⁶ See para. 9 above.

¹⁷ See 1394th meeting, para. 19.

question of the implementation of rules of international law. In any case, the normative development of international law must not depend on its institutional development. What was more, normative development could even influence institutional development.

48. With regard to articles 14 and 15, the inclusion in the draft articles of provisions relating to newly independent States was perfectly justified. Admittedly, the phenomenon of decolonization had reached its peak during recent decades, but there were still a number of dependent territories for whose problems it was advisable to provide solutions. In addition, the provisions drafted by the Commission could help to regularize certain situations created at the time of decolonization which were not consistent with the criteria established by the Commission. For example, there might be an agreement between a former colony and the former metropolitan country, establishing ties between them which were inequitable from the standpoint of the draft articles. Without going so far as to assert that such an agreement should be considered void, he hoped that, once the international community had accepted the criteria of the draft articles relating to newly independent States, some States would be induced to reconsider certain situations that were incompatible with those criteria and to begin negotiations for their rectification.

49. Where succession of States was concerned, the case of newly independent States should be considered separately, for it was characterized, first, by a bond of dependence between two international entities, and secondly, by the fact that succession often took place in difficult circumstances. Those circumstances often led to arrangements that were inequitable, grudging or even imposed. A Non-Self-Governing Territory was often prepared to subscribe to agreements detrimental to its essential interests as the price of its independence. It was in the economic sphere, which was now of considerable importance, that the characteristics of newly independent States were most marked.

50. In connexion with the economic sphere, the Special Rapporteur had introduced, in article 14, paragraph 3, a reservation relating to the permanent sovereignty of the newly independent State over its wealth and its natural resources. In his report, he had examined with great skill the problems which had arisen and continued to arise for peoples struggling for their independence. It was with full knowledge of the facts that he had expressed his views, since he had himself experienced the fight of the Algerian people to gain their independence. The solutions he proposed bore witness to his regard for intellectual honesty, for he had endeavoured to formulate criteria that would be acceptable to the administering Powers.

51. The reservation the Special Rapporteur had drafted concerning sovereignty over natural resources would not be sufficient, however, to protect States against themselves. There were, indeed, certain leonine situations resulting from conventions in good and due form which could not be considered void unless one of the causes of nullity accepted in international law could be invoked. Military coercion undoubtedly constituted grounds of

nullity but political or economic coercion exercised to procure the conclusion of a treaty was not yet a recognized cause of nullity. Moreover, in some cases treaties incompatible with the permanent sovereignty of newly independent States over their natural resources had not been concluded as a result of coercion. Perhaps one day it might be possible to observe the emergence of a rule of *jus cogens* under which all agreements incompatible with the sovereignty of States over their natural resources would be void. International law might thus come to protect States against their own weaknesses.

52. With regard to the wording of articles 14 and 15, he reiterated the criticisms he had made of the expression "direct and necessary link" during the consideration of articles 12 and 13.¹⁸ In his opinion, it would be sufficient to speak of a "reasonable link".

The meeting rose at 1 p.m.

¹⁸ See 1391st meeting, para. 3.

1396th MEETING

Wednesday, 23 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State)¹ (*continued*).

1. Sir Francis VALLAT thanked the Special Rapporteur for having set aside his personal preferences and followed the Commission's general wishes, particularly in articles 14 and 15. The case of the newly independent State should certainly be provided for in the present draft. Wherever possible, and especially in the case in question, the Commission should follow the pattern set

¹ For texts, see 1393rd meeting, para. 34.

by the draft articles on succession of States in respect of treaties² in dealing with the different cases of succession. He had no quarrel with the substance of the proposed texts, which would, of course, need some redrafting before final adoption.

2. With regard to article 14, paragraph 3, there was no doubt that the concept of sovereignty in the economic sphere had come to have a special place in the thinking of States as expressed in the resolutions of the Economic and Social Council and the General Assembly of the United Nations. Sovereignty in the economic sphere, however, was only one aspect of sovereignty and did not replace sovereignty in the territorial and political spheres. It was therefore necessary to remember that what was termed "economic sovereignty" was only one facet of the totality of sovereignty.

3. A further consideration to be borne in mind was that the somewhat mystical ideas of sovereignty which had been current in the nineteenth and early twentieth centuries were not so popular today. The idea of the indivisibility of sovereignty, for example, was no longer accepted by many thinkers and by many States. In many modern multilateral institutions, States agreed to surrender their sovereignty in particular fields. In fact, the right of a State to modify its sovereignty, and even to surrender part of it, was an aspect of the notion of sovereignty itself. It was also an aspect of the principle of self-determination; for that principle must necessarily include the right of a State to align itself with other States, even to the point of relinquishing its sovereignty in whole or in part.

4. It was therefore necessary to exercise caution in approaching the concept of economic sovereignty. It was possible that that concept might have legal implications, but it remained essentially a political and economic concept, which made it difficult to translate into legal drafting. He therefore believed that the provisions of article 14, paragraph 3, in their present form, were really unsuitable for inclusion in a draft article concerned with a particular case of succession to State property.

5. Moreover, the language used was very vague. It was difficult to see what was the precise legal meaning of the adjective "permanent", which qualified the term "sovereignty". He himself had misgivings on that point. In the Foreign Office of the United Kingdom, the "Permanent" Under-Secretary of State was far from permanent. The Permanent Court of Arbitration had lasted since the beginning of the century, but the Permanent Court of International Justice was no more. If the word "permanent" was being used in the sense of "inalienable", it would be difficult for him to accept its implications. Surely, States must be free to make any treaty arrangements they wished, to enter into a confederation of States, or even to merge with other States to form a federation. States should also be able to develop their resources by granting concessions to those who had the necessary equipment and knowledge. Very few States would consider that they were inhibited from availing themselves

of that possibility by the concept of permanent sovereignty.

6. The principle stated in article 14, paragraph 3 had some relevance to State succession, however, because it concerned the future of a State. He therefore agreed that it should be reflected somewhere in the draft articles. In his view, it was eminently suitable for a preamble, where it would exercise a flexible influence over the interpretation of the draft articles themselves. Moreover, in a preamble it was not necessary that every word should have a precise and definite meaning. Another possibility would be to embody the principle in a general article having a preambular character. But it was certainly quite out of place in article 14.

7. A definition of a "newly independent State", should be included in the present draft, as it had been in the draft articles on succession of States in respect of treaties adopted in 1974, otherwise there would be difficulties in interpreting the meaning of that expression in the two drafts. The definition in article 2, paragraph 1 (f) of the 1974 draft could be used as the starting point for formulating a suitable definition for the present draft.

8. Since provision was being made for the case of the newly independent State, it was also necessary to provide for cases which could be assimilated to it, as had been done in article 33, paragraph 3 of the 1974 draft. It was easy to visualize circumstances in which part of the territory of a State broke away from it and became a State itself in circumstances comparable to those existing when a newly independent State was formed. The relevance of the principle of self-determination in that case had been very properly stressed by Mr. Quentin-Baxter.³ If, as he suggested, provision was made for additional cases of that kind, it would perhaps be necessary to deal also, as Mr. Ushakov had suggested,⁴ with the case of two or more previously dependent territories which merged to form a single newly independent State.

9. Another point to be considered was that of property belonging to local authorities. If the title to the property was already vested in those authorities, the question could be regarded as being outside the scope of succession of States and could perhaps be left to be covered in the commentary. He thought, however, that the point deserved to be examined by the Drafting Committee to see whether a saving clause might not be needed to deal with it. Difficulties could arise, for instance, if the predecessor State had made a large contribution of funds for the construction of a building, even though the title was vested in the local authorities.

10. On the question of devolution agreements, he agreed that as a matter of principle, an agreement arrived at before independence could not be regarded as a treaty binding on the newly independent State. That proposition was correct both for the present draft and for the 1974 draft. Nevertheless, questions of State succession involved many equitable factors which sometimes weighed in favour of the successor State and sometimes in favour

² See *Yearbook... 1974*, vol. II (Part One), p. 175 *et seq.*, document A/9610/Rev. 1, chap. II, sect. D.

³ See 1394th meeting, para. 33.

⁴ *Ibid.*, para. 39.

of the predecessor State. Some arrangements between the two parties concerned were necessary for the orderly handing over of all the strings of government. Articles 14 and 15 should therefore not exclude the possibility of such arrangements. The proper procedure was for the two parties concerned to discuss their problems before independence and to incorporate the arrangements then made in a formal agreement concluded after independence. That procedure had been followed in many cases with which he himself had been concerned.

11. He was glad that Mr. Martínez Moreno had raised the question of archives,⁵ which constituted a very real problem not only for the successor State but also for the predecessor State. Sometimes the locally kept archives were more complete than those of the predecessor State on matters regarding the administration of the territory before independence. At the same time, much of the background material which was important for the administration of the territory would be in the archives of the predecessor State. Occasionally, the local administration had allowed archives to deteriorate, thus creating serious problems for both States. Another important consideration in all cases was that the predecessor State would need the archives in the future for certain purposes, such as solving problems arising out of its accountability for the administration of the territory. The test of the "direct and necessary link" with the territory would give rise to difficulties in the case of archives. That test was based on the assumption that a precise dividing line could be drawn between material of interest to the predecessor State and material of interest to the successor State. In fact, documents in the archives of the predecessor State relating to the transferred territory could be of interest to both the successor State and the predecessor State. The considerations which had been put forward on that question during the discussion on articles 12 and 13 were equally relevant to the present articles.

12. Lastly, he stressed the desirability of including in the draft some machinery for settling questions which arose out of succession to State property, where the two States concerned could not settle them by agreement.

13. Mr. CASTAÑEDA said he strongly supported the Special Rapporteur's conclusions and his treatment of the subject-matter of articles 14 and 15. The first merit of his approach was of a methodological character. He had shown that the cases covered by articles 14 and 15 were essentially different from the other cases of State succession. The case of the newly independent State was quite distinct from that of a uniting or separation of States, not only historically, but also by reason of the very nature of the newly independent State.

14. The Special Rapporteur, in his rich commentary, gave very cogent reasons for treating newly independent States separately. The most important of those reasons was that, contrary to the situation in other cases of State succession, the territory concerned had a legal status of its own, which was distinct from that of the territory of the State administering it. He welcomed the stress placed

by the Special Rapporteur on the very important factor of the ethnically different character of the people of a Non-Self-Governing Territory from that of the inhabitants of the metropolitan country. The General Assembly had attached great importance to that factor when it had drawn up a list of factors to determine the cases in which a situation could be described as colonial, and the territories which ought to be given independence. In the present instance, however, the most important factor was that of the legal status of the territory concerned, which was protected by international law. The metropolitan Power which had previously administered the Non-Self-Governing Territory had not exercised sovereignty over it; that sovereignty belonged to the people of the territory. For those reasons, the rules applicable to the particular case of the newly independent State must be different from those applicable in other cases of succession of States; basically, the former rules must be more strict because they were intended for the protection of the newly independent State.

15. He was in full agreement with the texts of articles 14 and 15 and had no amendments to propose. He did not believe that it was necessary to include a definition of a "newly independent State". The category of newly independent States was more of a political than of a legal character and was easy to identify, as Mr. Njenga had pointed out.⁶ Whether the territory had the status of a "dependent territory" or whether it was a Trust Territory administered under the Charter, it would still be a "newly independent State". Moreover, it would be difficult to formulate a precise definition of that type of State.

16. He did not think it necessary, either, to include in the draft a definition of the property of the successor State. In regard to the predecessor State, the Commission had adopted a definition of "State property" in article 5,⁷ but that was hardly a suitable model; it merely stated that the property of the predecessor State consisted of the property, rights and interests which were owned by that State on the date of the succession of States.

17. It had been argued that the provisions of article 14, paragraph 3 really applied to all States, not only to newly independent States. It had been suggested that they should form part of a general provision because they were applicable to all States irrespective of succession, since permanent sovereignty over natural resources was an attribute of the State as such. As he saw it, the Special Rapporteur's placing of the principle of permanent sovereignty in article 14 had a very special meaning. It was precisely in the case of a newly independent State that the problems covered by that article appeared in a particularly grave form. History showed that it was quite common for Non-Self-Governing Territories to enter into a complex set of agreements with the metropolitan country at the time of accession to independence. In many cases, those agreements could run counter to the principle of permanent sovereignty, and a provision on

⁶ *Ibid.*, para. 37.

⁷ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

⁵ See 1395th meeting, para. 30.

the lines of article 14, paragraph 3, was necessary to protect that sovereignty.

18. Apart from the principle of permanent sovereignty stated in paragraph 3, the essential provision of article 14 was the opening clause of paragraph 1, "Unless otherwise agreed or decided". The absence of that proviso in paragraph 3 clearly showed that the principle of permanent sovereignty could not be affected in any way by agreements entered into by the predecessor State with the newly independent State. The Special Rapporteur had shown in his commentary that, contrary to what the position might have been in the past, the principle of permanent sovereignty over natural resources was no longer in the nature of a residuary rule. It could in fact be said to constitute a rule of *jus cogens* from which it was not possible to derogate by an agreement. The Special Rapporteur had drawn the necessary legal consequences when he had pointed out that the validity of treaty relations established by devolution agreements "should be measured by the degree to which they respect the principles of political self-determination and economic independence", adding that

Any agreements which violate these principles should be void *ab initio*, without its even being necessary to wait until the new State is in a position formally to denounce their leonine character.⁸

19. He himself would go further than the Special Rapporteur. Believing that the principle of permanent sovereignty constituted a rule of *jus cogens*, he thought a provision should be inserted in the text of article 14, paragraph 3, to the effect that any agreement which violated that principle was void *ab initio*. A rather similar result could be achieved by adopting Mr. Njenga's proposal that subparagraph (a) should be deleted⁹ from paragraph 2, but he would prefer it to be expressly provided that the agreements in question were void *ab initio*.

20. The principle itself was, in a sense, one of long standing, since it was an expression of the sovereignty of the State. It could be said to constitute a rule of customary international law, which the United Nations had evolved through a long series of decisions and resolutions. The formula embodied in article 14, paragraph 3, however, had certain new elements. One of them was the key word "permanent", with regard to which he understood the difficulties mentioned by Sir Francis Vallat. The term had, however, a very profound meaning and was necessary to show that a State could not divest itself completely of its sovereignty over its natural resources. International law was reaching a point in its development at which it would have to protect the State against itself, or rather against its legal representatives, in order to avoid the plundering of its national wealth through the acts of misguided rulers. There was a former colony, one of whose first rulers after independence had actually granted a company a concession for all the mineral resources of the country for 99 years. An agreement of that kind could not possibly be regarded as valid in inter-

national law. It should be considered null and void because it violated the sovereignty of the newly independent State. A State was free to grant concessions—and even to restrict the exercise of its sovereign rights thereby—but it could not go so far as to surrender its sovereignty over its resources completely. Thus, it could grant concessions for the drilling of oil wells and the extraction of oil, but it could not relinquish the ownership of its oilfields altogether. Of course, the scope of the principle of permanent sovereignty—and of the exceptions to it—would have to be determined in the course of practical application, but it constituted a principle of international law which had to be asserted in forthright terms.

21. The Special Rapporteur had drawn attention to the long series of resolutions on the subject of permanent sovereignty over natural resources. It was worth noting that General Assembly resolution 1803 (XVII), which had categorically asserted that principle had been adopted by the Assembly practically without dissenting votes. The principle had been reaffirmed in article 1 of the two International Covenants on Human Rights¹⁰ and had been included in the Charter of Economic Rights and Duties of States¹¹ as one of its most important principles. Article 2, paragraph 1 of that Charter, which embodied the principle, had been adopted by 119 votes to 9. Moreover, the nine States which had voted against the provision had not been opposed to the principle itself; they had only disagreed with the use made of the terms "wealth" and "economic activities". They had considered that the term "wealth" was synonymous with "natural resources"; he himself agreed with the majority that it covered more than just natural resources: it included, for example, works of art.

22. The principle of permanent sovereignty over natural resources was based on the general concept of sovereignty, but was a creation of United Nations practice. It constituted the nucleus of economic independence, which was absolutely necessary for the political independence of newly independent States. Hence, he fully supported its inclusion in article 14.

23. Mr. KEARNEY said that Mr. Ushakov's remarks at previous meetings reviewing the writings of revolutionary authors of the twentieth century, had reminded him of such earlier revolutionary authors as Jefferson, Washington, Franklin and Madison, some of whose writings had served as a basis for United Nations actions. He was thinking, in particular, of the proclamation, which those writers had embodied in the Declaration of Independence of the belief that all men were born free and equal, as constituting a self-evident truth.

24. Turning from the question of political independence to that of economic problems, he said he was not at all certain that the Commission would make much progress by engaging in a discussion on economics. In any case, it was difficult to see how a State could be economically independent, unless it were to live on its own resources without relying on exports or imports. Many countries

⁸ A/CN.4/292, chap. III, para. 75 of the commentary to article 14.

⁹ See 1395th meeting, para. 42.

¹⁰ General Assembly resolution 2200 A (XXI), annex.

¹¹ General Assembly resolution 3281 (XXIX).

which were considered wealthy, including his own, were not, and could not be, economically independent. The present age was one in which all States were necessarily economically interdependent. He did not believe it was the purpose of the present set of draft articles to attempt to establish broad economic principles. Their purpose was rather to lay down a practical set of workable rules to govern the transfer of property, rights and claims from the predecessor State to the successor State, with the least difficulty for all concerned. That modest approach seemed to him more sound and reasonable than using the topic under study to promote sweeping economic reforms.

25. He believed that articles on newly independent States were needed in the draft, because the problems they were intended to cover were still likely to occur in the future. Ten years previously, he himself might have thought that other types of State succession were more important, but the trend towards considering the principle of self-determination as a rule of *jus cogens*, which would prevail over other forms of law opposed to it, was likely to create very difficult situations in the future.

26. One difficulty was that of determining what constituted a "people". The concept was a highly subjective one: any group of persons akin by race, language or location could lay claim to constitute a people and hence to be entitled to self-determination. If that claim was going to be recognized as having an overriding force in international law, a great many newly independent States were likely to emerge in the future. In most cases they would not be former colonies; they would probably result from the breaking up of States, old and new. The example could be given of one of the oldest States of Europe in which separatist movements were gathering force.

27. In broad term he was prepared to accept the rules stated in articles 14 and 15, but he thought they raised drafting problems. One of those problems lay in the difficulty of determining the precise meaning of the expression "direct and necessary link" (he was not at all certain, for example, that the formula "has no direct and necessary link" was its direct opposite). His major concern, however, related to article 14, paragraph 3. He had serious doubts about the usefulness of a provision which would mean, in effect, that all agreements between the predecessor State and the newly independent State must be considered void or voidable. It would have been better to state the rule in precise language and to inform States whether the agreements in question would be regarded as void or as voidable.

28. In any case, he did not believe that a voidability rule would have the effect of reducing friction between the States concerned. The existence of a rule of that type might very well lead the predecessor State to protect itself as best it could, because any agreement it reached with the newly independent State would be invalidated later. The predecessor State would thus be induced to take advantage of the situation at the time of accession to independence and leave the newly independent State in the worst possible position. He believed, however, that it was necessary to work on the assumption that there would be an element of good faith on the part of the pre-

decessor State and that the problems which arose would be settled by agreements that would have some degree of permanence. Experience showed that in fact most of the problems of succession of States in the past 20 or 30 years had been solved by agreement. If a devolution agreement which adversely affected a newly independent State was unfair or unjust, or had been obtained by means of coercion, it should certainly not be accepted. It would be easy to devise rules on that point if the matter was not already covered by the Vienna Convention on the Law of Treaties;¹² and nothing that he had heard during the discussion had convinced him that, for purposes of the application of treaty law, devolution agreements were outside the scope of the Vienna Convention.

29. The text of article 14, paragraph 3, was far too vague as to its scope and effect to serve as a good rule. If the intention was to make a new law, that law had to be made precise, particularly since it contained many seeds of dispute.

30. Mr. TABIBI said that he had derived much benefit from the Special Rapporteur's convincing and scholarly commentary to articles 14 and 15, which explained the contemporary problems of independence and described the tragic circumstances in which newly independent States came into existence and began their life in the community of nations. Without economic strength, political independence was but an empty word, and he had therefore been greatly interested to hear Mr. Kearney's remarks on the early history of the United States of America. It was worth noting that the 13 colonies had revolted against the mother country largely for economic reasons and because of taxation problems. The lofty aims embodied in the Declaration of Independence and in the United States Constitution had been formulated by men who had begun by asserting the economic independence of their nation.

31. It was important to retain articles 14 and 15 in the draft, because the colonial era was not yet over; there were still a number of colonies, enclaves and other territories waiting to gain their independence. He was also sure that, as other speakers had pointed out, those articles would be useful for future co-operation between predecessor and successor States. The rules stated in the articles would serve to solve problems arising out of the allocation of State property as between the predecessor State and the successor State.

32. In framing the rules in the three paragraphs of article 14, the Special Rapporteur had shown great understanding for the views of his colleagues. As Mr. Yasseen had said at the previous meeting, it was worth recalling that the Special Rapporteur had been an outstanding leader in the struggle for the independence of his country—Algeria—in the course of which one quarter of the Algerian people had sacrificed their lives.

33. With regard to the rule in article 14, paragraph 1, he was opposed to the saving clause "Unless otherwise

¹² See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

agreed or decided". The paragraph should state clearly that all immovable property in the territory which had become independent passed to the successor State. The saving clause would protect devolution agreements which were not negotiated on an equal footing: the predecessor State took advantage of the fact that it controlled the territory and the administration and that the leaders of the dependent territory did not have sufficient experience.

34. The same arguments applied with regard to the rule on the passing of movable property in paragraph 2. All the property, whether movable or immovable, which was in the territory of the successor State at the date of accession to independence should pass to that State. If the predecessor State had a claim to any item of property, it should enter into negotiations with the newly independent State and, if necessary, resort to the machinery for the settlement of disputes. As he saw it, the question of the transfer of State property and of the recognition of the right of ownership of the successor State was as important as independence itself. The conclusion of a devolution agreement with the predecessor State prior to independence meant that the newly independent State was made to pay a price for its independence. The predecessor State left by the front door and re-entered by the back. Independence was not just a new flag and a national anthem. Political self-determination without economic self-determination had no value. The right of ownership of a newly independent State over State property, both movable and immovable, should therefore be fully safeguarded. Without that property, the newly independent State could not make a satisfactory start in life in the international community.

35. Turning to the question of archives, he stressed that, although they were not like public funds or immovable property, they were vital both for studying the history of the newly independent State and for its future administration.

36. During the discussion on articles 12 and 13, Mr. Ustor had spoken in favour of the right of the predecessor State to retain the archives as part of its history.¹³ His own view was quite the opposite: the history of the predecessor State was recorded in its own archives in the home country; but so was everything that had been done in the colonial and dependent territories. For the newly independent State it was important to have access to the archives of the predecessor State in that State's territory. The secret documents in those archives, once released to the newly independent State, would enable its people to learn the secret history of the colonial era. They would thus learn the story of suffering and intrigue which had led to the assassination and disgrace of real national heroes. They would also learn who were the false heroes of that time and understand the patterns of colonial domination; they could thus shape their future policies, building on the true history of the colonial era which was to be found in those archives. He had spent a number of years in India and, from his research in the national archives of that country, particularly the nineteenth cen-

tury documents of British India, had been able to learn its real history. From that experience he could say that the transfer of archives of that kind to the predecessor State would be a tragedy for the newly independent State concerned.

37. He supported the provisions of article 14, paragraph 3. It could not be denied that the rule in that paragraph on economic sovereignty and economic self-determination was a rule of *jus cogens*. Perhaps, however, such a vital principle should have a better position in the draft. His own view was that it should constitute the introductory rule in section 2 of the draft and precede the articles on succession to State property. A rule which was the foundation of relations in the present society of nations should receive independent treatment; it should not form a sort of foot-note to the rules in article 14. The Special Rapporteur and the Drafting Committee should examine the question of the proper placing of the rule.

38. He approved of the régime established by article 15 and suggested that it should be referred to the Drafting Committee together with article 14.

39. Mr. CALLE Y CALLE said that convincing arguments had been advanced in support of articles 14 and 15, which related to newly independent States. It was appropriate to include provisions concerning such States, because the General Assembly had expressly instructed the Commission to take into account the experience of countries that were no longer colonies and had now acquired full international legal personality as free and sovereign States.

40. It was true that colonialism was drawing to a close. In making solemn declarations concerning the principles that were to govern relations between nations, States had recommended that everything should be done to put a rapid end to colonialism; but colonialism continued to exist on more than one continent. Many peoples, enclaves and areas, even in the Americas, were still under colonial or quasi-colonial régimes. It would be remembered that the observer for the Inter-American Juridical Committee had said that the topic of colonialism in the Americas remained on that Committee's agenda.¹⁴ For various reasons, the Commission's progress on the present item had been slow, but nobody could challenge the need for rules relating specifically to newly independent States. Clearly, the fundamental rule for such States was automatic, complete, free—and even unconditional—transmission to them of all State property.

41. Article 14, paragraph 1, started with the clause: "Unless otherwise agreed or decided"; could it really be assumed that that clause referred to agreement by treaty between parties which were truly equal and in a position to express their will freely? He agreed with those speakers who thought the clause should be deleted. Paragraph 1 should state categorically that "The newly independent State shall exercise a right of ownership of all immovable property which...". Article 9, on the general principle of the passing of State property, already contained the

¹³ See 1392nd meeting, para. 10.

¹⁴ See 1389th meeting, para. 62.

saving clause in question. It would be superfluous, not to say dangerous, to include it again in article 14. The Special Rapporteur had probably had that in mind when he had sought the Commission's opinion on the role of the clause in article 14, where it merely converted a categorical rule into a residuary rule.

42. Article 14, paragraph 3, was obviously designed to afford maximum protection for newly independent States under present-day international law. Permanent and full sovereignty of the State over its natural resources and economic activities was one of the great rules developed and confirmed by the international community. It could be held that the rule was already implicitly covered by article 2, and that the sovereignty of newly independent States over their natural resources and economic activities could not be denied or made subject to conditions. In fact, the sovereign rights of newly independent States were no different from those of older States. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States¹⁵ proclaimed that "Each State enjoys the rights inherent in full sovereignty". Natural resources were encompassed by State sovereignty, which must necessarily be full sovereignty. Hence, paragraph 3 referred to a rule of the greatest significance. In view of the enormous importance of State sovereignty, which gave rise to the right to reparation, the rule might be embodied in a separate article, possibly to be inserted after article 2; or it could remain in article 14. But he could not accept the argument that it should be omitted, merely because it applied to all States or because it was implicit in the reference in article 2 to the principles of international law.

43. He agreed that it would be advisable for articles 14 and 15 to be kept separate.

44. Mr. PINTO said that not enough weight would be given to the great importance and relevance of the principle of permanent sovereignty over natural resources if that principle was stated in article 14, paragraph 3. He endorsed the idea that it should be set out in a separate article and that the Commission should consider more carefully its general relevance to all the articles of the draft.

45. The CHAIRMAN speaking as a member of the Commission, said that he found articles 14 and 15 acceptable without any major change. He was struck by the suspicion shown by the developing countries, and more particularly the decolonized countries, regarding anything that did not emanate from them. That attitude was understandable; it was due to the fact that those countries had not got what they wanted and were doing everything possible to get it. They had been placed in such a position that they were often reduced to invoking morality or formulating aspirations instead of relying on rules of law.

46. He recognized that the conditions in which devolution agreements were concluded were not the best for safeguarding the legitimate rights of newly independent States. Moreover, in concluding such agreements, the

predecessor States were often tactless, not so much because they sought to gain economic advantages for themselves, as because they failed to respect the dignity of the decolonized peoples. In the case of the residence of the High Commissioner of France in Madagascar, which Mr. Ramangasoavina had referred to at the previous meeting, France had certainly made a serious psychological error.

47. Because the constitutional régime of newly independent States was not always clearly defined, commitments were sometimes entered into on their behalf under conditions which suggested that the agreements did not express their will as nascent States. The Special Rapporteur had mentioned one agreement of that kind, but there were others, some of which had had to be rejected. Since the conclusion of the Vienna Convention on the Law of Treaties, which treated corruption as a defect of consent, a safeguard against corruption had been provided. Nevertheless, he thought it would be dangerous to reject devolution agreements altogether. Certainly, when the predecessor State sought to assimilate the future successor State, it must be acknowledged that liberation through violence was not entirely disadvantageous: it enabled the successor State to become aware of its identity. But that did not mean that peaceful methods should be excluded *a priori*. He would, therefore, be willing to accept a rule to the effect that, after two years, devolution agreements could be reviewed, whatever their stipulations, in order to ensure that they were equitable. That arrangement would be less dangerous than complete rejection of devolution agreements.

48. The provision in article 14, paragraph 3, could be viewed in two ways. A lawyer would place it elsewhere in the draft. A person who distinguished between law as it was and law as it might evolve, would see an element of hope in the provision. He himself interpreted it in that way, and saw in it a way of indicating that decolonization was not finished, that it probably never would be finished, but that something could be done, even outside the scope of purely legal assertions.

49. Despite his great reluctance to refer to *ius cogens*, he could agree to consider that the restrictive rule he was proposing partook of *ius cogens*. As to the possibility of recognizing coercion as a cause of invalidity of some devolution agreements, it should be noted that the present position would hardly be any different if economic coercion had been recognized at the United Nations Conference on the Law of Treaties in 1969 as a defect of consent. All States, whether developed or developing, lived under economic coercion: it was not the existence of economic coercion that would lead, for example, to the cancellation of oil supply contracts.

50. As to the *rebus sic stantibus* clause, the United Nations Conference on the Law of Treaties had considered it essentially from the political standpoint. He regretted that the Commission had not had time to draft a provision on the relationship between that clause and economic contracts. He also regretted that no article of the Vienna Convention on the Law of Treaties provided that, in all treaties, there must be a certain balance between the contributions of the parties. The notion of an unequal

¹⁵ General Assembly resolution 2625 (XXV), annex.

agreement, referred to in connexion with decolonization, could also be applied to economic treaties. Moreover, it was common practice to include in transnational economic contracts a clause providing for their review if economic developments made performance intolerable. The question was a delicate one, but he hoped that international law would make progress on it.

51. He wondered whether articles 14 and 15 applied specifically to newly independent States, for a comparison with articles 12 and 13, and article 17, gave the impression that it was the same rule that applied in all the situations contemplated. Articles 14 and 15 seemed to be very moderate, despite the militant nature of the commentary. At the 1395th meeting, Mr. Tsuruoka, Mr. Martínez Moreno and Mr. Njenga had raised the question of proof in connexion with those articles, asking where the burden of proof lay. In his opinion, the position regarding the burden of proof could be clarified.

52. Mr. Ushakov had referred¹⁶ to article 5, under which the ownership of State property was determined by the internal law of the predecessor State. Obviously, it would be possible to adopt the opposite rule and provide that it was the law of the successor State which determined the régime of ownership of State property. But in that case there would be no succession of States: it would be sufficient to say that the predecessor State lost all its rights, which would amount to stating the full clean slate principle. He was opposed to that approach, since the reason why the successor State was free to establish whatever system of ownership it wished, was because it was a sovereign State, not because it was a decolonized State. In his opinion, the Commission would be making a mistake if it linked that faculty of the State with decolonization, for it would be indirectly diminishing the sovereignty of the successor State. The solution proposed by the Special Rapporteur in article 14 therefore seemed to him to be preferable. The question did not arise in article 15, since the sovereignty of the successor State played no part and it was not even possible to establish the clean slate principle.

53. The difference in wording between the titles of articles 14 and 15 raised a problem of substance. The reason why the Special Rapporteur had used the plural in the title of article 14 was that it might be necessary in order to cover some special cases. A succession of States might involve several newly independent States at the same time, and the property to which the succession related might be situated in only one of those States. For example, when a federation of colonial territories such as French West Africa acceded to independence, it was conceivable that property to which all the States in that group were entitled might be situated in only one of the territories which had become independent. Consequently, it would be dangerous to bring the title of article 14 into line with that of article 15 by using the singular instead of the plural, for that might cause difficulties in the relations between the decolonized countries.

54. Lastly, it was his impression that in articles 14 and 15, the Special Rapporteur had assumed that the origin of the contribution was taken into account in apportioning the property. There was no problem if apportionment of property in kind was possible. But if apportionment in kind was not possible, it was necessary to ensure that compensation was not prohibited by virtue of article 8.

55. Mr. BILGE said he could accept articles 14 and 15; he approved of the principles and the drafting of those articles and congratulated the Special Rapporteur on having arrived at a reasonable and sound solution. He would, however, prefer article 14, paragraph 1 to reflect the restoration of a right, since the right had been suspended and then restored. He would also prefer the principle embodied in article 14, paragraph 13 to be stated in a separate article. Lastly, although he appreciated the Special Rapporteur's feelings concerning decolonization, he thought that in his commentary, he should confine himself to investigating the facts, without making judgments.

The meeting rose at 1 p.m.

1397th MEETING

Thursday, 24 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Hambro, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State)¹ (*concluded*)

1. Mr. MARTÍNEZ MORENO said that articles 14 and 15, in their present form, might raise problems where a predecessor State had been replaced by an administering authority under the mandate system or the Trusteeship

¹⁶ See 1394th meeting, para. 41.

¹ For texts, see 1393rd meeting, para. 34.

System. For example, in what was now the Libyan Arab Republic, there had been three separate territories: Fezzan, Cyrenaica and Tripolitania, one of them administered by France and two of them by the United Kingdom. However, the predecessor State in that instance had unquestionably been Italy. Other examples came to mind: for instance, Iraq, Lebanon and Syria had been administered by different European countries under the League of Nations Mandate, but the predecessor State had been the Ottoman Empire.

2. It might be held that the relationship between an administering authority and a successor State was already covered by the definition of "succession of States" contained in the draft. On the other hand, the definition of a "predecessor State" and a "successor State" did not seem to provide a sufficient guarantee of the passing of movable and immovable property of the administering authority which was situated in the territory of the successor State, and that authority was not mentioned either in article 14 or in article 15. Perhaps the Special Rapporteur might consider adding the words "or administering authority" after the words "predecessor State" wherever necessary. A definition of an "administering authority" would not be required, since one was already contained in Article 81 of the Charter of the United Nations.

3. Mr. BEDJAOUI (Special Rapporteur) said he had greatly appreciated the quality of the debate on articles 14 and 15 and the high ideals displayed by the members of the Commission.

4. Before replying to the comments made, he wished to point out to Mr. Bilge, who had criticized the attitude he had adopted in his report and had asked him, particularly in connexion with article 14, paragraph 3, to refrain from making judgements,² that the Special Rapporteurs had complete freedom in preparing their reports and hence assumed full responsibility for them. Of course, the same did not apply to the text of the articles and the commentaries to them, for once they were adopted by the Commission they were no longer the personal work of the Special Rapporteur, but the collective work of the Commission. Sir Francis Vallat had rightly said that the role of the Special Rapporteur was both to guide and to follow the Commission. Many members, including Mr. Yasseen, Mr. Reuter, Mr. Ramangasoavina, Mr. Martínez Moreno and Sir Francis Vallat, had emphasized the fact that he had followed the Commission, sometimes even in its inconstancy and despite his personal convictions. And it was not always easy to follow the Commission, precisely because of the abundance and variety of the views of its members. He therefore asked to be allowed to retain, at least in his reports, his freedom of expression and the resultant responsibility.

5. Mr. Bilge had nonetheless recognized that a reasonable and sound solution had been reached in articles 14 and 15; Mr. Yasseen had emphasized the moderate and non-revolutionary nature of those articles; and Mr. Reuter had spoken of a "militant" report but of "moderate" articles.³ He was glad to hear it said that his articles were

very moderate and that they should be given more "muscle"—for example, as Mr. Bilge had said,⁴ in the direction of a "restoration" of the rights of the newly independent State over its property. He was, of course, quite willing to follow the Commission in that way.

6. On the whole, the members of the Commission had found that articles 14 and 15 were necessary, that his approach was sound and that the solutions proposed were acceptable, or even moderate; and they had suggested that the articles should be referred to the Drafting Committee. Some of them, however, had expressed doubts about the field of application of the two articles; the meaning of "property proper to the dependent territory"; the nature and treatment of devolution agreements; the advisability of stating, in article 14, paragraph 3, the principle of the sovereignty of newly independent States over their wealth; the presumption of the right of ownership of the newly independent State; and property considered *in concreto*, especially the problem of archives. They had also made some comments on the drafting.

7. As to the field of application of articles 14 and 15—in other words, the cases of State succession covered by those two articles—Mr. Ushakov, Mr. Quentin-Baxter, Mr. Tammes, Mr. Njenga, Sir Francis Vallat (and, to some extent, Mr. Kearney and Mr. Castañeda), had considered that the scope of those articles should not be restricted. Mr. Ushakov thought that the category of newly independent States should include not only the Non-Self-Governing Territories covered by Chapter XI of the Charter, but also Trust Territories coming under Chapter XII, that was to say, all dependent territories.⁵ He fully endorsed that point of view, which had helped him to gain a better understanding of the meaning and the scope of the question raised by Mr. Ushakov after the oral presentation of articles 14 and 15. For he had feared that Mr. Ushakov wished to restrict the scope of articles 14 and 15 to such an extent that separate articles would be devoted to Trust Territories and protectorates. But he was now reassured, for he saw that Mr. Ushakov had merely wished to point out that articles 14 and 15 applied to all dependent territories and not only to Non-Self-Governing Territories. Mr. Ushakov's comment had been prompted by a passage in the report which wrongly gave the impression that articles 14 and 15 were confined to cases of Non-Self-Governing Territories.⁶ He thanked Mr. Ushakov for his pertinent remark and assured him that the wording of that passage of his report would be amended accordingly. In referring to Non-Self-Governing Territories, however, he had mainly sought to show that the administering Power and the dependent territory differed with respect to their people, territory and sovereignty, as Mr. Castañeda had pointed out.⁷ In the case of a protectorate, it was clear—and had always been acknowledged—that sovereignty did not appertain to the protecting Power. That was why he had chosen, for pur-

See 1396th meeting, para. 55.

Ibid., para. 51.

⁴ *Ibid.*, para. 55.

⁵ See 1394th meeting, para. 39.

⁶ A/CN.4/292, chap. III, paras. 2 and 3 of the commentary to article 14.

⁷ See 1396th meeting, para. 14.

poses of demonstration, the case of Non-Self-Governing Territories, which might seem less obvious.

8. Articles 14 and 15 were thus applicable to all newly independent States, whether they had previously been Non-Self-Governing Territories, Trust Territories or protectorates. He was willing to speak of “dependent territories”, as Mr. Ushakov wished; but as Mr. Martínez Moreno had observed,⁸ “Non-Self-Governing Territories” had become a generic term currently used to designate all territories which had not yet acceded to independence.

9. At the present meeting Mr. Martínez Moreno had referred to the problem of determining the predecessor State when, between the colonial administration and the country’s accession to independence, there had been a fairly long period of administration by, for example, an organ of the United Nations; he had mentioned the case of the former Italian colonies administered by the United Nations. There had been no problem in the case of Libya, for an agreement had been concluded under United Nations auspices between Libya and the former administering Power, namely, Italy. In the case of Syria and Lebanon, on the other hand, the Ottoman Empire had been the predecessor State when Ottoman colonization had given place to the mandate of the United Kingdom and France. But when Syria and Lebanon had gained their independence, in 1941 and 1943 respectively, France had been the predecessor State. The problem mentioned by Mr. Martínez Moreno might arise on the accession to independence of Namibia, which was theoretically under United Nations administration, following the revocation of South Africa’s mandate.

10. Mr. Ushakov had also proposed that the field of application of articles 14 and 15 should include enclaves and any dependent territory which achieved decolonization by integration with a neighbouring State. On that point too, he now understood Mr. Ushakov’s position better. During the discussion of articles 12 and 13—in which the case in question had, in his opinion, been wrongly included—he had believed that Mr. Ushakov wished to split up articles 12 and 13 and devote two other separate articles to the case of decolonization through integration of a dependent territory with a neighbouring State. But as he now understood it, the point had been simply to distinguish that case from the case covered by articles 12 and 13, namely succession in respect of part of territory, to which it bore no relation, and to assimilate it to the case of decolonization resulting in newly independent States, covered by articles 14 and 15. If that was what Mr. Ushakov had in mind, he fully agreed with him. It should be remembered that it was not he himself, but the Commission that had wished to place the case in question on the same footing as succession in respect of part of territory. He would therefore be very glad if the Commission now agreed to assimilate it to the case of succession involving newly independent States. The Drafting Committee would certainly find a formula by which articles 14 and 15 could cover both the case of newly

independent States and the case of territories which were decolonized by merging with a neighbouring State.

11. Again, in order not to restrict the field of application of articles 14 and 15, some members of the Commission—Mr. Tammes, Mr. Quentin-Baxter, Mr. Njenga and Sir Francis Vallat—had asked him to assimilate to the case of newly independent States the case contemplated in article 33, paragraph 3, of the draft articles on succession of States in respect of treaties, in which “a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State”.⁹ Mr. Kearney had asked the Commission to adopt a more modest approach. The problem that arose was, in fact, that of the right of peoples to self-determination. After being applied to dependent territories, might not that principle also apply in future to States which were already old? He had no wish to take sides in the matter and would simply refer, as Mr. Castañeda had done,¹⁰ to the specificity of decolonization situations. He would prefer to bring all decolonization situations under articles 14 and 15 and to leave aside the case covered by article 33, paragraph 3, of the draft on succession of States in respect of treaties. If the Commission really wished to cover that case, it could devote a separate article to it.

12. Mr. Ushakov had asked whether it would not be advisable to include States consisting of more than one former dependent territory in the category of newly independent States.¹¹ He fully approved of that suggestion and thought that the text of articles 14 and 15 and the commentary thereto would have to be recast accordingly. Although he had allowed himself to consider, in connexion with the uniting of States dealt with in article 16 the case of an independent State formed by the uniting of more than one dependent territory, he was willing to transfer that part of his report to the section dealing with newly independent States.

13. He was in no way opposed to extending the field of application of articles 14 and 15. He was in favour of bringing under a single heading—that of newly independent States—all decolonization situations: dependent territories and not only Non-Self-Governing Territories, States formed from more than one dependent territory, and territories decolonized through integration with a neighbouring State. The Drafting Committee would review the text of articles 14 and 15 in the light of those considerations.

14. Some members of the Commission, such as Mr. Ushakov, Mr. Tsuruoka and Sir Francis Vallat, had asked whether the expression “newly independent State” should not be defined either in article 3¹² or within the framework of articles 14 and 15. Others, like Mr. Njenga

⁸ See *Yearbook... 1974*, vol. II (Part One), p. 260, document A/9610/Rev.1, chap. II, sect. D.

⁹ See 1396th meeting, para. 14.

¹⁰ See 1394th meeting, para. 39.

¹¹ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

⁸ See 1395th meeting, para. 35.

and Mr. Castañeda, thought that a definition was not necessary, since the category of newly independent States was easily identifiable. If the intention was to refer to newly independent States properly so called, a definition could easily be given for purposes of the present articles. But if it was intended to include, under the heading of newly independent States, all decolonization situations—enclaves, territories integrating with a neighbouring State, composite dependent territories and, especially, the case of separation provided for in paragraph 3 of article 33 of the draft on succession of States in respect of treaties—it would be difficult to find an appropriate definition.

15. The question of property belonging to the dependent territory had been raised by Mr. Ushakov¹³ and reverted to by Sir Francis Vallat, Mr. Thiam and Mr. Castañeda. They had all agreed with him, and with the Commission as a whole, that such property should remain in the ownership of the newly independent State. As Mr. Hambro had pointed out at the 1394th meeting it should not be said that the property “passed” to the successor State, but rather that it “remained” the property of the dependent territory which had become independent. But according to Mr. Ushakov, although article 14 did not say that the property passed, it did not say that it remained either: hence that article might deprive the successor State of property belonging to it, because “State property” was defined in article 5 by reference to the law of the predecessor State, not by reference to the law of the dependent territory. He agreed with Mr. Ushakov’s analysis of the situation, but not with the conclusion he drew from it. In his own commentary, he had clearly indicated the fate of property belonging to the dependent territory, but as Mr. Ushakov had said, the commentary would disappear and only the rule would remain.

16. The definition of State property given in article 5 did not satisfy him any more than it did Mr. Ushakov. In his third report, he had discussed at great length the question of the law applicable for determining the property affected by a succession of States.¹⁴ He had shown, by specific examples, that reference to the internal law of the predecessor State alone was insufficient and that in the practice of States reference was also sometimes made to the law of the successor State and to the local law of the territory to which the succession of States related. With regard to application of the law of the successor State, he had cited, in particular, the case of the *British Protestant Mission hospitals in Madagascar*; the case of “*habous property*” in *Algeria*; the case of the *Central Rhodopé forests* between Greece and Bulgaria; the case of *enti pubblici in Libya*; the case of the *property of the Order of St. Maurice and St. Lazarus on the Little St. Bernard Pass*; the definition of property by the restored Polish State by reference to the law of the successor State; the *Peter Pázmany University* case; the *Chorzów factory* case; and the case of *German settlers in Upper Silesia*.

¹³ See 1394th meeting, para. 42.

¹⁴ See *Yearbook... 1970*, vol. II, pp. 133 to 143, document A/CN.4/226, part II, commentary to article 1.

17. He had also discussed the application of the local law of the territory to which the succession of States related.¹⁵ The definition of public property proposed in his draft article 1 was much broader than the definition of State property given in article 5 because, at the time, he had intended to codify the treatment of all public property and had needed a definition broad enough to cover not only State property, but also provincial and communal property, the property of public institutions, etc. But as he had ultimately confined himself to State property, he had accepted without difficulty the definition proposed by the Drafting Committee, which had become article 5.

18. The problem raised by Mr. Ushakov concerning the determination of property by the local legislation of the territory did not arise only in regard to articles 14 and 15, but also in regard to articles 12 and 13, in the case of a succession in respect of part of territory. Obviously, in the case of a minor frontier rectification, no problem arose. But if, for example, the Canton of Geneva decided, by an act of self-determination, to become part of France, how would the property belonging to Geneva be determined? Should it be by reference to the internal law of the predecessor State, which was Swiss Federal law, or by reference to the law of the territory, which was the cantonal law of Geneva?

19. Mr. Ushakov agreed with him in considering that property belonging to the territory remained the property of the newly independent State, but he feared that such property might be lost to the newly independent State because it was not covered by the definition of State property given in article 5; he believed, in fact, that since the property was not mentioned in article 5, it would not be affected by the succession of States and hence would not pass to the newly independent State. He (the Special Rapporteur) did not share that view. For although property not affected by the succession did remain in the ownership of the predecessor State, it was on condition that it had belonged to that State before the succession. But that condition was not fulfilled in the case under consideration, because the property in question had belonged to the dependent territory itself. Moreover, article 5 gave a general definition, so there were many constituents of a succession of States which it did not provide for; yet it would not occur to anyone to conclude that those constituents should remain in the ownership of the predecessor State. For example, because article 5 did not deal with the private property of individuals, must it be concluded that such private property became the property of the predecessor State? Before the succession of States, the predecessor State did not own the property of the dependent territory any more than it owned the private property of individuals, and the occurrence of a succession of States could not logically confer on it a right of ownership which it had never possessed. What was more, the draft articles related exclusively to succession to *State property*, which meant the State property of the predecessor State. So how would it be possible to deal, in articles 14 and 15, with property

¹⁵ *Ibid.*, p. 137, paras. 14-16 of the commentary to article 1.

belonging to a territory which was not yet a State and which, according to Mr. Ushakov, could not conclude an agreement susceptible of being recognized as valid under international law. If the territory was still dependent it was not a State, and if it was not a State it could not have State property.

20. Nevertheless, Mr. Ushakov had been right to stress that any possible misunderstanding must be prevented, by removing all ambiguity. In the case of a succession involving a newly independent State, there were two bodies of property of unequal size: the immense body of property of the dependent territory, and the smaller body of property of the predecessor State, used for the administration of the territory. What the succession was concerned with was not the body of property belonging to the dependent territory, which in any case remained the property of the newly independent State, but the property with which the predecessor State had administered the territory. In Algeria, for example, a town hall, a stadium or a school had been property belonging to the dependent territory, built and managed with funds belonging to the Algerian territory, whereas a barracks, a military base, a law-court or a prison had been the property of the French State, built and managed by that State. The question to be decided, in the event of a succession of States, was whether the latter class of property should pass to the newly independent State. Article 14, paragraph 1, answered that question in the affirmative by laying down, as an absolute principle, that "the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State". The branch of international law relating to succession of States was concerned with the fate of the State affected by the succession, which was impoverished thereby or suffered a territorial, patrimonial, financial, monetary or other loss. That, and that alone, was what a succession of States amounted to. It concerned the predecessor State and the determination of its fate, and that of its property, debts, treaties, etc.

21. Sir Francis Vallat considered that if the predecessor State had contributed to the creation of property belonging to the territory, there should be an equitable apportionment of that property. He himself did not share that view: as he saw it, property belonging to the dependent territory remained the property of the territory which had become independent, and there was no occasion for equitable apportionment even if the predecessor State had contributed to that property.

22. The question arose whether the definition of State property given in article 5 should be amended. He did not think that course would be necessary in regard to the property of colonial territories; but perhaps the definition would have to be reviewed one day in the context of the whole draft, to see whether it could be improved. Should a separate article on the lines of article X (Absence of effect of a succession of States on third State property) be devoted to the question of property belonging to the territory? Article X had only been included to reassure the Commission and because the property in question was State property, which was not the case of property

belonging to the dependent territory. If the question of that property was dealt with in a separate article on the lines of article X or in a separate paragraph of article 14, the Commission might be criticized for going outside the subject. But the most important consideration was that if a special provision was devoted to property of the territory in the context of succession relating to newly independent States, parallel or identical provisions would have to be included for all the other types of succession of States. Otherwise, the existence of a special provision for newly independent States alone might be wrongly interpreted as meaning that, in the case of other types of succession of States, the territory to which the succession related lost the property belonging to it. He was therefore personally opposed to the insertion of a separate article, or of a special paragraph in article 14 or elsewhere, dealing with property belonging to the territory. He had already stressed in his previous reports that a succession of States did not affect the territory's right of ownership of its own property, and that at the most, that property would, as from the date of the succession, be governed by the legal order of the successor State. With regard to property belonging to a newly independent State, moreover, Mr. Thiam¹⁶ had reminded the Commission that administering Powers had often taken for themselves property belonging to the territory or to tribal communities. On that point, he had cited in his third report the judgment rendered by the Court of Appeal of French West Africa on 8 February 1907 in the case of *Daour Diop et al. v. French State*.¹⁷ The successor State should claim such property as property of the predecessor State which had to pass to it.

23. The problem of devolution agreements, which had been mentioned by Mr. Ushakov, Mr. Thiam, Mr. Raman-gasoavina, Mr. Njenga, Mr. Reuter and Mr. Castañeda, was a difficult one which had always caused him concern, and to which he had drawn the Commission's attention in his first report in 1968. The fact that colonialism had begun with false treaties and ended with false treaties confirmed, even in that sphere, its illegitimate, if not illegal, character. The "glass bead treaties" by which the colonial Powers had taken over Africa in the nineteenth century had provided for the occupation of a territory in exchange for a few trinkets or fire-arms. Those treaties nevertheless represented some progress compared with the sixteenth century, when possession had been taken of territories and continents merely by papal bulls, and with the eighteenth century, when, as J.-J. Rousseau had said, "His Catholic Majesty had only to take possession of the whole universe at one stroke".¹⁸ In most cases, the European contracting party had no status as a plenipotentiary: he was often an individual—an explorer, a merchant, or a representative of a private trading company. In addition, the indigenous party was obliged to cede rights of which it apparently had no conception. For instance, the German companies in east Africa had

¹⁶ See 1395th meeting, para. 16.

¹⁷ See *Yearbook... 1970*, vol. II, p. 138, document A/CN.4/226, foot-note 21.

¹⁸ *Du contrat social ou Principes du droit politique*, BK.1, chap. IX, [translation by the Secretariat].

inserted a clause providing that the Sultan of Zanzibar "ceded all the rights which constituted the notion of sovereignty as understood in German law". The sovereignty of the inhabitants of the territory had thus been recognized only for a moment—for as long as the colonizing State needed to alienate it by one of those devolution treaties which had opened the way for colonialism.

24. The devolution agreements concluded in modern times had different defects, but they were just as defective as the former ones. He was not, however, inclined to share Mr. Ushakov's views about them, for although he considered those treaties to be open to criticism and voidable, it was less because they were agreements between two States, one of which did not yet exist, as Mr. Ushakov had said,¹⁹ than because they were leonine agreements, heavily weighted against the newly independent State. Mr. Martínez Moreno had pointed out that there was a growing tendency to consider the nation, rather than the State, as a subject of international law.²⁰ Sovereignty, which was an historical product of relations of interdependence among human beings, gave the subjugated people in process of forming a State the capacity, now recognized by international law, to acquire the status of a subject of international law. According to General Assembly resolution 1514 (XV), every people, even if at some stage in its history it had not been politically independent, possessed the attributes of sovereignty, which was inherent in its existence as a people and could be extinguished only if it was destroyed. The sovereign authority of the State could only be the resultant of the political forces scattered throughout society. To an increasing extent, it was peoples which were becoming the subjects of contemporary international law. Moreover, the objective and final beneficiary of international legal rules was the individual, the primary and most basic component of the people.

25. He therefore believed, unlike Mr. Ushakov, that the capacity of the parties to devolution agreements did not raise any problem—especially as it was necessary to facilitate the access of dependent territories to independence by granting them the broadest possible power to conclude treaties. In 1962, some people had still been discussing the legal nature of the Evian Agreements, by which his country had acceded to independence, although two years previously the Soviet Union had recognized the Provisional Government of the Algerian Republic and its full capacity to conclude treaties. Thus the difficulty did not relate to the capacity of one of the parties to the devolution agreement, but rather to the specific content of that agreement. If the content of an agreement was irreproachable in regard to the right of peoples to dispose of their wealth and property, could one dare to condemn it because it had been concluded by a State which as yet had only potential existence? That would be excessively formalistic. Moreover, there were not only devolution agreements concluded before independence; there were also devolution agreements concluded after independence, when the problem of the capacity of the parties did not

arise. The reason why devolution agreements had been excluded in article 8 of the draft on succession of States in respect of treaties, to which Mr. Ushakov had referred, was not that the capacity of one of the contracting parties was inadequate, but that the Commission had considered that such agreements could not be invoked against third States.

26. Devolution agreements must therefore be judged according to their contents. Such agreements did not observe, or only seldom observed, the rules of State succession. In fact, they laid down new conditions for the independence of States. For example, the newly independent State could become independent only if it agreed not to claim certain property, to assume certain debts, to extend certain laws or to respect a certain treaty of the administering Power. There lay the basic difference from the other types of succession, in which the independence of the will of the contracting parties must be recognized. In the case of devolution agreements, freedom to conclude an agreement led to conditions being imposed on the actual independence of a State. The restrictive content of such agreements established a "probation" system, with conditional independence for newly independent States. The problem of their validity must therefore be posed in terms of their contents.

27. When Iraq had acceded to independence in 1932, the League of Nations had set five very stringent conditions for the independence of a State. The State had to have an established Government and an effective administration for its essential services; it had to be able to maintain its territorial integrity and political independence, to ensure safety and public order, to have sufficient financial resources to meet its normal needs, and to ensure regular administration of justice. It might be questioned whether many European States fulfilled those conditions themselves. In fact, contemporary devolution agreements laid down similar new conditions for newly independent States—hence the inadmissibility of such agreements and their incompatibility with the right of peoples to self-determination. It was in the commentary rather than in the text itself of article 14 that he had expressed his views on that subject.

28. Mr. Reuter had proposed two solutions to save what might be useful in devolution agreements.²¹ He had proposed applying to economic agreements the *rebus sic stantibus* clause, whose *raison d'être* had originally been essentially political, so that the agreement could be amended if economic developments made it too difficult to implement. He had also proposed saying that all devolution agreements could be revised after two years in order to ensure that they had been concluded on an equitable basis. He (the Special Rapporteur) considered that those two proposals were good, but that they could not solve the basic problem; for their application assumed that the economic and political pressure exerted by the dominant State had previously been reduced so that, after a few years, the newly independent State would be strong enough to ask for revision of the agreement. The two proposals thus appeared to regard a problem which

¹⁹ See 1394th meeting, para. 43.

²⁰ See 1395th meeting, para. 31.

²¹ See 1396th meeting, paras. 47-50.

remained to be solved as being solved already, namely, that of economic and political coercion. On the other hand, to declare the agreements void *ab initio* protected the successor State in advance and served as a warning to the predecessor State, as Mr. Castañeda had rightly observed.

29. With regard to the principle of the permanent sovereignty of the newly independent State over its wealth and natural resources, set out in article 14, paragraph 3, he wished first of all to defend himself against Mr. Hambro's accusation of "conceptualism" (*Begriffsjurisprudenz*). He was not advancing a new theory, but a new idea of sovereignty which was developing of itself and gaining ground every day. It should be borne in mind that the sovereignty of the State was not expressed only by its political elements, but also, and to an increasing extent, by its economic elements. Mr. Reuter had said that the economic sovereignty of States was only a hope which had not yet been translated into legal rules.²² But a new international economic order was being established as a result of such important events as the Fourth Conference of Heads of State and Government of Non-Aligned Countries (Algiers, September 1973); the sixth special session of the General Assembly (April-May 1974), which had been devoted to the establishment of a new international economic order; the adoption, in December 1974 of the Charter of Economic Rights and Duties of States;²³ the Conference of Sovereigns and Heads of State of the OPEC Member Countries (Algiers, March 1975); the seventh special session of the General Assembly (September, 1975) on development and international economic co-operation; the Conference on International Co-operation (North-South Conference) (December 1975); and the fourth session of UNCTAD, held at Nairobi in May 1976. Those meetings had not produced only aspirations and words, but concrete efforts which would gradually lead to new legal rules. For one could not accept political decolonization and reject its inevitable consequence—the recovery by the newly independent State of its wealth and resources.

30. Four questions had been raised in regard to article 14, paragraph 3: was it necessary to state the principle of the economic sovereignty of the newly independent State and, if so, how, where and why should it be stated?

31. Mr. Tsuruoka had said²⁴ that it was not necessary to state that principle because the Commission had already taken a decision on the question in connexion with draft article 10 (Rights in respect of the authority to grant concessions), which he (the Special Rapporteur) had submitted in his seventh report. The Commission had reserved its position on that draft article and had considered it "unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of

succession of States."²⁵ Mr. Tsuruoka had therefore taken the view that there would have to be a really compelling reason, if the Commission was to reopen that question. It would be remembered, however, that he (the Special Rapporteur) had himself withdrawn draft article 10 to propose a broader and more up-to-date text, as he had considered that the article was no longer justified in 1975. As a result of the energy crisis in 1973, the system of concessions had, indeed, practically disappeared; besides which, rights in respect of the authority to grant concessions were only one aspect of the permanent sovereignty of the State over its natural wealth.

32. Mr. Tsuruoka had also said that the principle stated in paragraph 3 was not only valid for newly independent States, but for all sovereign States, and had no direct connexion with the law of the succession of States. It was, however, a cause for rejoicing that legal theory was beginning to regard that principle as a principle of public international law. If the principle was valid for all States, it was valid for newly independent States in a succession. That fact should be stressed, in one way or another, at the point when it was most likely to be forgotten—that was to say, at the crucial moment of the birth of States. For as Mr. Thiam had so rightly said,²⁶ there were States which were weaker than others, whose economic sovereignty might be threatened, and they must be protected. That applied to newly independent States.

33. Mr. Tabibi, Mr. Yasseen, Mr. Castañeda and Mr. Calle y Calle believed that the principle of the economic sovereignty of the State should be enunciated, because it was a principle of *jus cogens*. It certainly constituted a general rule applicable to all States, but its inclusion in article 14 was appropriate and particularly important, as Mr. Sette Câmara had stressed.²⁷

34. Mr. Tammes, Mr. Quentin-Baxter and Mr. Njenga had raised the question how that principle should be expressed. They had asked for his views on the subject and had made proposals. Mr. Tammes had inquired²⁸ how the principle of economic sovereignty could be translated into precise legal terms; he had very aptly observed, as had Mr. Quentin-Baxter, Mr. Yasseen and Mr. Castañeda, that the text of article 14, paragraph 3 did not go as far as the commentary. He (the Special Rapporteur) had in fact proceeded in three stages. First, the opening proviso of article 14 "Unless otherwise agreed or decided" appeared to give precedence to agreement between the parties. Then paragraph 3 called in question any agreement which was incompatible with the sovereignty of a newly independent State over its wealth. Lastly, the commentary went further, by advocating the invalidity of devolution agreements and developing the idea of economic sovereignty. He had thus proceeded with caution: setting aside his personal convictions and avoiding a radical formulation, he had given the Commission the choice of two formulas, one more

²² *Ibid.*, para. 48.

²³ General Assembly resolution 3281 (XXIX).

²⁴ See 1395th meeting, para. 10.

²⁵ *Yearbook... 1975*, vol. II, p. 108, document A/10010/Rev.1, para. 66.

²⁶ 1395th meeting, para. 15.

²⁷ 1394th meeting, para. 27.

²⁸ *Ibid.*, para. 15.

moderate than the other. That was why Mr. Yasseen had thought that the reservation in article 14, paragraph 3 was not a sufficiently effective remedy against agreements or situations which violated the sovereignty of the newly independent State.²⁹ Mr. Pinto, for his part, considered paragraph 3 too restricted and wished it to be broadened.³⁰

35. Those considerations raised the question of the residuary character of the rules proposed in article 14. Were those rules residuary or quasi-peremptory? Mr. Šahović had reverted to that question. He had criticized the opening proviso of article 14, paragraph 1, "Unless otherwise agreed or decided", and had requested that a general article should be drafted, which would specify once and for all the residuary character of the rules proposed.³¹ He agreed with Mr. Šahović so far as articles 12 and 13 were concerned, and indeed all the other articles except, precisely, article 14. For it was not a residuary rule that was stated in article 14, since paragraph 3 limited the powers of States and laid down what was almost a rule of *jus cogens*. He believed, like Mr. Castañeda,³² that devolution agreements were void *ab initio*, because they were incompatible with the principle of self-determination. That was a peremptory rule of *jus cogens* which should appear in paragraph 3.

36. In order to reconcile the contradiction between the residuary character and the quasi-peremptory character of the different rules proposed in article 14, Mr. Njenga had proposed³³ an attractive formula which he himself would favour: it would be sufficient to delete from paragraph 1 of article 14 the usual formula "Unless otherwise agreed or decided", so as not to give importance to devolution agreements. Mr. Tabibi and Mr. Calle y Calle had supported that proposal at the previous meeting, saying that the rule in paragraph 1 should be stated more categorically. Mr. Ushakov had asked what was meant by the words "Unless otherwise . . . *decided*" and had expressed the fear that the decision taken might be contrary to the interests of the newly independent State.³⁴ He himself was in favour of deleting the whole of the opening proviso in paragraph 1, as Mr. Njenga had proposed.

37. Mr. Sette Câmara had said that a safeguard clause was needed to protect newly independent States against leonine agreements.³⁵ Paragraph 3 of article 14 therefore seemed to him to be useful, and he found its wording in conformity with the language used in the decisions of United Nations bodies from which it had been taken. Other members of the Commission, like Mr. Tsuruoka (1395th meeting) and Mr. Castañeda (1396th meeting), had said that paragraph 3 should be modelled as closely as possible on the international conventions on human rights already in force and, in particular, on article 1,

paragraph 2, of the International Covenant on Economic, Social and Cultural Rights.

38. Mr. Quentin-Baxter had some difficulty in accepting paragraph 3,³⁶ because it stated an obligation conflicting with the sovereignty of States, which were free to conclude whatever agreements they wished. But he was prepared to accept an article or a paragraph which fully respected the principle of self-determination.

39. Sir Francis Vallat had pointed out that economic sovereignty was only one aspect of political and territorial sovereignty.³⁷ He himself had never denied that: he had always asserted that sovereignty must be defined by reference to all its elements, political and economic.

40. Sir Francis Vallat had also asked what was meant by "permanent" sovereignty.³⁸ The answer to that question had been given by Mr. Yasseen and Mr. Castañeda and it expressed his personal conviction. Mr. Yasseen had stressed that international law was moving towards protection of the State against itself;³⁹ Mr. Castañeda had said that it was also necessary to protect the State against the acts of a bad government or a bad representative⁴⁰ and had referred to the case of Zaire at the time when there was a danger that the province of Katanga might secede. Thus the permanence of State sovereignty meant that a State must not go so far as to surrender completely its sovereignty over its natural resources.

41. Several members of the Commission had expressed the hope that paragraph 3 of article 14 would be moved, for example, to the beginning of the draft. That arrangement would only emphasize the importance of the provision and he was all in favour of it. Nevertheless, he stressed that the provision in question particularly concerned newly independent States.

42. Despite the arguments based on the notions of independence, sovereignty and economic coercion put forward by some members of the Commission, there was every justification for reiterating the principle set out in article 14, paragraph 3. Mr. Tsuruoka had made the point that permanent sovereignty naturally belonged to all States, not only to newly independent States.⁴¹ Mr. Kearney had observed that economic interdependence was the lot of all States, not only of the newly independent.⁴² As to economic coercion, Mr. Reuter considered that even if it had been accepted as a defect in consent by the United Nations Conference on the Law of Treaties, the present situation would not be much different, because the whole world was living under economic coercion.⁴³ Thus according to those members of the Commission, all States were sovereign, but they were also interdependent and, whether large or small,

²⁹ See 1395th meeting, para. 51.

³⁰ See 1396th meeting, para. 44.

³¹ See 1394th meeting, para. 20.

³² See 1396th meeting, para. 19.

³³ See 1395th meeting, para. 40.

³⁴ *Ibid.*, para. 2.

³⁵ See 1394th meeting, para. 27.

³⁶ *Ibid.*, paras. 31-32.

³⁷ See 1396th meeting, para. 2.

³⁸ *Ibid.*, para. 5.

³⁹ See 1395th meeting, para. 51.

⁴⁰ See 1396th meeting, para. 20.

⁴¹ See 1395th meeting, para. 10.

⁴² See 1396th meeting, para. 24.

⁴³ *Ibid.*, para. 49.

were undergoing economic coercion. For his part, he only wished that the third world countries might be as "sovereign" and as "interdependent" as the great nations of the world, and that they might experience the same "economic coercion" as those nations.

43. In his view, the energy crisis and the economic recession made it necessary to consider economic problems in the aggregate. He distinguished four cardinal points in the new economic and world space, namely, sovereignty, equality, development and solidarity—or interdependence. All those notions were present in classical public international law, but they had undergone qualitative changes. An effort was now being made to give a specific content to such notions as the sovereignty and equality of States. On that point it had been said in certain quarters that the advocates of permanent sovereignty had become intoxicated with that idea. They were reproached for making excessive claims of sovereignty when the world was passing through a period of interdependence. The critics seemed to be asking the States of the third world to renounce their very newly acquired sovereignty. Before their independence, it had been too soon for them to enjoy real sovereignty; now, it was too late. An attempt was being made to confiscate their regained sovereignty by invoking the theory of interdependence.

44. The reasoning of the well-endowed countries was particularly suspect when they invoked the notion of the common heritage of mankind. They claimed that natural resources were necessary to mankind as a whole and did not belong to the countries in which chance had placed them. They asked for a share of what did not belong to them, but refused to share what did belong to them, namely their prosperity. A veritable club of oil consumers had been formed at Washington in 1974, by the establishment of the International Energy Agency. The Western countries were now complaining of the unfair distribution of the resources of the earth, but it had not caused them any concern when they were the sole beneficiaries. They claimed that the mineral deposits of the third-world countries should be made available to all, but refused to give those countries the benefit of their own "intellectual deposits". In fact technology was the very archetype of the common heritage of mankind. At the sixth special session of the General Assembly, certain representatives had supported the theory of limited sovereignty, according to which sovereignty over natural resources was only a trust or limited right of management. The State in whose territory the natural resources were situated would thus be only a trustee for those resources, acting on behalf of the international community. Other representatives, however, had tried to reconcile sovereignty over natural resources with the interests of the international community.

45. Most of the members of the Commission were in favour of the presumption of the right of ownership of the newly independent State, which derived from the general principle of the passing of State property stated in article 9. Mr. Bilge had even expressed the hope that that principle would be more clearly affirmed in article 14, paragraph 1.⁴⁴ Mr. Quentin-Baxter had also endorsed

that presumption, but he had stressed the need to take into account not only the letter, but also the spirit of the principle of self-determination.⁴⁵ Mr. Ushakov believed that in adopting the principle of geographical location of property, the Commission would be running into difficulties. He had suggested adopting the criterion of the link between State property and the activity of the predecessor State in the territory.⁴⁶ But that criterion might limit the amount of property which could pass to the newly independent State in accordance with articles 14 and 15. Property belonging to the territory which became independent would pass, but the property appertaining to sovereignty and used by the predecessor State, such as military bases, would not pass.

46. Mr. Yasseen and Mr. Martínez Moreno had suggested replacing the criterion of a "direct and necessary link" by that of a "reasonable link".⁴⁷ That solution would be appropriate for articles 12 and 13, but would be disadvantageous to newly independent States in the cases covered by articles 14 and 15. Equity required that the predecessor State should be treated more severely in the case of articles 14 and 15 than in that of articles 12 and 13. Nevertheless, the criterion could not be changed in one case without being changed in the other. With regard to the burden of proof, he considered that it fell on the predecessor State in the case of article 14. All those difficulties had led some members of the Commission to advocate the formulation of a system for the settlement of disputes.

47. Several members of the Commission had proposed drafting a special provision on archives, in view of the importance of that category of State property for the newly independent States. It had also been pointed out that archives could be useful both to the predecessor State and to the successor State. An illustration of that was the case of the Algerian records of births, deaths and marriages, part of which had been taken to France at the time of independence, causing grave difficulties and even tragedies for Algerian citizens until those archives had been restored to Algeria. It would be for the Drafting Committee to try to formulate a provision concerning archives.

48. With regard to the notion of property belonging to the territory, as understood by Mr. Ushakov (who had explained his views to him), it covered not only property which had belonged to the colony, but also property which had belonged to the territory before its colonization, such as archives, works of art and gold, which had passed to the colonizing State. Thus in 1962, when Algeria had become independent, France had taken away the Algerian historical archives known as the Arab, Turkish and Spanish records, which had been the State property of Algeria before its colonization in 1830. On that point, he referred members to his third report.⁴⁸ He thought that a formula should be found to cover those two categories of State property.

⁴⁵ See 1394th meeting, para. 32.

⁴⁶ See 1395th meeting, para. 3.

⁴⁷ *Ibid.*, para. 27.

⁴⁸ See *Yearbook... 1970*, vol. II, p. 159, document A/CN.4/226, part. II, para. 37 of the commentary to article 7.

⁴⁴ *Ibid.*, para. 55.

49. With regard to the drafting of articles 14 and 15, the Drafting Committee should, in particular, try to unify the terminology of paragraphs 1 and 2 of article 14. The expressions "shall exercise a right of ownership", and "property . . . shall pass" and the notion of a "right of ownership" all required careful consideration. It seemed that it would be difficult to adopt the concept of a *droit éminent* (eminent domain) to which Mr. Martínez Moreno had referred,⁴⁹ because it was not well known except in Spanish, Italian and French law. Lastly, with regard to Mr. Ramangasoavina's remarks concerning the extract from an article in the *New York Times* quoted in his eighth report,⁵⁰ he had not intended to attach the same importance to that information, which he had only put in a foot-note, as to the Ordinance of the Comorian Government mentioned in paragraph 19 of the commentary to article 14. He had even taken the precaution of using the conditional mood, in particular in paragraph 20, to report the statements contained in that document, although it was official.

50. The CHAIRMAN, speaking as a member of the Commission, said that he wished to comment on the question of the definition of the expression "newly independent State", which he believed had been first raised during the discussion by Mr. Martínez Moreno, and might be taken up by the Drafting Committee as the Special Rapporteur had indicated. The Commission had given a definition of that expression in article 2, paragraph 1 (j), of the draft on succession of States in respect of treaties:

"newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.⁵¹

51. The suggestion made at the beginning of the meeting by Mr. Martínez Moreno appeared to be linked with the definition of the expression "newly independent State" which would be adopted for purposes of the present draft.

52. Mr. MARTÍNEZ MORENO explained that the object of his suggestion was to obviate any difficulties that might arise in regard to Trust Territories. He had suggested that, where necessary, the reference to the "predecessor State" should be accompanied by a reference to the "administering authority", which was the term used in Article 81 of the Charter in regard to Trust Territories. He did not think it was necessary to define the term "administering authority" because its meaning was already explained in Article 81 of the Charter. Unlike Mr. Njenga, however, he thought the expression "newly independent State" should be defined.

53. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Martínez Moreno's sugges-

tion brought out the importance of including a broad category of territories in the definition of the expression "newly independent State". Article 81 of the Charter was in the chapter dealing with the International Trusteeship System. The Commission should not confine itself to borrowing a term from the Charter, but should work out a formula broad enough to cover all non-independent territories.

54. The Charter itself drew a distinction between the former League of Nations mandates which had passed under the United Nations Trusteeship System, the territories placed under trusteeship since the establishment of the United Nations, and "Non-Self-Governing Territories". As far as the latter were concerned, the Powers responsible for their administration were required to submit information to the United Nations and to lead the peoples of the territories concerned to independence. All those territories, regardless of their status—colonies, protectorates or Trust Territories—were not fully sovereign and independent and should be covered by the definition.

55. The Special Rapporteur had referred to the concept of eminent domain, which was a concept of internal law. In international law, the concept of *dominium*, or territorial sovereignty, was coupled with that of *imperium*, which was the power of a State to exercise supreme authority over its citizens; taken together, those two attributes constituted sovereignty with all its prerogatives.

56. Speaking as Chairman, he thanked the Special Rapporteur for his eloquent and detailed replies to all the numerous questions raised by the members of the Commission regarding articles 14 and 15.

57. If there were no objections, he would take it that the Commission agreed to refer articles 14 and 15 to the Drafting Committee for consideration in the light of the comments and suggestions made.

*It was so agreed.*⁵²

The meeting rose at 1 p.m.

⁵² For the discussion on the articles proposed by the Drafting Committee, see 1405th meeting, paras. 20-42.

1398th MEETING

Friday, 25 June 1976, at 10 a.m.

Chairman: Mr. Juan José CALLE y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

⁴⁹ See 1395th meeting, para. 26.

⁵⁰ *Ibid.*, para. 22.

⁵¹ *Yearbook... 1974*, vol. II (Part One), p. 175, document A/9610/Rev.1, chap. II, sect. D.

**Succession of States in respect of matters
other than treaties (*continued*) (A/CN.4/292)**

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR
(*continued*)

ARTICLE 16 (Uniting of States)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 16, contained in his eighth report (A/CN.4/292) and worded as follows:

Article 16. Uniting of States

1. On the uniting of two or more States in one State, movable and immovable property situated in the territory of the State thus formed shall remain the property of each constituent State unless:

- (a) the constituent States have otherwise agreed; or
- (b) the uniting of States has given rise to a unitary State; or
- (c) in the case of a union, the property in question has a direct and necessary link with the powers devolving upon the union and it thus appears from the constituent acts or instruments of the union or is otherwise established that retention by each constituent State of the right of ownership of such property would be incompatible with the creation of the union.

2. Movable and immovable property situated outside the territory of the State formed by the uniting of two or more States and belonging to the constituent States shall, unless otherwise agreed or decided, become the property of the successor State.

2. Mr. BEDJAoui (Special Rapporteur) said that draft article 16 was relatively straightforward, since it concerned a kind of State succession, namely uniting of States, that involved the pooling and not the apportionment of property. It was therefore, not a divorce but a marriage, and no conflict was likely to arise.

3. The definition of uniting of States contained in article 30 of the draft articles on succession of States in respect of treaties adopted in 1974¹ was valid for the present draft articles as well: there was a uniting of States when two or more States united and so formed one successor State. Such a uniting of States could take widely differing forms. In the case of complete integration, where two or more States united to form a unitary State, all State property passed to the successor State. There was no reason in that instance to distinguish between movable property and immovable property or between property situated within the territory and property situated outside the territory of the new State. Between that form of uniting of States and a confederation of States there was a whole range of other forms. The constitutional organization of the successor State would be the determining factor for the purposes of the article under consideration, whereas it had not affected the case of succession of States in respect of treaties. In matters of that kind, third States were faced with a single authority, namely that of the successor State, regardless of its internal constitutional organization. Generally speaking, the constituent States of the new State lost, if

not their international personality, at least their international powers. In succession to State property, several courses were possible, depending on the degree of integration existing in the new State. The property might all become common property or, conversely, it might continue to be owned by the constituent States. The question involved the subject of succession to the internal legal order, since acts of internal law affected the treatment of State property. For all that, the question under consideration was still one of succession to State property.

4. Where States merged to form a federal State, there was normally an agreement on the subject which could be used to determine the treatment of State property, but where they merged to form a unitary State, it was necessary to refer to internal law, as expressed in the constitution or a basic law. There was accordingly a close link between the subjects of succession in respect of State property and succession in respect of legislation.

5. Since a uniting of States led to the creation of a new community, and consequently movable property was not likely to be excluded from the succession, there was no reason to draw a distinction in article 16 between movable and immovable property. Thus uniting of States was covered by a single article in which the first paragraph dealt with State property situated in the territory of the new State and the second with State property situated outside that territory. It had been decided that articles 14 and 15 should encompass all situations arising from decolonization; his observations regarding unions formed from dependent territories² should therefore be considered as applying to articles 14 and 15 and would be transferred to the commentaries to those two articles. There were, however, borderline cases in which dependent territories had decided to unite after attaining a broad measure of autonomy.

6. Article 16 was based on the functional criterion for the allocation of property. Paragraph 1 referred first to the most common case, namely the creation of a federal union or of a confederation. It went on to mention, in the form of exceptions, the case in which the constituent States agreed to derogate from the general rule, the case in which a unitary State was established, and the case in which the degree of integration determined succession to property. In the latter case, the notion of the viability of the successor State had to be considered. The general rule was that movable and immovable property situated in the territory of the new State remained the property of each constituent State. Many examples of the different situations mentioned were given in his report.³

7. Paragraph 2 of article 16 concerned property situated outside the territory of the new State. In principle, when two States decided to unite, it was because they did not wish to remain separate. Their uniting would not be genuine if they fully retained both their internal autonomy and their independence in international terms. If they formed a unitary State, all property passed to that State. But even if they formed a union of States, experience

¹ *Yearbook... 1974*, vol. II (Part One), p. 252, document A/9610/Rev.1, chap. II, sect. D.

² See A/CN.4/292, chap. III, paras. 24 *et seq.* of the commentary to article 16.

³ *Ibid.*, paras. 13 *et seq.* of the commentary.

showed that the union was generally vested with responsibility for the international relations of the constituent States and took over property situated abroad since it was in the best position to manage and protect it. Because of the exceptions to that rule, paragraph 2 contained the proviso "unless otherwise agreed or decided".

8. Mr. AGO said that he was somewhat puzzled by article 16 as proposed by the Special Rapporteur. Admittedly a residuary rule should cover all possibilities, but in the present instance a residuary rule did not seem necessary. A uniting of States involved the formation of a new State made up of all of the predecessor States. The new State might be a unitary State in which the constituent States disappeared entirely, not only in terms of international law but also in terms of internal constitutional law. That had been the case when Italy had united: the former States had not re-emerged in the new kingdom, even in the shape of provinces. Clearly, in a case of that kind, the constituent State could not retain the ownership of their property. The Special Rapporteur himself had provided that the general rule should not apply in that case. He (Mr. Ago) felt that the draft articles should not even contemplate such a case.

9. If two or more States united to form a federal State in which they still existed, but only as persons under constitutional law, it was the new State which would determine, under a federal enactment, the treatment of the property of the constituent States. That treatment would depend therefore on a rule of federal constitutional law, and not on a rule of international law. Consequently, there were no grounds for compensating for the possible lack of a rule of internal constitutional law by a rule of international law.

10. A final case was that of States which formed a union based on an international instrument and which continued to have international relations with each other. It was quite likely that such an instrument would settle the question of the property of the constituent States. However, should any doubts remain in that regard, he would agree that they should be dispelled by means of a rule of international law. The rule proposed by the Special Rapporteur would then be acceptable, but it should apply only in that particular case.

11. Mr. KEARNEY said that, in matters of international law such as the question of the uniting of States, he was bound to be influenced, like the previous speaker, by what had happened when his own country had been formed. In numerous respects, the United States was different from other unions. It functioned in many ways as a unitary State but in other ways it constituted a union of States. It could not easily be placed in any particular category because of the division of governmental powers as between the Federal authorities and the authorities of the individual States. For example, even now the individual States had authority to conclude international agreements, but those agreements had to be approved or authorized by the United States Congress. From his reading on the subject, he had arrived at the conclusion that, because of such distinctions and variations, it was very difficult in almost any case of a uniting of States to differentiate clearly between one type of organization arising from that process and another type which pro-

duced different results. Moreover, the rules on the division of governmental powers as between a union and its component parts could vary according to the category of subject-matter concerned. For example, in Canada—which was also a union of States—the Provinces had much greater rights of ownership over rivers flowing within or between them than the States of the United States of America had over rivers flowing through their territories or along their boundaries. It should be borne in mind that some of the rivers in question flowed through both Canada and the United States of America.

12. In view of the different situations that could thus arise, there was justification for Mr. Ago's concern regarding the formulation of rules to govern the internal relationships between the constituent States of a union in respect to property. As he (Mr. Kearney) saw the matter, it was unnecessary to lay down residuary rules for the internal disposition of property following a uniting of States. Even if the constituent States forming the union adopted rules which were not sufficiently thorough or adequate, or which left some gaps, there would always be internal machinery to remedy the situation. It would be for the judicial system, parliament or the Executive, as the case might be, to deal with problems of that kind. That being so, it would be wise to refrain from framing any residuary rules and to leave such questions to be solved by the States concerned.

13. A residuary rule was, however, necessary for property situated outside the territory of the State formed by the uniting of two or more States and belonging to the predecessor or constituent States. If the draft articles contained no such rule, the third State in which the property was situated might not know how to deal with it. The provisions of paragraph 2 of article 16 were thus necessary for international purposes.

14. In conclusion, he favoured the retention of paragraph 2, subject to any amendments which might be considered desirable, but considered that the Commission should keep out of the area which paragraph 1 attempted to cover.

15. Mr. ŠAHOVIĆ supported the views expressed by Mr. Ago. There was no reason to deal with succession to the property of predecessor States which united to form a unitary State or a federal State. At most, consideration could be given to the case of the formation of a confederation. A study of the new Yugoslav Constitution confirmed that, in federal States, the treatment of the property of federated States was determined by internal law. It followed that the title of article 16 should be changed. Furthermore, the concept of a union should be clarified.

16. Like Mr. Kearney, he considered that paragraph 2 of that article was of some value and should perhaps be retained.

17. Mr. SETTE CÂMARA congratulated the Special Rapporteur on the very interesting material which he had assembled in support of his proposed article 16. He understood why the Special Rapporteur thought that an article of that kind should be included in the draft. Since the draft articles were intended to cover all types of succession, as classified by the Commission in its draft

articles on succession of States in respect of treaties, it was natural that the present draft should deal with the type of succession resulting from a uniting of States.

18. With regard to the structure of article 16, however, he shared the misgivings already expressed by several members. The article appeared to take as its starting-point the presumption that a uniting of States would always give birth to a union of States. The examples given by the Special Rapporteur in his report showed that such had often been the case in recent years. He himself, however, felt that it was not advisable to turn that presumption into a rule and attach exceptions to it. He considered it far preferable to lay down a general rule of *renvoi* to the internal law of the successor State in regard to questions concerning the treatment of property.

19. With respect to the exceptions set forth in paragraph 1, it was true that recent cases of the uniting of States had usually led to the formation of a union. The past history of Europe and other continents, however, showed that a uniting of States had often resulted in the formation of a unitary State. The exception mentioned in subparagraph (c) of paragraph 1 constituted a typical case of *renvoi* to internal constitutional law. It would be for the internal constitutional law of the successor State to determine which powers devolved to the union and which must belong to the constituent States. Some constitutions reserved the residual powers to the union. Others did exactly the opposite: the union had no powers other than those specifically conferred upon it by the constitution and the constituent States had the residual powers. Property could have its links with the powers of both the constituent States and the union. He therefore supported the idea of laying down a general rule which would leave States free to decide what kind of union they had in mind and what its results would be with regard to the treatment of property.

20. With regard to paragraph 2, he agreed that no distinction should be made between movable and immovable property. The main reason for distinguishing between those two types of property in other articles had been the ease with which a movable could be transferred from one territory to another and the consequent risk of dispossession when a succession of States occurred. That did not apply where all the predecessor States merged into a single successor State.

21. Having said that, he suggested that the provisions of paragraph 2 should be modelled on those of subparagraph (c) of article 13 and paragraph 1 (b) of article 15, both of which laid down the principle that, in determining the apportionment of property, regard should be had to the contribution of the territory to the creation of that property. That principle was all the more necessary where the territories concerned had formerly been independent States. In every such case the constituent States would have paid for the property in question. It was therefore difficult to understand why the principle of apportionment should not be extended to article 16.

22. Mr. PINTO said that article 16 differed from the other articles of the draft. The reason was that the cases of uniting of States for which it provided did not involve the existence of competing domestic legal systems, unlike

practically all the cases dealt with in the other articles. He accordingly felt that article 16 had no place in the series of articles under consideration, except in respect of paragraph 2; that could be useful in dealing with the question of property situated in a third State, which did in fact involve an outside or foreign legal system.

23. He also wished to raise a question of drafting. The change in the legal status of the State property concerned was described in a variety of ways in articles 14 to 17. The formula most frequently used consisted in stating that the property "passed" to the successor State, but in article 15 the newly independent State was described as succeeding to the property. In article 17, it was stated that property "shall... be attributed to" the State in question. In subparagraph (c) of article 13, it was stated that the property of the predecessor State situated outside the territory would be "apportioned equitably" between the predecessor State and the successor State. In subparagraph (b) of article 15, the same idea was expressed differently: it was stated that the newly independent State "shall succeed thereto" in the proportion determined by its contribution. He urged that the Drafting Committee should try to standardize the terminology.

24. The CHAIRMAN said that the Drafting Committee would deal with the points raised by Mr. Pinto and would endeavour to unify the terminology used in the various language versions of the draft articles.

25. Sir Francis VALLAT said that he was inclined to agree with other speakers that paragraph 1 of article 16 was not really appropriate to the articles under consideration, but that some provision on the lines of paragraph 2 should be included. However, that course would somewhat upset the balance of the general structure of the draft. The Commission was seeking to make appropriate provision for cases of succession of States within the meaning of the provisional definition given in subparagraph (a) of article 3.⁴ According to that definition, the term "succession of States" meant the replacement of one State by another in the responsibility for the international relations of territory. Where two or more States united to form a single State, a successor State was created and the case was indubitably one of succession of States. It would therefore be appropriate to include in the draft articles a provision indicating what happened to State property in that case.

26. The principle applicable in the case of uniting of States might be that the treatment of State property was referable to the internal law of the successor State. That would be correct. Yet other States would wish to know what treatment was accorded to State property on succession, and so the principle in question should perhaps be spelt out in the commentary. If necessary, it could be embodied in the article at a later stage.

27. The use of the term "union" inevitably caused confusion. The Commission had already experienced that in another context. The logic of the draft articles demanded that a new State was either formed or not. If the uniting

⁴ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

of States was such that certain constituent units retained only some of their powers, the result would essentially be a State with a federal structure. If, on the other hand, the constituent units retained their identity as States, what emerged was a union or, in ordinary parlance, a confederation. The latter case—that of a confederation—would fall completely outside the existing definition of a successor State and the Commission should not be concerned with it. That point must be taken into account in the drafting of the text of article 16, the commentary thereto and the Commission's report.

28. Mr. USHAKOV observed that, in his view, the hypothetical case of the Canton of Geneva deciding to join France had to be considered within the framework of a uniting or a separation of States. A case of that kind would not come under the provisions of articles 12 and 13 since those provisions only concerned successions to small portions of territory.

29. Mr. RAMANGASOAVINA said that, in the cases dealt with in article 16, the disposition and apportionment of the property were in principle matters for the internal jurisdiction of the new State. When two or more States united, they normally did so freely; the treatment of the property was then settled either in an agreement concluded at the time of uniting or in a constitution promulgated subsequently. The Special Rapporteur's comparison with a marriage was very apt, since the spouses had the choice between the régime of community of property and that of separation of property.

30. As he saw it, where two or more States decided to unite and become a new State, it was natural for all their property, whether situated in the territory of the State thus formed or outside it, to become the property of the new State. He accordingly had doubts regarding the usefulness not only of paragraph 1 but also of paragraph 2.

31. Mr. AGO said that Sir Francis Vallat's remark was absolutely correct: when several States united to become a single State, problems of succession arose. Those problems could arise in various fields, for instance in that of international responsibility. It might thus become necessary to determine whether the new State was bound by the international obligations arising from an internationally wrongful act committed by one of the constituent States. The series of articles under consideration, however, concerned State property alone. If that property was situated within the new State, no question arose internationally and there was no need to formulate a rule of international law on the matter, even a residuary one. It was only then the property was situated abroad that the situation could become complicated, although it was doubtful whether any genuine international problem was involved. The treatment of immovable property possessed abroad by the States which had united to form the Kingdom of Italy had been settled by the latter's internal law and not by specific international agreements. Obviously, if a third State refused to recognize the new State, the situation might become extremely complicated, but the Commission did not have to enter into questions of that kind.

32. As far as a genuine international union of States was concerned, it might not give rise to a succession of States, as Sir Francis Vallat had pointed out.

33. Mr. MARTÍNEZ MORENO said that the Special Rapporteur had included article 16 in the draft in conformity with the decision that the draft articles should deal with every type of State succession. In addition, the Special Rapporteur had designed article 16 to cover all the various forms which the uniting of States could take, whether the successor State was a confederation, a federation, a real or personal union or a unitary State.

34. The debate had shown almost unanimous agreement in the Commission not to deal with matters which were connected more with constitutional law than with international law. He believed however that it would be advisable, as suggested by Sir Francis Vallat, to spell out the fundamental principle applicable to the case of uniting of States, namely that the agreement of the constituent States was the main rule that concerned the passing of State property. That basic principle could be stated in the first paragraph of article 16. As to the present paragraph 2, dealing with State property situated outside the territory of the successor State formed by the uniting of States, it should be retained. The result would be an article 16 which would satisfactorily cover all the necessary cases, in accordance with the intentions of the Special Rapporteur.

35. Mr. QUENTIN-BAXTER said that he largely agreed with Mr. Pinto with regard to article 16: it did not present the issue which was central to the remainder of the draft articles, namely the obligation to choose between competing sovereignties.

36. For the reasons already advanced by other speakers, he felt that paragraph 1 of article 16 was not strictly within the scope of the draft. As to paragraph 2, if it was necessary at all, it would have to be worded in the simple form in which it had been proposed. The paragraph should merely provide that, in the event of the uniting of two or more States, the only possible successor State—namely the State thus formed—would succeed to the State property.

37. Having said that, he wished to comment on the question of *renvoi* to the internal law of the successor State. It was a well known fact that national courts, in order to identify the parties before them—especially when a party was a legal person—had to refer to the law under which the legal person had been constituted. It seemed strange, however, that the principle of *renvoi* should be touched on in the context of article 16 but not in others. Under the moving treaty-frontiers rule, it was not impossible for a territory which had an identity of its own to move as a unit into another area; reference to the law of the successor State was then necessary in order to discover how that law described the subordinate unit. Accordingly, the *renvoi* principle could be applied to cases other than that of the uniting of States. It was a principle which followed upon the application of such tests as those of contribution and the "direct and necessary link". Once the choice of sovereignty had been made, there could be an additional need for the doctrine of *renvoi*.

38. He shared the general feeling that the contents of paragraph 1 had no place in the draft, yet he felt that they could not be wholly disregarded in view of the case of

separation of parts of a State, dealt with in article 17. There had been cases where the parts of a unified State which had later dissolved had retained their identities so completely during the period of unification that the rules of succession had had to be applied to the parts of the State. Consequently, when applying the tests of contribution and of the direct and necessary link, it would be necessary to keep in mind the case in which a separating part of a State had at all times been clearly identified with a particular body of property.

39. Mr. TSURUOKA said that it would be best to simplify the article under consideration as much as possible. It derived from the idea that a new State was born and that all the property passed to that new State regardless of the latter's form. The apportionment of that property should be a matter for the internal law of the new State.

40. Mr. KEARNEY said that the problem of *renvoi* to internal law was frequently encountered in conventions on conflicts of law. Such conventions commonly incorporated what was called a federal-state clause, which sought to determine the particular law that would apply—the law of the State or the law of a subdivision of the State. In dealing with federal unions of one kind or another, it was not possible to refer simply to internal law; it was essential to specify which law was to be applicable. The Commission might therefore do well to avoid touching on the question of *renvoi* to internal law.

41. Mr. Ago had questioned the need for the rule enunciated in paragraph 2, but there were good grounds for adopting a rule of that kind. For example, if two or more States united, a third State might ask itself whether property formerly owned by one of the constituent States should continue to be exempt from taxation or immune from execution. In other words, the status of the property might change, with adverse effects upon the property itself and upon the international relationships of the States concerned. It would be useful to have a residuary rule which made it clear that the status of the property would be determined by the internal law of the successor State—that was the reason for the phrase “unless otherwise agreed or decided”—but that, in the absence of such a determination, the property would continue to be viewed as State property. A rule of that kind would eliminate friction, and with rules of international law that was always desirable.

42. The CHAIRMAN, speaking as a member of the Commission, observed that the discussion had focused not so much on the text itself but on the question whether, in the case of uniting of two or more States, international law determined in some way the ownership of property of different kinds. It was clear that, within the new unified State, movable and immovable property would ultimately be apportioned under internal constitutional law or a federal kind of law. That possibility was not precluded by the terms of article 16, which contained the proviso “unless... the constituent States have otherwise agreed”, i.e. unless they agreed by other means, constitutional and legal.

43. However, the uniting of two or more States could create certain problems affecting not only the constituent

States but also third States—for example, in the case of credits or loans extended to the constituent States before they united. In his view, there should be a certain uniformity between the draft under discussion and the draft articles on succession of States in respect of treaties, and accordingly the draft under consideration should cover uniting of States, especially since the Special Rapporteur had also proposed an article on the possible separation of States which had previously been united. Recent times offered examples of attempts by States to unite, or of short-lived unions, and it would be advisable to lay down certain rules for cases of that kind. Moreover, future unions of States were likely to be more gradual, with the constituent States retaining their own legal personality for an initial period and becoming more integrated or united at a later stage. Some drafting changes could be made in the text, but the important point was that the draft should include an article on the uniting of States, as clearly defined in article 30 of the draft articles on succession of States in respect of treaties.

44. Mr. BEDJAOU (Special Rapporteur) said that all the observations made with regard to article 16 were absolutely correct. It was true that some of the cases contemplated in that article fell outside the scope of succession of States; particularly in the case of complete unification—i.e. the setting-up of a unitary State—the treatment of the property was settled by internal law. The draft articles could obviously not deal with problems of internal constitutional or administrative law. Moreover, where it was internal law that settled the treatment of the property, that law could not of course operate until the unitary State had been created. The situation contemplated therefore arose after the date of succession, which was normally the determining date. The case of unitary States was accordingly outside the scope of succession of States. If an attempt was made to deal with that case, there would be a problem of *renvoi* that would lead to many difficulties, as pointed out by Mr. Quentin-Baxter. He should reflect further on the matter to see if it would be preferable to leave aside the case of unitary States, as Mr. Ago and Mr. Kearney in particular had suggested.

45. Perhaps the draft articles should also disregard the second case contemplated in article 16, namely that of the federal State. It was an intermediate case in which the constituent States retained some personality of their own within the federation in terms of internal public law because, constitutionally, they were States and could settle the question of the devolution of their property as they wished.

46. Thus, since the case of international unions of States—or confederations of States—was the only case which raised questions of international law and of succession of States, the Commission would limit the scope of article 16 to that case alone, in other words, to the case where two or more States agreed to set up among themselves a community which preserved their personalities not only internally but also internationally. His task as Special Rapporteur would thereby be greatly facilitated, because unions of that kind were nearly always created by an international agreement among the States concerned which contained provisions governing the devolution of property. The Commission would thus confine

the article to the statement of a very simple residuary rule.

47. In real life, however, the situation was not so simple, because intermediate cases existed. Cases could occur of unions of States in which the component States surrendered only part of their international personality to the union thus set up and continued to exercise the remainder. In that connexion Mr. Kearney had mentioned the case of his own country, in which the component States had a treaty-making capacity which was subject to supervision by the United States Congress.

48. If article 16 was confined to international unions of States, the question would arise as to how those unions were to be defined. Would it be by reference to similar cases? The Drafting Committee might be able to find an acceptable formula. However, the Commission would undoubtedly experience great difficulty in defining international unions of States satisfactorily.

49. Mr. Ushakov had mentioned the hypothetical example of the Canton of Geneva joining France by an act of self-determination. In his own view, that would be a case of part of the territory of a State joining a neighbouring State, a situation which was governed by articles 12 and 13. If the Canton of Geneva were to set itself up as an independent State, the case would be governed by article 17. At all events, the example given by Mr. Ushakov was not referable to article 16. Nevertheless, he himself had difficulties with that example because, in his view, articles 12 and 13 could only relate to the case of a very small portion of territory joining a neighbouring State.

50. In conclusion, he proposed that article 16 should be referred to the Drafting Committee to see whether it was possible to confine the case of uniting of States exclusively to that of international unions of States and at the same time keep the draft in line with the draft articles on succession of States in respect of treaties.

51. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 16 to the Drafting Committee for consideration in the light of the discussion.

*It was so decided.*⁵

The meeting rose at 12.35 p.m.

⁵ For consideration of the text proposed by the Drafting Committee, see 1405th meeting, paras. 43-53.

1399th MEETING

Monday, 28 June 1976, at 3.10 p.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Succession to State property in cases of separation of parts of a State)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 17 (A/CN.4/292), which read:

Article 17. Succession to State property in cases of separation of parts of a State

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

1. its immovable property shall, except where otherwise specified in treaty provisions, be attributed to the State in whose territory the property is situated;

2. its movable property shall:

(a) be attributed to the State with whose territory it has a direct and necessary link, or

(b) be apportioned in accordance with the principle of equity among successor States so formed, or among them and the predecessor State if it continues to exist;

3. movable and immovable property of the predecessor State situated outside the territory of that State shall be apportioned equitably among the successor States and the predecessor State if the latter continues to exist, or otherwise among the successor States only.

2. Mr. BEDJAOUÏ (Special Rapporteur) said that draft article 17 covered two possible cases. The first was the converse of the case covered by article 16: failure of the uniting of States, dissolution of the State thus formed and return to the situation before the union. It made little difference whether the uniting of States referred to in article 16 had resulted in the creation of a unitary State or of a federal or confederal State; what mattered was the return to the *status quo ante*, through the total elimination of the international personality of the State which had resulted from the uniting of States. It was found, however, that dissolutions usually involved unions of States, rather than unitary States. Moreover some members of the Commission appeared to wish to confine article 16 to international unions of States. Thus, in the first case the united State disappeared completely and there was a return to the situation before the uniting. In the second case, on the other hand—that in which one of more parts of a State detached themselves from it to form new States—the original State retained its international personality.

3. The 1972 draft articles on succession of States in respect of treaties had followed the same typology, distinguishing between two cases: that of dissolution and that of separation of States. But in the first case, that draft appeared to refer to the disappearance of a State rather than to the dissolution of a union. To judge from the definition of dissolution given in article 27 of the 1972

draft,¹ what was meant was the total dismemberment of a unitary State which broke up and was replaced in each part of its territory by so many new States. However, the examples given in the commentary clearly showed that what was meant was the dissolution of unions. With regard to the case of separation, the Commission had associated it with that of secession, by assuming, in article 28 of its 1972 draft, that it occurred “If part of territory of a State separates from it and becomes an individual State”, and by specifying, in paragraph 1 of the commentary to that article, that the State from which the part of the territory concerned had sprung—that was to say, the predecessor State— “continues in existence unchanged except for its diminished territory”.²

4. Those two cases had been contested in 1973 by certain members of the Sixth Committee, who had found that the distinction between the dissolution of a State and the separation of part of a State was quite nebulous and that differentiation based on the disappearance or survival of the predecessor State was entirely nominal. He believed that the distinction should be maintained, however, because of the special character of succession to State property in the case dealt with in article 17 of the draft under consideration. For if the distinction was valid for treaties, it was also, and especially, valid for property. If the predecessor State survived it could not be deprived of all its property; and if it disappeared, its property could not be left uninherited. The distinction seemed even more fundamental for property than for treaties, in regard to which it had been maintained, for although article 33 of the 1974 draft made no distinction, article 34 referred to the position if the predecessor State continued to exist after the separation.³

5. The two cases—dissolution and separation—could, however, be dealt with in a single article, as he had done in article 17, while maintaining the distinction between them in the body of the article. There were three reasons for that. First, the criterion for distinguishing between separation and dissolution being the disappearance or survival of the predecessor State, the two cases were the same when there was dissolution of a union or total dismemberment of a unitary State, for in both cases the predecessor State disappeared.

6. Secondly in both dissolution and separation, the basic criterion for the attribution of property was that of its equitable apportionment among all the States concerned: among the successor States if the predecessor State disappeared, and among the successor State or States and the predecessor State if the latter survived. Qualification as a predecessor State or a successor State lost its importance, since the same criteria of viability and equity were applied to all parties. That being so, it was pointless to inquire whether the predecessor State had disappeared or continued to exist, except to determine whether property should be left to it. For the purposes of attribution of property, the predecessor State was, in a sense, treated as one suc-

cessor State among the others. In the case either of separation or of dissolution, it was a question of apportioning a common patrimony equitably among all the parties, their status, as successor or predecessor State, having no effect on the principle of apportionment, which was equity.

7. Thirdly, if the distinction based on the survival or extinction of the international personality of the predecessor State was, as some claimed, purely nominal where succession in respect of treaties was concerned, it must be even more so in regard to succession to State property.

8. It was for those reasons, and especially because the solutions for succession to State property were practically identical in the cases of dissolution and separation, that he had to make no distinction between those cases and to combine them in a single article.

9. What were the solutions proposed in article 17? He had excluded from the application of the article property belonging to each of the States concerned and had distinguished between movable and immovable property and between property situated in the territory and property situated outside it. He had also drawn a distinction, in the commentary, between the disappearance and the survival of the predecessor State.

10. When the predecessor State ceased to exist, the attribution of immovable property to the State in whose territory it was situated (paragraph 1 of the article) did not preclude application of the criterion of equity, for if other States had contributed to the acquisition of that property, they could be compensated proportionately to their contribution, if it could be determined, or in a just and equitable proportion if the share they had contributed could not be evaluated.⁴ That rule in article 17 and the reference to the principle of equity were equally valid if the predecessor State continued to exist.

11. With regard to movable property, the two criteria stated in article 17, paragraph 2—the direct and necessary link and equity—were not mutually exclusive, but applied simultaneously, according to the nature of the property. When the link between the property and the territory was obvious there was no problem. But if the link was insufficient or could indicate two beneficiary States, the criterion of equity was applied.

12. With regard to movable or immovable property situated outside the territory of the predecessor State, both doctrine and State practice showed that the obvious solution was the rule of equitable apportionment stated in paragraph 3. That was the rule which had prevailed, in the dissolution of the Union between Sweden and Norway, with regard to consular and diplomatic property, both movable and immovable; in the dissolution of the Austria-Hungarian Empire, particularly with regard to the vessels on the Danube claimed by Czechoslovakia; and in the dissolution of the Federation of Rhodesia and Nyasaland, with regard to Rhodesia House in London.⁵

¹ See *Yearbook... 1972*, vol. II, p. 292, document A/8710/Rev.1, chap. II, sect. C.

² *Ibid.*, pp. 295 and 296.

³ *Yearbook... 1974*, vol. II (Part One), p. 260, document A/9610/Rev.1, chap. II, sect. D.

⁴ See A/CN.4/292, chap. III, para. 22 of the commentary to article 17.

⁵ *Ibid.*, paras. 47, 50 and 51 of the commentary.

13. Cases of secession, in which the predecessor State continued to exist, were rare: the only ones that could be cited at present were those of Pakistan which had separated from India, of Bangladesh, which had separated from Pakistan, and of Singapore, which had separated from Malaysia.⁶ The rules stated in article 17 applied in those cases too, the essential criterion still being equity.

14. Mr. YASSEEN said that, in his report and in his oral presentation of article 17, the Special Rapporteur had clearly shown that a single solution could be applied to the different types of succession covered by article 17. That arrangement seemed acceptable and fully justified by the explanations the Special Rapporteur had given. Immovable property raised no problem: it passed to the State in whose territory it was situated. That was a general principle which could be accepted, as it already had been for other types of succession. But in regard to movable property the Special Rapporteur had not rested content with the criterion of the direct and necessary link: he had also introduced the criterion of equity. Those two criteria should not be mutually exclusive, but on the contrary, should both contribute to the solution of the problems which might be raised by the types of State succession covered by article 17. It should, however, be made clear, in the text of the article, where the application of the criterion of the direct and necessary link ceased and where the application of the criterion of equity began. The Drafting Committee would have to show how those two criteria combined to produce a solution acceptable to all the parties.

15. With regard to the application of the principle of equity, the Special Rapporteur had been guided by legal theory and, in particular, by the judgment rendered by the International Court of Justice in the *North Sea Continental Shelf* cases.⁷ It was obvious that equity was an autonomous and independent source of law. But there was an enormous difference between the role of equity in internal law and its role in international law. In internal law, if the judge did not find a solution in positive law, he had to apply the principle of equity; but in international law, the *non liquet* existed, because it was accepted that the international legal order was not complete. Thus, in the absence of a rule, an international tribunal could refuse to give judgment without being guilty of a denial of justice. Article 38 of the Statute of the International Court of Justice allowed the Court to settle a dispute in accordance with the principle of equity only "if the parties agree thereto". There could accordingly be no recourse to equity in international law unless the parties expressly accepted it. But equity could in itself be a rule of positive law when it was prescribed as a solution by a rule of positive law. For instance, when a convention stated that the principle of equity applied in the absence of agreement between the parties, it was stating a rule of positive law. In that case, if a dispute between the parties to the convention was referred to an international arbitral tribunal, the tribunal did not need the consent of the parties to judge according to equity, because equity

had become a rule of positive law. That was the method the Special Rapporteur had relied on to solve the problem of equity. Article 17 therefore represented the application of a positive rule, not the traditional recourse to the *ex aequo et bono* principle.

16. How should the rule of equity be formulated? In his opinion, it should be derived from the material sources of law, as might be done by a legislator, taking account of the principles of justice, but adapting them specifically to the circumstances of the case. In that sense, the criterion of equity was the one best suited to the cases covered by article 17—they comprised a great diversity of particular cases, which could not be strictly classified in advance and to which ready-made solutions could not be applied. The solutions must depend on the circumstances and be found by applying the principle of equity in each particular case. The diversity of the cases justified recourse to a general criterion such as that of equity. The rule stated in the article did not empower the judge to decide a case *ex aequo et bono*: it required him to find the solution to the dispute in equity. That criterion must be applied, in particular, when the movable or immovable property was not situated in the territory of the successor States.

17. Of course, the settlement of the problems must be left, first of all, to the parties, and the Special Rapporteur had referred to several cases in which the parties concerned had reached an agreement. But it was necessary to formulate a criterion which would guide the parties and help them to agree. By formulating a rule which provided for the application of the principle of equity, the Commission could help States to find an acceptable solution. He therefore proposed that article 17 be referred to the Drafting Committee.

18. Mr. TAMMES observed that, in his excellent commentary to article 17, the Special Rapporteur had made it very clear that, for the purposes of the attribution of State property in cases of dissolution or separation of States, the question of whether the predecessor State continued or ceased to exist was not of decisive importance. In paragraph 8 of his commentary, the Special Rapporteur affirmed that the predecessor State was, in a sense, treated as one successor State among all the others—a statement that contrasted with the provisions of the draft articles on succession of States in respect of treaties, under which the fate of the predecessor State played an important part from the point of view of the continuity of treaty relations. Should it consequently be inferred that the whole typology of separation employed in the draft articles on succession in respect of treaties was not relevant to the case of State property? In his opinion, the reasons which had prompted the Commission to formulate special rules for cases of separation similar to the formation of a newly independent State were pertinent in the cases covered by article 17.

19. The dissolution, in 1944, of the union between Denmark and Iceland was a typical example of peaceful and agreed separation. However, many instances of secession had not been peaceful, nor were they likely to be peaceful in the future. He did not see why, in the many cases of enforced separation, the new State, which would

⁶ *Ibid.*, paras. 56 *et seq.*, of the commentary.

⁷ *Ibid.*, paras. 13-14 of the commentary.

in any case find itself in difficult circumstances, should be denied the favourable presumption in article 14, paragraph 2, that the movable property situated in its territory would pass to it unless such property had no direct and necessary link with the territory or it was otherwise agreed. In those cases of unfriendly separation, there would be no agreement and he questioned why the separating State should be encumbered with the burden of proving the existence of a direct and necessary link or that it was, in equity, entitled to the property. That did not seem particularly just, in view of the often unequal position, in political terms, of the parties in dispute. A more uniform provision for presumption, and thus for burden of proof, could be incorporated in the present draft. While it might be in accordance with the practice and facts of international life to start from a presumption based on the location of the property in the territory concerned, the Commission must none the less admit that it did not know very much about the practice underlying the application of the rules stated in article 17.

20. In the famous case of the Magnusson collection,⁸ for instance, it was not yet known on what grounds the Copenhagen High Court had reached its decision concerning the restitution of that cultural property. Had it been based on an interpretation of a special clause in the Danish-Icelandic agreement or had it involved the application of a general principle? In the major case of dissolution of a State into two new States which had not been the constituent parts of a union—the case of Germany in 1945—the sole example available was the unsolved problem of the allocation of the Prussian Library,⁹ which merely indicated the limitations of the principle of equitable apportionment in the case of cultural property belonging to a whole people rather than to one or more successor States. As rightly stated in article 1 of the Convention concluded between the Republic of Austria and Italy on 4 May 1920,¹⁰ such property was “indivisible”.

21. Again, the court of a third State, in which property affected by a succession was situated, would not find it easy to apply the principle of equity in accordance with article 17, paragraph 3, quite apart from such impediments as the absence of recognition, which had occurred in the case of Irish funds deposited in the United States, mentioned in paragraphs 63 to 66 of the commentary.

22. It should not be assumed that his remarks contradicted the view he had expressed at an earlier meeting, namely, that the equitable principles underlying the decision of the International Court of Justice in the *North Sea Continental Shelf* cases had found their right and proper place in the present draft.¹¹ The notion of equity was essential in the context of article 17.

23. Mr. PINTO said it would be advisable to state explicitly that paragraph 1 of the article did not preclude

the application of the principle of equity. For example, important and costly immovable property such as a dam or port installation might be placed, for development purposes, in a relatively poor area of a State and the necessary funds might come from outside that area. If the area in question later fell within the territory of a new State, some kind of compensation would have to be considered, as was noted in paragraph 22 of the commentary. In its present form, paragraph 1 did include the proviso “except where otherwise specified in treaty provisions”, but that formulation was too concise to cover application of the principle of equity and no indication was given that the need for some form of compensation might arise.

24. In his opinion, it would be preferable to introduce into paragraph 1 the idea that, in cases of separation, there was at least an obligation to negotiate in order to reach agreement on the basis of equity, where it could be established that the other State had made a substantial contribution to the creation of the immovable property. The notion of a contribution to the creation of immovable property, which was certainly relevant in the case of dams or port installations, was already embodied in article 15, subparagraph (b) and it should be more generally applied. Consequently, the obligation to negotiate and to reach a settlement on the basis of equity should be made more explicit in relation to paragraph 1, bearing in mind the Special Rapporteur’s statement that it was already implicit in that paragraph.

25. Mr. RAMANGASOAVINA said that, in article 17, the Special Rapporteur had succeeded in determining the various cases which could arise and which, to some extent, resembled those dealt with in the preceding articles. With regard to immovable property, the Special Rapporteur had found a valid formula by first bringing the criterion of presumption into play. It was, in fact, quite normal for immovable property to be attributed to the State in whose territory it was situated. Moreover, if the property of a union of States was situated in a single State—for example, in the capital of the union or in the State which was best suited to certain industrial or financial activities—there was nothing to prevent the other States from receiving compensation in proportion to the share they had contributed.

26. To some extent, that presumption also applied to movable property, but in that case there was also the criterion of equity, which was the key to the apportionment of the property which had belonged to the union. That principle was essential in the cases covered by article 17, but it was very difficult to apply, and should, therefore be made clearer. The principle of equity should be applied to a large extent in settling the disputes which could arise as a result of a separation of States, but it was also necessary to stress the elements to be used in valuing the property so that it could be equitably apportioned. With regard to archives, for example, the essential criterion to be applied was that of the direct and necessary link with the territory. But other elements could also come into play in the apportionment of movable property. When it was necessary to apportion property such as currency, which was essential to the viability of a State, the criterion of equity should introduce such elements

⁸ *Ibid.*, para. 43 of the commentary.

⁹ See *Yearbook... 1970*, vol. II, p. 161, document A/CN.4/226, part II, para. 49 of the commentary to article 7.

¹⁰ See A/CN.4/292, chap. III, para. 39 of the commentary to article 17.

¹¹ See 1391st meeting, para. 5.

as the size of the territory, its income and its budget. The principle of good faith should also be introduced, particularly in cases of arbitration, where it was often necessary for the application of the principle of equity.

27. He considered that article 17 was perfectly acceptable and that, subject to some drafting changes to clarify the scope of the terms used, it could be referred to the Drafting Committee.

28. Mr. KEARNEY said that among the many points raised in an extremely fruitful discussion, the Commission would inevitably have to take into consideration the question posed by Mr. Tammes concerning the way in which cases of separation were treated in the present draft and in the draft articles on succession of States in respect of treaties. As he had already pointed out in connexion with articles 14 and 15, cases of separation of parts of a State would continue to occur in circumstances very similar to those involving the creation of newly independent States.¹² To a large extent, the rules concerning newly independent States in the draft articles on succession of States in respect of treaties were designed to cover instances in which a metropolitan and a dependent territory separated. Obviously, the situation was different in the case of a single territory which broke up into two or more States. One possibility might be to formulate a somewhat modified rule concerning the direct and necessary link, that was to say, to create a presumption that the area in which the property was situated at the time of the dissolution or separation of parts of a State would be presumed to have the direct and necessary link, unless it was established otherwise.

29. With regard to paragraph 1, Mr. Pinto's highly pertinent comments concerning a contribution to the creation of immovable property and the need for compensation had also foreshadowed another problem, that of succession to public debts—a matter that was likely to be intimately bound up with equitable apportionment of the property in question. It would be interesting to learn the Special Rapporteur's views on whether a cross-reference should be made to public debts, indicating that the problem would be examined at a later stage, or whether it should be considered at the present time.

30. It had also been suggested that, where movable property was concerned, there should be an interplay between the principles of the direct and necessary link and of equitable apportionment. The difficulty inherent in the concept of a direct and necessary link was that movable property might have such a link with all the parties concerned, and application of the principle of equitable apportionment might be the only way to decide which of the competing links was the most important. It might prove necessary for the Commission to develop further the interrelationship between those two principles; otherwise, it would be very difficult to determine which was to be the governing factor.

31. Paragraph 3 posed the problem of which system of law was applicable. Was it the law of the particular third

State, that of the predecessor State or general international law? In determining title to property, specific rules had to be applied and courts and tribunals would be inclined to apply the *lex fori*. The findings of an international tribunal might be different, but it was more than likely that, in a third State, the law of that State would apply. Consequently, it was necessary to consider the latitude to be given to the third State in determining what the equitable apportionment was to be.

32. In conclusion, he wished to point out that he agreed with the need for a general approach. He had simply mentioned questions and problems that would arise as a result of such an approach.

33. Mr. USHAKOV said that, in principle, he accepted article 17, but he wished to make three comments. First, he questioned whether the Commission should provide, as it had done in article 33, paragraph 3, of the draft on succession of States in respect of treaties, for the case in which a part of the territory of a State separated from it and became a State in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. That distinction was justified by the fact that two principles were applicable to succession in respect of treaties; the principle of continuity, which was valid in normal circumstances, and the clean slate principle, which was appropriate in the case covered by article 33, paragraph 3. For the purposes of draft article 17, it was not necessary to differentiate according to the way in which the new State was formed in the event of separation. Whether the separation took place in accordance with an agreement concluded with the predecessor State or as the result of a struggle for self-determination, the property must pass to the successor State.

34. In the case of separation, it was the solution by agreement which should take precedence. If possible, an agreement must be concluded between the predecessor State and the successor State or States or, when the predecessor State ceased to exist, between the successor States. He was not sure whether the case in which the State formed as a result of the separation possessed its own property should be treated separately. In that connexion, he reminded the Commission that, when preparing the draft on succession of States in respect of treaties, it had referred to the case of the property belonging to Syria and Egypt before the formation of the United Arab Republic.

35. Article 17, paragraph 3, related to the movable and immovable property of the predecessor State, although immovable property seemed to be covered already by paragraph 1, which applied to immovable property in general, wherever it was situated. With regard to movable property, which was referred to in paragraph 2 and had, in some cases, to be equitably apportioned, it should be noted that it was not always possible to carry out an equitable apportionment. For example, if the predecessor State agreed to lend a building for the embassy of one successor State, it was not always possible for it to do the same for other successor States. In reality, it was not so much a matter of equitable apportionment as of equitable compensation.

¹² See 1396th meeting, para. 26.

36. Mr. AGO said that the substance of article 17 called for a number of comments which had already been made in regard to previous articles. Since the Special Rapporteur consistently used the same terminology as in previous articles, he (Mr. Ago) could only repeat that he endorsed the principle of equity, but had doubts about its practical application. He stressed that article 17, even more than other provisions, would justify the introduction of an obligation to negotiate. It was because each case was different that the Special Rapporteur had suggested recourse to the principle of equity, but it was for that same reason that the obligation to negotiate would be particularly appropriate. The rules stated in article 17 should really only make up for the absence of an agreement between the parties.

37. With regard to the drafting of the article, he was not sure what subject the words "its immovable property", at the beginning of paragraph 1, related to. He thought that many drafting difficulties might be due to the fact that the Special Rapporteur had dealt simultaneously with two cases which ought to be separated: that of complete dissolution and that of simple separation. In paragraph 2, the words "its movable property shall... be attributed to the State with whose territory it has a direct and necessary link" were appropriate in the case of dissolution, since the predecessor State no longer had any property; in the case of separation, however, the predecessor State continued to exist and nothing was attributed to it: it simply remained the owner of its property.

38. Mr. MARTÍNEZ MORENO said that article 17 was the last of a set of articles which dealt with succession to State property in the various cases or types of succession of States. After disposing of that problem in the other types of succession, it was logical to deal, in article 17, with the fate of State property in cases of separation or secession.

39. He entirely agreed with Mr. Yasseen and other speakers that the principle of equity embodied in the rules in paragraphs 2 and 3 was a substantive principle, different from the procedure of adjudication *ex aequo et bono*. Whether it was to be construed, according to Aristotle, as justice applied to a specific case, or in any other manner that was generally agreed, the concept of equity should be the underlying principle of the rules in article 17.

40. The Special Rapporteur had given an exhaustive account of State practice and legal literature in support of article 17. He had been struck, however, by the fact that the Special Rapporteur had not included among his examples the case of Panama, which had become a member of the international community under very special circumstances, which had had a series of consequences. The relations between Panama and Colombia, the State from which it had separated, had for a long time been far from cordial and it was particularly impressive to note that the President of Colombia, Mr. López Michelsen, was now a staunch advocate of the Panamanian cause. As a Latin American, and as a jurist devoted to the rule of law, he (Mr. Martínez Moreno) believed that it was necessary to reassert the fundamental principle that immovable property belonged to the successor State

in whose territory it was situated. The right of Panama to the whole of its territory should accordingly be acknowledged. It was, moreover, impressive to see the spirit of justice shown by the present Government of the United States of America in that regard. Despite strong opposition and considerable internal difficulties, that Government had formally adhered to its policy of negotiating with Panama as an equal. That attitude placed the United States high among countries which showed respect for the rights of others.

41. The principle that immovable property should be attributed to the successor State in whose territory it was situated should be based on respect for the full exercise of the sovereignty of that State over much immovable property, even if it represented a large area of the States territory.

42. During the debate, Mr. Kearney had drawn attention to the question of debts incurred in connexion with the immovable property that would pass to the successor State. He had rightly pointed out that where property passed to that State, any debts relating to the property should also pass to it. An example, that came to mind was the case of a dam, an irrigation system or a hydroelectric plant constructed with the aid of a long-term loan from the World Bank or a regional development organization. A successor State which, following a succession of States, became the sole owner and beneficiary of such immovable property, should logically have to bear the burden of amortizing the loan.

43. He agreed with Mr. Ago that provision should be made for an obligation to negotiate. Direct negotiation between the parties concerned was the golden rule of diplomacy. But if the negotiations were not successful, the parties should resort to other means of peaceful settlement, in particular, arbitration or adjudication by the International Court of Justice. There was no other way in which property could be equitably apportioned among the States concerned. In the case, contemplated in paragraph 3, of property situated in a third State, perhaps the safest course was to apply the *lex fori*, so that the property would devolve in accordance with the local law.

44. In view of the many problems which could arise in regard to succession to State property in cases of separation of part of a State, he believed that the draft articles should specify an obligation to negotiate and make provision for procedures for the settlement of disputes.

45. He noted that, in his valuable commentary, the Special Rapporteur had quoted chiefly from two authors: Fauchille and Bustamante y Sirvén. He therefore wished to take that opportunity of raising a point connected with article 16. In paragraph 5 of the commentary to that article, the Special Rapporteur had quoted a passage from Bustamante y Sirvén which referred to the annexation of one State by another. It was necessary to stress that, in Spanish, the expression *anexión de Estados* could be used with two meanings: the first was the complete union of States by lawful means; the second was the absorption by force of one State by another. In his books, Bustamante y Sirvén had referred to the

first case, and had never attempted to justify the illegal annexation of one State by another. He thought it necessary to draw attention to that point because of the prestige of that great Latin American writer, who had been the father of the codification of private international law. He was sure that the Special Rapporteur had intended to give a correct impression of the views of Bustamante y Sirvén, but the passage quoted could be misinterpreted.

46. He agreed that article 17 should be referred to the Drafting Committee.

47. Mr. QUENTIN-BAXTER said that article 17 completed the set of articles on State property and in a sense controlled it. The cases dealt with in article 17 had some similarity with the situations contemplated in articles 12 and 13, where a predecessor State remained. They also had similarities with the situations envisaged in articles 14 and 15, in the sense that the succession produced a new international person, and it was necessary always to bear in mind that the agreements would have to be recognized and applied after the moment when the succession of States occurred.

48. On comparing the solutions set out in article 17 with those applied to other situations, however, one was struck by the role played by the locality of the property. As article 17 now stood, the rule that property was attributed to the State in whose territory it was situated appeared to be laid down in somewhat absolute terms. Paragraph 1 concerning the fate of immovable property did contain the proviso "except where otherwise specified in treaty provisions", but those treaty provisions would be influenced by the rules which the Commission would adopt. Apart from that, the rule in paragraph 1 was not qualified in any way: the immovable property went to the State of situation.

49. As far as movable property was concerned, the question of locality was not specified as a criterion of any kind. Irrespective of location, the destination of movables was determined by other tests: linkage, contribution and equitable apportionment. In fact, each of those three criteria should be recognized as aspects of a deeper sort of equitable test, which needed to be expressed differently for different types of succession.

50. It was also of interest to contrast the rules in article 17 regarding succession to immovable property in the territory of the predecessor State, with the rules adopted for a similar situation in other articles of the draft. It should be remembered that many cases which came under article 17 would involve a predecessor State. In articles 12 and 13, the rule was that immovables would pass to the successor State if there was a link with, or a contribution by, that State. In the case contemplated in articles 14 and 15, such immovables passed to the successor State only if there had been a contribution by that State. Location would appear to play no part: the test was purely that of linkage or of equity.

51. If locality were the only criterion in the matter, no rule would be needed. It was also clear that, where national selfishness might intrude, locality could not be the only test. As he saw it, the rule should be that locality was not a sufficient guide to ownership in the case of a succession of States. It had to be recognized

that there were cases in which much of the national wealth and public expenditure had been directed to a particular locality and to particular resources. If, unfortunately, the State broke apart, the principle of equity required that immovable property should not go without any qualification to the successor State in whose territory it was situated. It had to be recognized that there were cases in which the question of contribution would arise.

52. When dealing with movables, where the predecessor State survived and perhaps even where there was a total dissolution of the predecessor State, it was not realistic wholly to ignore the location. Very often, location would provide an obvious guide as to who should succeed. Movable property was in many cases associated with immovable property: sufficient examples were the furniture in a building and the maintenance equipment of a railway.

53. There was thus a natural and obvious link based on location. It was, of course, necessary to qualify the test of location by reference to linkage of particular property with a new State formed by separation or dissolution, and also by taking into account the question of equitable apportionment. Those qualifications, however, should be introduced against the background that location was not a sufficient test, not that it was no test at all. He did not believe there was any disagreement between him and the Special Rapporteur with regard to the dominant idea, but simply with regard to the form in which article 17 was presented.

54. The Commission should also consider carefully whether slightly different treatment might not be required for the case of separation, where a predecessor State remained, and the case of dissolution, where the predecessor State disappeared. In that connexion, consideration should be given to aligning article 17 more carefully and more precisely with the language used in the 1974 draft on succession of States in respect of treaties.

55. He subscribed to all the remarks which had been made regarding the duty to negotiate. The recognition of that duty, however, did not relieve the Commission of anxiety with regard to the drafting of the rules it would embody in article 17. Whether agreements were outlined before the separation of a State or whether, in the case of violent secession, the entire negotiation had to take place after the succession of States, the rules that would be adopted by the Commission would exert a certain legal and moral influence: they would be the background against which the negotiations would take place.

56. Mr. BILGE said that he approved of the substance of article 17. The solutions proposed by the Special Rapporteur were satisfactory and recourse to the principle of equity was just. It seemed, however, that that principle did not have the same role in each of the three paragraphs of the article. For the purposes of paragraphs 1 and 2, the principle of equity should serve to correct the formalistic aspect of the rules stated in those two provisions concerning the attribution of movable and immovable property. For the purposes of paragraph 3, which contained no other rule than recourse to the principle of equity, that principle should apply as broadly as possible and thus have a creative effect. It should be noted that the application of the principle of

equity involved an obligation to negotiate with a view to reaching an agreement.

57. With regard to the drafting of the article, in paragraphs 1 and 2, he would prefer a reference to the “*principles*”, rather than the “*principle*” of equity; paragraph 3 should not be changed, though it might be made into a separate article. The same applied to article 16, paragraph 2, on which he had not had an opportunity of expressing his views.

58. Sir Francis VALLAT said he wished to stress two points in connexion with article 17. The first was that where the predecessor State continued to exist, there was, at least in internal law, a possibility of continued ownership. In the case of dissolution of a State, where the predecessor State disappeared, there could well be a vacuum creating serious legal problems.

59. Consideration should therefore be given to laying on the State where the property was located an obligation to honour the rights and interests of the successor State. Otherwise, apart from conflicts between two or more successor States, there could also be a conflict between a successor State and the local government claiming the property for itself. In many countries, there was a rule of internal law whereby *bona vacantia* became the property of the State in which they were situated. The Drafting Committee should give some thought to that point.

60. He was also concerned at the loose and general use of the term “equity”. As he understood the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases,¹³ the Court, when recommending parties to apply equitable principles in their subsequent negotiations, had been careful to indicate the factors they should take into account. Without a directive of that kind, a reference to “equity” would be unduly vague. Hence the Special Rapporteur’s remark: “In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelt out in individual agreements”.¹⁴

61. In the context of a succession of States, the two main factors relevant to equity were clearly the question of linkage and the contribution to an asset. That relationship should be made clear in paragraph 2 of article 17. In paragraph 3, however, it was necessary to indicate more concretely what was to be regarded as equitable for the purposes of application of that paragraph.

62. Mr. CASTAÑEDA said he approved of the Special Rapporteur’s approach to the problems involved in article 17 and the basic solutions embodied in that article. He particularly welcomed the introduction of the criterion of equity, which alone could provide a solution to the problem of attributing property in the variety of circumstances and situations covered by the article.

63. The principle of equity was embodied in article 17 as a substantive rule of law and not by reference to the procedure of adjudication *ex aequo et bono*. That prin-

ciple was intended to provide a guide to the parties in their negotiations, and to any authority adjudicating a dispute. The question of the law to be applied by the judge of a third State, to which Mr. Kearney had referred, was a different matter.

64. He agreed with Mr. Ago that there should be an obligation to negotiate, but he believed that the question of the peaceful settlement of disputes should be kept apart. Some separate provision on that subject, possibly in the form of an optional protocol, might perhaps be attached to the set of draft articles later.

65. He was in favour of retaining article 17 as it stood, though he could accept Mr. Ushakov’s suggestion that precedence be given to agreement between the parties. That would show that the other rules set out in the article were residuary rules, to be applied only if the parties concerned did not agree otherwise.

66. On the question whether the location of the property should be the sole criterion, he had been impressed by Mr. Quentin-Baxter’s remarks, but in view of the great difficulty of the problem, he doubted whether there was a better solution than that proposed in the article. Where immovable property was concerned, its location provided a strong presumption, and the only practical solution was to attribute it to the State in whose territory it was situated.

67. Reference had been made during the discussion to the case of investments made in a depressed area for purposes of development and the need to take them into account when a succession of States occurred. He believed that situations of that kind could be best settled by agreement between the parties.

68. It was also logical, when attributing the ownership of immovable property, to take account of public debts incurred to create that property. On that point, he thought that if several or all of the successor States had contributed to the cost of constructing public works which, after the succession of States, remained entirely in the territory of one successor State, the principle of equity required that the State benefiting from the property should pay an indemnity to all the other successor States which had contributed to its cost. That conclusion would be examined by the Commission when it came to consider the question of public debts, but it did not in any way detract from the soundness of the solution of attributing immovable property to the successor State in whose territory it was situated.

69. With regard to movables, the rules stated in article 17 differed from those laid down in article 15 concerning the case of a newly independent State. In the cases covered by article 17, the situation was rather different, in that there were several successor States and it was therefore logical to attribute the property on the basis of linkage and equitable apportionment.

70. He agreed with Mr. Ago on the need to clarify the wording of the article in order to cover the different situations which arose in the case of separation of part of a State and in that of the total dissolution of a State leaving several successor States and no predecessor State. He suggested that the Drafting Committee should under-

¹³ *I.C.J. Reports 1969*, p. 3.

¹⁴ A/CN.4/292, chap. III, para. 34 of the commentary to article 17.

take that clarification, but keep the provisions in a single article.

The meeting rose at 6 p.m.

1400th MEETING

Tuesday, 29 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 17 (Succession to State property in cases of separation of parts of a State)¹ (*concluded*)

1. Mr. NJENGA said that he agreed substantially with article 17, which was the last of the series or articles under consideration. It was a well-balanced article which provided a good basis for the Drafting Committee to work on.

2. He fully concurred with the Special Rapporteur's approach, which aimed at ensuring a just distribution of State property in cases of separation of parts of a State. He agreed with the Special Rapporteur that it was not necessary to specify whether the predecessor State continued to exist after the separation or whether there was a complete dissolution. The principles applicable in both situations were identical: those of justice and equitable distribution.

3. It had been said during the discussion that equity could mean anything or nothing. It was certainly difficult to specify the conditions that had to be taken into consideration in order to ensure a just outcome in every case. The situations concerned differed considerably and the factors to be taken into account varied accordingly.

4. In the present context, however, equity was not a concept of absolute justice but rather a principle of law. That point had been well brought out by the International Court of Justice in the *North Sea Continental Shelf* cases, in a passage quoted by the Special Rapporteur in his report:

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-

up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.²

That passage afforded a good basis for the application of the principle of equity as a rule of law in the cases covered by article 17.

5. Secession was usually an unhappy process and the examples given by the Special Rapporteur confirmed that. In modern times, cases of separation of part of a State were very rare. The only situations of that kind that could be mentioned were the separation of India and Pakistan in 1947, the separation of Singapore from Malaysia in 1965 and the more recent case of Bangladesh. There had been a few attempts at secession in Africa, which had constituted very unfortunate incidents. He was thinking of the case of Katanga and of the more recent situation in Angola, where mercenaries had tried to break the State into several portions to the detriment of its people. He suggested that the wording of article 17 should take into account the unhappy character of the situations which the article covered.

6. The provisions in paragraph 1 on the attribution of immovable property would not always make for a just solution. It would not be fair to attribute a dam, a hydroelectric scheme or some other major public work to the successor State in whose territory it was situated if the cost of construction had been paid by all parts of the predecessor State. He suggested that a different rule was necessary to deal with cases of that kind. The property should go to the State where it was situated, but the rule to that effect should be coupled with an obligation to work out an agreement to compensate the other States which had contributed to the formation of the property in question. There was clearly no reason to apply one and the same rule to different categories of State property such as State land and major hydroelectric schemes. He also suggested that the Drafting Committee should take into account the fact that in African law immovable property was subject to different kinds of régime, including communal ones.

7. By way of illustration, the Special Rapporteur had referred to the case of the dissolution of the East African Currency Board³ and the treatment of the funds attributed to the three States which had been its members. Another case conceivable was that of three States forming an association of that kind and building a harbour or port in the territory of one of them as the common property of all three. In the event of the dissolution of the association, it would be totally unjustifiable to attribute the harbour or port automatically to the State in whose territory it was situated. The Special Rapporteur had not ruled out the possibility of a more just solution, since he had said that the parties concerned were completely free to settle the matter among themselves by agreement. The parties were clearly under an obligation to enter into an agreement to effect an equitable

¹ For text, see 1399th meeting, para. 1.

² See A/CN.4/202, chap. III, para. 16 of the commentary to article 17.

³ *Ibid.*, para. 28 of the commentary.

apportionment by making compensation where appropriate.

8. With regard to movables, the two criteria set forth in paragraph 2 of the article, namely that of the direct and necessary link and that of apportionment on the basis of equity, should be taken not as independent of each other but as cumulative, since both aimed at achieving a just distribution of movables.

9. Lastly, he agreed with the rule embodied in paragraph 3; if applied in good faith, that rule should provide a satisfactory solution to the problem of property situated outside the territory of the predecessor State.

10. Article 17 might be referred to the Drafting Committee, which he felt sure would make the text fully acceptable.

11. Mr. SETTE CÂMARA said that he had no objection to the text of article 17 as submitted by the Special Rapporteur.

12. The Special Rapporteur's starting-point was that the situation dealt with in article 17 constituted a return to the situation existing prior to the uniting of States, after the latter had proved a failure. He himself was not at all certain that the return to the *status quo ante* was the real starting-point. The Special Rapporteur had acknowledged that there could be a separation of parts of a State, or a dissolution of a State, which throughout its history had been a unitary State and not a union, although the Commission itself had recognized that "almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States".⁴

13. The practical effects of the distinction between dissolution and separation had given rise to divergent opinions on the part of States which had commented on the 1972 draft articles on succession of States in respect of treaties.⁵ The distinction had some meaning in the context of the present draft, where it was impossible to ignore the fact that the predecessor State disappeared in the case of dissolution but survived in the case of separation. Where the predecessor State survived, it should qualify for treatment at least equal to that of the other successor States in the distribution of State property. The Special Rapporteur, however, had decided to combine the two cases, as had been done in the 1974 draft articles on succession of States⁶ in respect of treaties following the comments on the 1972 draft.

14. In providing for the passing of State property, the Special Rapporteur had remained faithful to the distinction in treatment between movable property and immovable property which was now a general feature of the whole draft.

15. As far as immovable property was concerned, the rule in paragraph 1 attributing it to the State in which

it was situated was logical and natural. The location of immovable property constituted evidence of a physical link which had to be taken into account in a case of succession. The saving clause "except where otherwise specified in treaty provisions" preserved the freedom of action of States which decided to settle the question of succession by treaty. He himself, however, doubted whether the location of the property alone should be taken as a permanent criterion in the absence of express agreement. He cited the example of a union of States in which a constituent State had important property, such as a building for its representation, in the capital of the union; with the separation, the capital remained the territory of the predecessor State, which continued to exist. In that case, the separated State should not be deprived of that property merely because it was in the territory remaining to the predecessor State. Perhaps the rule in paragraph 1 should be modified to cater for such situations.

16. Paragraph 2, dealing with movable property, specified that its attribution would depend on the criterion of the direct and necessary link, but it did not make it very clear whether that criterion excluded the one specified in the second subparagraph, namely that of apportionment. As he saw it, apportionment would take place only if there was no direct and necessary link, or if such a link existed with all the States disputing a succession.

17. It was hardly necessary to repeat everything which had already been said during the discussion about the dangers of relying on the vague concept of equity in matters of apportionment. The Special Rapporteur himself had recognized that equity meant everything and nothing.⁷ It was true that the Special Rapporteur, on the basis of the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, had differentiated slightly between the meaning of "equity", seen as abstract or natural justice as opposed to formal justice, and that of "equitable principles" which were applicable as a result of a rule of law.⁸ He himself, however, still believed that the use of some vague formula such as "reasonable and normal", which appeared in paragraph 1 of article 11 of the 1961 Vienna Convention on Diplomatic Relations⁹ and in article 14 and 46 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,¹⁰ would be less dangerous than relying on "equity", which was the ultimate remedy for *non liquet*.

18. With regard to paragraph 3, which dealt with the apportionment of movable and immovable property situated outside the territory, he failed to see why the principle of consideration for the contribution of each territory to the formation of the property, a principle which appeared in a number of the previous articles,

⁷ A/CN.4/292, chap. III, para. 34 of the commentary to article 17.

⁸ *Ibid.*, paras. 13-16 of the commentary.

⁹ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁰ See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), pp. 171 and 175.

⁴ *Yearbook... 1972*, vol. II, p. 295, document A/8710/Rev.1, chap. II, sect. C, para. 12, of the commentary to article 27.

⁵ *Ibid.*, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C.

⁶ *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

should not be applied in the cases covered by articles 16 and 17 when an equitable apportionment had to be arrived at.

19. Subject to those comments, he had no major objection to the substance of article 17. The article should be referred to the Drafting Committee.

20. The CHAIRMAN, speaking as a member of the Commission, said that he approved the substance of article 17. For reasons which were not merely a question of drafting, however, he suggested that the expression "principle of equity" should be in the plural and that the notion of equity should be developed either in the text of the article itself or in the commentary. To that end, the Commission might perhaps include a reference to the source of funds. Subject to that reservation, article 17 might be referred to the Drafting Committee.

21. Speaking as Chairman, he invited the Special Rapporteur to reply to the observations made on article 17.

22. Mr. BEDJAOUI (Special Rapporteur) noted that all the members of the Commission had considered article 17 acceptable and had found that his proposals for it were justified. The test of equity on which the article was based had given rise to many observations.

23. As far as the need to rely on the criterion of equity was concerned, the situations contemplated in article 17 could not be resolved without it, since no legal rule could settle in detail the variety of situations of that kind which arose. As pointed out by Mr. Yasseen,¹¹ the approach to the notion of equity in article 17 was different from that which had guided the Permanent Court of International Justice and the International Court of Justice in deciding cases *ex aequo et bono* where the parties had agreed to that. In many cases, those Courts had touched only superficially on the problem of equity, having been unable to go very far because the parties had not consented to a judgment being given *ex aequo et bono*.

24. After mentioning a number of cases in which the Permanent Court of International Justice had raised the question of equity, he said that, in the *Serbian Loans* case, counsel for one of the parties had held that equity was conceivable without law but not law without equity; he had defined equity as "the law which stood above written law, the law which was engraved on the human conscience, the natural law which proceeded from the very nature of beings and things without the positive intervention of any legislator."¹² In the present case, the legislator would intervene, since article 17 stipulated that the principle of equity should be applied. In the *Oscar Chinn* case, one of the parties had contended that the application of the criterion of equity implied that the judge should make an *ex aequo et bono* assessment of what was "reasonable" in the particular case and place and at the particular time.¹³ It was precisely on that understanding that the question should be decided whether or

not it was reasonable to attribute a particular item of State property.

25. In referring to equity in article 17, he had not intended to refer to a source which the judge would apply *ex aequo et bono* if the parties agreed, but to a notion which was an integral part of the positive rule embodied in the article. It was equity construed as a rule of positive law and a source of substantive law. As pointed out by Mr. Njenga,¹⁴ the application of equity meant the application of a principle of law. International courts could not invoke equity without the consent of the parties because otherwise they might be tempted to stray from the field of law into that of political controversy. For the purposes of article 17, however, equity formed part of the substantive content of a rule of positive law.

26. Several members of the Commission had discussed the problem of the constituent elements of equity. Thus, on the subject of archives, Mr. Ramangasoavina had stressed, at the previous meeting, the importance of the territory, its extent, its wealth and its population. Equity did not imply a division into equal shares but rather a division which took those various elements into account. That was why Mr. Bilge¹⁵ and Mr. Reuter¹⁶ preferred the wording "*principles of equity*" to the words "*principle of equity*".

27. With regard to the role and place of equity in the article under consideration, he wished to make three comments. In the first place, paragraphs 1 and 2 contained two objective criteria which predominated, namely that of location and that of the direct and necessary link; the criterion of equity merely operated to redress unbalanced results. In paragraph 3, on the other hand, the criterion of equity had a creative role, since it was an essential ingredient in the apportionment of property situated outside the territory of the predecessor State. Secondly, it was precisely for that reason that the effects of article 17 were different from those of the previous articles. Lastly, he referred to the observations by Mr. Ushakov¹⁷ and Mr. Castañeda,¹⁸ both of whom had suggested that the property should be apportioned by agreement between the parties and, failing such agreement, in accordance with the rules of equity set forth in article 17. Personally, he was of the opinion, like Mr. Pinto, and other members of the Commission, that paragraph 1 should provide that even an agreement of the parties must respect the principles of equity applicable in the matter.

28. Several members of the Commission had proposed that an obligation to negotiate in good faith should be introduced into the article. Mr. Bilge, for his part, had pointed out that the obligation to negotiate was part of the very idea of equity.¹⁹ Mr. Castañeda had urged that the substantive rules of article 17 should not be mingled

¹¹ See 1399th meeting, para. 15.

¹² *P.C.I.J.*, Series C, No. 16 (III), p. 211 (translation by the United Nations Secretariat).

¹³ *Ibid.*, No. 75, p. 106 (translation by the United Nations Secretariat).

¹⁴ See para. 4 above.

¹⁵ 1399th meeting, para. 57.

¹⁶ See para. 20 above.

¹⁷ See 1399th meeting, para. 34.

¹⁸ *Ibid.*, para. 65.

¹⁹ *Ibid.*, para. 56.

with procedural questions relating to the settlement of disputes.²⁰ On that point, the draft articles as a whole might be accompanied by a set of provisions for the settlement of disputes which was distinct from its substantive rules.

29. Several members of the Commission had stressed the limitations of the principle of equity, in particular with regard to cultural property and the cultural heritage. As he saw it, there were no limits to the principle of equity, only different applications of that principle. In one case, the principle might require the apportionment of certain property among the States concerned; in another, it might require the attribution of the property to one of those States in order to preserve the integrity of the property.

30. Members of the Commission had also been concerned about the geographical criterion of the location of the property, which was bound to play an important part. In particular, Mr. Quentin-Baxter had compared article 17 with the previous articles from that point of view.²¹ In article 17, the test of location played an important but not an exclusive role. The geographical link created a very strong presumption but, where necessary, it had to be qualified by the principle of equity. In that connexion, several members of the Commission had given examples of the need to make compensatory equalization payments, financial or otherwise, and also to share public debts. As Mr. Castañeda had rightly pointed out, however, those examples in no way detracted from the fundamental criterion of the location of the property.²²

31. Reviewing the observations made in connexion with each of the three paragraphs of article 17, he mentioned first the suggestion by certain members of the Commission that the notion of equity should be expressly introduced into paragraph 1. It was an idea which he himself had touched on in his report;²³ it would be particularly relevant in cases of succession to dams and other public works, especially where a unitary State dissolved. The notion of equity should also operate in the event of succession to a mine or jointly invested funds.

32. The question of succession to public debts had also been raised, by Mr. Kearney²⁴ and Mr. Martínez Moreno.²⁵ In that connexion, a "localized" debt would probably be taken over by the State in whose territory a dam or other public work, for example, had been constructed with the aid of the loan which was the counterpart of that debt. If the case related to a national public debt and the successor State had benefited from the corresponding loan, it would shoulder the burden of the loan to the extent of the value of the assets which it had obtained. Whatever the case, the successor State

would in all probability take over the corresponding debts in some manner or other. The question was one which would have to be examined at a later stage, but he was not opposed to its being dealt with briefly in the commentary.

33. Also, as pointed out by Mr. Sette Câmara,²⁶ certain immovables covered by paragraph 1 might be situated outside the territory of a predecessor State which continued in existence. That would be another case in which the criterion of equity should be applied.

34. With regard to paragraph 2, several members of the Commission had raised the question whether the criterion of the direct and necessary link and that of equity should be applied cumulatively or alternatively. In actual fact, the two criteria should operate concurrently, as some members had observed. It would be for the Drafting Committee to clarify the relationship between the two criteria.

35. The question also arose whether paragraph 2 covered all movable property wherever situated, in which case paragraph 3 was perhaps superfluous. Paragraph 3 concerned property situated outside the territory of the predecessor State, i.e. in a third State. Movable property might also be situated in the predecessor State but outside the territory of one of the successor States to which it should be attributed under the principle of equitable apportionment or in accordance with the criterion of the direct and necessary link. That case was covered by paragraph 2. Paragraph 2 accordingly covered two cases: first, that of a movable situated in the territory of the successor State. In that case, there was a presumption that the property would devolve to that State but that another successor State could invoke the criterion of the direct and necessary link, or that of equity, in order to claim the property for itself. The second case was that of a movable which was not located in the territory of the successor State but was nevertheless located in the larger territorial area constituted by the predecessor State. That property could be situated in the territory of another neighbouring successor State.

36. Generally speaking, the arrangements proposed in paragraph 3 had been considered acceptable but certain problems had nevertheless been raised. Mr. Tammes had stressed the difficulties which the non-recognition of a dissolution or of a separation could involve in the case of property situated in a third State.²⁷ However, important though that issue might be, it was not peculiar to article 17: it might arise in connexion with any type of succession. Mr. Kearney had raised the question whether the applicable internal law was that of the third State or that of the predecessor State.²⁸ His own answer was that the rule in paragraph 3 was penetrated throughout by the notion of equity and that it had to be observed both by international courts and by the national courts of a third State. Mr. Ushakov had drawn attention to the

²⁰ *Ibid.*, para. 64.

²¹ *Ibid.*, paras. 48 *et seq.*

²² *Ibid.*, para. 66.

²³ See A/CN.4/292, chap. III, paras. 22-24 of the commentary to article 17.

²⁴ 1399th meeting, para. 29.

²⁵ *Ibid.*, para. 42.

²⁶ See para. 15 above.

²⁷ See 1399th meeting, para. 21.

²⁸ *Ibid.*, para. 31.

difficulty of sharing certain types of property.²⁹ On that point, he wished to explain that the notion of equitable apportionment in no way ruled out compensatory equalization payments of a financial or other character.

37. Several members of the Commission had spoken on article 17 as a whole and had compared it to other provisions of the draft articles. Mr. Quentin-Baxter, for instance, had observed that the notion of a contributory share expressed in paragraph (b) of article 15 did not appear in article 17.³⁰ In actual fact, it was not excluded by article 17. In the case contemplated in article 15, there was only one successor State, namely, the newly independent State. In the case covered by article 17, there were several successor States and the principle underlying the idea of contribution was replaced by the principle of equitable distribution among all the successor States in proportion to their respective contributions.

38. Comparisons made between article 17 and the previous articles had also led members to raise the problem of presumption and burden of proof. The application of the principle of self-determination could lead either to the situation provided for in articles 14 and 15—namely, the creation of a newly independent State, or to the situation provided for in article 17—namely, that of the separation of one or more parts of a State. At the 1399th meeting, Mr. Kearney and Mr. Tammes had more or less explicitly declared themselves in favour of aligning article 17 on articles 14 and 15. In accordance with article 14, movable property passed to the newly independent State unless there was no direct link between that property and the territory of that State. The burden of proof thus fell on the predecessor State. In the case covered by article 17, it would be difficult to place the burden of proof on the shoulders of the predecessor State, since that might disappear. Besides, paragraph 2 of article 17 was a neutral provision: it did not specify the State on which the burden of proof rested. One member of the Commission had suggested a solution half way between that of articles 14 and 15 and that of article 17, in the form of a presumption in favour of the successor State based on the fact that the property was situated in its territory. In actual fact, that was exactly what paragraph 2 proposed. The test of the direct and necessary link would be decisive precisely because the property was situated in the territory of the successor State.

39. The comparisons between article 17 of the present draft and article 33, paragraph 3, of the 1974 draft articles on succession of States in respect of treaties had raised the problem of a separation which occurred in circumstances essentially the same as those existing in the case of the formation of a newly independent State. Several members of the Commission had suggested that it might be advisable to deal with that case separately. Mr. Ushakov had rightly pointed out that the case in question could not be dealt with in isolation because, where State property was concerned, the circumstances

in which the separation had occurred were scarcely material.³¹

40. Several members of the Commission had also made comparisons between the various provisions of article 17 itself. They had suggested that a clearer distinction should be drawn between the cases of separation and dissolution and that slightly different treatment should be specified for each. In particular, Mr. Njenga had stressed that cases of separating invariably led to an unhappy situation.³² In point of fact, it was not easy to deal in one and the same provision with the cases in which the predecessor State disappeared as a result of dissolution and the cases in which it survived after separation. In his own view, the Drafting Committee should endeavour to draw a distinction between those two categories of cases but should not treat them differently. The wording of article 17 would in any case depend on how article 16 was finally drafted.

41. Lastly, Mr. Ushakov had referred to property belonging to the various component States of a federation such as the United Arab Republic.³³ The question arose whether, in the event of the dissolution of a federation of that kind, works of art which had previously belonged to one of the component States but which had subsequently become the property of the federation should be shared among the successor States. Neither the principle of equity nor that of the direct and necessary link, or of the origin of the property, dictated such a result. If the point could not be clarified in the text of article 17, it should at least appear in the commentary to it. Whatever the position, there was no doubt that the principle of equity referred to in article 17 required the origin of the property to be taken into account.

42. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission decided to refer article 17 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³⁴

The meeting rose at 11.05 a.m.

³¹ *Ibid.*, para. 33.

³² See para. 5 above.

³³ See 1399th meeting, para. 34.

³⁴ For consideration of the texts proposed by the Drafting Committee, see 1405th meeting, paras. 54-62.

1401st MEETING

Thursday, 1 July 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenda, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

²⁹ *Ibid.*, para. 35.

³⁰ *Ibid.*, para. 50.

State responsibility (*continued*) * (A/CN.4/291 and Add.1-2; A/CN.4/L.243 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the title of chapter III and the titles and texts of articles 15*bis*, 16 and 17, proposed by the Drafting Committee (A/CN.4/L.243).

TITLE OF CHAPTER III

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) had noted that the title of chapter III proposed by the Special Rapporteur in his fifth report (A/CN.4/291 and Add.1-2) had met with the general approval of the members of the Commission. The Committee had therefore adopted that title, which read: "The breach of an international obligation". The definite article had been inserted in order to bring it into line with the title of chapter II of the draft, "The act of the State under international law".

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

It was so agreed.

ARTICLE 15*bis* (Existence of a breach of an international obligation)

4. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following new article 15*bis*:

Article 15*bis*. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

5. The members of the Commission would recall that, during the discussion of article 16, submitted by the Special Rapporteur in his fifth report, for reasons of logic and economy in the drafting of other articles, it had been suggested that a new article in the nature of a definition should be inserted at the beginning of the chapter, dealing with the notion of breach of an international obligation. The new article would specify the conditions under which the breach by a State of an international obligation incumbent upon it occurred or, more precisely, when there was a breach of an international obligation. The Drafting Committee and the Special Rapporteur had agreed that such a provision would be useful and the Committee had therefore adopted the new article 15*bis*, entitled "Existence of a breach of an international obligation", which provided that there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. The phrase

"is not in conformity with" had been preferred to other wordings such as "conflicts with" or "is contrary to" in order to indicate that a breach might still exist, even if a State claimed that its act conflicted only partially with an international obligation incumbent upon it. Hence, for a breach to exist, it was not necessary for the act of the State to be completely and totally in conflict with what was required of it by an international obligation; a breach of an international obligation existed when the act of a State was not in conformity with what was required of it by that obligation.

6. Mr. YASSEEN said that article 15*bis* was not really necessary, but he would not oppose its adoption.

7. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 15*bis*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 16¹ (Irrelevance of the origin of the international obligation breached)

8. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following wording for article 16:

Article 16. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

9. Article 16, as originally submitted by the Special Rapporteur in his fifth report, had been entitled "Source of the international obligation breached". The members of the Commission would note that, both in the title and in the text of article 16, as adopted by the Drafting Committee, the word "origin" was used instead of the word "source". Although some members of the Committee had believed that the word "source" was appropriate, the Committee had decided that the word "origin", qualified by the phrase "whether customary, conventional or other", conveyed the intended meaning better and was not liable to cause the confusion or concern to which the use of a term such as "source" might give rise.

10. The provision contained in the article centred on the obligation breached, rather than on the international legal rule which established that obligation. Besides, in international legal theory, the term "source" was commonly used to denote not only "formal sources", but also "material sources" of law. Furthermore, the article was not intended to deal with the general theory of the sources of international law or to identify such sources, but simply to draw the necessary inferences for the purposes of the responsibility of States. As the title indicated, the

* Resumed from the 1376th meeting.

¹ For consideration of the text originally submitted by the Special Rapporteur, see 1364th-1366th meetings.

purpose of the article was simply to affirm the irrelevance of the origin of the international obligation breached, whether customary, conventional or other, so far as it related to the international wrongfulness of an act of a State which constituted a breach of an international obligation. As suggested in the Commission, the title of the article followed, with the necessary changes, the wording originally suggested in the Commission's report on its twenty-seventh session.²

11. Paragraphs 1 and 2 of the article had been redrafted in the light of the text of the new article 15*bis* adopted by the Drafting Committee, in order to achieve greater precision and clarity. For example, in paragraph 2, the expression "régime of responsibility" had been replaced by a reference to "international responsibility".

12. Mr. YASSEEN said that article 16 was well drafted, except for the use of the word "origin", which had no precise technical meaning in international law. In his opinion, the word "source" would be much more precise and much more correct. The article did not refer to the source of a rule of law, but to the source of an obligation deriving from a rule of law. There was no danger of confusion with the material sources of international law, for the reference to a "customary, conventional or other" source, made it clear that only the formal sources were involved. He therefore considered that the Drafting Committee had not improved article 16 by replacing the word "source" by the word "origin".

13. Mr. CALLE Y CALLE said that the Drafting Committee sought to reflect in its texts the view expressed by the majority of the Commission. Like Mr. Yasseen, he had considered "source" to be the appropriate legal term. The word "origin" was not imprecise, however, for it referred to the time and place at which something came into being—in the present case, the international obligation. Moreover, the qualifying phrase "whether customary, conventional or other" would make the rule clearer for foreign ministries, which, as had already been pointed out on a number of occasions, were not necessarily staffed by lawyers. Consequently, although he had initially favoured the word "source", he none the less believed that the use of the term "origin", both in the title and in the body of the article, fulfilled the purposes of the draft.

14. The CHAIRMAN, speaking as a member of the Commission, thanked the Drafting Committee for its endeavours. He had been among those who had called for the use of the word "Irrelevance" in the title of the article and it was gratifying to note that that change had been made.

15. Mr. AGO (Special Rapporteur) said he was grateful to Mr. Yasseen for defending a term which he (Mr. Ago) had adopted from the outset, but he also wished to thank Mr. Calle y Calle for endorsing the term "origin". The real purpose of the article was to indicate that the provenance of the obligation breached was irrelevant. Whether the word used was "source" or "origin", no doubts

could arise once the qualification "customary, conventional or other" was added. He therefore willingly accepted the word "origin".

16. Mr. QUENTIN-BAXTER said he entirely agreed with Mr. Yasseen. The term "source" was readily understood and a great deal could be said in favour of retaining it, particularly in the context of paragraph 2, which emphasized that the source of an international obligation was immaterial and that it did not affect the responsibility arising from the internationally wrongful act. However, the Drafting Committee had, as always, striven to accommodate the view of the majority of the members of the Commission, who had appeared to favour the use of the word "origin".

17. Mr. KEARNEY said that he too would have preferred the traditional term, which was "source".

18. Mr. TSURUOKA said he shared the reservations expressed regarding the word "origin", and preferred the term "source".

19. Mr. REUTER said that, apart from the question of the term "origin", he was not certain that the statement in paragraph 2 was correct. He therefore reserved his position on it.

20. Mr. USHAKOV observed that the Commission was adopting the draft articles on State responsibility on a provisional basis; he thought that formal reservations could be entered when the final text was adopted.

21. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 16 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 17³ (Requirement that the international obligation be in force for the State)

22. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following wording for article 17:

Article 17. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory rule of international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

² See *Yearbook... 1975*, vol. II, p. 57, document A/10010/Rev.1, para. 45.

³ For consideration of the text originally submitted by the Special Rapporteur, see 1367th to 1371st meetings.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

23. Article 17, as adopted by the Drafting Committee, had been redrafted to some extent, to make it conform with the language and structure adopted for the previous articles. For example, the Drafting Committee had used the phrase “not in conformity with” rather than “contrary to”, as in article 15*bis*. The article originally submitted by the Special Rapporteur had consisted of three paragraphs, with the final paragraph subdivided into three subparagraphs. The Drafting Committee had decided to make the three subparagraphs of paragraph 3 into three full paragraphs, so as to make a clearer distinction between the three kinds of wrongful act covered.

24. As the new title indicated, the purpose of the article was to establish the requirement that the international obligation must have been in force for the State at the time of commission of the act of the State which was not in conformity with what was required of it by that obligation. Paragraphs 1 and 2 stated that general rule in precise terms: an act of the State which was not in conformity with what was required of it by an international obligation constituted a breach of that obligation only if the act was performed at a time when the obligation was in force for that State. However, if subsequently such an act became compulsory by virtue of a peremptory norm of international law, it ceased to be considered an internationally wrongful act. In that connexion, he drew the attention of the Commission to the fact that, in the English and French versions of paragraph 2, the word “rule” should be replaced by “norm” (*norme*), the term used in article 53 of the Vienna Convention on the Law of Treaties.⁴

25. Paragraphs 3 to 5 of article 17 stated the general rule for three particular kinds of wrongful act which necessarily extended over a period of time. Paragraph 3 concerned an act of the State having “a continuing character”, paragraph 4 dealt with an act of the State “composed of a series of actions or omissions in respect of separate cases”, and paragraph 5 related to an act of the State which was “a complex act constituted by actions or omissions by the same or different organs of the States in respect of the same case”.

26. Mr. AGO (Special Rapporteur) said that article 17 was very important. He thanked the Commission and,

in particular, the members of the Drafting Committee for having adhered to his views in paragraph 2, which was a step forward in the progressive development of international law, by introducing an element of flexibility into a rule that would have been too rigid if it had been applied even to the case in question.

27. Paragraphs 3, 4 and 5 of the new text proposed by the Drafting Committee were an improvement on the text he had originally submitted, since the three kinds of act of the State, a continuing act, a composite act and a complex act—were clearly identified in each instance. The wording of paragraph 5 had been worked out, in particular, in the light of the comments made by Mr. Yasseen and Sir Francis Vallat. It was the first time those three categories of act of the State had appeared in the draft articles, but it would not be the last, because the Commission would still have to take their specific aspects into account when it came to establish the notion of *tempus commissi delicti*, which was very important in determining the responsibility of the State.

28. Mr. USHAKOV said that he readily accepted article 17 as proposed by the Drafting Committee.

29. Mr. USTOR said that, if the word “rule” in paragraph 2 was to be replaced by “norm”, in order to bring the wording into line with article 53 of the Vienna Convention on the Law of Treaties, it would be advisable to refer, as did that Convention, to “a peremptory norm of general international law”.

30. He could accept paragraph 2 as it stood, although it could well have been drafted in a different way. Nevertheless, the commentary should explain why the new norm, which required a certain attitude on the part of the State to be compulsory, must necessarily be a peremptory norm of general international law.

31. Mr. AGO agreed that the text should follow the wording of the Vienna Convention, for a peremptory norm could only be a peremptory norm of general international law. The commentary would, of course, take Mr. Ustor’s comment into account in connexion with paragraph 2.

32. Mr. YASSEEN said that he could agree to article 17, as proposed by the Drafting Committee, for he found the new text better than the one discussed by the Commission. However, the criterion adopted in paragraph 2 was perhaps not sufficiently clear and the paragraph might well have been brought into line with article 71, paragraph 2 (*b*) of the Vienna Convention. It would be better to say that, if a peremptory rule of general international law supervened, a State which had committed an act conflicting with an earlier rule could be relieved of its responsibility only if the very fact of holding it responsible conflicted with the new peremptory rule. The Special Rapporteur had chosen a different criterion, but the provision in article 71 of the Vienna Convention would perhaps be more comprehensive and more subtle. He was, however, quite willing to respond to the Special Rapporteur’s appeal.

33. Mr. RAMANGASOAVINA said he gladly supported the text proposed by the Drafting Committee, which was an improvement on the former text. The

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

meaning of paragraph 2 seemed very clear, but he wondered the drafting could not be improved by replacing the words "*devenu dû*", in the French text, by a more euphonious expression.

34. Mr. AGO (Special Rapporteur) thanked Mr. Yasseen for his comment which he had already made during the Commission's consideration of article 17. The Drafting Committee had borne it in mind, but had finally taken the view that to use the language of article 71 of the Vienna Convention, would produce a looser rule and that, since the Commission accepted the principle stated in paragraph 2 of article 17 only if it was formulated in the strictest fashion, it would be better to keep to the initial text. The aim was not to go so far as to affirm that the mere fact that an act had become lawful by virtue of a later peremptory rule meant that an act which had been wrongful when it was committed ceased to be considered wrongful. For an internationally wrongful act no longer to be considered as such, it must become not only lawful, but also compulsory, by virtue of a peremptory norm of international law. That was a much more restrictive rule.

35. Mr. KEARNEY said that, as he interpreted it, paragraph 2 did not conflict with, or differ from, the principles embodied in article 71 of the Vienna Convention, which dealt with the same problem in a somewhat different manner. Indeed, he would not be able to accept paragraph 2 if he thought that it would affect or overrule article 71 of the Vienna Convention.

36. Mr. QUENTIN-BAXTER observed that paragraph 4 was concerned with situations in which a wrongful act was not an isolated occurrence, but one of a series of incidents which proved the existence of a wrongful policy. Such situations were familiar to the members of, for example, the Committee on the Elimination of Racial Discrimination or the Commission on Human Rights and subsidiary organs thereof, which investigated complaints in the field of human rights. From 1967 to 1975, the Economic and Social Council had adopted a number of resolutions, for instance resolution 1919 (LVIII), on the study of situations that revealed a consistent pattern of gross violations of human rights. The language of paragraph 4 might seem abstract until it was related to a particular situation. Consequently, the Special Rapporteur might consider the advisability of including in his report a reference to the form of language consistently used by the Economic and Social Council and approved, in general terms, by the General Assembly.

37. Mr. CASTAÑEDA said that it was difficult to grasp the meaning of the phrase *un tel fait est devenu dû* in the French version of paragraph 2. In the English version, the phrase "such an act has become compulsory" presented no difficulties. Surely, the object of the paragraph was to refer to a particular conduct or behaviour. It might be preferable, in French, to use a phrase such as: *l'accomplissement d'un tel fait*.

38. Again, he had some misgivings about the restricted scope of the rule in paragraph 2. The assistance that could be given, and was given, to national liberation movements which sought to liberate peoples by force, constituted the most pertinent example, at the present

time, of a change in thinking whereby action previously considered wrongful was subsequently regarded as lawful. For instance, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁵ recognized the right to render such assistance. However, paragraph 2 spoke of something that was compulsory, in other words, an obligation and not simply a right. Presumably, the right he had mentioned would not be covered by the rule embodied in that paragraph. The Special Rapporteur had pointed out, however, that, generally speaking, the Commission would prefer to restrict the scope of the rule and ascertain the views of the General Assembly on the matter.

39. Mr. AGO (Special Rapporteur) said that, if an act like the granting of military aid to peoples struggling for their independence became lawful, it did not follow that military intervention by a State on behalf of an oppressed people, which was wrongful when it took place, would automatically cease to be wrongful. An international court hearing a case of that kind would necessarily judge it in the light of the law in force when the military intervention took place. On the other hand, if a State had undertaken to supply arms to a particular country and, in the end, had refused to do so because for example, it knew they would be used to apply by force a policy of *apartheid*—and had refused even before that policy had been condemned and all military aid to that country had been prohibited—the wrongful act it had committed by refusing to deliver the promised weapons could no longer be considered an internationally wrongful act, since it became not only lawful, but also compulsory by virtue of a peremptory rule of international law. It was then obvious that that State could no longer be held responsible.

40. As to the terminology employed in article 17, he pointed out that the Commission had decided to use the expression "act of the State". He proposed that the question should not be reopened, since it had already been sufficiently discussed. In his opinion, the expression was clear enough, and there was no need to amend the text.

41. Mr. REUTER said that if some members found the expression *devenu dû* clumsy, the word *dû* could be replaced by the word *exigible*.

42. Mr. RAMANGASOAVINA said that he would prefer that solution.

43. Mr. AGO (Special Rapporteur) said that there was a whole theory about the *acte dû*. Nevertheless, he was quite willing to have the word *dû* replaced, but he would prefer the word *obligatoire*.

44. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) and Mr. USHAKOV said they could agree to the word *obligatoire*, which was a better rendering of the English word "compulsory".

45. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed

⁵ General Assembly resolution 2625 (XXV), annex.

to approve article 17 as proposed by the Drafting Committee, with the following amendments to paragraph 2: the word “rule” to be replaced by the word “norm”, as proposed by the Chairman of the Drafting Committee; the word “general” to be added before the words “international law”, as proposed by Mr. Ustor; and, in the French text, the word *dû* to be replaced by the word *obligatoire*.

It was so agreed.

The meeting rose at 11.30 a.m.

1402nd MEETING

Monday, 5 July 1976, at 3.05 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2; A/CN.4/L.243 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 18¹ (International crimes and international delicts [wrongs])

1. The CHAIRMAN said that, before inviting the Chairman of the Drafting Committee to introduce the title and text of article 18 as adopted by the Drafting Committee (A/CN.4/L.243/Add.1), he wished to congratulate Mr. Kearney on behalf of all the members of the Commission, on the bicentenary of the signing of the Declaration of Independence of the United States of America. He had recently been reading a work on the Declaration of Independence in which he had been struck by two illustrations of the perennial problems of drafting. The first concerned the reference to the unalienable rights to “life, liberty and the pursuit of happiness”, words which Thomas Jefferson had borrowed from John Locke, but with the expression “pursuit of happiness” substituted for the word “property”; Locke, however, when speaking of “property”, had intended to refer to the whole estate of man and not just to his material possessions.

2. The second point was that Thomas Jefferson had accepted no less than 86 proposals for changes in his draft but had remained adamant with regard to the use of the term “unalienable”. He himself had been reminded

of that when thinking of the effort which the Drafting Committee had devoted to the preparation of the new version of article 18. He wished to congratulate the Committee and the Special Rapporteur for their labours and for the mutual co-operation and understanding which they had displayed.

3. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following wording for article 18:

Article 18. International crimes and international delicts [wrongs]

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*;

(d) a serious breach of an international obligation of essential importance for safeguarding the preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict [wrong].

4. The article embodied the basic principle enunciated in the text originally proposed by the Special Rapporteur in his fifth report (A/CN.4/291 and Add.1-2), namely that the subject-matter of the international obligation breached was irrelevant in characterizing as internationally wrongful an act of a State which constituted a breach of an international obligation. The structure and wording of the article had nevertheless been altered in the light of the observations and suggestions made in the Commission's debate, with a view to giving greater clarity and precision to the categorization of internationally wrongful acts of the State as international crimes and international delicts.

5. The present text of article 18, like the original text, consisted of four paragraphs. The first and the fourth paragraphs remained essentially the same, with the first paragraph setting forth the general principle which he had mentioned and the fourth paragraph defining an international delict as any internationally wrongful act which was not an international crime in accordance with paragraph 2. In paragraph 1, the word “content” had been replaced by “subject-matter”, which was clearer from the juridical point of view.

¹ For the consideration of the text originally submitted by the Special Rapporteur, see 1371st to 1376th meetings.

6. The contents of paragraphs 2 and 3 were basically those of the corresponding paragraphs of the text originally submitted by the Special Rapporteur. All the major fields or categories in which international crimes might occur had been retained in the new draft.

7. The Drafting Committee had taken up a suggestion to combine paragraphs 2 and 3 which had been made during the Commission's consideration of the initial draft. The new paragraph 2 stated the general rule as to what constituted an international crime. It was in fact the key to the whole article. It laid down the basic rule that an internationally wrongful act which resulted from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, constituted an international crime. Paragraph 3 should be understood exclusively in the light of paragraph 2 and within the limits which paragraph 2 defined. That was clearly emphasized by the introductory words of paragraph 3: "Subject of paragraph 2. . .".

8. Paragraph 3 listed, by way of example, the major fields in which international crimes might occur. The non-exhaustive character of the list was indicated by the words "*inter alia*". Also, it was plain from the words "on the basis of the rules of international law in force" that the examples of the categories or fields enumerated were based strictly on the rules of international law as they existed today. Needless to say, it had not been the intention of the Drafting Committee to draft a code of international crimes or to indicate definitively and exhaustively what acts were and what acts were not international crimes, or to pronounce on their legal nature. It left the door open for any future developments "on the basis of the rules of international law", an approach reflected in the wording of the subparagraphs of paragraph 3.

9. The new text of paragraph 3 not only indicated general fields or categories but also contained specific examples of what might be regarded as international crimes on the basis of the generally recognized and accepted rules of present-day international law, whether conventional or customary. The Drafting Committee had considered the suggestion made by one member of the Commission, in connexion with subparagraph (a), concerning what might be called "economic aggression". The Committee had decided to employ the term "aggression" in subparagraph (a) on the understanding that it had the meaning given it by the international community in the Definition of Aggression adopted by consensus by the General Assembly on 14 December 1974.² The commentary to the article would explain that, in the view of some members of the Commission, the notion of "aggression" might have a broader meaning than that indicated in the Definition of Aggression.

10. There were two purely drafting points to mention. First, the Drafting Committee had felt it advisable, in the French version of paragraph 3, to use the words

d'après les règles du droit international, whereas in English the phrase "on the basis of the rules of international law" had been thought best. The Drafting Committee wished to emphasise that the meaning of the two phrases was none the less the same. Secondly, the French version of paragraph 4 spoke of *un délit international*. The Drafting Committee, and more particularly its English-speaking members, had considered that the English translation of that, "an international delict", could be improved and needed further thought. Accordingly in the English version of paragraph 4 and the title, the word "wrong" had been placed in square brackets after the word "delict"; the Commission would thus be in a good position to decide whether the phrase "international delict" was appropriate in English.

11. Lastly, following a suggestion made in the Commission, the Drafting Committee had decided to entitle the article quite simply "International crimes and international delicts [wrongs]".

12. Mr. CASTAÑEDA said that he wished to associate himself with the Chairman's congratulations to Mr. Kearney. He was reminded of a remark by the late Adlai Stevenson that the Declaration of Independence signed at Philadelphia in 1776 had marked the beginning of the process of decolonization. That Declaration had had a great influence in Latin America and in particular in his own country.

13. Having been absent during the Commission's discussion of article 18 as proposed by the Special Rapporteur,³ he wished to take the present opportunity to express his gratitude to the Special Rapporteur, and his agreement with the philosophical and legal conception underlying article 18. The article exemplified in every way the progressive development of the law of State responsibility. The rules embodied in it were a basic response to the needs of the international community as the Commission understood them, rather than a codification of precedents from case-law. Article 18, as now proposed, reflected modern developments in State responsibility and met the present requirements of the world community. He felt that the Commission's work on the article would be highly appreciated by the General Assembly.

14. The first merit of the Commission's endeavours was a question of method. As the Special Rapporteur had pointed out, the various types of internationally wrongful acts had been distinguished for normative and not for scientific reasons. The distinction between them would affect the régime or form of responsibility which would be applied in due course to each type of internationally wrongful act.

15. In his fifth report, the Special Rapporteur had given a remarkable review of the historical development of State practice, judicial opinion and legal writings in the matter of State responsibility. His account showed that a slow but sure process had led to the recognition of two categories of internationally wrongful act. It revealed just how much the publicists had foreseen and influenced

² General Assembly resolution 3314 (XXIX), annex.

³ See 1371st meeting, para. 9.

the course of international practice, but it also demonstrated the opposite process at work.

16. Three important factors had contributed to the division of internationally wrongful acts into two categories. The first was the emergence of the notion of *jus cogens*. The second was the new idea of acceptance of the possibility of applying penal sanctions against individuals. In that connexion, it was important to draw a clear distinction between the responsibility of individuals and the responsibility of the State itself for an international crime attributable to it. The punishment of an individual should not constitute the only expression of responsibility for an international crime. That point should be stressed, in order to avoid any confusion in the General Assembly between State responsibility for international crimes and the punishment of individuals for international crimes.

17. The third factor was the practice which had developed in the United Nations with regard to colonial situations. A long series of General Assembly resolutions reflected the growing conviction that the colonial status as understood at the time of the drafting of the Charter had undergone a profound change. In particular, the Declaration on the Granting of Independence to Colonial Countries and Peoples⁴ had had not only a political but also a legal influence; it had radically modified international law on the colonial issue. He therefore strongly supported the inclusion of a reference to colonial situations in paragraph 3 (b) of article 18.

18. As far as the commentary was concerned, he believed that it would have gained from references to two important United Nations texts which had emerged from the work of the International Law Commission. The first was the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.⁵ Those principles had previously been affirmed by the General Assembly in resolution 95 (I), as an expression of international law in force. The second was the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954.⁶ It was true that the Nürnberg Principles and the Code of Offences both referred to crimes committed by individuals, but a fuller discussion of them would have been of advantage even if it had not affected the conclusions reached by the Special Rapporteur.

19. It would have been also useful to dwell at greater length on measures taken by the United Nations, in particular pursuant to General Assembly resolution 377 (V) entitled "Uniting for peace", which involved the use of armed force but not any coercive action on the part of the Security Council or the General Assembly. He was thinking of such cases as the Suez and Congo operations.

20. The Special Rapporteur had aptly drawn attention to the recognition by the International Court of Justice, in the *Case concerning the Barcelona Traction, Light and*

Power Company, Limited that the distinction between different types of internationally wrongful acts could have an influence on the determination of the subjects which had a legal interest in claiming the performance of an international obligation.⁷

21. In the Special Rapporteur's very thorough account of the writings on the subject, he (Mr. Castañeda) had been interested to note the reference to the views expressed in the United States of America by Root in 1915 and Peaslee in 1916.⁸ Those two writers had drawn a distinction between breaches of international law which affected only the injured State and those which affected the community of nations as a whole. With regard to the second kind of internationally wrongful act, Peaslee had recommended the establishment of international machinery for its punishment, but Root had considered that any State should be authorized to punish acts of that kind. That doctrine had been propounded by Root when he had been Secretary of State, and it had had a great influence on United States's policy. It had led to an impressive series of unwarrantable interventions in Latin America. His own country, Mexico, had suffered from interventions of that kind undertaken with a view to obtaining reparation for injuries done to aliens during civil strife.

22. The Special Rapporteur had shown that many writers, whose views he himself shared, had accepted the idea that sanctions could be applied to a State. That subject would be taken up later in the draft, but since the Special Rapporteur had already given some indication of his views, it would be useful to discuss it at the present stage.

23. Before the establishment of the United Nations, the international community had no institutions or machinery to maintain the international legal order; at that times, it was only natural to admit the possibility of individual action by States to restore the legal order which had been violated. Article 16 of the Covenant of the League of Nations was faulty in that it allowed for that possibility.

24. The adoption of the Charter of the United Nations had completely changed the situation. The system of collective security embodied in the Charter was intended to be complete; the Charter had taken away from individual States the right to resort to force and, above all, the power to take a unilateral decision to evaluate a situation and determine whether the injury sustained permitted the use of force. Under the Charter, there were only two exceptions to the prohibition of the use of force: the first was the case of participation in collective action by the United Nations and the second was that of individual or collective self-defence against armed attack in accordance with Article 51 of the Charter. In his view, the expression *agression armée* used in the French version was more appropriate in that context than the words "armed attack".

25. The system of collective security provided for in the Charter had not functioned as such in practice. The

⁴ General Assembly resolution 1514 (XV).

⁵ *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, para. 97.

⁶ *Yearbook... 1954*, vol. II, pp. 151-152, document A/2693, para. 54.

⁷ See A/CN.4/291 and Add.1-2, para. 89.

⁸ *Ibid.*, para. 131.

Security Council had never taken any action to impose the sanctions specified in Article 42 of the Charter, and no agreement had been concluded to give effect to Article 43, which made provision for contributions of armed forces and other forms of assistance by Member States to enable the Security Council to impose such sanctions. States had, however, made arrangements for collective action in self-defence against armed attack as provided in article 51 of the Charter, under the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947, the North Atlantic Treaty signed at Washington on 4 April 1949, and the Treaty of Friendship, Co-operation and Mutual Assistance signed at Warsaw in 14 May 1955. But States were not entitled, except in the case of self-defence, to decide individually that sanctions should be applied against a State. That right had been withdrawn from Member States by the Charter and was the monopoly of the United Nations.

26. Another legitimate question, and one which had been discussed at length by many leading writers, including Kelsen, was whether coercive action ordered by the Security Council constituted a penalty in the strictly technical sense of the term, or a political or military measure to stop a breach of the peace or an aggression. Kelsen was inclined to take the latter view, on the basis of the preparatory work done in 1945 by the United Nations Conference on International Organization at San Francisco, on the drafting of Articles 5, 39, 41, 42, 43 and Article 25, provisions which dealt with the residual powers of the Security Council. Above all, Kelsen's conclusion was based on the whole philosophy of collective security exemplified by the Charter.

27. The United Nations system of collective security was deliberately political in purpose: its essential aim was to maintain peace without taking into account the letter of the law. An act which was not unlawful, such as certain economic measures, could lead to coercive action because it constituted a threat to the peace. On the other hand, in a case of grave and flagrant violation of international law, the Security Council might well feel that the best manner of safeguarding the peace was to refrain from ordering any coercive action. It was significant that the Security Council would in that case be acting perfectly legally. It should be noted that, unlike the Covenant of the League of Nations, the Charter of the United Nations did not guarantee the territorial integrity of its members. In Article 2, paragraph 4, it prohibited the threat or use of force against the territorial integrity or political independence of any State, but it did not impose on the States Members of the United Nations any obligation to guarantee that territorial integrity or political independence.

28. In view of the foregoing, Kelsen had arrived at the conclusion that the purpose of the United Nations system of collective security, and of any coercive action ordered under that system, was not to restore the legal order which had been violated but simply to restore peace, and the two could very well not be synonymous. That was perhaps why a number of writers had considered that the only genuine sanction for which provision was made in the Charter was the expulsion of a Member State under Article 6.

29. In view of the monopoly of the use of force conferred on the United Nations by the Charter, it was also clear that reprisals were no longer permissible, except in the case of self-defence. To be considered as an act of self-defence, reprisals had to be immediate and proportional to the act to which they constituted a response. The Security Council had had occasion to recall that principle in its resolution 188 (1964) in connexion with an attack on a fort in Yemen by United Kingdom forces; it had stated in that case that the armed reprisals were incompatible with the Charter. Armed reprisals had also been banned by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁹ All those matters would be discussed at a later stage of the work on State responsibility. There were clearly cases of the use of force which had previously been lawful and now constituted internationally wrongful acts. In that connexion, he drew attention to the issues discussed in paragraph 159 of the Special Rapporteur's fifth report, where the Special Rapporteur had been particularly cautious in admitting only three forms of retaliation against a State guilty of an act of aggression: first, a State that was the victim of aggression had the faculty to take, against the aggressor State, measures infringing the latter's rights, and that faculty, exceptionally, was not subject to the general obligation first to seek reparation for the injury suffered; second, the victim of an act of aggression might use armed force in self-defence; third, a third State might assist, even with armed force, a State that was the victim of an act of aggression.

30. The legal consequences of an international crime should of course be much more severe than those of an international wrong of lesser gravity. He felt it necessary, however, to express his concern that, in the absence of sufficient limitations and safeguards, the principle of sanctions against individual States might be applied too widely. As far as international crimes were concerned, he did not deny that, quite apart from any action by the United Nations, it might be open to States to adopt sanctions individually. The extent, scope and nature of those sanctions, however, would have to be examined in future with the utmost care.

31. He was in broad agreement with the text of article 18 as proposed by the Drafting Committee, but on some points he would have preferred the language originally proposed by the Special Rapporteur. In paragraph 2, the repetition of the word "crime" in the concluding portion rendered the text rather heavy.

32. A more important point was that the Special Rapporteur's original text had the advantage of particularizing resort to the threat or use of force against the territorial integrity or political independence of another State, thus characterizing it as the most serious international crime of all. In the new formulation, paragraph 3 (a) did not express that idea.

33. However, he preferred paragraph 3 (b) of the new version to the corresponding provision, namely, paragraph 3 (a), of the Special Rapporteur's text, since it

⁹ General Assembly resolution 2625 (XXV), annex.

made a useful reference to the prohibition of the establishment or maintenance by force of colonial domination.

34. He noted that, in paragraph 3 (c) the reference in the corresponding provision of the original text to “human rights and fundamental freedoms” had been replaced by the words “safeguarding the human being”.

35. Finally, paragraph 3 (d) was particularly interesting in that it referred to the preservation of the human environment, which had acquired great prominence in international relations. Serious breaches of the international obligation to safeguard the human environment could injure humanity as a whole. However, he would have preferred the text originally proposed by the Special Rapporteur in his paragraph 3 (c); the mention of the examples given in the new text could have its drawbacks. If there was to be a list, it should, for example, mention deliberate action to alter the climate, which would undoubtedly constitute an international crime. That question was being at present discussed in the Committee on Disarmament.

36. One of the purposes of the United Nations was to achieve international co-operation in economic matters. Perhaps in the not too distant future—possibly within a generation—the international community might recognize that the breach of an obligation to carry out that essential purpose of the United Nations constituted an internationally wrongful act.

37. In conclusion, he stressed that, as a result of the new formula proposed for paragraph 3 (a), the article had lost much of its ideological content. The new text referred to the prohibition of aggression, but might with advantage have mentioned resort to the use or threat of force as the leading example of an international crime. It was important to remember that, with a single exception, there was only one example of a clear decision by the Security Council that an act of aggression had been committed, and that decision had been taken in the absence of one of its permanent members. There were, however, a great many decisions of the Security Council dealing with cases of the use or threat of force.

38. Mr. YASSEEN said that article 18 was a key article, for the future work of the Commission on the various categories of responsibility would hinge on it. The Commission had, in principle, agreed to the distinction between international crimes and international delicts and, as a result of the laudable efforts of the Drafting Committee, it had been possible to formulate a text which should be generally acceptable. From the standpoint of legal technique, the new draft was better than the one proposed by the Special Rapporteur, which had been based cautiously on present times and had not allowed for future developments in the category of international crimes. The technique used in drafting the new article, namely the non-exhaustive enumeration of international crimes, would make it possible for new crimes to be included in that category.

39. He personally would have liked article 18 to contain a stricter definition of an international crime. The definition started satisfactorily, but after that it seemed to fall into a vicious circle. If an international crime was defined as an internationally wrongful act which resulted from the

breach by a State “of an international obligation... essential for the protection of fundamental interests of the international community”, it seemed unnecessary to add that the breach of that obligation should be “recognized as a crime by that community as a whole”. The breach of an international obligation essential to the protection of fundamental interests of the international community was bound to be recognized as a crime by that community as a whole. However, such excessive caution was perhaps useful; the provision was a draft article and, to begin with, its acceptance would be no more than a question of provisional adoption by the Commission.

40. An advantage of the article under consideration was that it gave examples. In such a new field as that of international crimes and delicts, the examples would give shape to somewhat abstract ideas. Moreover, the Drafting Committee’s examples had been well chosen and would not hamper the evolution of the notion of an international crime.

41. The text proposed by the Drafting Committee might be criticized generally as being too circumspect. For example, the expression “serious breach on a widespread scale” in paragraph 3 (c) was perhaps evidence of excessive caution.

42. The CHAIRMAN, speaking as a member of the Commission, joined the previous speakers in expressing great appreciation of the work of the Drafting Committee. The text proposed by the Committee was a compromise which was bound to leave some members of the Commission unsatisfied. He himself had expressed his views on the Special Rapporteur’s article 18 during the earlier discussion and would not revert to that text. He would concentrate his remarks on the new text proposed by the Drafting Committee.

43. In general, he agreed with Mr. Yasseen that the text proposed by the Drafting Committee was marked by excessive caution which might well dilute some of the basic concepts embodied in the Special Rapporteur’s original article. He also agreed with Mr. Castañeda that it would have been preferable to make a special place in article 18 for the breach of those fundamental norms of the Charter prohibiting the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.

44. He had doubts regarding the use of the adjective “serious” as a qualification of a breach of an international obligation of essential importance in the various subparagraphs of paragraph 3. Such a breach was bound to be “serious”; the adjective was therefore totally unnecessary and, ultimately, detrimental to the meaning of the expression which it qualified. Article 39 of the United Nations Charter referred to a “breach of the peace” without unnecessarily qualifying it as “serious”.

45. Similarly, he saw little point in the words “in force” which appeared after the words “the rules of international law” in the opening words of paragraph 3. He appreciated that they had been used for psychological reasons, so as to exclude trends which had not yet evolved into rules of law. However, any mention of “rules of international

law” necessarily implied that the rules referred to were in force.

46. It was significant in that connexion that article 53 of the 1969 Vienna Convention on the Law of Treaties¹⁰ referred to a peremptory norm of “general international law” without adding the words “in force”. The same was true of treaties; there was no reference to a treaty “in force” anywhere in the Vienna Convention, not even in Article 30 (Application of successive treaties relating to the same subject-matter), where there might have been a reasonable case for using the expression “treaty in force”. There too, the draftsmen of the 1969 Vienna Convention had taken it for granted that the term “treaty” implied a treaty in force.

47. In paragraph 3 (c), he found the reference to “safeguarding the human being” somewhat vague. The United Nations Charter referred to “human rights and fundamental freedoms”, the expression originally used by the Special Rapporteur. Article 1 of the Universal Declaration of Human Rights declared all human beings to be “equal in dignity”.

48. He had misgivings about the replacement of the notion of a “resource common to all mankind”, which was in the original text of paragraph 3 (c), by the notion of “human environment” contained in the text of paragraph 3 (d) prepared by the Drafting Committee.

49. The comments he had made did not in any way affect his general position regarding article 18; he did not oppose the acceptance of the compromise formula which the article contained.

50. Mr. TABIBI commended the Drafting Committee on the excellent compromise text which it had submitted. Article 18 was a very important article and it was difficult to produce a generally acceptable text for it. The wording now proposed was a genuine compromise because it was flexible and because the enumeration in paragraph 3 was not exhaustive.

51. He accepted the language proposed by the drafting Committee because, although in principle he believed that the terminology of the Charter should be adhered to, he also felt that the experience of the past 30 years should be taken into account. The terms used in the proposed text allowed for the developments which had taken place in United Nations law since the adoption of the Charter.

52. With regard to paragraph 3 (a), he preferred the term “aggression” to the original reference to “the threat or use of force”. The use of the term “aggression” would cover cases of economic and political aggression, which was much more dangerous for third world countries than the use of force itself.

53. With regard to paragraph 3 (c), he agreed with Mr. El-Erian’s comment on the words “safeguarding the human being”, which constituted a new notion. He felt it would do no harm to reintroduce into subparagraph (c)

a reference to “human rights and fundamental freedoms”, which was the basic notion in the United Nations Charter. However, since the text was a compromise, he was prepared to accept it as it stood.

54. Having said that, he wished to make it clear that he could not accept article 18 finally until he had seen the commentary. The Chairman of the Drafting Committee, in speaking about economic aggression, had said that the term “aggression” was used in paragraph 3 (a) in the meaning given it in the Definition of Aggression adopted by the General Assembly. In fact, the weakest point of that Definition was precisely its silence on the question of economic aggression. He therefore felt that great care should be taken not to refer in the commentary to a text which remained silent on such an important subject.

55. He wished to remind the Commission that when it had adopted its draft articles on the law of treaties in 1966, there had been a discussion on the question of the commentary, and the Special Rapporteur on that topic, Sir Humphrey Waldock, had said that it should be left to the practice of States and of United Nations organs to interpret the meaning of a notion.

56. Mr. BILGE said that the new title of article 18, “International crimes and international delicts [wrongs]”, gave the impression that the Commission was seeking to establish primary rules. He preferred the earlier title, “Content of the international obligation breached”, which to his mind was a better reflection of the idea underlying the article, namely, that the subject-matter of the obligation breached might affect the régime of responsibility.

57. The Drafting Committee had been right, in paragraph 2, to give a composite definition of international crime, following the method successfully adopted for the Definition of Aggression. However, he failed to see why the definition should be accompanied by the requirement that the breach of the obligation must be recognized as a crime by the international community as a whole. It was difficult to understand the purpose of that requirement, which in his opinion detracted from the strength which a general definition could have. If the aim was to be cautious, as some had pointed out, caution seemed to him unnecessary, since the examples listed in paragraph 3 clearly showed which types of breach constituted international crimes. The requirement should therefore be removed from paragraph 2 and, as a precaution, the word “serious” should be inserted before the word “breach”. In that way, the paragraph would indicate that not all breaches of an international obligation were international crimes, and its wording would be brought into line with that of paragraph 3, which spoke of “a serious breach of an international obligation”.

58. As a whole, paragraph 3 was well formulated, but he wondered whether, in subparagraph (c), the expression “for safeguarding the human being” covered human rights and fundamental freedoms. In his view, that wording could be improved. Nor did he find the expression “on a widespread scale” felicitous, since what mattered was primarily the will of the State and its policy. He therefore proposed that the expression should be replaced by the adjective “systematic”.

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

59. He preferred the earlier version of paragraph 4, but if the Commission decided in favour of the new wording, there should be a reference to paragraph 3 as well as to paragraph 2.

60. Lastly, he felt that States should be warned of the extremely important consequences that article 18 might have.

61. Mr. REUTER said that, in the main, he could accept article 18 in its present form. He did not believe it to be a compromise article. In his opinion, its importance lay in the methodology used. The Special Rapporteur had deemed it necessary, at the present stage in his work, to state the principle that there were two categories of internationally wrongful act: international crimes and international delicts. It could therefore be asserted that article 18 was normative in effect. However, he felt that it was an article full of promise and commitment; it gave a fairly general definition of international crimes, but without saying what the general régime for such crimes was. The Special Rapporteur's report had listed examples of genocide which indicated the régime of responsibility applicable to that crime, but it did not state what general rules would apply to international crimes as a whole. True, it was possible to envisage the direction that such rules would take: a right to prosecute, a régime of prescriptibility and, above all, a right to impose certain penalties, for the notion of crime was bound up with that of punishment. What then were the penalties involved? For instance, in the case of aggression, the major international crime, the aggressor State could be deprived of some of its fundamental rights, especially the right to dispose of its territory. However, the notion of punishment of a State still had to be defined. In article 18, the Commission was committing itself to the establishment of a régime of different responsibilities based on the distinction drawn between international crimes and international delicts. However, article 18 simply held out that promise, for it could not establish such a régime.

62. Nor could the Commission claim that in article 18 it was stating any kind of rule concerning an international crime. The Commission would require a considerable amount of time to define the crime of aggression and other international crimes from the penal standpoint. Juridically, therefore, it had confined itself, in paragraph 3, to referring to what had already been done or, in the case of the example given in subparagraph (c), to what was being done at the international level, i.e. to the work of the General Assembly and to the many conventions either adopted or in preparation. The examples given in paragraph 3 did indeed constitute a political choice, but they were also the most important international crimes, which the Commission was seeking to draw to the attention of the General Assembly. It was for the General Assembly to instruct the competent organs to define, in penal terms, the various international crimes, including economic crimes. He therefore regarded article 18 methodologically, as a pointer which would dominate the work of the Commission but did not commit it to drawing up either a general régime of international crimes or, still less, a penal definition of a particular crime. In his opinion, it was very difficult to establish general rules for international crimes, and the Commis-

sion should not embark on that task without an express mandate from the General Assembly.

63. In analysing the examples from the past, the Special Rapporteur had pointed to the emergence, in international delicts as a whole, of elements which called for more than mere reparation. Consequently, it would seem necessary to abandon the somewhat over-simplified distinction between two categories of breach: crimes, which fell exclusively under penal law, and delicts, which fell under the traditional law of reparation pure and simple. In fact, the truth was much more complex, for there was a penal nuance to some delicts. The Commission's task was therefore extremely difficult, to say nothing of the frequent confusion, pointed out by Mr. Castañeda, between coercion, which was an expression of executive power, and sanction, which was an expression of repressive power; the Security Council itself did not act identically in its capacities as an organ of repression and an organ of coercion. Hence, in article 18, the Commission was making a commitment, but nothing more; it was proposing neither a régime of international crimes nor a definition of a particular crime.

64. With regard to the wording of article 18, he readily agreed, with regard to paragraph 3 (c), that mention should no longer be made of human rights, and that was from conviction, not caution.

65. Mr. PINTO said that international lawyers of future generations would be grateful to the Special Rapporteur for his rare courage in formulating an article such as the one under consideration.

66. He agreed with Mr. Reuter that article 18 was full of promise, but a great deal might still remain to be done if the Commission moved in the direction in which the article seemed to point. Like Mr. Yasseen, he thought that the Drafting Committee had been too cautious; he would have preferred wording that was more forceful and more precise.

67. The text appeared to state two equations: first, a breach of an international obligation equalled an internationally wrongful act; and second an internationally wrongful act minus an international crime equalled an international delict. Paragraphs 2 and 3, taken together, seemed to indicate that the criterion for distinguishing an international crime within the broad category of internationally wrongful acts was the seriousness of the breach. Consequently, as Mr. Bilge had observed, paragraph 2 should draw attention to that criterion immediately, by specifying: "An internationally wrongful act which results from a serious breach by a State...". In that way, paragraph 2 would form a logical introduction to the serious breaches enumerated in paragraph 3.

68. Moreover, the proviso that paragraph 3 was "subject to paragraph 2" seemed to have no precise meaning, unless it signified that paragraph 3 did not restrict the generality of paragraph 2. If that was so, the fact should perhaps be put in a different way. Also, paragraph 3 specified that "an international crime may result"; a more positive and more precise form of language might have been used, at least with regard to paragraph 3 (a), which was concerned with the maintenance of international peace and security. Again, in his capacity as a member

of the Commission, the Chairman had spoken of the difficulty he found in the qualification of the words "rules of international law" by the words "in force", which implied the existence of a time element in respect of international crimes. He wondered whether the words "in force" were intended to exclude breaches that had occurred in the past. In any event, the time element posed a troublesome problem.

69. Lastly, he wondered why the Drafting Committee had decided to use in paragraph 4 the term "delict"; he doubted whether, in the present context, its employment necessarily exhausted the category of internationally wrongful acts. It was by no means certain that all wrongful acts other than crimes were delicts. For example, a country in breach of a treaty obligation to repay a debt would be a delinquent State, but its delictual liability might not be involved. By asserting that all internationally wrongful acts were either crimes or delicts, the Commission might be omitting certain classes of such acts or incorrectly including some such acts under the heading of delicts. The Commission appeared to be moving towards the concepts of "crime-punishment" and "delict-compensation", and he was not sure that it was the right course to take. The word "delict" carried unnecessary overtones of internal law and its use might lead to an area of needless uncertainty.

70. Mr. SETTE CÂMARA said that the new wording proposed by the Drafting Committee appeared to be much more suited than the original text to the handling of problems which were far from clearly defined. At an earlier stage, he had suggested¹¹ that paragraph 1 should form an article by itself and that the remaining paragraphs, which called for care, should constitute a separate article.

71. From the drafting angle, he had some misgivings about the phrase "recognized as a crime by that community as a whole" in paragraph 2. Obviously, at least one State, i.e. the State accused of the internationally wrongful act, would not be included among the international community "as a whole".

72. The insertion of the phrase "on the basis of the rules of international law in force" in paragraph 3 was undoubtedly an improvement, but it had been pointed out that the words "in force" might not be necessary. Similarly, in paragraph 3 (b), the words "such as that prohibiting the establishment or maintenance by force of colonial domination" were open to question, since they could imply that colonial domination not exercised "by force" was permissible and did not constitute an international crime.

73. He agreed with Mr. Castañeda that the words "on a widespread scale" should be deleted from paragraph 3 (c). Clearly, nobody should think that to practice slavery, genocide or *apartheid* on a small scale was not an international crime.

74. Paragraph 3 (d) concerned the biosphere, and its examples should not be limited to the atmosphere and

the seas. Massive pollution could occur in rivers, lakes, canals or even whole areas of the territory of States.

75. In conclusion, in the English version, the term "wrong" was preferable to the term "delict". In many legal systems and languages, the terms "crime" and "delict" were synonymous.

76. Mr. NJENGA said that the text submitted by the Drafting Committee had greatly watered down the important ideas which had been set forth so clearly in the report of the Special Rapporteur and reflected in his formulation of the article. It would be extremely difficult for anybody who had not participated in the Commission's discussion of the article to understand the reasons for the changes made by the Drafting Committee.

77. He questioned whether the words "an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole" in paragraph 2 of the Drafting Committee's text, conveyed the same idea as what the Special Rapporteur had had in mind in referring in paragraph 3 of the original text to "an international obligation established by a norm of general international law accepted by the international community as a whole". The language employed by the Special Rapporteur reflected what was generally understood by *jus cogens*, as defined, for example, in the Vienna Convention on the Law of Treaties. The difficulty was compounded by the fact that paragraph 2 of the new text did not specify who was to determine whether an international obligation was of such an essential character.

78. Like earlier speakers, he felt that the words "in force" in paragraph 3 were unnecessary. They merely increased the difficulty of interpreting what was in any case a complicated provision. Paragraph 3 (a) dealt with a concept of the utmost importance, namely the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State; the Drafting Committee should have used the language employed in paragraph 2 of the Special Rapporteur's text, which drew on the phraseology of the Charter. Paragraph 3 (b) of the new text, concerning the right of self-determination of peoples, was again no improvement on paragraph 3 (a) of the original text. The present version could even be construed as meaning that the establishment or maintenance of colonial domination was not an international crime unless force was used, something that was clearly untrue. With regard to paragraph 3 (c), previous speakers had already observed that the qualification "on a widespread scale" was quite unnecessary. Furthermore, it was essential to explain why reference was made to "safeguarding the human being". The Special Rapporteur had rightly spoken in paragraph 3 (b) of the original text of "respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion", which was the very phraseology of Article 1, paragraph 3 of the Charter.

79. He failed to see why the present draft article omitted a most important aspect of the Special Rapporteur's text, namely, the concept of "the conservation and the free enjoyment for everyone of a resource common to all

¹¹ See 1373rd meeting, para. 9.

mankind". If the Commission wished to formulate a text that would be applicable in the future, it could not ignore an idea of that nature. In connexion with the law of the sea, no Government, as far as he knew, had denied the validity of the internationally recognized notion of the common heritage of mankind.

80. Lastly, the commentary should reflect as fully as possible both the intentions of the Special Rapporteur and the latter's formulations, so that the General Assembly would be in a proper position to take a decision on the article.

The meeting rose at 6.15 p.m.

1403rd MEETING

Tuesday, 6 July 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*concluded*) (A/CN.4/291 and Add.1-2; A/CN.4/L.243 and Add.1)

[Item 2 of the agenda]

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

ARTICLE 18 (International crimes and international delicts [wrongs])¹ (*concluded*)

1. Mr. RAMANGASOAVINA said he was well satisfied with the new text of article 18 proposed by the Drafting Committee (A/CN.4/L.243/Add.1) which was a very clear improvement on the Special Rapporteur's original text. It was a complete recasting and rearrangement of the principles stated in the Special Rapporteur's text. It was, in fact, a transcription, in a more specific and, so to speak, innovative form, of the obligations embodied in the Charter of the United Nations. For the article stated the principle of a breach of an international obligation, but it also cited concrete cases, thereby contributing to the progressive development of international law. In that respect it brought to mind certain constitutions and organic laws which were not confined to the solemn proclamation of rights and duties, but also stated the means of attaining their objects by giving concrete examples. The new article 18 proceeded in the same way: instead of immediately proposing a definition, which was always very risky where international crime was concerned, it proceeded step by step, citing concrete but

not exhaustive cases. He therefore fully endorsed the method adopted in the article.

2. In paragraph 3, the expression "international law in force", which had been criticized, seemed to him, on the contrary, to be meaningful and promising, since it took account of the development of international law and thus constituted a "breakthrough", as Mr. Reuter had very aptly said.² For the universal conscience had already evolved and was continuing to evolve in many spheres, particularly those of colonialism and racial discrimination, and the *jus cogens* of contemporary law was still capable of evolving. The text of article 18 permitted and promised that evolution: it was not static, but evolutive and dynamic.

3. He also welcomed the introduction, in paragraph 3 (a), of the term "aggression", which was a reference to the Definition of Aggression adopted by the General Assembly.³ As some had pointed out, it was regrettable that the article did not refer to "serious and manifest economic aggression", but the concept of aggression had the advantage of having been established in the Definition adopted by the General Assembly, and its introduction contributed to the progressive development of international law.

4. With regard to the text of the draft article proposed by the Drafting Committee, paragraph 1 did not call for any particular comment, since the new text did not differ much from the original one; nevertheless, he preferred the new version. The methodological change in paragraph 2 seemed to him to be most felicitous: whereas, in the original text, there had been an immediate and somewhat abrupt reference to cases of breach—"resort to the threat or use of force against the territorial integrity or political independence of another State"—the new text began by giving the general definition, appealing to the universal conscience and referring to the protection of fundamental interests of the international community. Paragraph 2 should therefore be understood in the light of the Charter and the resolutions of the General Assembly. It might be criticized as tautological were it not supplemented and clarified by the specific examples given in paragraph 3.

5. He had no difficulty in accepting the term "by force" in paragraph 3 (b), which had been criticized by some speakers, for colonial domination was especially to be condemned when it was maintained by force. On the other hand, the term "on a widespread scale" in subparagraph (c) seemed much too restrictive. Mr. Bilge⁴ had rightly said that, in the cases of slavery, genocide and *apartheid*, it was not the number of persons which made the crime, but the will of the State and the systematization of a policy contrary to human dignity. The expression "on a widespread scale" introduced an idea of size, which seemed to authorize the perpetration of crimes "on a small scale". He was therefore in favour of deleting that expression and simply referring, as in the

² See 1402nd meeting, para. 62.

³ General Assembly resolution 3314 (XXIX).

⁴ See 1402nd meeting, para. 58.

¹ For text, see 1402nd meeting, para. 3.

other subparagraphs, to a "serious breach of an international obligation". In his view, the words "safeguarding the human being" should be understood as meaning not merely the preservation of human life, but also maintenance of the dignity of the human person.

6. In subparagraph (d), he suggested that the words "safeguarding" and "preservation" should be separated, since they were two complementary notions and that the text should read "...for the safeguard and the preservation of the human environment ..." instead of "...for safeguarding the preservation..."⁵

7. In paragraph 4, the term "international delict" seemed rather vague. Some members of the Commission, in particular Mr. Sette Câmara,⁶ had rightly emphasized that, in international law, the distinction between a crime and a delict was not very clear and sometimes did not even exist. In internal law, it was the penalty applicable that determined which court was competent: an act tried by a court of summary jurisdiction was a delict, whereas an act tried by an assize court was a crime. Thus theft, which was normally a delict, could become a crime in certain circumstances. Hence it was not possible to enumerate and especially, to provide for the different categories of international crimes and appropriate sanctions. The possibility of introducing new categories of international crimes in the future must therefore be reserved, and it would be useful to retain the category of international delicts provided for in paragraph 4. Perhaps the notions of an international crime and an international delict would be amplified and made more specific in the future.

8. Mr. USHAKOV said he thought the text of article 18 proposed by the Drafting Committee was well balanced, prudent and lucid. He willingly accepted it, though with some reservations. First, as to the general tenor of the article, he agreed with Mr. Reuter⁷ that in distinguishing two categories of internationally wrongful acts—international crimes and international delicts—without, for the time being, defining the régimes of responsibility applicable to them and without determining the consequences of the various breaches of international norms—the Commission was committing itself in advance in regard to its future work. He understood Mr. Reuter's concern in that regard but he wondered whether the Commission would not also be committing itself if it took the opposite course, that was to say, first defining the various forms of responsibility—sanctions, reparation, restitution, satisfaction, etc.—and then applying them to various internationally wrongful acts. In his view, the danger would be the same in both cases.

9. In paragraph 3 (c), he thought the expression "on a widespread scale" was justified, because the examples which followed—slavery, genocide and *apartheid*—were, by definition, breaches on a wide scale. If a breach was committed against a single person, that was a delict, not an international crime.

10. In paragraph 3 (d), the Drafting Committee seemed to have departed from the rule it had adopted for drafting paragraph 3: to refer only to existing concepts such as aggression, genocide or *apartheid*. The phrase "massive pollution of the atmosphere or of the seas" did not refer to an existing concept. What was meant by "massive pollution of the atmosphere or of the seas"? Was it nuclear pollution, oil pollution or bacteriological pollution? It was impossible to know without a definition of pollution. Moreover, the reference to "preservation of the human environment" suggested the biosphere in general, not merely the atmosphere or the seas. He therefore believed that it would be wiser to delete from subparagraph (d) the words "such as those prohibiting massive pollution of the atmosphere or of the seas".

11. Sir Francis VALLAT said that the great merit of the text originally submitted by the Special Rapporteur was that it had raised the important issue of international crimes and had drawn attention to the problems involved. The Special Rapporteur's formulation had, in many respects, appeared to be specific, but the use of language which referred to the purposes set out in the United Nations Charter had raised the question whether reference should also be made to the obligations specified in the Charter. Inevitably, the Drafting Committee had been compelled to decide whether it should embark on the extremely lengthy process of drawing up detailed definitions, or whether it should enunciate a general principle for determining the breach of an obligation that would constitute an international crime, and then proceed to give examples. From that standpoint, the text submitted by the Drafting Committee was a remarkable contribution to the work of the Commission.

12. In paragraph 2, the concept of international crimes was coupled with an indication of the main test for determining their existence. A different form of words might eventually be found to replace the expression "recognized as a crime by that community as a whole". It meant, in essence, however, that no single State could declare or assert, in opposition to the international community, that a particular kind of act constituted a crime; and conversely, that no single State could deny that a particular kind of act constituted an international crime. In accordance with article 53 of the Vienna Convention on the Law of Treaties,⁸ it was the international community as a whole that acted as what might be termed the governing body—a fact that was made absolutely clear in paragraph 2 of draft article 18. Moreover, article 53 of the Vienna Convention gave no indication of the content of the concept of *jus cogens*, whereas paragraph 2 of draft article 18 was reinforced by the examples in paragraph 3. Nobody had raised any basic objection to the relevance of those examples, which did not in any sense constitute an exhaustive list. In addition, the opening proviso of paragraph 3: "Subject to paragraph 2" made it plain that, in every case, the examples listed would be

⁵ Text subsequently circulated as document A/CN.4/L.243/Add.1/Corr.1 of 23 July 1976.

⁶ See 1402nd meeting, para. 75.

⁷ *Ibid.*, para. 63.

⁸ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. 70.V.5), p. 289.

- subject to the test specified in paragraph 2 for determining the existence of an international crime.
13. While he appreciated the reasoning behind Mr. Ushakov's comment regarding paragraph 3 (d), deletion of the phrase "such as those prohibiting massive pollution of the atmosphere or of the seas", or its replacement by another example, would require very careful consideration, which the Commission was not in a position to give to those questions at the present time.
14. Article 18, as now proposed, stated essentially that internationally wrongful acts fell either into the category of international crimes or into that of other kinds of breach of an obligation which did not constitute international crimes. As the Special Rapporteur had pointed out, such a categorization was necessary for the Commission's future work on régimes of responsibility. The present structure of the article should, he thought, be maintained, but there again, the question whether it should be split into separate articles could be considered at a later date.
15. The use of the term "delict" in the English version of paragraph 4 created very real difficulties: it would not be enough to speak of "other internationally wrongful acts", and the expression "international wrong" was not sufficiently precise.
16. At the present stage, proposed amendments to the draft could not be considered in full. The best course would be to approve the article provisionally, and to continue to examine it on first reading at the Commission's twenty-ninth session in the light of the comments that would be made in the Sixth Committee.
17. Mr. QUENTIN-BAXTER said he shared the view that article 18 was an achievement of the greatest importance. Initially, he, too, had had misgivings about some of the phraseology of the text of paragraphs 2 and 3 proposed by the Drafting Committee, but further reflection had revealed that it was difficult to find alternatives that were better than, or even as good as, the wording now proposed.
18. Paragraph 1 had the advantage of using a formulation that was more in keeping with the precedent articles, particularly article 16.
19. Paragraphs 2 and 3 involved the ideology, precepts and policy of the United Nations. The essential strength of those paragraphs was that they maintained a skilful balance between the criterion of *jus cogens*, in other words, obligations *erga omnes* to the international community, and the practice of the General Assembly (in other words, the notion of international crimes). International lawyers must always consider State practice, that was to say, the way in which the international community conducted itself. The two paragraphs endeavoured to imbue that practice with principle, by suggesting the scope and the true meaning of the action taken by the international community in particular cases. In an imperfect world, the law operated within parameters of power; perfection and total objectivity did not lie within the Commission's grasp. But the Commission was at all times concerned to extend the area in which political decision-making and the use of power were based on legal principles.
20. Paragraph 2 acknowledged the realities of the world as now organized: the test for determining the criminality of the act of a State was whether the breach of the obligation was of such essential importance that it had to be regarded by the international community as a crime. Paragraph 3 went on to suggest the manner in which the international community could come to such a judgment. When the paragraphs were considered in that way, his earlier doubts about certain wording were dispelled. For example, the merit of the phrase in paragraph 2 "recognized as a crime by that community as a whole", was that it followed closely article 53 of the Vienna Convention and served as a reminder that, in judging the criminality of a particular act, the international community applied the basic concept of *jus cogens*, which meant a rule from which no State could depart merely by exercising its will. The commentary should make it perfectly clear that, under that rule, no individual recalcitrant State would be allowed to claim that certain acts were legal when the international community had decided otherwise.
21. The introductory sentence of paragraph 3 rightly included the proviso "Subject to paragraph 2", for State practice was of paramount importance. The reference in the same sentence to the "rules of international law in force" indicated that it was not the function of the Commission to create a penal law or to define crimes. It was essential for that limitation to be acknowledged, not only by the Commission itself, but also by the General Assembly. In article 17, it had been possible to accept the notion of obligations "in force". Consequently, in article 18 it was possible to accept the notion of rules of international law in force, since the phrase indicated that the law was evolving and that new rules of positive law would emerge in the future.
22. Paragraphs 2 and 3 were appropriately linked to each other. They did not represent a compromise in which positions of principle had been abandoned: they embodied a concept to which all could subscribe. Fortunately, the references to crimes had been so rearranged that the article did not deal in one sense with the primary case of aggression and, in another sense, with other kinds of obligations enunciated in the Charter among the purposes and principles of the United Nations.
23. It was gratifying that paragraph 3 referred, without restriction or qualification, to the maintenance of international peace and security, in deference to the place held by that concept in the Charter. He had no difficulty in regard to the words "by force" in paragraph 3 (b), for the Commission should beware of seeking to contribute to positive penal law. If it failed to employ a reasonably qualified and cautious form of words, it might be exceeding the limits of its own competence.
24. Paragraph 3 (c) was concerned primarily with human rights. Neither the commentary nor the discussion had paid much attention to General Assembly practice in that field, and it might be advisable to recall certain key resolutions. For example, the Economic and Social Council, with the endorsement of the General Assembly, had referred in resolution 1235 (XLIII) to "gross violations of human rights and fundamental freedoms", in resolution 1503 (XLVIII) to "a consistent

pattern of gross and reliably attested violations of human rights", and in resolution 1919 (LVIII) to "situations that reveal a consistent pattern of gross violations of human rights". Such resolutions demonstrated the growth of a practice in the field of human rights that did much to validate the concepts enunciated in article 18, and it was to be hoped that they could be mentioned in the Commission's report. In his opinion, article 18 would impart a new dynamism to the work of the United Nations in human rights and similar fields.

25. He saw no immediate need for the inclusion of paragraph 4. It had already been pointed out that the term "international delict" might lead the Commission in the wrong direction. The purpose of article 18 was not to state that internationally wrongful acts were of two mutually exclusive kinds, but to indicate that some types of internationally wrongful act were of such importance that a special régime of responsibility was involved and that they had, in the lexicon of international law, become known as international crimes of the State. However, the underlying message of paragraphs 2 and 3 was one of great promise for the United Nations. Like Sir Francis Vallat, he believed that, in the light of the comments of the Sixth Committee, it would be possible to continue, at the Commission's twenty-ninth session, the consideration on first reading of something that was novel and seminal.

26. Mr. TSURUOKA said that he approved of article 18 as proposed by the Drafting Committee, but only provisionally, for the misgivings he had expressed during the earlier consideration of the original text had still not been dispelled. He drew attention to the summary record of his statement of 24 May 1976.⁹ Although he had appreciated the reasoning which had led the Special Rapporteur to propose paragraphs 1 and 2, he had at that time questioned whether the rules contained in those provisions should be affirmed and had added that that question could only be answered when it was known how the two paragraphs would be applied and what instance "would establish that there had been a violation and decide on the measures to be taken to redress the wrong". Paragraphs 2 and 3 were on the borderline between politics and law and dealt with the same topics as the United Nations Charter; for instance, the maintenance of international peace and security, the right of peoples to self-determination and human rights. If it was formulating rules on matters already covered by rules established in the Charter, the Commission must ensure a balance between the political and legal factors; but such a balance was very difficult to maintain. Consequently, it might be wiser not to establish such rules, but simply to refer to the Charter. In any event, it seemed premature to attempt to evaluate fully the practical value of article 18 before knowing how it would be applied. The Special Rapporteur should therefore give some indication of the application procedure in his commentary. That would help Governments to assess article 18 properly.

27. Mr. CALLE Y CALLE said he shared the collective views of the Drafting Committee which had returned a

text of article 18 that was perhaps more cautious and more moderate than the original one proposed by the Special Rapporteur.

28. As already pointed out by other speakers, the text formulated by the Special Rapporteur had the attraction of setting out in clear and direct terms the major categories of obligation which were so essential to the international community that their breach was considered highly wrongful; the international community considered such breaches so detrimental to its fundamental interests that it regarded them as crimes giving rise to very grave responsibility. They should thus be clearly distinguished from other breaches of international obligations which, although also constituting internationally wrongful acts, gave rise to a different degree of responsibility.

29. The Special Rapporteur was to be commended for thus giving the Commission an opportunity to declare, in the most explicit manner, that there were certain categories of behaviour or conduct which the international community had to condemn, prosecute and punish.

30. The text of article 18 now proposed by the Drafting Committee differed from the original text in that the international crime *par excellence*, constituted by breaches affecting the maintenance of peace and security, had been moved from paragraph 2 to paragraph 3 (a), but without the explicit reference to resort to the threat or use of force. The various categories of international crimes were thus placed on the same level in the new paragraph 3. He found that structure more logical and better balanced than that of the original text.

31. The new text of paragraph 2 specified that where an obligation was so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, the breach constituted an international crime. He believed that the statement in that paragraph was indisputable and that it was perfectly justified to regard the acts it described as international crimes.

32. The words "on the basis of the rules of international law in force", in paragraph 3, were particularly important. The use of the words "in force" meant that, apart from the case contemplated in paragraph 2, of breaches recognized as international crimes by the international community, probably under customary international law and by virtue of rules of *jus cogens*, there were international crimes defined as such by treaty law. The cases mentioned in paragraph 3 did not represent violations of the body of ethico-legal rules evolved by the international community, but breaches of rules of contemporary positive international law which were in force at a given time.

33. Because of the importance he attached to the opening clause of paragraph 3, he suggested that paragraph 4 should be reworded so as to refer explicitly not only to paragraph 2, but also to paragraph 3. It would thus state that any internationally wrongful act which was not an international crime in accordance with paragraph 2—customary rules of *jus cogens*—or paragraph 3—rules of positive international law—constituted an international delict or wrong.

⁹ See 1375th meeting, paras. 1-4.

34. In conclusion, he supported the text proposed by the Drafting Committee for article 18, which had been described as well-balanced and prudent. The article was prudent, not because its provisions were timid, but because it was couched in lucid and wise terms. He was convinced that the text would be favourably received by the Sixth Committee, because it specified clearly the main categories of obligation which the international community regarded as essential and whose breach should logically be considered as highly wrongful and criminal.

35. Mr. AGO (Special Rapporteur) said he was glad to note that all the members of the Commission accepted article 18 as proposed by the Drafting Committee. The wording of the provision was probably not perfect—he was not 100 per cent satisfied with it himself—but the text was on the whole satisfactory and it could be improved later on second reading once the views of Governments were known.

36. Many members of the Commission who had expressed their views on the article at the 1402nd meeting had appeared to regret that the Drafting Committee had changed the wording which he had originally proposed. The text now under consideration had several times been described as a compromise text; but the members of the Commission were not spokesmen for a Government or a group of Governments: they sat on the Commission in a personal capacity. The members of the Commission should try to find formulae which satisfied their own legal conscience without attempting to seek a compromise between conflicting political interests as though they were participating in a conference of plenipotentiaries. Governments would be only too anxious to seek a compromise later. The text prepared by the Drafting Committee should therefore not be considered as a compromise text; it had been drafted in an effort to express in the best possible way the legal idea underlying the article he had proposed and it was for that reason that as Special Rapporteur he recommended that the Commission should adopt it.

37. In article 18, the Commission was dealing with the question whether the breach of certain obligations should be subject to a certain régime of responsibility. In his fifth report (A/CN.4/291 and Add.1-2), he had already mentioned in broad outline the problem of the different régimes of responsibility connected with the various categories of internationally wrongful acts. Despite the encouraging remarks made on that point, he felt that no effort should be made to explore the matter further in the commentary. The Commission had not yet had an opportunity of studying the consequences of internationally wrongful acts, the forms of responsibility and the modes of implementation. The future should not be mortgaged by taking a position on those questions forthwith in the commentary to article 18. Besides, as Mr. Quentin-Baxter had pointed out, the distinction between international crimes and other internationally wrongful acts would not always be very clear, and he wished to emphasize that it had never been his intention to propose one single régime applicable to all international crimes and another single régime applicable to all other internationally wrongful acts. When the time came, the Commission would probably have to provide

for a variety of régimes of responsibility. Lastly, he recalled that the distinction made in article 18 between international crimes and international delicts was not really new—by endorsing it in its draft the Commission would really only be taking note of a distinction which had been gradually gaining recognition by the international community and which it could not ignore.

38. As to the text of article 18, he wished to emphasize, as Mr. Reuter had done,¹⁰ that the adoption of that provision would not mean that the Commission intended to create international crimes itself. The Commission had no intention of drafting an international penal code; it was merely establishing, in accordance with international law in force, that a serious breach of certain international obligations must be regarded as an international crime.

39. In paragraph 2, the Commission gave a general definition of an “international crime” that was valid for the present and for the future. The international community could of course add crimes to the list in paragraph 3 or even remove them from it, but the criterion for determining whether an internationally wrongful act constituted an international crime would still be the one stated in paragraph 2. In paragraph 3, on the other hand, the Commission gave a number of examples, referring only to the rules of international law at present in force and it could not have done otherwise. That reference to international law covered both written instruments and the unwritten rules recognized by the international community.

40. Generally speaking, some members of the Commission had found that the idea underlying paragraph 2 was right, but that to state it was a truism. Article 53 of the Vienna Convention contained a definition of the expression “peremptory norm”, which was just as much a truism as paragraph 2 of the article under consideration, if such a truism was indeed present. For a peremptory norm was stated to be a norm accepted and recognized as having a peremptory character by the international community of States as a whole. Nevertheless, article 53 of the Vienna Convention was generally considered to be satisfactory, for it served to specify that a claim by one or another group of States that a rule was peremptory was not enough to make it so; the international community as a whole had to recognize it as such.

41. The notion of the “international community as a whole” did not by any means imply unanimity of the members of the international community. As was clear from the debates at the United Nations Conference on the Law of Treaties, what was required was that the main groups of States making up the international community—namely the various essential components of that community—should recognize the peremptory nature of a norm, even though some individual States might hold a different opinion. On the other hand, a single group of States which formed the majority at a particular time must not be able to impose its views and by those views alone, frustrate the *pacta sunt servanda* rule. In the absence of such a safeguard, the introduction of the notions of a

¹⁰ See 1402nd meeting, para. 61.

“peremptory norm” and an “international crime” would not be a genuine advance, but would tend to divide the international community. Some would regard such a guarantee as excessive caution; but he thought it was a matter of common sense, since it was only in that way that the international community could progress towards greater cohesion and unity. As the international community had no legislative institutions empowered to determine what internationally wrongful acts were international crimes, it was indispensable for all the essential components of the community to participate in that determination. While it was true that the wording of paragraph 2 could be improved as regards certain matters of form, it was very important not to change the substance of the rule which it stated.

42. The examples of international crimes given in paragraph 3 were all taken from international law in force. As already dated, the list could be extended if the international community as a whole came to include other crimes in that category in the future. The text of the article proposed by the Drafting Committee was no doubt more precise than the text he had originally submitted. In paragraph 3 (a), the Drafting Committee had referred directly to one of the purposes of the United Nations, as stated in Article 1 of the Charter. In that connexion, he observed that while the Commission could refer to the Charter, it was not obliged to confine itself exclusively to referring to the terms of the Charter. Stating the purposes of an international organization and drawing a distinction in general international law between international crimes and international delicts were two different things. It was for that reason that the Drafting Committee had considered that article 18 should not be too closely linked with the purposes of the United Nations. At the present time, the breach of obligations of essential importance for the maintenance of international peace and security, such as that prohibiting aggression, was in the forefront of international concern, but the breach of other international obligations could also constitute an international crime. Nor were the examples given in paragraph 3 exhaustive in that respect. That was why the introductory phrase in paragraph 3 contained the words “*inter alia*”, while subparagraph (a) contained the words “such as”. The Drafting Committee had moreover not attached any adjective to the term “aggression”, since the Commission was not required to pronounce on the different forms that aggression might take. Personally, he believed that all acts which, even if they did not involve the use of armed force, constituted genuine attacks against the independence, freedom or existence of a State, should be characterized as acts of aggression; the Commission, however, was not called upon to give a definition of aggression. Referring to the reservation made by Mr. Tabibi,¹¹ he assured the Commission that the different views expressed by members would be objectively reflected in the commentary to the article.

43. For an internationally wrongful act to constitute an international crime, two conditions must be satisfied.

There must be a breach of an international obligation considered by the international community as essential to the protection of its interests, and the breach must be serious. Hence, those two elements were repeated in each of the examples given in paragraph 3.

44. Only one comment had been made on paragraph 3 (b). One member of the Commission had been concerned about the phrase “the establishment or maintenance by force of colonial domination”, and another had replied in terms that he (the Special Rapporteur) endorsed. It was the act of opposing by force the desire for liberation of a people under colonial domination which was today considered criminal. There could, however, be cases in which such a people might feel no need to separate from the mother country, so care should be taken not to make the notion of an international crime too broad. One might be opposed to colonization, but it could not be claimed that every vestige of colonization was an international crime even where it did not lead to any conflict. If every breach of an international obligation came to be regarded as an international crime, the distinction between international crimes and international delicts would be meaningless.

45. He agreed that the expression *à une large échelle* (“on a widespread scale”), in paragraph 3 (c), could seem unsatisfactory and that an expression equivalent to the English term “gross” might have to be found. The expression would have to indicate that the breach affected a substantial number of persons and not merely a few individuals. He had always been an ardent advocate of human rights and considered that the sovereignty of States should not prevent international law from imposing certain obligations on them regarding the treatment of their own nationals. He was in favour of the establishment of authorities such as the Commission on Human Rights or the European Court of Human Rights. The matters brought before such authorities were not generally international crimes, however, and there was an enormous difference between, for example, genocide and wrongfully preventing someone from exercising a particular profession. That was the difference between a simple breach of an international obligation and an international crime.

46. Only slavery, genocide and *apartheid* were mentioned in paragraph 3 (c), but there were, of course, other international crimes consisting in the breach of obligations relating to the safeguarding of the human being, such as the massacre of prisoners of war or the deportation of populations. The reason why the Drafting Committee had not included further examples was in order to avoid giving the impression that the list in subparagraph (c) had been intended to be exhaustive and to avoid mentioning the crimes referred to in conventions on humanitarian law—a sphere in which it might be very difficult to distinguish between international crimes and other internationally wrongful acts.

47. The expression “safeguarding the human being”, in subparagraph (c), seemed to him satisfactory, since it covered not only the physical integrity of human beings, but also their equality in regard to dignity. In the case of *apartheid*, it was not so much the physical integrity of the individual that was threatened, as human dignity.

¹¹ See 1402nd meeting, para. 54.

48. Paragraph 3 (*d*) was, he thought, especially important. For the international crimes enumerated in the preceding subparagraphs, with the exception of aggression, should sooner or later become things of the past; colonialism and slavery, genocide and *apartheid* were destined—or so it was hoped, at least—to disappear. But the crimes referred to in subparagraph (*d*) could be the crimes of the future: depriving human beings of their environment, taking away their sources of supply, causing climatic changes, etc. Mr. Ushakov had pointed out that the example chosen for subparagraph (*d*) was not entirely satisfactory, but that could be remedied later.

49. As to paragraph 4, he hoped that a term could be found in English to render the French notion of *délit*. It would be regrettable to have to abandon that provision for lack of a suitable English term.

50. Draft article 18 was particularly important because it committed the Commission. It had enabled the Commission to throw light on one of the most important aspects of State responsibility, if not of all international law. Although the wording might be open to criticism, it was the result of the praiseworthy efforts of the Drafting Committee. He hoped, therefore, that the Commission would adopt the provision unanimously.

51. Mr. ŠAHOVIĆ speaking as a member of the Commission, said that in formulating the article under consideration, the Commission had done work of historic importance. He fully shared the views of the Special Rapporteur and approved of the draft article proposed by the Drafting Committee.

52. Speaking as Chairman of the Drafting Committee, he emphasized that the articles drafted by that Committee were in no way compromises. They had been prepared on the basis of the texts proposed by the Special Rapporteur, in the light of the Commission's discussions. Each member of the Drafting Committee had made his contribution, as a jurist, to the drafting of texts that were in conformity not only with the development of the rules on the international responsibility of States, but also with the development of the international legal order as a whole.

53. Article 18, as proposed by the Drafting Committee, respected the ideas of the Special Rapporteur. The wording had been improved to make it correspond more closely to the needs of the international community and of contemporary international law. The concept of international crime had been envisaged having regard to the present and to the future. The Drafting Committee had taken into account the views of all the members of the Commission, and the practice of States on which the Special Rapporteur had mainly based his work. Article 18 certainly involved taking a position which would have important repercussions on the future development of international law.

54. Mr. USHAKOV said he hoped that his reservations regarding the last phrase of paragraph 3 (*d*), "such as those prohibiting massive pollution of the atmosphere or of the seas", would be reflected in the commentary to article 18.

55. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed

unanimously to approve article 18 as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 1.5 p.m.

1404th MEETING

Thursday, 8 July 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause * (*concluded*) (A/CN.4/293 and Add.1; A/CN.4/L.244)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the draft articles on the most-favoured-nation clause proposed by the Drafting Committee.

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) drew attention to document A/CN.4/L.244, containing the set of draft articles on the most-favoured-nation clause adopted by the Drafting Committee at the present session. Before introducing the new texts, namely, articles 21, E, F, B, C, D, 21 *bis* and subparagraph (*e*) of article 2, he wished to make some preliminary comments. In the first place, as explained in the note at the beginning of the document, some drafting changes had been made to the texts of some of the articles already adopted by the Commission¹ in order to make the terminology consistent throughout the draft. As the note stated, those changes were indicated by underlined words and foot-notes. Most of them resulted from the Drafting Committee's decision to use systematically, throughout all the draft articles, the verbs "to accord" in English, *accorder* in French, *otorgar* in Spanish and *predostavlyat* in Russian when referring to the treatment applied by the granting State to the beneficiary States, and the verbs "to extend" in English, *conférer* in French, *conferir* in Spanish and *predostavit* in Russian when referring to the treatment applied by the granting State to a third State. With respect, in particular, to the text of article 5,

* Resumed from the 1389th meeting.

¹ For the text of the articles adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

the necessary changes had been made in the French, Russian and Spanish versions, while in the English version, the corresponding verbs had been added to make the text uniform in the four languages. In addition, the verb "to accord", and its equivalents in the other languages had been used wherever material reciprocity was involved. In article 17, the square brackets round the words "or other" had been deleted, since the discussion that had taken place in the Sixth Committee of the General Assembly, whose attention had been drawn to those words, had indicated that there was no objection to their inclusion.² As to the deletion of the words in square brackets at the beginning of article 16, he would revert to that point in connexion with article D.

3. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve the drafting amendments indicated by the Chairman of the Drafting Committee.

It was so agreed.

4. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said it was now his duty to inform the Commission that the Drafting Committee had decided not to adopt, for inclusion in the draft articles, two of the texts referred to it by the Commission and initially proposed by the Special Rapporteur in his seventh report (A/CN.4/293 and Add.1). They were the new clause (4) proposed for insertion in the introductory sentence of article 3 (*ibid.*, para. 21) and the new article A (*ibid.*, para. 9). With regard to the new clause (4) to be inserted in article 3, the Drafting Committee and the Special Rapporteur had agreed that the suggested addition was not particularly necessary, since the proposed clause would deal with a situation seldom encountered in current practice. They had also rejected an article based on the article A initially proposed by the Special Rapporteur. That article had dealt with the relationship between the draft articles and the Vienna Convention on the Law of Treaties.³ The Drafting Committee had decided that there was no need for such an article in the draft and that it might be a source of confusion if the parties to a future convention based on the draft articles were not also parties to the Vienna Convention and vice versa. The Committee had also taken the view that, since the draft articles applied only to most-favoured-nation clauses contained in treaties between States, it was obvious that the general rules of the law of treaties would apply in any case.

5. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve the decisions by the Drafting Committee which had just been explained.

It was so agreed.

² See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 120-164.

³ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

ARTICLE 2 (Use of terms) subparagraph (e) ("material reciprocity")⁴

6. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for sub-paragraph (e) of article 2:

Article 2. Use of terms

[For the purposes of the present articles:

...]

(e) "material reciprocity" means that the beneficiary State is entitled to the treatment provided for under a most-favoured-nation clause only if it accords equivalent treatment to the granting State in the agreed sphere of relations.

7. He reminded the Commission that, in his seventh report, the Special Rapporteur had taken up the suggestion previously made by certain members that a definition of "material reciprocity" should be included in article 2 (Use of terms). On the basis of the discussion in the Commission and the proposals submitted, the Drafting Committee had slightly amended the initial proposal by the Special Rapporteur and had adopted the present text, according to which the expression "material reciprocity" meant that the beneficiary State was entitled to the treatment provided for under a most-favoured-nation clause only if it accorded equivalent treatment to the granting State in the agreed sphere of relations. In that text, the words "equivalent treatment" replaced the words "the same treatment in kind", used by the Special Rapporteur in his first proposal. The phrase "in the agreed sphere of relations" made the concept of material reciprocity more precise, and linked it with the definition of the most-favoured-nation clause in article 4.

8. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve subparagraph (e) of article 2 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 21⁵ (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences)

9. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 21:

Article 21. Most-favoured-nation clauses in relation to treatment under a generalized system of preferences

A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.

The Drafting Committee had adopted article 21 exactly as it had been provisionally adopted by the Commission at the twenty-seventh session. Although some drafting amendments had been proposed during the discussion at the present session, it had taken the view that, since the

⁴ For previous discussion, see 1378th meeting.

⁵ See 1386th meeting, paras. 37-43 and 1387th meeting.

article had, on the whole, been favourably received by the Sixth Committee at the last session of the General Assembly and, indeed, by the members of the Commission, which had referred it to the Drafting Committee, the best course was to leave it as it stood.

The title and text of article 21 had therefore been submitted without change.

10. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve article 21 as proposed by the Drafting Committee.

It was so agreed.

11. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that, for the convenience of members of the Commission, the texts of the articles which he was about to introduce had been reproduced in document A/CN.4/L.244 with the numbers or letters given by the Special Rapporteur to the corresponding original articles. The Drafting Committee had, however, placed them in the order in which it thought they should appear in the draft. The final numbering was shown in square brackets for each article.

ARTICLE E [22] (Most-favoured-nation clauses in relation to treatment extended to land-locked States)⁶

12. The Drafting Committee proposed the following text for article E [22]:

Article E [22]. Most-favoured-nation clauses in relation to treatment extended to land-locked States

1. A beneficiary State other than a land-locked State is not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under the most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State and relating to its access to and from the sea only if the most-favoured-nation clause relates especially to the field of access to and from the sea.

13. In paragraphs 80 to 82 of his seventh report, the Special Rapporteur had proposed the inclusion of an article dealing with the most-favoured-nation clause in relation to treatment extended to land-locked States. The Drafting Committee had adopted a new version of that article, in two paragraphs, taking account of the concern expressed by various members of the Commission during the discussion on the initial proposal. Paragraph 1 of the article referred to the case in which the beneficiary State was not a land-locked State and reproduced the tenor of the general rule contained in the Special Rapporteur's original single paragraph. It provided that a beneficiary State other than a land-locked State was not entitled under the most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea. Paragraph 2 introduced a specific

provision concerning the case in which the beneficiary State was a land-locked State. That paragraph stipulated that a land-locked beneficiary State was entitled under the most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State and relating to its access to and from the sea only if the most-favoured-nation clause related especially to the field of access to and from the sea. It should be noted that paragraph 2 reproduced the *ejusdem generis* rule incorporated in articles 11 and 12. Thus although the paragraph might not appear to be absolutely necessary, the Drafting Committee had thought its inclusion desirable in order to make it quite clear that it was only under a clause relating especially to the field of access to and from the sea that a land-locked beneficiary State acquired the advantages extended in the same field to a third land-locked State. The title accordingly read: "Most-favoured-nation clauses in relation to treatment extended to land-locked States".

14. Sir Francis VALLAT proposed that the words "rights and facilities", in paragraphs 1 and 2, should be replaced by the word "treatment", which was used in the title of the article.

15. Mr. USTOR (Special Rapporteur) endorsed that proposal. The word "treatment" was used in the other articles of the draft. Moreover, the title and the text of the article would thus be aligned, and the inelegant wording "rights and facilities . . . to facilitate . . ." would be avoided.

16. Mr. TABIBI said that the article was not concerned with the "treatment" extended to land-locked States, but with the fundamental principles of the freedom of the high seas, in other words, with the rights of land-locked States. It would be better to amend the title of the article accordingly.

17. Sir Francis VALLAT observed that the term "treatment" was much more comprehensive than "rights and facilities" and would be more favourable to the land-locked States.

18. Mr. SETTE CÂMARA agreed that the word "treatment" expressed a much broader concept. The expression "rights and facilities", however, related exclusively to access to and from the sea; it should be retained because it was more precise.

19. Mr. CALLE Y CALLE pointed out that article F [23], for example, spoke of "treatment . . . to facilitate frontier traffic". The word "treatment" covered rights and facilities concerning access to and from the sea and its use would be more in keeping with the other articles of the draft.

20. Mr. USHAKOV said that the expression "rights and facilities" was perfectly clear, whereas the use of the word "treatment", which was not sufficiently specific, might lead to difficulties in interpreting the article.

21. Mr. AGO said that the term "treatment" had, indeed, a much broader meaning than the expression "rights and facilities". The purpose of article E, however, was not to accord treatment, but to make an exception to the granting of treatment. The intention was not to say that a State having common frontiers with several

⁶ For the discussion on the text originally submitted by the Special Rapporteur, see 1385th and 1386th meetings.

land-locked States must accord to those different States the same treatment as it extended to one of them. For instance, if Italy were to extend exceptional treatment to Switzerland by placing at its disposal a dock in the port of Genoa, it was not bound to accord that treatment to any and every other land-locked country. The rights and facilities involved related only to the access of land-locked countries to and from the sea. The expression "rights and facilities" was thus preferable to the term "treatment", because it was more restricted.

22. Mr. BILGE proposed that the expression "land-locked State" should be put in the singular in the title, since it was used in the singular in the body of the article.

23. Sir Francis VALLAT said that the title could, of course, be changed. But while one could "extend treatment", one could not "extend facilities". It would be better to reconsider the matter during the second reading of the draft articles.

24. The CHAIRMAN, speaking as a member of the Commission, said it was not essential that the title of an article should always correspond exactly with the text.

25. Mr. SETTE CÂMARA, referring to the point raised by Mr. Bilge, said it might be preferable to refer to "most-favoured-nation clauses", in the plural. For instance, Brazil extended certain treatment to two land-locked States, Bolivia and Paraguay. Nevertheless, he would not insist on the use of the plural.

26. Mr. USTOR (Special Rapporteur) noted that the use of the singular as proposed by Mr. Bilge would necessitate consequential changes in other articles of the draft.

27. The CHAIRMAN suggested that the matter be left to the Special Rapporteur. If there were no further comments, he would take it that the Commission agreed to that suggestion and to approve article E [22] as proposed by the Drafting Committee.

It was so agreed.

ARTICLE F [23] (Most-favoured-nation clauses in relation to treatment extended to facilitate frontier traffic)⁷

28. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article F [23]:

Article F [23]. Most-favoured-nation clauses in relation to treatment to facilitate frontier traffic

1. A beneficiary State other than a contiguous State is not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic only if the most-favoured-nation clause relates especially to the field of frontier traffic.

⁷ For the discussion of the Special Rapporteur's proposals concerning exceptions to the operation of the clause (A/CN.4/293 and Add.1, paras. 31 to 39), and in particular frontier traffic, see 1380th meeting, paras. 37-44 and 1381st meeting, paras. 1-28.

29. Article F [23] originated in paragraphs 35 to 39 of the Special Rapporteur's seventh report, which constituted a section relating to "frontier traffic" and reflected what seemed to be the general opinion of the members of the Commission concerning the need to include an article on frontier traffic in the draft articles. Its structure was like that of the preceding article E [22]. Thus, paragraph 1, which stated the general rule, dealt with the situation in which the beneficiary State was not contiguous to the granting State, while paragraph 2 covered the special situation in which the beneficiary State was a contiguous State. As in article E [22], paragraph 2 of article F [23] reaffirmed the *ejusdem generis* rule stated in articles 11 and 12 which related to the subject-matter of the clause. It was therefore clear that a contiguous beneficiary State was entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State and relating to frontier traffic, only if the clause related especially to the field of frontier traffic. The Drafting Committee had considered that, in English, the word "contiguous" corresponded better to the French word *limitrophe* and better rendered the meaning of the words *frontière commune* than a word such as "adjacent".

30. Following the example of article E [22], the title of article F [23] read: "Most-favoured-nation clauses in relation to treatment extended to facilitate frontier traffic".

31. Mr. USHAKOV pointed out that, in the titles of articles E [22] and F [23], the word "clauses" was in the singular in the French text and in the plural in the English text. The two texts should be made uniform.

32. Mr. BILGE proposed that article F [23] should be placed before article E [22] because, in his opinion, the question of frontier traffic was more important than that of land-locked States.

33. The CHAIRMAN said that the Special Rapporteur would take into consideration the observations made. If there were no further comments, he would take it that the Commission agreed to approve article F [23] as proposed by the Drafting Committee.

It was so agreed.

THE CUSTOMS-UNION ISSUE

34. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that, in adopting articles 21, E and F, the Drafting Committee had dealt with what could rightly be called "exceptions" to the application of the most-favoured-nation clause. Members would recall that the Commission had also discussed the advisability of including a provision dealing with the "Customs-union issue",⁸ which some might consider to be an implied exception. The Special Rapporteur had not proposed an article on that issue, and the Commission had referred the question to the Drafting Committee, asking it to consider whether a provision on customs unions should be included in the draft, or whether it would be better

⁸ See 1381st to 1384th meetings.

to deal with the matter in the Commission's report. After examining the matter from that angle, the Drafting Committee had decided against the inclusion of an article on the "Customs-union issue". It had considered the proposals submitted by a member of the Commission and various other proposals on the subject. It had concluded that it was not possible to draft a text which would reconcile the different points of view expressed, and that it was better not to try to adopt an article which could not be unanimously supported by the members of the Commission. It had also been emphasized in the Drafting Committee that the adoption of article C would make it clear that, so far as Customs unions and similar associations of States were concerned, the present articles would not affect relations based on most-favoured-nation clauses contained in treaties which had been in force before the present articles took effect. Having regard to those considerations and to the Commission's discussion on the "Customs-union issue", the Drafting Committee had decided not to propose the inclusion of any article on that issue in the draft. The Committee nevertheless considered that it would be advisable to give, in the Commission's report, a suitable account of the differing views which had been expressed in the Commission.

35. Mr. AGO said that the Drafting Committee had not really decided against including an article on the Customs-union issue in the draft, but had rather abandoned the attempts to find a text acceptable to all its members. The Commission's report should therefore clearly indicate the differences of opinion which had arisen on that issue in the Drafting Committee.

36. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve the decision taken by the Drafting Committee on the Customs-union issue.

It was so agreed.

ARTICLE B⁹ [24] (Case of State succession, State responsibility and outbreak of hostilities)

37. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article B [24]:

Article B [24]. Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present article shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

38. Article B [24] was based on article 73 of the Vienna Convention on the Law of Treaties and on the corresponding provisions of the draft articles on succession of States in respect of treaties.¹⁰ Since the article proposed by the Special Rapporteur had been generally approved during the Commission's discussions, the Drafting Committee had adopted it without change as article B [23].

⁹ For the discussion of the text originally submitted by the Special Rapporteur, see 1378th meeting.

¹⁰ See *Yearbook... 1974*, vol. II (Part One), p. 268, document A/9610/Rev.1, chap. II, sect. D.

That article indicated that the provisions of the present articles did not prejudice any question that might arise, in regard to a most-favoured-nation clause, from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

39. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to approve article B [24] as proposed by the Drafting Committee.

It was so agreed.

ARTICLE C¹¹ [25] (Non-retroactivity of the present articles)

40. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article C [25]:

Article C [25]. Non-retroactivity of the present articles

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses embodied in treaties which are concluded by States after the entry into force of the present articles with regard to such States.

41. Article C [25] was modelled on article 4 of the Vienna Convention. It provided for the non-retroactivity of the present articles. The Drafting Committee had considered the question of the link between draft article C [25] and article 28 of the Vienna Convention, but it had found that the two articles dealt with quite different problems and that article C [25], which dealt only with the non-retroactivity of the present articles, could therefore be adopted without prejudice to the general rules of the law of treaties relating to non-retroactivity, as stated in article 28 of the Vienna Convention. The Drafting Committee had considered that article C [25] was important because it stressed that the present articles did not apply to most-favoured-nation clauses contained in treaties concluded before the entry into force of those articles, such as treaties relating to customs unions or other associations of States. The Drafting Committee had adopted the title and text of article C [25] as proposed by the Special Rapporteur, without change.

42. Mr. KEARNEY said that the word "embodied", while it served a purpose in article 2, subparagraph (a), was entirely unnecessary in article C [25].

43. Mr. USTOR (Special Rapporteur) said that deletion of the word "embodied" would not impair the wording of the article in any way.

44. Mr. USHAKOV suggested that it would be possible to use the word "contained", as in article 1.

45. Mr. CALLE Y CALLE said that, in the Spanish text, the principle of non-retroactivity should not be stated in such general terms. The text should specify that the articles applied only to most-favoured-nation clauses

¹¹ For the discussion of the text submitted by the Special Rapporteur, see 1379th meeting.

contained in treaties: *sólo se aplicarán a las cláusulas de la nación más favorecida contenidas en los tratados...*

46. The CHAIRMAN said that the necessary change would be made in the Spanish text. The Special Rapporteur had agreed to Mr. Kearney's suggestion and, if there were no further comments, he would take it that the Commission agreed to approve the article with those amendments.

It was so agreed.

ARTICLE D¹² [26] (Freedom of the parties to agree on different provisions)

47. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article D [26]:

Article D [26]. Freedom of the parties to agree on different provisions

The present articles are without prejudice to the provisions which the granting State and the beneficiary State may agree to, regarding the application of the most-favoured-nation clause, in the treaty containing the clause or otherwise.

48. He reminded the members of the Commission that, at its twenty-seventh session, the Commission had indicated that it would consider whether it would be advisable to introduce an article on the residuary nature of the draft articles as a whole or to adopt the method of introducing, in individual articles, the words "Unless the treaty otherwise provides or it is otherwise agreed".¹³ That was why those words had been placed in square brackets in article 16, as adopted in 1975. In paragraph 30 of his seventh report, the Special Rapporteur had proposed adding an article D entitled "Freedom of the parties to draft the clause and restrict its operation" (A/CN.4/293 and Add.I, chap. I, sect. 9). During the discussions on that draft article in the Commission and in the Drafting Committee, divergent opinions had been expressed on the question whether the present articles applied to treaties containing most-favoured-nation clauses providing for exceptions or limitations *ratione personae*, in other words, stipulations to the effect that, although most-favoured-nation treatment was accorded by the granting State to the beneficiary State, the treatment which the granting State extended to one or more specified third States, or to a group of States, must not be taken into consideration in determining whether or not there was most-favoured-nation treatment. In drafting article D [26], the Drafting Committee had taken as a starting-point the first sentence of article D as originally proposed by the Special Rapporteur. As several members of the Commission had pointed out during the discussion of that article, the second sentence seemed to be mainly explanatory and superfluous in the text of such an article. In the opinion of several members, that sentence went too far. The present text of article D [26] however, did differ from the first sentence of the original text,

in that the limitation "regarding the application of the most-favoured-nation clause" had been added. Most of the members of the Drafting Committee had considered that, as it now stood, the article did not preclude the application of the present draft articles to clauses including restrictions *ratione personae*, but it had also been said that such clauses were still not covered by the draft articles in their present form, in spite of the addition of article D [26]. That being so, the Drafting Committee understood that the Special Rapporteur intended to record, in the commentary to article D [26], the various views expressed on that matter. The title of the article had been amended and read simply: "Freedom of the parties to agree on different provisions".

49. Lastly, the adoption of article D [26] had made it unnecessary to include the words "Unless the treaty otherwise provides or it is otherwise agreed" at the beginning of article 16. The Drafting Committee had therefore decided to delete them.

50. Mr. YASSEEN asked why the English verb "to agree" had been translated into French by two different verbs—"s'entendre", in the title, and "convenir", in the text of the article. He believed, moreover, that the freedom of the parties extended to all the provisions of the clause, not only to those regarding its application.

51. Mr. USTOR (Special Rapporteur) replied that there was very little uniformity in the drafting of most-favoured-nation clauses, which ranged from straightforward statements to highly complex stipulations. As noted in the Commission's report on its twenty-seventh session there was no such thing as the most-favoured-nation clause: every treaty required independent examination.¹⁴ The purpose of article D [26] was to state that the rules were not rules of *ius cogens* and that, consequently, the parties were free to agree to provisions otherwise than in the manner specified in the draft. The slight difference of opinion regarding the meaning of the article would be reflected in the commentary.

52. Mr. USHAKOV observed that the difficulty mentioned by Mr. Yasseen arose only in the French text. In the English text, the word "agree" was used both in the title and in the body of the article.

53. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the drafting point raised by Mr. Yasseen was simply a matter of translation. The French text needed to be adapted to the English original. With regard to the substantive question, he pointed out that the word "application" had not appeared in the original text and had been added by the Drafting Committee for the sake of precision.

54. Mr. KEARNEY suggested that Mr. Yasseen's misgivings might be dispelled if the word "application" was replaced by the word "scope".

55. Mr. SETTE CÂMARA said it might be better simply to delete the words "the application of".

56. Sir Francis VALLAT said that deletion of the word "application" or the use of a word like "scope" would raise difficulties that should be avoided at the present stage. In the Drafting Committee, he had proposed that

¹² For the discussion of the text originally submitted by the Special Rapporteur, see 1379th and 1380th meetings.

¹³ See *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

¹⁴ *Ibid.*

article 2, subparagraph (d) should be supplemented by some phrase such as “except any State that may be excluded by agreement between the granting and the beneficiary States”. He had withdrawn that proposal on the understanding that the present article would incorporate the phrase “regarding the application of the most-favoured-nation clause”. If that phrase was to be weakened by an amendment, he would feel compelled to reintroduce his earlier proposal concerning article 2, subparagraph (d). In its present form, article D [26] in some measure accommodated the views of both sides—a point that would be clearly stated in the Commission’s report.

57. In the English text, the commas could be eliminated by recasting the article to read: “. . . without prejudice to the provisions to which the granting State and the beneficiary State may agree regarding the application of the most-favoured-nation clause in the treaty. . .”. Similarly, the title could be re-worded: “Freedom of the parties to agree to different provisions”.

58. Mr. CALLE Y CALLE said that, as originally submitted by the Special Rapporteur, the title of article D had referred to the freedom of the parties to restrict the operation of the clause. The original article had also included a somewhat complex provision whereby the parties could, in particular, withhold from the beneficiary State the right to treatment extended by the granting State to a specified third State or States, or to persons and things in a determined relationship with such States, or to most-favoured-nation treatment in respect of a specified subject-matter. In order to obviate the many difficulties raised by that provision, the article proposed by the Drafting Committee simply used the phrase “regarding the application of the most-favoured-nation clause”. As now worded, the article respected the freedom of the parties to reach agreement on such matters as the clause itself, its scope and its application.

59. Mr. YASSEEN said he could agree to the replacement of the word “application” by the word “scope”, suggested by Mr. Kearney.

60. Mr. USHAKOV observed that it was very difficult to amend the text of the article at the present stage, since it would mean reopening the discussion that had taken place in the Drafting Committee.

61. Mr. YASSEEN said he would not press the point.

62. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article D [26] as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 21 bis¹⁵ [27] (The relationship of the present articles to new rules of international law in favour of developing countries)

63. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 21 bis [27]:

Article 21 bis [27]. The relationship of the present articles to new rules of international law in favour of developing countries

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

64. At the present session, chapter II of the Special Rapporteur’s seventh report entitled “Provisions in favour of developing States” had been considered by the Commission at some length. In the light of the Commission’s discussions, the Drafting Committee had decided that it was not in a position to include in the draft any articles other than article 21 containing provisions in favour of developing countries, until the practices and policies of States and of the international community were more precise and better known, particularly those that might result from the decisions of competent organs such as UNCTAD. The Drafting Committee had nevertheless considered that it was important to show that the Commission was fully aware of the legitimate concerns of the developing countries, that it understood them and that it reserved its position as to the future development of law on the subject. The Drafting Committee had accordingly adopted article 21 bis, which provided that the present articles were without prejudice to the establishment of new rules of international law in favour of developing countries. The title of the article indicated its purpose, namely: “The relationship of the present articles to new rules of international law in favour of developing countries”.

65. Mr. KEARNEY said that, since the law was impartial, it might be advisable to replace the words “in favour of” by a more suitable form of words.

66. Mr. YASSEEN said he thought the expression “in favour of developing countries” should be retained, because the rules referred to really were rules in favour of those countries. On the other hand, he wondered whether the word “establishment” was appropriate, since it applied to conventional law, but not to custom, and the new rules might well derive from custom. The word “establishment” should therefore be replaced by another word, such as “supervention”.

67. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee had discussed the word “establishment” at length and had not found anything better.

68. Mr. USTOR (Special Rapporteur) said that the Drafting Committee had decided to use the word “establishment” because it covered developments in customary law and the adoption of conventional rules. He was, of course, fully prepared to accept a better term.

69. With regard to the point raised by Mr. Kearney, it would be noted that there was a difference between the establishment of new law and the “establishment of new rules of international law”. For the reasons given by Mr. Yasseen, it would be preferable to retain the words “in favour of”.

70. Mr. YASSEEN said that, if the word “establishment” was retained, it should be emphasized in the commentary that the article covered not only the creation of conventional rules, but also the formation of customary rules.

¹⁵ See 1386th meeting, paras. 37-43 and 1387th meeting.

71. Mr. AGO said that, as Mr. Yasseen had pointed out, new rules in favour of developing countries could, indeed, be created either by convention or by custom. But he did not see how the adoption of a convention could arrest the development of custom.

72. Mr. TSURUOKA said he thought that the word "establishment" covered the supervision of new customary rules; but it was usually through the adoption of conventions that new rules came into being.

73. Mr. USHAKOV noted that article 5 spoke of "treatment accorded by the granting State . . . to persons or things in a determined relationship with that State", but also of "treatment extended by the granting State . . . to persons or things in the same relationship with a third State". Article 7 also referred to "treatment extended . . . to persons or things in a determined relationship with a third State". In his opinion, the words "a third State" should, in each case, be "that State". The matter was of some importance for translating the text into Russian.

74. Sir Francis VALLAT agreed that the matter was important, but precisely because the words "a third State" might well signify a different State. The same State was not necessarily involved in each case. The point could best be considered by the Drafting Committee.

75. Mr. USHAKOV said that there was no immediate difficulty. The problem could be examined during the second reading of the draft articles.

76. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 21 *bis*.

It was so agreed.

RESOLUTION ADOPTED BY THE COMMISSION

77. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had decided not to stand for re-election to the Commission. In many years of long friendship, he had always admired the scholarship and ability of Mr. Ustor, a man who combined wisdom with humility. It had been a very great pleasure to know him and work with him, for he was an outstanding member of the Commission and had made a great contribution not only to the work of the Commission itself, but also to the cause of international law during a difficult period in international relations.

78. In appreciation of the work of the Special Rapporteur, he wished to submit the following draft resolution:

The International Law Commission,

Having adopted provisionally the draft articles on the most-favoured-nation clause,

Desires to express to the Special Rapporteur, Mr. Endre Ustor, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the most-favoured-nation clause.

79. Mr. TABIBI proposed that the draft resolution should be co-sponsored by all the members of the Commission.

It was so agreed.

The draft resolution was adopted by acclamation.

80. Mr. USTOR (Special Rapporteur) said that he was very touched. His ten years as a member of the Commission had been a great experience and had strengthened his belief that friendship could exist despite differences of creed, colour and origin. He was particularly pleased that it had been possible to complete the first reading of the draft articles on the most-favoured-nation clause and hoped that it would be possible to conclude the codification of the topic later. The resolution adopted by the Commission was something in which he took great pride.

The meeting rose at 5.15 p.m.

1405th MEETING

Tuesday, 13 July 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*concluded*) * (A/CN.4/292, A/CN.4/L.251)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by that Committee (A/CN.4/L.251), beginning with the new subparagraph (*f*) of article 3.

ARTICLE 3 (Use of terms), subparagraph (*f*)

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the new subparagraph (*f*) proposed for article 3 read as follows:

Article 3. Use of terms

[For the purposes of the present articles:

...]

(*f*) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

* Resumed from the 1400th meeting.

3. Before introducing the new subparagraph (*f*) of article 3, he wished to make a few general comments on the texts proposed by the Drafting Committee. In addition to the new subparagraph (*f*) of article 3, the Committee had adopted the titles and texts of articles 12 to 16, which formed section 2 (Provisions relating to each type of succession of States) of part I of the draft, entitled "Succession to State property". The Committee had not changed the title of that section. Wherever possible it had tried to adopt wording in harmony with that of the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-sixth session¹ without thereby ignoring or dismissing the characteristic features that distinguished succession in respect of matters other than treaties, and, in particular, succession to State property.

4. Bearing in mind that the problem of the passing of State property from the predecessor State to the successor State was to be considered separately for each type of succession, the Drafting Committee had accepted as basic the position taken by the Commission in its 1974 draft articles, namely, that for the purposes of codifying the modern law of succession of States in respect of treaties, it was sufficient to arrange the cases of succession of States in three broad categories: (*a*) succession in respect of part of territory; (*b*) newly independent States; and (*c*) uniting and separation of States.² Nevertheless, in view of the characteristics and requirements of the topic being codified, the Committee had found that more precision was necessary in differentiating the types of succession. Thus, in regard to succession in respect of part of territory, it had decided that it was appropriate to distinguish, and deal separately with, three cases: the case in which part of the territory of a State was transferred by that State to another State (article 12); the case in which a dependent territory became a part of the territory of a State other than the State which had been responsible for its international relations, that was to say, the case of decolonization of a territory through integration with a State other than the predecessor State (article 13, para. 5); and the case in which part of the territory of a State separated from that State and united with another State (article 15, para. 2). Similarly, in regard to the uniting and separation of States, while dealing with those two types of succession in separate articles, the Committee had nevertheless found it appropriate to distinguish between the "separation of part of the territory of a State" (article 15) and the "dissolution of a State" (article 16).

5. As to categories of property, the Committee had maintained, throughout the texts adopted, the distinction between movable and immovable property. However, while accepting the relevance of the distinction between property situated in the territory to which the succession of States related and property situated outside that territory, it had concluded that those two situations did not necessarily call for treatment in two separate articles

for each type of succession, as originally proposed by the Special Rapporteur in his eighth report (A/CN.4/292), but could conveniently be dealt with in a single article for each specific type of succession. Consequently, those two situations, which had been covered in the Special Rapporteur's draft by articles 12 and 13, on the one hand, and articles 14 and 15, on the other, were now provided for in draft articles 12 and 13 proposed by the Drafting Committee.

6. In the light of the discussions in the Commission, the Committee had decided to formulate articles of a general character for each type of succession, but to make special provision for certain specific kinds of State property, in particular archives. It had been understood that the question of archives would be taken up at a subsequent stage, on the basis of specific proposals to be submitted by the Special Rapporteur in a future report.

7. With regard to the criterion of the link between the property and the territory as determining the passing of property, in the case of immovable State property the Committee had chosen the geographical situation of the property, in conformity with the provisions of article 9 (General principle of the passive of State property) as adopted by the Commission at its twenty-seventh session.³ In the case of movable State property, the geographical situation was not very significant, because of the mobility of the property, so the Committee, while bearing in mind the concept proposed by the Special Rapporteur, in subparagraph (*b*) of his draft article 12, of a "direct and necessary link" between the movable property and the territory to which the succession of States related, had provisionally concluded that that concept should be made more precise. After having considered various expressions such as "property pertaining to the activity of the State and its sovereignty over the territory" and "property connected with the exercise of the sovereignty and activity of the State in the territory", the Committee had opted in article 12 for the criterion "property . . . connected with the activity of the predecessor State in respect of the territory to which the succession of States relates", which had been included in the text of a proposal submitted by a member of the Commission at the twenty-seventh session. The word "activity" should be understood as meaning essentially a governmental activity or the exercise of a governmental function. In adopting that formula, however, the Committee did not wish to imply that there might be no need to continue to search for improved language. It had been agreed that the wording chosen would be illustrated by specific examples in the commentary.

8. With regard to the new subparagraph (*f*) of article 3, he observed that the general feeling of members of the Commission had been that a definition of the term "newly independent State" was necessary. The Drafting Committee had found no reason to depart from the definition contained in article 2, paragraph 1 (*f*), of the 1974 draft articles on succession of States in respect of treaties

¹ *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

² *Ibid.*, p. 172, para. 71.

³ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

and it had accordingly adopted the same wording for the new subparagraph (f) of article 3. He drew attention to the following passage in the commentary to article 2 of the draft on succession in respect of treaties, which was equally relevant to the present draft articles:

... the definition given ... includes any case of emergence to independence of any former dependent territories, whatever its particular type may be. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case ... of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".⁴

9. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the new subparagraph (f) of article 3 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 12⁵ (Transfer of part of the territory of a State)

10. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12:

Article 12. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

11. Two of the cases which had originally come under article 12, as proposed by the Special Rapporteur, had been excluded from the provisions of the present text: the case of decolonization of a territory through integration, in other words, the case of a dependent territory which became part of the territory of a State other than the State which had been responsible for its international relations; and the case in which part of the territory of a State separated from that State and united with another State. Those two cases were now dealt with in the new texts proposed by the Committee for articles 13 and 15 respectively. The new text of article 12 was thus confined to the classical cases of transfer of part of a territory from one State to another. The word "transfer", in the title, and the words "is transferred", in paragraph 1,

were intended to specify that new scope of article 12. The situation covered by article 12 was that of territory either small in area, as in the case of a frontier rectification, or at least unimportant from the economic or political standpoint, for example, a large area of desert territory. In that situation, the problem of currency, treasury, archives and so on did not arise, or not in an acute form, so that the principle was primacy of the agreement between the States. Obviously, in the case covered by article 12, there was practically no need to consult the inhabitants, because there were either very few of them or none at all; moreover, in accordance with article 2 (Cases of succession of States covered by the present articles), the cases in question were cases of succession occurring in conformity with international law and the Charter of the United Nations. The situation covered by the text proposed by the Drafting Committee for article 15, paragraph 2, on the other hand, related to the separation of a large province and the resulting problems concerning archives, currency and treasury. That second situation was not always settled by agreement. Moreover, it was not agreement between the States which prevailed, but the decision taken by the people of the part of the territory which separated, in the exercise of their right of self-determination.

12. Paragraph 1 of the text proposed by the Drafting Committee for article 12 provided that, in the case of transfer of part of the territory of a State, the passing of State property of the predecessor State to the successor State was settled by agreement between those two States. It was understood that, in accordance with paragraph 1, the passing should, in principle, be settled by agreement and that the agreement should govern the disposition of the property, no duty to agree being thereby implied. In the absence of an agreement, the provisions of paragraph 2 applied.

13. Paragraph 2 (a) stated the general principle of the passing of State property embodied in article 9, with particular reference to immovable property. Its wording was basically the same as that of subparagraph (a) of the original draft proposed by the Special Rapporteur. The word "ownership" had been deleted as unnecessary, since the concept of the "passing of ownership" was implied, by reason of the provisions of draft articles 5 (State property), 6 (Rights of the successor State to State property passing to it) and 9 (General principle of the passing of State property).

14. In paragraph 2 (b), relating to movable property, three changes had been made to the original text: first, the distinction previously made according to the location of movable property had been dropped; secondly, the criterion of the "direct and necessary link" had been replaced by that of connexion with the activity of the predecessor State in respect of the territory to which the succession of States related; and thirdly, the words "on the date of the succession of States" had been deleted, since in article 5 State property was already defined by reference to that time element.

15. Mr. KEARNEY said that the words "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the

⁴ Yearbook... 1974, vol. II (Part One), p. 176, document A/9610/Rev.1, chap. II, sect. D, para. 8, of the commentary to article 2.

⁵ For the discussion of the text originally submitted by the Special Rapporteur, see 1389th to 1393rd meetings.

territory” in paragraph 2 (b) seemed to constitute a difficult and amorphous test to apply to practical situations. He could agree to that wording as a basis for consideration by Governments, but wished to make it clear that he had some doubts about the usefulness of paragraph 2 (b) as a test for determining title to property.

16. Mr. TSURUOKA said he thought the term “activity” was too broad. The Drafting Committee had used it for want of a better one, and it could be accepted provisionally, but it would subsequently have to be replaced by a more appropriate term.

17. Mr. BILGE said he had difficulty in accepting the new criterion proposed by the Drafting Committee in paragraph 2 (b); he proposed that it should be placed in square brackets since the Commission was considering alternative wording.

18. Mr. HAMBRO said he agreed with the view expressed by Mr. Kearney. In his opinion, however, there was no need to place the proposed wording of paragraph 2 (b) in square brackets, since the Commission was quite free to reconsider the articles on second reading in the light of the debates in the Sixth Committee and of the comments by Governments.

19. The CHAIRMAN said that, if there were no objections and if Mr. Bilge did not press his proposal, he would take it that the Commission agreed to approve article 12.

It was so agreed.

ARTICLE 13⁶ (Newly independent States)

20. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 13:

Article 13. Newly independent States

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became independent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in subparagraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

21. That article dealt with the passing of State property when the successor State was a newly independent State. It covered three situations: that of newly independent States; that of States formed from two or more dependent territories; and that of the decolonization of a territory through integration with another State. In its 1974 draft the Commission had dealt with succession relating to the transfer of territory and decolonization of a territory through integration under the same heading, but the two cases were separated in the draft under consideration.

22. Paragraph 1 was a new provision stating the rule on property of a dependent territory which had belonged to it as an independent State before it became dependent; the Special Rapporteur had mentioned that case in his eighth report (A/CN.4/292), but had not taken it up in the draft article he had proposed.

23. Paragraph 2, relating to immovable property, corresponded to paragraph 1 of the original article 14, except for the omission of the saving clause “Unless otherwise agreed or decided”, which might have the effect of attaching an absolute legal obligation to devolution agreements. The paragraph was in conformity with the solution adopted in article 9 and applied in respect of each type of succession. The Drafting Committee had taken the view that the case of immovable property situated outside the territory should not be covered in article 13. It should be noted that the Committee had deleted the references to “the date of the succession of States” and to “ownership”, which had appeared in the original text, because State property was already defined with reference to the time element in article 5.

24. Paragraph 3 (a) stated the same rule as paragraph 2 (b) of the new article 12, and thus required no comment.

25. Paragraph 3 (b) dealt with movable property other than that connected with the activity of the predecessor State in respect of the territory to which the succession of States related. There, the Drafting Committee had introduced the concept of equity by referring to the contribution of the dependent territory to the creation of the property, as originally provided for in article 15, subparagraph (b) of the Special Rapporteur’s draft. The Committee had considered, however, that the rule should apply regardless of the location of the property, unlike the rule proposed by the Special Rapporteur in article 15.

26. Paragraph 4 simply provided that the same rules applied when a newly independent State was formed from two or more dependent territories—a case which clearly came within the definition of a “newly independent State” given in subparagraph (f) of article 3.

⁶ For the discussion of the text originally submitted by the Special Rapporteur, see 1393rd to 1397th meetings.

27. Paragraph 5 related to another specific case; that of decolonization by integration. For the purposes of determining the passing of State property, that case was assimilated to the cases involving newly independent States.

28. Paragraphs 4 and 5 of article 13 might well form a separate article but the Drafting Committee had considered it unnecessary to combine them in an article at the present stage.

29. Paragraph 6 corresponded to paragraph 3 of the original draft article 14 proposed by the Special Rapporteur. Different opinions had been expressed in the Commission on the question of the permanent sovereignty of a newly independent State over its wealth, natural resources and economic activities. The Drafting Committee had come to the conclusion that in order to make the rule in paragraph 3 of the original draft article 14 more widely acceptable, it must be made less general and kept strictly within the context of the article in which it appeared.

30. Mr. TSURUOKA said he doubted whether paragraph 1 of article 13 really concerned succession of States. Although he approved of the substance of the provision, he doubted whether it was appropriate to refer to a situation which had obtained several generations before the succession. Paragraph 1 was likely to cause more difficulties than it settled. Furthermore, it should be possible to settle many aspects of the case dealt with in that paragraph by a broad interpretation of paragraphs 2 and 3 of the same article. However, he would not oppose the retention of paragraph 1.

31. Mr. RAMANGASOAVINA, referring to paragraph 6, which provided that agreements concluded between the predecessor State and the newly independent State must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, observed that the wealth and natural resources in question were not those of the people, but those of the territory over which the people exercised sovereignty. As a superstructure on the territory, the people itself had no wealth or natural resources. He therefore proposed that the paragraph should refer to "the principle of the permanent sovereignty of every people over the wealth and natural resources of its territory".

32. Mr. USHAKOV pointed out that the articles proposed by the Drafting Committee had been drafted hastily, and that there were consequently certain awkwardnesses in their wording. For instance, the word "If" at the beginning of paragraph 1 of article 13 was unnecessary. In the same paragraph, the expression "in the territory" was not sufficiently precise; it was necessary to refer to the commentary to find out what territory was meant. At the end of that paragraph, the expression "newly independent State" could be replaced by the words "successor State". To understand what dependent territory was referred to in paragraph 3 (b), it was again necessary to refer to the commentary. The first phrase of paragraph 4, which was taken from the corresponding provision in the draft articles on the succession of States in respect of treaties (article 29), described the territories forming a newly independent State as being "dependent".

The term "successor State" could again be substituted for the expression "newly independent State" where that expression was used for the second time in paragraph 4. The same substitution could be made in paragraph 6.

33. Mr. YASSEEN said he approved of the substance of article 13. It was the result of great efforts on the part of the Drafting Committee and took full account of reality. The drafting left something to be desired; but it could be improved and, in particular, condensed at a later stage. In his view, the expression "an independent State which existed in the territory" was inaccurate, since the territory was one of the constituent elements of the State.

34. With regard to paragraph 6, he hoped that Mr. Ramangasoavina would not press his proposal. The Commission ought to use the language employed by other United Nations organs, and most of the relevant resolutions of the General Assembly and the Economic and Social Council referred to sovereignty over wealth and natural resources, without specifying that they were those of the territory.

35. Mr. QUENTIN-BAXTER said that when the Commission had discussed the subject of newly independent States it had been aware that when, for example, the courts of a third State had to deal with a question of title to property under a succession of States, they encountered two problems: that of ascertaining the relevant successor sovereign, and that of referring to the law of that sovereign State in order to determine the title to the property. The Commission's discussions had dealt almost exclusively with the problem of ascertaining the successor sovereign. A uniting of States presented no problems as to the ascertainment of the sovereign, but did present considerable problems as to reference to the law of the successor State. Article 14 had been placed in square brackets in the Drafting Committee's text precisely because it did not cover the situation which the Commission had primarily discussed.

36. With regard to the question of ascertainment of the sovereign, he believed that the draft articles, as revised by the Drafting Committee, represented a great step forward. Article 13 might be said to be the very heart of the draft articles under consideration, just as the corresponding provisions of the draft articles on succession of States in respect of treaties had been considered to be the heart of that draft. In regard to article 13, the Commission owed something to the Special Rapporteur's insistence on the need for separate treatment of the cases of newly independent States and self-determination. The Drafting Committee had fully respected that distinction, dealing not only with the typical case of the newly independent State, but also assimilating to it the case in which a newly independent State was formed from more than one dependent territory and the case in which a colonial territory found its permanent status not in independence, but in integration or association with an existing State. Consequently, in article 13, the Commission now had a consistent category which corresponded entirely to United Nations doctrine and experience.

37. The matter did not end there, however. In article 12, the Commission had recognized, in accordance with a

distinction made by Mr. Ushakov,⁷ that sovereign States could make small adjustments to frontiers or other arrangements to their mutual benefit. The Commission had thus provided for the case in which there was a change of sovereignty because that was the wish of the population of the territory. That seemed to be a particularly important distinction, which had been only latent in the Commission's earlier discussions, but was now manifest in the new texts of articles 15 and 16, which dealt with cases in which a change of sovereignty could take place only because it was in accordance with the will of the population of the territory affected by the transfer. There again, the Commission had assimilated the case of a separation of States, or of dissolution of a predecessor State, to the case in which a territory joined another sovereign State. There again, too, the categories were true, corresponded to reality and did not create any artificial distinction between the case of the newly independent State and other cases. The draft articles thus contained a new threefold categorization, which he considered to be rock-solid and to provide a basis for the further work of the Commission and the General Assembly.

38. That categorization had two consequences. When the Commission dealt with rules relating to immovable property, it could, for the most part, content itself with the simple and almost inevitable rule that the property passed to the successor State in whose territory it was situated, but when necessary, as in articles 15 and 16, it could make that passing subject to the rule of equitable allocation. In the case of movable property, however, the Commission had adopted a test which would no doubt require refinement. In his opinion, the purpose and general correctness of the test were not in doubt, but its detailed application would be difficult. At first glance, the wording of article 13, paragraph 3, did not seem to place enough emphasis on the geographical location of the movable property, although that location of the property would, in most cases, be an indication of its connexion with the territory to which the succession of States related. He agreed with other members of the Commission who thought that the draft articles would still require considerable refinement, but nevertheless believed that they marked an extremely important breakthrough in the work on the topic of succession of States in respect of matters other than treaties.

39. With regard to article 13, paragraph 1, he agreed with Mr. Tsuruoka that the question of the restitution of property which had cultural or historical significance for a State was perhaps not very closely connected with the heart of the matter of a succession of States, but it was extremely important for newly independent States which believed that their heritage had in some way been dissipated before they themselves had been in a position to look after it. The idea behind paragraph 1 therefore justified further attention.

40. He regretted that the provision was limited by the words "having belonged to an independent State",

because those words imported a severe and arbitrary limitation which would, in practice, give rise to disputes. He thought the Commission was aware that there were many cases in which it was difficult to say whether, before colonization, a territory had possessed sovereignty in the sense recognized by international law, and whether an independent State had actually existed. Often, the difference was accidental and formalistic, rather than real. Sometimes the colonizing Power had dealt with the territory as though it already had independent sovereignty, without necessarily believing that it actually possessed such sovereignty and without necessarily attaching to the treaties it had made the same status as it would have attached to treaties concluded under international law. He therefore believed that for every newly independent State which saw some element of justice in paragraph 1, there would be twice or three times as many which would be disappointed by the reference to "an independent State". If the thought behind that paragraph had any place at all in the draft, article 13 would have to be drafted on a more equitable basis. It might be sufficient, since the Commission was dealing primarily with cultural property, or property of prestige, to think more in terms of the identification of the property with the people before colonization, rather than in terms of "an independent State".

41. The CHAIRMAN said that, with regard to the question of wealth and natural resources referred to in article 13, paragraph 6, he could assure Mr. Yasseen that his memory was still good and that many United Nations bodies dealing with the question of permanent sovereignty over wealth and natural resources tended to use such wording. A recent example was to be found in the Charter of Economic Rights and Duties of States.⁸

42. If there were no objections, he would take it that the Commission agreed to approve article 13, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 14⁹ (Uniting of States)

43. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 14:

Article 14. Uniting of States

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

44. During the Commission's discussion of the article 16 originally proposed by the Special Rapporteur, it had

⁸ General Assembly resolution 3281 (XXIX).

⁹ For the discussion of the text originally submitted by the Special Rapporteur, see 1398th meeting.

⁷ See 1390th meeting, paras. 20-21.

been generally considered, in regard to the uniting of States, that having stated the general rule that the property of the predecessor State passed to the successor State, there was no need to indicate in detail how that property was to be allocated among the component units of the successor State, since that was a matter to be determined under the internal law of the State concerned. The Commission had considered that a *renvoi* to internal law in general would suffice, and that was how the Drafting Committee had attempted to formulate article 14. Paragraph 1 stated the general rule, subject to paragraph 2, which contained the *renvoi* to the internal law of the successor State. The text of the article had, however, been placed in square brackets, because there had been differences of opinion in the Committee concerning the meaning to be attached to the *renvoi* to internal law for the purposes of allocating State property as belonging to the successor State or to its component parts, and the necessity of including such a *renvoi*.

45. Mr. USHAKOV said that the simplest case of succession of States was probably that of uniting of States. The rule that the State property of uniting States passed to the successor State, as contained in paragraph 1 of article 14, was also simple. It was stated, however, subject to paragraph 2, according to which the allocation of the State property as belonging to the successor State or to its component parts was governed by the internal law of the successor State. It followed that the State property did not pass to the successor State until it had enacted its internal law. Thus the application of the rule of international law stated in paragraph 2 finally depended on internal law.

46. If the Canton of Geneva decided to unite with France, it was article 15, paragraph 2, that would apply. The Commission was in agreement on that point. On the other hand, it had been unable to agree on the provision that would be applicable if Switzerland decided to unite with France to form a new State. That was why article 14 had been placed in square brackets. For Switzerland to be able to unite with France, it might be necessary for its 22 component Cantons to unite successively with France, in accordance with article 15, paragraph 2. At least that was the solution that would be required until the principle was established that the property of the predecessor States passed to the successor State in the event of a uniting of States.

47. Mr. YASSEEN said he was not really satisfied with the wording of article 14. The passing of the property of the predecessor States to the successor State was a completely separate operation from the allocation of that property among the component parts of the successor State. The latter operation was governed by internal law and it was perhaps not necessary to mention it; but if the Commission decided to do so, it should at least delete the words "subject to paragraph 2", which implied that the second operation was of the same nature as the first. Furthermore, the French word *appartenance* did not convey the same idea as the English word "allocation".

48. Mr. SETTE CÂMARA said that, despite the valuable criticisms of article 14 made by Mr. Ushakov and Mr. Yasseen, he thought the Drafting Committee was to

be congratulated on its efforts to revise that article. The difficulty was that the Commission always confused the idea of a uniting of States with that of a federation resulting from a uniting of States. But a uniting of States might result in something quite different from a federation, namely, a unitary State. If that occurred, and if the State had no component parts enjoying some degree of autonomy, there would be no need to mention the problem of the allocation of property to the State itself or to its component parts. In that sense, he agreed with Mr. Ushakov and Mr. Yasseen that article 14, paragraph 2, might not be necessary. But if the Commission had the idea of a federation in mind, the only solution to the problem of State property was a *renvoi* to internal law and, in that sense, he thought the Drafting Committee had been right to embody that rule in paragraph 2, thus simplifying a problem which had given rise to much confusion during the discussion of the text submitted by the Special Rapporteur.

49. He therefore found the text of article 14 entirely satisfactory and would be able to support it even if the square brackets were deleted.

50. Mr. RAMANGASOAVINA said he shared the views of Mr. Ushakov and Mr. Yasseen concerning article 14. He agreed with Mr. Yasseen that the use of the word *appartenance* was unjustified. Paragraph 2 seemed unnecessary and he proposed that it should simply be stated that the successor State received all the property that had belonged to the predecessor State.

51. Sir Francis VALLAT said that if anything was to be deleted from article 14, it ought to be paragraph 1, not paragraph 2. It might be that, where ownership of property was identified with sovereignty, the proposition advanced by Mr. Ushakov was true. But that was not the case in all States, and in many States the two concepts were quite different. In practice, when a new State was formed by the uniting of two independent States, those States usually agreed on a constitution, or at least a basis for a constitution, immediately before union took place. Thus the new State was born and the new constitution came into force concurrently, and there was no moment of time at which the property of the predecessor State in its entirety was vested in the successor State. In all likelihood, such property was vested partly in the successor State and partly in the constituent units of the successor State. Consequently, it would be fallacious to maintain that, whenever a uniting of States occurred, all the property of the predecessor States became the property of the successor State. The truth of the matter was that title was determined in accordance with the internal law of the successor State.

52. Mr. KEARNEY said he fully agreed with the views expressed by Sir Francis Vallat. While there were numerous precedents for the position taken by Sir Francis, he did not know of any precedents for the opposite position.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve article 14, retaining the square brackets.

It was so agreed.

ARTICLE 15 (Separation of part or parts of the territory of a State)

and

ARTICLE 16¹⁰ (Dissolution of a State)

54. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Committee proposed the following text for articles 15 and 16:

Article 15. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 16. Dissolution of a State

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

55. As he had already explained, the article 17 originally proposed by the Special Rapporteur had been split into two articles by the Drafting Committee, namely, a new article 15 and a new article 16. Article 15 as adopted by the Committee dealt only with those cases of separation of part or parts of the territory of a State in which that State continued to exist. Article 16 dealt with the case in which a State dissolved and disappeared and the parts

of its territory formed two or more States. Article 15, unlike article 12, did not place emphasis on agreement. Admittedly, agreement was a factor, but the formulation was different because there were cases of violent separation; moreover, it was not agreement between the two States which must prevail, but the will of the people expressed in the exercise of their right of self-determination. A second difference between article 15 and article 12 lay in the inclusion in article 15 of a subparagraph (c) dealing with other movable State property which had to be distributed in an equitable proportion.

56. Article 15, paragraph 1 (a), stated the rule, also included in other articles, governing the attribution of immovable property to the territory in which it was situated. Paragraph 1 (b), stated the rule, also stated in other articles, relating to movable property connected with the activity of the predecessor State in respect of the territory to which the succession of States related. The provisions of paragraph 1 (c), were essentially the same as those of subparagraph (f) of the original article 17, paragraph 2. A slightly different formulation had been used in the new text for the sake of conformity with the provisions of other articles adopted by the Drafting Committee.

57. Paragraph 2 extended the provisions of paragraph 1 to the case in which part of the territory of a State separated from it and united with another existing State.

58. Paragraph 3 was a new provision intended generally to safeguard, on the basis of equity, the interests of the predecessor and successor States where questions of compensation might arise as a result of a succession of States.

59. With regard to article 16, the rules governing the passing of State property in the case of dissolution and disappearance of a State should be the same as in the case of separation of part of the territory of a State, except in regard to immovable property of the predecessor State situated outside its territory. As provided in paragraph 1 (b) of that article, such immovable property passed to one of the successor States, while the other successor States must be compensated in an equitable manner.

60. Mr. USHAKOV observed that the Drafting Committee had omitted to specify, in article 15, that the predecessor State continued to exist. It should be indicated in the commentary that that omission would be rectified on second reading.

61. In addition, in article 16, paragraph 1, the word "disappears" should be replaced by the words "ceases to exist", for if the predecessor State disappeared, nothing remained on the succession of States.

62. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve articles 15 and 16 as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 5.30 p.m.

¹⁰ For the discussion of the text originally submitted by the Special Rapporteur, see 1399th and 1400th meetings.

1406th MEETING

Wednesday, 14 July 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

The law of the non-navigational uses of international watercourses (A/CN.4/294 and Add.1, A/CN.4/295, A/CN.4/L.241)

[Item 6 of the agenda]

1. The CHAIRMAN invited Mr. Kearney, the Special Rapporteur, to introduce his first report on the law of the non-navigational uses of international watercourses (A/CN.4/295).

2. Mr. KEARNEY (Special Rapporteur) said that his report dealt mainly with the issue of what should be the scope of the Commission's work. It had seemed inadvisable to go too deeply into the topic, or, in particular, to attempt to reach any conclusions on the principles which should govern the uses of international watercourses, because the Commission was going to appoint a new Special Rapporteur, who would have to formulate his own approach; a delimitation of the scope of the work, however, would provide the new Special Rapporteur with a basis on which to proceed and save a loss of time of up to two years. The desirability of proceeding with the work as expeditiously as possible had been emphasized by many representatives in the Sixth Committee at the thirtieth session of the General Assembly, and by the Economic and Social Council in its resolution 1955 (LIX), entitled "International river basin development", which appealed to the International Law Commission to give priority to the study of the law of the non-navigational uses of international watercourses and to submit a progress report to the United Nations Water Conference, which was to take place in 1977. It might be expected that the General Assembly, at its thirty-first session, would take similar action.

3. In addition to what might be termed political considerations, the mounting pressures on the available supply of fresh water made it essential for the Commission to take a position which would enable the new Special Rapporteur to move ahead with his work. A recent study by the secretariat of the Economic Commission for Europe on Europe's water supply problems¹ showed that water resources no longer covered needs in five European countries—Cyprus, the German Democratic Republic, Hungary, Malta and the Ukrainian SSR—

¹ "Preparatory work for the United Nations Water Conference: draft report on policy options in water use and development in the ECE region" (WATER/GE.1/R.21).

and that seven other countries—Belgium, Bulgaria, Luxembourg, Poland, Portugal, Romania and Turkey—did not expect to be able to meet the growing demand for water from their own resources by the year 2000. The situation in Europe was matched throughout the rest of the world, and a general shortage of fresh water could be expected by the end of the twentieth century.

4. That situation had three basic causes. First, the world's population was growing at an ever-increasing rate: whereas it had taken 100,000 years to reach the 1 billion mark, it had taken only another 250 years to reach a second billion, and a further 30 to 40 years to reach a third billion. The population was expected to exceed 4 billion well before the year 2000. The second cause of the water shortage was widespread industrialization. In the majority of countries, demand for water for industrial purposes exceeded demand for domestic and agricultural purposes, and industrial demand was steadily increasing as a result of the introduction and application of new technologies: for instance, the use of atomic power in place of fossil fuels or other sources of energy. Thirdly, there were the pressures of urbanization. Urban settlements, in which over half of the world's population was likely to be concentrated by the end of the 1980s, made far greater demands on water supplies than did rural communities. In view of that situation, it was essential to make the best possible use of available water, and that in turn, as numerous expert studies had emphasized, required that legal rules should be formulated.

5. While demand for water was growing, its supply—barring a drastic change in meteorological conditions—would remain constant. Even though the population drawing its water from a particular river might increase from 1 million to 10 million, the quantity of water in the river would remain the same. Of course, it might be possible to divert water from other sources, but that was very much a short-term solution which did not affect the total amount of water available. Again, it might be possible to utilize existing supplies more efficiently, but there were obviously limits to the improvements that could be made in that direction.

6. Because of its self-renewing supply cycle, water could be said to be the one natural resource over which States exercised truly permanent sovereignty. Other natural resources usually associated with that concept—for instance, minerals and oil—were finite. A State could decide whether to mine, say, coal immediately or at a later stage, but once the coal was extracted the State's permanent sovereignty over it effectively ended. Water was a unique resource in many ways. Physically, it was essential to life. It was interesting to note that one of the major purposes of the current United States Viking space probe investigating Mars was to determine whether there was or ever had been water on that planet, and on that basis to assess the probability that there was or had been life there.

7. Another of the outstanding physical characteristics of water was its mobility. Rain would fall on a hillside, run off into a stream, flow into a river and subsequently into the sea, and then be drawn up into the clouds and deposited on the land once more in a new form. The pro-

cess could be described as a perfect example of perpetual motion. The question therefore arose whether a State could truly exercise permanent sovereignty over water in the sense of being able to decide exactly when to use it. Generally speaking, water not used today would not be available tomorrow. While man could impose exceptions on that pattern by building reservoirs and artificial lakes, the resources stored in that manner were insignificant compared with the total quantity of water in motion.

8. Notwithstanding the transitory nature of water, however, it seemed to him that, if the doctrine of permanent sovereignty over natural resources had any fundamental validity, to deny any possibility of applying it to the most vital of all natural resources would be a very sweeping and grave decision. That decision would ignore another fundamental physical characteristic of water, namely, its cohesiveness and unity and its tendency to form into larger and larger units, ranging from brooks and streams to rivers and the sea. There was cohesiveness throughout the area covered by a particular river system, and all water formed one natural unit as part of a vast cycle of continual renewal. If a particular river system lay entirely within one State, the doctrine of permanent sovereignty over natural resources could clearly be applied to it, although somewhat differently from the way it applied to any other natural resource. In the case of a river system situated in two or more States, the doctrine could also be applied—clearly not in the sense of permanent sovereignty over a particular quantity of water moving through national territory, but as permanent sovereignty over a portion of the renewable and unitary resource contained in the river basin that lay within the territorial jurisdiction of the State. By nature, the process of water renewal was always confined within a certain geographical area, the boundaries of which were determined by watershed limits, rainfall patterns and so forth. The fact that all river basin areas were delimited solely by physical phenomena was another element that needed to be taken into account in dealing with the question of the uses of water and formulating the necessary legal rules. The Commission's task would be to propose how sovereignty in a particular river basin should be exercised over a natural resource which, because of its physical qualities, was common to several States. The concepts of ownership generally considered to be applicable to natural resources had not been designed for a resource with those characteristics, and the Commission needed to formulate rules which took them into account.

9. In their replies (A/CN.4/294 and Add.1) to the questionnaire prepared by the Commission (*ibid.*, para. 6) and contained in a note by the Secretary-General dated 21 January 1975 a number of Governments had stated that it would be desirable to retain, as a basis for the Commission's work, the definition of an international watercourse adopted in article 108 of the Final Act of the Congress of Vienna of 1815² which he had quoted in paragraph 21 of his report. Because of the

physical characteristics of water which he had mentioned, such an approach would, in his view, be less than satisfactory. It seemed to him that it was in no way possible to reduce the scope of any definition of the Commission's future work to less than the river system itself, that was to say, the river, its tributaries and all the smaller watercourses flowing into the river and its tributaries. The definition adopted by the Congress of Vienna had been devised for purpose of navigation; in the case of the non-navigational uses of watercourses different factors were clearly involved: for instance, pollutants discharged into the tiniest of streams, where no vessels could pass, might eventually find their way into a major river, with disastrous consequences for the riparian States. The Commission must take such considerations into account if it was to produce a rational set of rules meeting man's great need to improve the quantity and quality of fresh water available.

10. The CHAIRMAN thanked the Special Rapporteur for his introduction of the report, which had demonstrated his scholarship and the breadth of his culture.

11. Mr. SETTE CÂMARA congratulated the Special Rapporteur on his report and on his masterly introduction. The Special Rapporteur was to be commended for the prudent approach which had led him to state, in paragraph 4, that he would discuss the decisions which should be made by the Commission in order to provide a basis for commencing the substantive work on international watercourses. In other words, the report was a preliminary study, intended only to complete the initial attempt to prospect the ground, undertaken by the Commission in its questionnaire on the topic.

12. It was not perhaps altogether accurate to describe the replies of Governments to that questionnaire as "scanty", as the Special Rapporteur had done in paragraph 2 of his report. Considering the difficulties of the topic, the general practice of the United Nations in similar situations and the average number of replies to questionnaires sent out by the Secretary-General, the questionnaire of 21 January 1975 could be said to have evoked a substantial response. For instance, only five Governments had submitted observations in response to General Assembly resolution 1401 (XIV) and only nine in response to General Assembly resolution 2669 (XXV). By contrast, more than 20 Governments had replied to the 1975 questionnaire, and their answers provided important information concerning prevailing trends of thought on the main points of the Commission's enquiry.

13. For the purpose of the Commission's future work, it was of particular interest to examine government replies to question A: "What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?" and question B: "Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?". The Special Rapporteur's conclusion, in paragraph 6 of his report, that "A small majority of replies... supported the view that it would be desirable to begin the work on the basis of a less

² For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

general term than ‘international drainage basin’” seemed something of an understatement in view of the emphatic content of some of the replies. For instance, the French Government, in its reply to questions A, B and C, had stated that “As far as the use of the watercourse is concerned, it would be almost unthinkable to adopt any concept of a waterway other than that of an international watercourse” (A/CN.4/294 and Add.1, section II, question A).

14. He was glad to note that the Special Rapporteur appeared to have discarded the concept of the “drainage basin” as a basis for the Commission’s future studies. However, he demurred at the statement in paragraph 13 of the report that “the work on international watercourses should not be held up by disputes over definitions. This approach is, of course, in line with the customary practice of the Commission in deferring the adoption of definitions, or at the most adopting them on a provisional basis, pending the development of substantive provisions regarding the legal subject under review”. Questions A and B of the questionnaire were designed to elicit more than mere definitions of terms; they were intended to establish a preliminary delimitation of the Commission’s field of work, without which it would be very difficult to proceed.

15. To his mind, the Commission’s mandate was very clear: it was to formulate rules regarding the non-navigational uses of international watercourses—a traditional concept of customary international law embodied in hundreds of treaties and conventions—and not to deal with the river basin, which was a purely territorial concept covering part of the territory of a particular country or countries. What were to be considered as international, according to the customary rules of international law embodied in articles I (Future regulations) and II (Free navigation) of the Regulation of 24 March 1815³ concerning the free navigation of rivers, and articles 108 and 109 of the Final Act of the Congress of Vienna of 1815, were the international watercourses which separated or cut across the territory of two or more States, not the physical portion of land contained within the *divortium aquarum* of an international river. The fact that such a portion of the territory of a State was bathed by an international watercourse did not confer on it a status different from that of any other part of national territory. River basins varied from river to river, from place to place and from region to region. They might encompass very limited or very large portions of the territory of a State, or might cover parts of the territory of different States. The Amazon basin covered an area of 4,787,000 square kilometres and the River Plate basin an area of 2.4 million square kilometres. It could not seriously be contended that the Commission had the authority to formulate rules that would be valid for the whole of such huge areas, imposing a kind of dual or multiple sovereignty. The Commission’s mandate was to deal with international watercourses and international watercourses alone.

³ G. F. de Martens, ed. *Nouveau recueil de traités*, vol. II, 1814-1815 (Göttingen, Dieterich, 1887), p. 434.

16. Of course, the concept of a hydrological basin, or even a drainage basin, could be extremely useful in economic and geographical studies, development projects or plans for the exploration of resources; but it could hardly be thought of as a basis for establishing rules of law grounded in customary or conventional international law. To revert to his former example, the River Plate basin covered the whole of the territory of Paraguay, two thirds of the territory of Uruguay, practically all of northern Argentina, substantial parts of Bolivia, and almost all of Brazil south of the Amazon basin. To apply the theory of the integrity or unity of the river basin advanced by the Helsinki Rules on the Uses of the Waters of International Rivers (the so-called “Helsinki Rules”)⁴ an approach which the Special Rapporteur seemed to favour—would entail submitting that vast area to a régime of dual or multiple sovereignty, at least for certain specific purposes. It was highly questionable whether countries which were legitimately interested in developing their natural resources and enjoyed full sovereignty over them, would accept limitations of that kind. Moreover, there seemed to be no basis for concluding that there existed customary rules of international law which would cover all the multifarious aspects of the utilization of the river basin as a sort of international condominium.

17. In the *Lanoux Lake* case, the arbitral tribunal, while recognizing the reality of the unity of the river basin from the point of view of physical geography, had found that “The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life”⁵ and that “the rule that States may use the hydraulic power of international waterways only if a preliminary agreement between the States concerned has been concluded cannot be established as a customary rule or, still less, as a general principle of law”.⁶

18. Attempts to depart from the traditional concept of international river law and substitute the law of “international drainage basins” had also been criticized by Professor Edwin Glaser, who maintained that the aim pursued was to justify participation by great Powers in the elaboration of international rules on the utilization of certain international rivers and in the international river commissions concerned, although those Powers were not riparian States.

19. The difficulty lay not only in the sweeping nature of the “drainage basin” concept, but in avoiding a departure from the traditional rules embodied in hundreds of treaties based on the concept of international river law. The important point was to ensure that the utilization of international watercourses was always subject to the principle of legal responsibility, and that could be done without resorting to the “drainage basin” concept. If, for instance, an upstream State caused a considerable reduction in the flow of an international river by drawing

⁴ *Yearbook... 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, part four, sect. C, 1.

⁵ *Ibid.*, pp. 195-196, document A/5409, part three, chap. II, sect. 6, para. 1064.

⁶ *Ibid.*, p. 197, para. 1066.

off water for irrigation purposes, or if its industry discharged pollutants causing damage to a downstream riparian State, the effects of the upstream State's actions would be immediately perceptible and could form the subject of a claim for reparations. Thus the concept of the "unity" of the international river, as far as the principle of responsibility for appreciable damage was concerned, would be preserved.

20. The Niger, Senegal and Chad Basin treaties⁷ endorsed the concept of the river basin in its managerial, geographical and economic sense and not as a basis for formulating legal rules. Article 2 of the Act of 1963 regarding navigation and economic co-operation between the States of the Niger basin—the expression "navigation and economic co-operation" was itself instructive—contained the following provision: "The utilization of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and without prejudice to its sovereign rights...".⁸ No mention was made of the principle of the unity of the river basin or of the idea of the primacy of the common interests of all riparian States over the sovereign rights of each. The treaties dealing with the Senegal River basin and the Chad basin were drafted in the same spirit. In fact, there was not a single treaty that provided any evidence of a departure from the classical concept of international watercourses or its corollary, the distinction between the treatment of successive rivers and that of contiguous rivers, which had recently been embodied in the Declaration of Asunción on the use of international rivers.⁹

21. While he agreed with the Special Rapporteur that "If a substantial number of States balk at the idea of using the drainage basin concept as the starting point for constructing a set of rules on the non-navigational uses of international watercourses because it is too sweeping a concept, then this is a dubious starting place",¹⁰ and that "the work on international watercourses should not be held up by disputes over definitions",¹¹ he disagreed with the recommendation that the Commission should "adopt the principle that its task is to formulate legal principles and rules concerning the non-navigational uses of international river basins".¹² In their replies to the Commission's questionnaire, Austria, Brazil, Canada, Colombia, Ecuador, the Federal Republic of Germany, France, Nicaragua, Poland, Spain and Venezuela had recommended that the Commission should confine itself strictly to formulating rules for international watercourses and should not concern itself with the management of river basins. If the Commission took any decision at the present session on the scope of its work on the topic—and in his view the shortage of time available for discussion and the sharp differences of opinion in government replies to the questionnaire made it advisable to post-

pone that step—its decision should not exceed the terms of reference laid down, *inter alia*, in paragraph 4 of General Assembly resolution 3071 (XXVIII).

22. As to the other matters dealt with in the questionnaire, questions D and E would clearly be the subject of long discussions in the future. Questions F, G and H should, he thought, be answered in the affirmative. On question I, the Commission should preserve its freedom to seek technical advice wherever necessary, without resorting to cumbersome procedures such as the establishment of a Committee of Experts or accepting too hastily the expertise of existing bodies which lacked the legal background to study the problems involved. Following the Special Rapporteur's example, however, he would refrain from going into those matters in detail at the present stage.

Mr. Calle y Calle (Second Vice-Chairman) took the Chair.

23. Mr. TABIBI congratulated the Special Rapporteur on his excellent and concise report on a topic whose complexity had been reflected in the views and comments of the Governments which had replied to the Commission's questionnaire. Unfortunately, those replies would not enable the Commission to draw conclusions to be used as a basis for its study of the topic. Moreover, the associations and organizations which had also studied the topic had dealt with it in accordance with their regional and geographical needs, and the fact that each one had approached the topic in a different way showed that there were no clear and universal principles of international law relating to the non-navigational uses of international watercourses.

24. Many writers had also concluded that there were no generally recognized rules of international law concerning the economic uses of international rivers. Moreover, it appeared that no international tribunals had rendered judgements on that topic. In the judgment rendered in 1937 by the Permanent Court of International Justice on the *diversion of water from the Meuse*,¹³ the only case brought before it concerning the use of international waters, the Permanent Court had restricted itself to the provisions of the particular treaty in question and had refused to consider the general rules of international law concerning international waters. As Professor H. A. Smith had stated, the set of rules proposed by the Institute of International Law in 1911 and the various drafts adopted by the International Law Association since 1959 had been nothing more than "a premature attempt at codification". Some writers maintained that the decisions of the Supreme Court of the United States of America had made a contribution to the case law governing the rights and duties of riparian States. It should not be forgotten, however, that the disputes brought before that Court involved States belonging to a federation and that none of its judgments had referred to any particular rule of international law which was applicable to the use of watercourses. He therefore considered that the law of the non-navigational uses of international water-

⁷ See document A/CN.4/295, paras. 31-35.

⁸ *Ibid.*, para. 31.

⁹ *Ibid.*, paras. 37-40.

¹⁰ *Ibid.*, para. 42.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, para. 49.

¹³ *P.C.I.J.*, series A/B, No. 70, p. 4.

courses had not yet been fully developed and that the Commission should be very cautious in formulating rules on that topic, particularly since each river had separate historical, social, geographical and hydrological characteristics.

25. The view that international rivers were not subject to any binding rules of international law had found clear expression in the "Harmon doctrine", which had been advanced in 1895 by the United States Attorney-General, as a result of a dispute between the United States and Mexico over the waters of the Rio Grande.¹⁴ Harmon had held that international law imposed no obligation upon the United States to share its water with Mexico, since the United States had sovereignty over the Rio Grande in its own territory. If the United States no longer defended the Harmon doctrine, it was mainly because it now attached greater importance to its interests as a downstream, rather than an up-stream, riparian State. Although some writers now considered the Harmon doctrine to be a dead letter, others still invoked the argument of sovereignty, which was an indirect revival of the Harmon doctrine. He considered that the ineffectiveness of that doctrine could be attributed to the increasing socialization of international law or to the rise of "involuntary" obligations in international law.

26. In that connexion, he noted that Professor H. A. Smith took the view that premature attempts to force agreement on specific rules were more likely to do harm than good, and that nations must negotiate to find solutions to their particular problems concerning international rivers. Such negotiations were the best possible way of settling disputes about international rivers, because each river basin was different and required different treatment. He agreed with the view of Professor Smith that the topic was not ripe for codification, because experience was rapidly accumulating and scientific progress was opening many doors, with the result that it was impossible to predict new developments in areas such as irrigation and the proper economic uses of water.

27. Although experience did indicate that there were certain principles which were applicable to all States, it was difficult and dangerous to make generalizations when trying to formulate principles of international law. The Commission should therefore take account of the principle of the sovereignty of States over their natural resources and of the principle that every State must behave in such a way as not to damage the interests of other States. The Commission should also consider the principle of equitable apportionment, provided for by custom or in treaties or other instruments binding upon the parties to them. In that connexion, he noted that it might be instructive for the Commission to study the litigation involving various rivers in the United States, which showed that the principle of equitable apportionment had superseded both the "natural flow" doctrine and the "prior appropriation" doctrine. Moreover, the Commission might consider the view of the late Professor Eagleton, who had said that international lawyers should

be cautious about stating principles of substantive international law, but should lead the way in suggesting procedures that would be likely to produce voluntary agreements and voluntary settlement of disputes.

28. Referring to the Special Rapporteur's report, he said that the Commission could deal with the question of definitions at a later stage. The term "international watercourse" should, however, be defined as an international "river", in accordance with article 108 of the Final Act of the Congress of Vienna. An international river could, of course, be successive or contiguous when it separated, or served as a boundary between, States. If the river was successive, it was under national jurisdiction, but if it was contiguous, sovereignty over it was shared and prior agreement was required for the use of its water. In view of the vagueness of the term "drainage basin" and of new scientific developments, the Commission's study should use the traditional terms "watercourses" or "international rivers" or "waters". The concept of a drainage basin was too broad and should be used only for engineering and technical studies, not for a study of the legal aspects of the uses of fresh water or of the pollution of international watercourses.

29. The Commission's study should also cover flood control and erosion problems, whether caused by nature or by man. The question of pollution was important and the example the Special Rapporteur had given in paragraph 19 of his report warranted serious consideration. The Commission should, however, ask itself whether the problem of pollution should be dealt with globally or regionally, subregionally or bilaterally. It might seek the assistance of technical and expert bodies which were already studying that problem. The Commission should not deal with the questions of the quality and quantity of water in the same way, because if quantity was reduced up-stream, it might be useful for the lower riparian State, whereas if quality was endangered, that would be an entirely different matter.

30. He believed that before the Commission began serious consideration of the topic of the law of the non-navigational uses of international watercourses, it should again request Member States, particularly those with the most experience in dealing with international rivers, to transmit their views and comments. The Commission should also seek the assistance of experts in the early stages of its work, because the topic was of a very technical nature.

31. The CHAIRMAN,* speaking as a member of the Commission, said that he wished to pay tribute to the Special Rapporteur, whose excellent report had provided a basis for a set of rules to be applied to the complex topic of the law of the non-navigational uses of international watercourses.

32. The uses of rivers were as old as the rivers themselves, although modern technology had found new uses for them and had discovered new applications for old uses. The history of the uses of rivers and the rules governing those uses was extremely varied and could be

¹⁴ See *Yearbook... 1974*, vol. II (Part Two), p. 78, document A/5409, part two, chap. III, paras. 201-205 and foot-note 175.

* Mr. Calle y Calle.

said to have begun with Ovid, whom the Special Rapporteur had quoted at the beginning of his report, and to have continued with the famous Harmon doctrine of absolute territorial sovereignty. The history of the uses of rivers now included the ideas of the Special Rapporteur, who had suggested that the Commission should adopt a broad approach to the topic so that it might formulate the necessary legal rules. In formulating those rules, the Commission must take account of State practice and custom, which were reflected in existing legal cases; moreover, it must deal with the reality of the situation and bear in mind the fact that the use of water had advantages and disadvantages. In view of that fact, countries such as his own, which were crossed by rivers forming different basins, had concluded special agreements with their neighbours on the uses of those rivers.

33. The rules to be formulated by the Commission should not be more than basic principles which could apply to the particular aspects of every river. The Commission should not take as a basis the broad concept of a geographical basin, as Mr. Sette Câmara had suggested in referring to the Amazon basin, but a less general concept. He noted that at a meeting of the Presidents of the American States reference had been made to the development of integrated river basins; taken as a geographical unit, a river basin included all the States concerned and it was in the interests of those States to work together to develop rules for its use. Such rules should not, however, require the States concerned to promote the joint use of river basins.

34. The resolutions of the Economic and Social Council dealing with the development and use of international river basins embodied the principle of effective and sovereign control over water as a natural resource and referred to the principle of ecological good neighbourliness. The Commission should bear those principles in mind and try to formulate rules that would encourage States to use international watercourses without damaging the interests of other States which were also entitled to use them.

35. Another principle to be taken into account by the Commission was that of equity in the use of international rivers which formed frontiers. The rules to be adopted must also embody the principle that the benefits derived from the use of international watercourses did not, in all cases, have to be shared by all the riparian States concerned. Lastly, the rules to be drawn up by the Commission must be residuary rules taking duly into account the time-honoured customs of neighbouring States and the agreements they had concluded, in particular, for the joint exploitation of water resources and the integrated development of river basins on the basis of specific geographical conditions.

36. Mr. HAMBRO said he agreed with Mr. Calle y Calle that, in using the water flowing through their territories, States should behave in such a way as not to damage the interests of other States. He also agreed with Mr. Calle y Calle that the rules to be formulated by the Commission must be of a residuary nature.

37. He supported the view expressed by the Special Rapporteur in paragraph 13 of his report and in his

introductory statement, that the Commission's work on international watercourses should not be held up by disputes over definitions. He also shared the Special Rapporteur's view that the Commission must not limit the scope of its task too much, because the interests of the international community required it to deal with all the aspects of the question of the use of international rivers. It would therefore be short-sighted of the Commission to do anything that might restrict the freedom of the next Special Rapporteur to deal with all the aspects of the topic.

38. He had been impressed by what Mr. Sette Câmara had said about the vast size of various river basins. The fact that a basin was vast should not, however, prevent the Commission from dealing with it. Such vastness made it all the more necessary to formulate rules to guide States in the non-navigational uses of international watercourses. If the Commission adopted broad definitions, it could always restrict them if the Sixth Committee or governments so wished; it would be much more difficult to enlarge the scope of narrow definitions.

39. The ghost of sovereignty had once again appeared in connexion with the topic under consideration. He was convinced that sovereignty was not the right basis for dealing with the uses of international watercourses; the Commission must realize that there was another principle of international law to which it should attach greater importance, namely, the principle of the development of a social law dealing with the delimitation of competence and sovereignty, and with the interest of the international community as a whole in the use of natural resources for the benefit of all mankind.

The meeting rose at 1 p.m.

1407th MEETING

Thursday, 15 July 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/294 and Add.1, A/CN.4/295, A/CN.4/L.241)

[Item 6 of the agenda]

1. Mr. USHAKOV congratulated the Special Rapporteur on his first report on the law of the non-navigational uses of international watercourses (A/CN.4/295) and on his excellent oral introduction at the 1406th meeting; he had rightly adopted a general approach to the subject entrusted to him.

2. Before trying to determine what rules of international law were applicable to the non-navigational uses of international watercourses, it was important to consider certain social situations from which those rules derived. The subject under study was international watercourses, and more particularly fresh water, as one of the natural resources of mankind and of the States through whose territory the watercourses passed. Seen as a natural resource of mankind with a social role, water went beyond the bounds of the topic under study. It was a subject which included the use of both international and national watercourses, and raised the fundamental problem of humanity's natural resources. Moreover, it should be noted that an international watercourse was primarily a national watercourse, since it was necessarily connected with the territories of a certain number of States. That situation raised the question of the use by a State of the territory under its sovereignty. According to general international law, a State was free to use its territory as it pleased, so long as it did no harm to other States or to mankind as a whole.

3. The topic under study was confined to international watercourses. First of all he wished to draw attention to the distinction made in French between *fleuves*, which flowed into the sea, and *rivières*, which did not. Soviet international legal doctrine drew a distinction between international *fleuves* and multinational *rivières*. International *fleuves* were watercourses which flowed into the sea; their international character derived from the fact that States other than riparian States used them for navigation. Multinational *rivières* were watercourses which passed through the territory of several States without reaching the sea, so that only riparian States were interested in navigating on them. That Soviet conception took account both of the geographical and of the legal aspect of the situation, for the distinction between international *fleuves* and multinational *rivières* was based both on physical characteristics and on the interest of States in using the watercourses in question.

4. In principle, the régime applicable to international *fleuves* and, *a fortiori*, that applicable to multinational *rivières* was established by the co-riparian States. It was incumbent on them to conclude international agreements for that purpose. Consequently, the only rules of international law applicable in the matter were completely general rules and principles which the co-riparian States must take into account when concluding such agreements. That being so, the Commission's task would be relatively simple. It would have to determine those general principles, and establish them by codification or progressive development of international law. It would be vain to try to formulate detailed rules of international law valid for all the régimes applicable to international watercourses. The existing situations were so varied that the riparian States must establish the detailed rules, basing them on the broad principles of international law applicable.

5. He believed that the Commission should confine its study to international watercourses proper, without considering drainage basins or ground-water; but it need not settle that question at once.

6. Mr. RAMANGASOAVINA, after congratulating the Special Rapporteur on his report, said that the topic it dealt with was a new one, but the problem of the use of water was as old as the world, since water was a vital element for all mankind. The answers (A/CN.4/294 and Add.1) to the questionnaire (*ibid.*, para. 6) sent to Member States, a questionnaire which had been most judiciously drafted, already gave some idea of the direction the study would take.

7. One of the questions asked was whether the geographical concept of an international drainage basin was the appropriate basis for a study of the legal aspects of the pollution of international watercourses (*ibid.*). In his report, the Special Rapporteur attached some importance to the notion of an "international drainage basin", which was taken from the Helsinki Rules on the Uses of the Waters of International Rivers (Helsinki Rules).¹ It was mainly that aspect of the non-navigational uses of international waterways that had to be considered in Europe. The river Danube was a case in point, for it bounded or crossed several European countries and had been the subject of international agreements. For other countries, the problems of pollution were of primary importance. That made it necessary to consider the drainage basin, because the pollution of a watercourse was usually linked with the pollution of its tributaries.

8. The questionnaire sent to Governments dealt with a great variety of uses of fresh water: in the agricultural sphere, in the economic and commercial sphere and in the domestic and social sphere. For many countries the question of the uses of water was of prime importance. African countries had no sources of energy apart from their hydro-electric power potential. Furthermore, they could intensify their utilization of water, not only for agricultural purposes, but also in order to improve the quality of family life, for example through fish-breeding, which would provide new sources of food. As Mr. Ushakov had pointed out, the uses of water often had a regional aspect and should be regulated at the regional level, but taking certain general principles of international law into account.

9. In the report under consideration, much attention was devoted to flood control and the prevention of erosion. Those matters were very important in continents like Asia and Africa where methods of cultivation still included the rotation of crops, burn-beating and brush fires. Clearing and deforestation led to the running off of water, and then erosion. That in turn caused silting or sedimentation, and river mouths could be blocked by deposits which might cause flooding. The use of the waters of rivers such as the Nile, the Congo, the Senegal and the Niger was so important for the existence of the riparian States that they had held consultations with a view to drawing up regulations. Silting could cause certain run-off waters to change course, thereby causing serious damage in countries downstream. The example of the Yangtze Kiang, which had caused considerable changes in the life of Chinese farmers, was well known.

¹ *Yearbook... 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, part four, sect. C, 1.

In the United States of America the Tennessee Valley Authority had been set up to promote navigation, irrigation and electric power production. In both those cases much more difficult problems of regulation would have arisen if the watercourses had been international.

10. The drainage system very often depended on the conformation of mountain ranges, so that a sudden change due to a cataclysm could alter it. Often, a crest marked a frontier between two States, but if it collapsed, the drainage system on both sides could undergo considerable changes. It was not surprising, therefore, that in various parts of the world the States using the great international rivers had concluded agreements and set up special commissions.

11. The Special Rapporteur's report provided a useful starting-point for the study of the topic entrusted to him. In addition to Governments, he had consulted a dozen United Nations agencies and bodies, but he could also have consulted other organizations such as FAO, UNESCO and WHO, which was interested in the propagation of bilharziasis through irrigation canals. Some lakes, such as Lake Victoria, were already heavily polluted.

12. He thought the report under consideration augured well for the future of the Commission's study. The non-navigational uses of international watercourses should, it was true, be regulated at the regional level, but in accordance with general principles of international law which the Commission must endeavour to define.

13. Mr. USTOR congratulated the Special Rapporteur on his very interesting report and introductory statement. The subject before the Commission was really extremely topical because, as the Special Rapporteur had said, the world was facing a water shortage. Water would become more and more scarce, so the international community needed to plan ahead and take measures to prevent possible disasters. Planning, which had first been introduced by socialist Governments, had now been adopted in all countries and had become necessary in international life, for countries were bound to plan ahead at a time when human society was developing at such a rapid rate. Planning required a legal basis, and the Commission's task was to determine what role it could play in the codification and progressive development of the law of the non-navigational uses of international watercourses.

14. With regard to methods, he observed that the Commission's traditional method was inductive: it took stock of situations and tried to evolve rules on the basis of those situations. In dealing with the non-navigational uses of international watercourses, however, the Commission could also apply the deductive method, because there was a generally recognized rule of international co-operation, which was based on Article 56 of the United Nations Charter and embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²

15. Thus, what the Commission had to try to do was to determine, on the basis of the principle of international co-operation, what more specific principles could be applied to the non-navigational uses of international watercourses. That would, of course, be a difficult task; but if the Commission could affirm that the old maxim "*sic utere tuo ut alienum non laedas*" applied to the law of the non-navigational uses of international watercourses, it would be able to give valuable guidance. For although States had a duty to co-operate with one another, they were sometimes reluctant to agree on the principles of such co-operation because, in many disputes, they were not sure how far such co-operation should go and to what extent they had to share their water resources. Of course, many problems could be solved on a bilateral basis, but the solution to others required the wider participation of many States. All those factors should be taken into account when the next Special Rapporteur took up the study of the topic.

16. He fully agreed with the present Special Rapporteur that the question of definitions should not be allowed to delay the Commission's work on such an urgent matter.

17. The Commission also had to decide whether to deal with water pollution. He would not be opposed to consideration of that problem, but thought the Commission should bear in mind that it was closely connected with water distribution. When a State polluted water, it reduced the amount of useful water available, and the problems which then arose were almost the same as those arising when a State used too much water. The Special Rapporteur should therefore deal with the question of water pollution and disputes arising therefrom, in conjunction with the related problem of water distribution.

18. Sir Francis VALLAT thanked the Special Rapporteur for his excellent report and introductory statement on the non-navigational uses of international watercourses. It was encouraging that that topic was now before the Commission, because water problems were important and pressing and should be governed by basic legal principles, which it was the duty of the Commission to formulate. It was obvious that the scope of the problems to be dealt with was very broad and that those problems affected all countries. In that connexion, he fully agreed with Mr. Hambro that the Commission should remember that international law applied to States. However great the problems to be dealt with or the areas affected, the Commission should not hesitate to examine the rules and principles which should be applicable.

19. The question of the definition of the term "international watercourse" had been raised, but he thought the Commission should concentrate on the basically different question of the uses of international watercourses. He shared the view of other members of the Commission, who had stated that it was not the time to try to formulate a definition of an international watercourse, because that endeavour would only hamper the Commission's work unnecessarily. Perhaps after hearing the Commission's discussion, the Special Rapporteur would also be able to agree that the problem of definitions should be left aside for the time being, while the Commission considered the main principles to be applied internationally.

² General Assembly resolution 2625 (XXV), annex.

20. He also agreed with the members of the Commission who had said that water problems had to be solved on the basis of the great variety of situations which could arise, and that it was not possible to formulate detailed rules to deal with every conceivable situation. The Commission should content itself with formulating general principles to guide States. For example, it might agree on the general principle that the upper riparian State should not pollute the waters of a river in such a way that the pollution would result in serious injury to the population of the lower riparian State.

21. In that connexion, he noted that the question had also been raised whether the Commission should deal with pollution problems at all. He agreed with Mr. Ustor that pollution problems were an important aspect of the topic, but he had some doubts as to whether these problems should be given priority, since the technical development of water uses was so rapid that the question of the distribution or diversion of water was at least of equal urgency. He therefore believed that the Commission should not decide on priorities at the present stage. It should merely inform the next Special Rapporteur that his first task should be to review the various aspects of the topic, including water pollution and distribution, and then to suggest priorities to be adopted by the Commission.

22. Lastly, he reminded the Commission that there was a risk that on moving from one topic to another basic attitudes might change and that each member might tend to view the topic under consideration from the point of view of problems which arose in his own country. He therefore appealed to the members of the Commission to bear in mind the humanitarian aspects of the topic, as it had done in dealing with other matters.

23. Mr. YASSEEN said that the Special Rapporteur's report, although only twenty pages long, was undoubtedly the fruit of a very thorough study, which must have required a great deal of time and effort on the part of its author. He hoped that the Special Rapporteur would continue his work on the question. The importance of water for mankind could not be better emphasized than it was in the verse from the Koran which said that all living things had been created from water.

24. With regard to the scope of the study, it did not involve the question of the definition of an international watercourse. To extend that notion to cover drainage basins would be to change the nature of the topic. The General Assembly, in its resolution 2669 (XXV), had asked the Commission to study the question of the non-navigational uses, not of international drainage basins or hydrographic basins, but of international watercourses. That being so, the best definition of an international watercourse was that derived from the Final Act of the Congress of Vienna of 1815.³ International watercourses should accordingly be taken to mean international rivers which formed a frontier or crossed one or more frontiers. That definition would provide a good starting point;

³ For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

but there was nothing to prevent the Commission from drawing certain inferences from geographical concepts such as a drainage basin.

25. During a General Assembly debate on the international regulation of the uses of international watercourses, some representatives had observed that each international river had its own character, and that that question lent itself less to codification than to individual arrangements. He himself had pointed out that there were certain international rules established by custom and that they could be considered as general principles of international law. It was precisely those principles which the Commission was called upon to clarify and confirm. A State could not, for example, invoke a false concept of sovereignty to do as it pleased with an international watercourse. It must remember that it had legal obligations to other riparian States, and must also not neglect the humanitarian aspect of the question, as Sir Francis Vallat had said. Furthermore, every State must respect the historic rights of the other States participating in the use of the waters of an international watercourse. There were other general principles of international law which the Commission should try to formulate, but it should only go into the details when that was really necessary, for example, in order to clarify a principle or ensure its application.

26. The Special Rapporteur had approached the study of the topic by distinguishing three main categories of use. The Commission should be careful, however, not to give the impression that that list of uses was exhaustive, for scientific and technical progress could produce new uses. Moreover, it would be necessary not only to enumerate possible uses, but to combat bad uses, which caused floods, erosion or silting. The Commission ought also to concern itself with pollution, which could deprive an international watercourse of all its usefulness. However it should not give priority to that question, although it took an acute form in some cases; other questions were equally important and might be equally urgent. An overall view of all those questions was necessary in order to take a decision as to priorities.

27. Mr. TAMMES, after congratulating the Special Rapporteur on his report and introductory statement, said that in most cases it was wise to proceed from the particular to the general, considering concrete needs in practical situations before laying down abstract rules for general application. It was questionable, however, whether that approach was the best for a subject bristling with so many technical problems as the law of the non-navigational uses of international watercourses. To go into matters such as those dealt with in questions D, F and H of the 1975 questionnaire would plunge the Commission into areas where it did not feel at home and where it would be dependent upon expert advice, with the result that its work might lose momentum. It seemed to him that there were other questions on which the Commission was expert in its own right and to which it could more usefully direct its attention.

28. One such question—the concept of abuse of right—had been touched upon by Mr. Sette Câmara and Mr. Tabibi. Approaching the matter from a different angle,

Mr. Ustor had referred to the principle of co-operation. The Commission's study of the topic of international watercourses provided a unique opportunity to expand the concept of "reasonable regard to the interests of other States", which had been embodied in article 2 of the 1958 Convention on the High Seas⁴ and in other subsequent instruments such as the 1967 Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies.⁵ The Commission might base its approach on the award of 16 November 1957 in the *Lake Lanoux* case between France and Spain, in which the Arbitral Tribunal had considered that "the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own".⁶ The "rules of good faith" was an example of the kind of principle to which the Commission might most fruitfully devote attention in its future work on the topic of international watercourses.

29. Mr. BILGE contratulated the Special Rapporteur on his scientific and objective work. The non-navigational uses of international watercourses was certainly an important question, which was becoming more urgent every day, but there were other more tragic questions, such as underdevelopment. Moreover, the Commission did not have sufficient material for codification of the topic: State practice was insufficient to constitute a solid foundation, and the few treaties mentioned by the Special Rapporteur in his report applied only to certain regions and had no equivalent in others. Thus the topic under consideration was more suitable for progressive development than for codification, and the Commission's task was to encourage States to co-operate, not to impose co-operation on them.

30. The question of definition raised by the Special Rapporteur was extremely important. It was not a mere question of methodology, since the scope of the study could be broadened or narrowed according to the terminology used. It was the Commission's practice not to adopt a fixed and final definition at the outset, but to start with a provisional definition. The Special Rapporteur had therefore proposed an intermediate terminology. He (Mr. Bilge) had no difficulty in accepting it provisionally, but his acceptance depended on the rules that would be formulated for riparian States.

31. The question of pollution could not be separated from the rest of the study, since it was linked with the quality of water. It should therefore be studied at the same time as the other questions.

32. It was too soon to set up a committee of experts, and for the time being the Commission would do better to rely on the assistance provided by specialized organizations.

Co-operation with other bodies (*concluded*) *

[Item 9 of the agenda]

COMMUNICATION FROM THE SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

33. The CHAIRMAN announced that a letter had been received from Mr. Sen, the Secretary-General of the Asian-African Legal Consultative Committee, explaining that, owing to factors such as the dates of various meetings and pressure of work, it would unfortunately not be possible for the Committee to be represented at the Commission's present session. Mr. Sen had stressed that every effort would be made to send a representative to the next session of the Commission and had repeated the Committee's invitation to the Commission to be represented at its eighteenth session, to be held at Baghdad, early in 1977.

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

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

35. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that he first wished to mention some problems raised by the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms⁷ (known as the European Convention on Human Rights), which might be of interest to the Commission. The judicial body established by the Convention—the European Court of Human Rights—was not only hearing a relatively large number of cases—five cases were now before it—but had also handed down four judgments since 1975, which were of particular importance for the community of States members of the Council of Europe. One of those judgments related to other international instruments: the 1969 Vienna Convention on the Law of Treaties,⁸ the result of the Commission's deliberations, which was increasingly being used as a reference text for the interpretative work of the Court, and certain instruments of the ILO, which had guided the Court and would continue to do so in its interpretation of the European Convention, particularly on questions of trade-union freedoms.

36. In the sphere of general principles, the implementation of the European Convention on Human Rights raised a number of problems which had not yet been solved. First, there was the question of the effect of the Convention in relation to a separate legal order formed by the European Communities and the extent to which the rules of the Convention bound not only member States which were parties to it, but also the organs of the Communities

⁴ United Nations, *Treaty Series*, vol. 450, p. 82.

⁵ *Ibid.*, vol. 610, p. 205.

⁶ See *Yearbook... 1974*, vol. II (Part Two), p. 198, document A/5409, part three, chap. II, sect. 6, para. 1068.

* Resumed from the 1389th meeting.

⁷ United Nations, *Treaty Series*, vol. 213, p. 221.

⁸ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.

as organs of an autonomous legal order. In that situation developments were taking place, which had crystallized in a relatively recent judgment of the Court of the European Communities. That judgment, delivered in October 1975, recognized that the European Convention on Human Rights, in its normative part, was also applicable within the legal order of the Communities.

37. The question also arose of the relations between the European Convention on Human Rights and a universal instrument which had just entered into force and covered the same subject-matter—the International Covenant on Civil and Political Rights.⁹ That was a problem of material coexistence, which had not yet been solved for the parties to the European Convention; but it was also a problem of coexistence between two regulatory systems applying different criteria, but which might be seized of the same case at Strasbourg and New York simultaneously. Should that occur, he did not believe that article 30 of the Vienna Convention on the Law of Treaties (Application of successive treaties relative to the same subject-matter) provided a solution to the problem of coexistence, particularly with regard to the operation of supervisory bodies. The problem of the coexistence of different treaties might perhaps result from the very nature of international law which, in its present state, was relatively primitive and unsystematic. Thus it was sometimes difficult to know the scope of the international treaty obligations imposed on a single State, if that State was a contracting party to various international conventions.

38. That question arose, in particular, with regard to the implementation of the European Convention for the Protection of International Watercourses against Pollution. It was difficult to find a mode of coexistence between that Convention and three other conventions recently concluded by practically the same States—the 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, the 1976 Berne draft Convention on the protection of the Rhine against chemical pollution and the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution. Those three instruments raised a problem of concordance with the European Convention though it was true that the Paris and Barcelona texts contained some provisions identical with those of the European Convention particularly in regard to the settlement of disputes.

39. The European Communities had recently laid down directions for the discharge of dangerous substances into water, and the question arose to what extent those legal rules applicable within a narrow framework could be reconciled with the broader provisions of the European Convention—which was in any case only a model convention and not absolutely inflexible. The problem was all the more serious because the community directives provided for a system of international co-operation on pollution control which was entirely different from that provided for by the European Convention. For whereas

the Community directives established a system of control of the discharge of dangerous substances at the point of emission, the European Convention, like the three other conventions he had mentioned, provided for a system of monitoring the degree of admixture of dangerous substances—in other words, the degree of water pollution. Hence problems would inevitably arise if the International Law Commission prepared a universal instrument on the subject. Regional experience could help it to find a universal solution to ensure the protection of water, which was a resource essential to the survival of mankind.

40. As to the capacity of an international organization to be a party to an international treaty—a question of interest to the Commission and one with which Mr. Reuter was concerned in connexion with agenda item 5—two texts were in force concerning participation of the European Communities as such in conventions prepared by the Council of Europe. It should be noted that the European Communities were not an international organization of the traditional type: they had their own powers, which were mandatory in the territory of member States and for the nationals of those States, and which had the peculiarity of evolving with time and not being fixed once and for all.

41. The European Convention on State Immunity had entered into force on 11 June 1976. Under that Convention, a foreign State waived its immunity from jurisdiction when it was involved in an action *jure gestionis*, that was to say, an action not connected with the exercise of governmental authority. That Convention did not contain any general clauses, but set out, in a negative list, the legal situations in which a State involved in judicial proceedings could not invoke immunity from jurisdiction. The Convention also provided for the establishment, at the European level, of a real court competent to settle disputes concerning the interpretation and application of the Convention. Moreover, that was not the only initiative which had led to the establishment of a European court proper, in addition to the one operating under the European Convention on Human Rights: in another, much more technical and limited sphere, the Council of Europe would, at the end of 1976, adopt an instrument providing, in particular, for the establishment of a European authority to settle conflicts of national jurisdiction related to the specific problem of custody of children.

42. Among the activities of the European Committee on Legal Co-operation which might be of interest to the Commission, he also wished to mention two draft conventions which would shortly be adopted and which related to administrative assistance—a sphere which, apart from fiscal problems, had not yet been the subject of international codification, so far as he knew. One of those draft conventions related to the service of administrative documents abroad and the other to obtaining information and evidence abroad in administrative cases. European States were giving each other real administrative assistance, but it was usually on the basis of mere courtesy, without sufficient guarantee for the persons directly concerned with the administrative act to which the assistance related. The purpose of those two draft conventions was to make co-operation more

⁹ General Assembly resolution 2200 A (XXI), annex.

“transparent”, in order to protect the interests and rights of private persons.

43. With regard to co-operation in criminal cases, he wished to mention two instruments which had recently entered into force, the first of which related to the recognition and execution of foreign criminal judgments. That convention was not intended to strengthen the enforcement machinery of the State, but, on the contrary, to defend the interests of persons falling foul of the criminal law of a foreign State, who should benefit from the same humanitarian considerations as nationals of that State.

44. Lastly, under the auspices of the Council of Europe a draft convention had been adopted which broke away from an important and almost general principle of international practice concerning extradition—the principle that persons who had acted with political motives were exempt from extradition. That convention listed a certain number of concerted acts of violence which would not be considered as political offences for the purposes of extradition. Consequently, extradition would be mandatory for persons committing those acts, whatever their motives. A similar step had already been taken at The Hague in 1969, against the hijacking of aircraft, but it had not been accepted by the very broad community represented at the International Conference on Air Law held at the Hague in 1970. The draft European convention for the suppression of terrorism had been adopted in the small circle of States members of the Council of Europe, which were now invited to sign and ratify that Convention.

45. All that work might appear very specific to the European States, but it had the same purpose as the work of the International Law Commission: to consolidate and develop the rule of law in international relations. It was to that same end that the European Committee was endeavouring, to the best of its ability, to promote the work of the International Law Commission. Thus, it was shortly to undertake preparatory work for the diplomatic Conference on Succession of States in Respect of Treaties and the diplomatic conference on territorial asylum.

46. He regretted, however, that the Commission had so little time to give him as observer for the European Committee on Legal Co-operation and, especially that its members were too busy with their national and international work to attend the meetings of that Committee. He hoped that the Commission would be represented by its Chairman or by another member at the next session of the European Committee on Legal Co-operation, which was to be held in December 1976.

47. Mr. KEARNEY asked whether the draft European Convention on the service of administrative documents abroad was supplementary to the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, or whether there was some degree of overlap between the two instruments.

48. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the system of the draft Convention on the service of administrative documents abroad was based on that of the Convention

on the Service Abroad of Judicial and Extra-Judicial Documents. However, it was specifically provided that the draft Convention did not apply to judicial documents but solely to administrative documents.

49. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the observer for the European Committee on Legal Co-operation for his instructive account of the Committee's activities. It was gratifying to note that the Committee was dealing with subjects closely related to the Commission's own work, a case in point being its activities regarding water pollution control. The Committee had also taken an active interest in the question of treaties concluded between States and international organizations or between two or more international organizations, and in the topic of succession of States in respect of treaties. He wished to assure the observer for the European Committee that the Commission greatly appreciated and would continue to follow the work of the Committee. He hoped that co-operation between the two bodies would be maintained or even strengthened in the future.

The meeting rose at 1.05 p.m.

1408th MEETING

Friday, 16 July 1976, at 10.25 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/294 and Add.1, A/CN.4/295, A/CN.4/L.241)

[Item 6 of the agenda]

1. Mr. QUENTIN-BAXTER said that, despite its geographical isolation, New Zealand was exposed to many of the problems with which the Special Rapporteur had dealt so movingly and magnanimously in his first report on the law of the non-navigational uses of international watercourses (A/CN.4/295), particularly the problem of pollution. Although pollution was probably felt less acutely there than in almost any other part of the world, New Zealand had, for instance, been concerned over atomic explosions in the atmosphere which, although taking place thousands of miles away, had nevertheless had their effect on its air-space.

2. In weighing its approach to that matter, New Zealand had had to think deeply about the principles of law on which rights and interests were based in cases of that kind. The first such principle was the general duty of States, whether acting inside or outside their own territory, not to breach the rules of law or to commit acts

which were in themselves wrongful. The notion of an internationally wrongful act, which was embodied in the draft articles on State responsibility,¹ was bound to play an increasing part in the development of international law. That notion had been reinforced and magnified by the recent upsurge of interest in the environment, as reflected in the activities undertaken as a result of the United Nations Conference on the Human Environment held at Stockholm in 1972. There was growing recognition of the fact that, in the contemporary world, any act of any State was bound to affect the international community as a whole. He was glad to note, therefore, that the Special Rapporteur had approached the topic of international watercourses in broad terms and not simply in terms of regulating a transnational problem.

3. At the same time, activities of the sort he had referred to were inevitably analysed also in terms of national sovereignty. States did not regard an atomic explosion merely as an international wrong, but also considered whether it would produce injurious consequences in their own territory and encroach upon their sovereignty. The elements of the crossing of national frontiers and of sovereignty were still very strong and fundamental in contemporary concepts of law. It was extremely important that, at the present early stage of its work on international watercourses, the Commission should not view those two notions as being opposed to one another and, as it were, reduce the problem to an irreconcilable conflict between global interests and narrow national interests. On the basis of the Special Rapporteur's report and the valuable legal material supplied by the Secretariat, it was entirely possible to reconcile the two notions.

4. In that connexion, he drew attention to the earlier work on the law of the sea. While individual States had been anxious to protect their national interests and concerned with questions of sovereignty and boundaries, the international community, through the General Assembly, had recognized that the sea-bed belonged to mankind as a whole.² Although, owing to the multitude of agencies and influences involved, progress on subjects relating to the human environment would inevitably be somewhat irregular, it would from time to time, under the stress of circumstances, be generally recognized that there was a common interest so great that it transcended any interests which could be expressed in terms of national frontiers: at the same time, because the world was, and would long remain, a world of sovereign States, legal concepts would be developed through the interplay of sovereign interests.

5. It seemed to him that the history of international co-operation in regard to international watercourses held out great hopes for the formulation of global rules designed to protect the environment. In no other area had sovereign States pursued their own interests in such enlightened fashion. It had come to be a widely accepted

principle that a downstream riparian State possessed rights regarding the quantity and quality of the water it received, and the principles of law governing that matter could be said to be more advanced than, for instance, those relating to the access of land-locked States to the sea. Moreover, an examination of agreements between States concerning international watercourses, and of the rare but significant judicial decisions on the subject, revealed principles of equity which could be extracted from State practice. It was true that such agreements normally provided that the specific arrangements concluded were without prejudice to general rules, but the insistence on non-principled settlements could not conceal the fact that a pattern of generally recognized and usable principles existed.

6. In his view, the Commission should not be unduly concerned with the definitional element, that was to say, the question whether the basic unit for its work should be the international watercourse or the river basin. In their replies (A/CN.4/294 and Add.1) to the questionnaire (*ibid.*, para. 6) sent to Members States, Governments had shown no inclination to adopt an unduly restrictive approach. For instance, no State had maintained that pollution originating in a tributary which subsequently flowed into an international watercourse was not a source of State responsibility. There were many cases in which two or more States sharing a particular river basin had combined to uphold their common interests, and that process should, and undoubtedly would, continue.

7. It was clear that, where water lay upon or crossed an international boundary, there was a set of rights and obligations which needed to be developed in particular contexts, according to physical and economic interests. The degree of responsibility did not depend on proximity to the boundary. In the modern world, States would clearly be unwilling to create a condominium over every river basin that crossed an international boundary. They would increasingly be able to provide, however, that the responsibility of the riparian States extended to all that happened in such river basins and that damage or, conversely, increased advantages through development, were matters requiring equitable adjustment.

8. On the whole, Governments' replies to the questionnaire were not inadequate and revealed a very widespread recognition of the fact that there were global interests at stake. They also recognized that such interests could be promoted by careful study of, and abstraction of principles from, State practice as revealed in bilateral and multilateral arrangements.

9. He congratulated the Special Rapporteur on his broad approach to the topic and expressed the hope that the new Special Rapporteur to be appointed by the Commission would proceed with his work in the same open context.

10. The CHAIRMAN, speaking as a member of the Commission, said there was one point in the Special Rapporteur's report which had not been mentioned in the discussion, namely, the question of form. On that question he fully endorsed the view expressed by the Special Rapporteur in paragraph 42 of his report that

¹ For the text of the articles adopted, see *Yearbook... 1975*, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B, 1.

² See the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (General Assembly resolution 2749 (XXV)), para. 1.

"It is a fact of international life that States are more willing to support a course of conduct in a charter than is considered a statement of political intent rather than in a treaty which imposes a legal burden to take action instead of positions. The Commission's task is to draw up a set of draft articles which may be adopted in treaty form".

11. The concise, lucid and rich report submitted by the Special Rapporteur mentioned a number of multilateral instruments which could be extremely useful to the Commission in its work, including those relating to the Niger and Senegal rivers and the Chad Basin,³ the Declaration of Asunción on the use of international rivers⁴ and the European Water Charter of 1968.⁵

12. Speaking as Chairman, he said that the Commission's debate had been extremely thorough and of a very high standard. Mr. Tammes had rightly pointed out⁶ that the topic afforded a unique opportunity for the Commission to consider and develop the concept of international co-operation, while the Special Rapporteur himself, in his opening statement,⁷ had made a very convincing plea for co-operation between States to preserve the quantity and quality of the vital natural resource constituted by water. Sir Francis Vallat had addressed a moving appeal⁸ to the Commission not to lose sight of the humanitarian aspects of the matter. Mr. Sette Câmara had made a masterly statement⁹ with an approach different from that adopted by the Special Rapporteur. Further valuable statements had been made at the two previous meetings by Mr. Ushakov, Mr. Tabibi, Mr. Ramangasoavina, Mr. Quentin-Baxter, Mr. Calle y Calle and Mr. Hambro. In connexion with the question of sovereignty referred to by Mr. Hambro,¹⁰ it should be borne in mind that sovereignty, like property, was not an absolute concept, but was subject to the restrictions of the law and the interests of the community.

13. With regard to the scope of the Commission's work on the topic, the Special Rapporteur appeared to favour the drainage-basin concept, whereas Mr. Sette Câmara had proposed¹¹ that the Commission should proceed on the basis of existing practice and of the time-honoured and traditional definition of an international watercourse adopted in the Final Act of the Congress of Vienna of 1815.¹² As was pointed out, in paragraph 8 of the Special Rapporteur's report, a useful point had been made by the Government of Hungary, which had argued that there was no general geographic term that could be applied to all of the legal relations relating to

waters that were on the territory of more than one State, and that consequently the need was not to study the meaning of terms, but to consider whether a term was suitable for the regulation of certain legal relations. An equally interesting point had been made by the Special Rapporteur in paragraph 21 of his report when, commenting on the definition adopted by the Congress of Vienna in 1815, he had observed that "A definition devised for purposes of navigation is not necessarily the best choice for the requirements of the wide range of uses other than navigation". Mr. Ustor had suggested that the Commission should follow the inductive method and should take stock of existing law and practice before proceeding to formulate general rules. In his view, the Commission would be well advised to leave the question open for the time being and content itself with its thorough discussion of the topic, which would provide a basis for eliciting the views of governments.

14. With regard to the question of pollution, he wished to draw attention to the statement of the Government of Poland that "the problem of water pollution should be considered simultaneously with its cause, i.e. domestic, agricultural and commercial uses" (A/CN.4/294 and Add.1, section II, question H). He fully concurred with the view expressed by the Special Rapporteur in paragraph 46 of his report that "it would seem appropriate for the Commission to concentrate upon uses at the outset and to consider particular aspects of pollution in the context of specific uses". There was agreement that pollution should be considered eventually, if not at the outset since, not only in international watercourses but also in the seas and the oceans, it presented a grave problem which should certainly command the Commission's attention, and the process of industrialization was likely to make water pollution an even more acute problem in the future.

15. As to whether a committee of experts should be set up to assist the Commission in its work, it should be noted that it had not been considered necessary to appoint such a body for the Commission's earlier work on the much wider topic of the law of the sea, although some experts had been consulted on an individual basis. The proper course of action, he believed, would be to leave it to the Special Rapporteur to inform the Commission what kind of technical assistance and advice he required.

The meeting rose at 11.25 a.m.

1409th MEETING

Monday, 19 July 1976, at 3 p.m.

Chairman: Mr. Paul REUTER
later: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

³ See A/CN.4/295, paras. 31-35.

⁴ *Ibid.*, paras. 37-40.

⁵ *Ibid.*, para. 41.

⁶ See 1407th meeting, para. 28.

⁷ See 1406th meeting.

⁸ See 1407th meeting, para. 22.

⁹ See 1406th meeting.

¹⁰ *Ibid.*, para. 39.

¹¹ *Ibid.*, para. 15.

¹² For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/294 and Add.1, A/CN.4/295, A/CN.4/L.241)

[Item 6 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on agenda item 6.
2. Mr. KEARNEY (Special Rapporteur) said that he thought the Commission had held an excellent discussion, which represented substantial research, preparation and study by the members who had taken part in it. The main objective had been to clarify positions and determine the extent of possible differences of opinion. The basic issue the Commission had dealt with had been that of determining the underlying principles which should be applied to the non-navigational uses of international watercourses and of deciding what ethical and political considerations should be taken into account in formulating the applicable rules.
3. The discussion had revealed some diversity of views on those matters, but there had also been substantial agreement on a number of issues. For example, all the members of the Commission had agreed that the acceptability of the concept of an international drainage basin, as a basis for the scope of the Commission's work, was a matter which went well beyond the problem of defining an international watercourse. In that connexion, Mr. El-Erian had referred to Wolfgang Friedman's division of the principles of international law into the two classifications of the settlement of disputes and international co-operation. That division aptly illustrated the wide range of views on, and the different approaches to, the problem of international watercourses. Some members of the Commission considered that one part of that division should predominate over the other, although the view had been expressed that the two parts had to be harmonized and were both essential to the Commission's work. He believed there were precedents for the latter view and that it would, in some situations, be necessary to go beyond what might be called the limits of State responsibility in regard to the consequences of the uses of water.
4. Sir Francis Vallat had pointed out¹ that what might seem to be a reasonable agricultural development upstream might have disastrous consequences downstream. That was a very good description of what had happened on the Colorado River and of the effects of the development of an irrigation system on an irrigation district in Mexico, when the water to which the United States was entitled had passed into some underground aquifers containing saline water. That water had moved down into Mexico and had adverse effects on crop production because it had been too salt. In the circumstances of that particular case, ordinary rules for restitution or reparation for injury had not been applicable. The two States concerned had therefore had to co-operate in finding a solution to the problem. Various remedies had been tried, but none had been successful until it had been agreed that the United States would build a desaliniza-

tion plant to remove the salt from the water flowing into Mexico. That was an example of a situation in which co-operation, rather than recourse to adversary proceedings, had been successful.

5. He believed that the scope of the Commission's work must go beyond the issue of what the rules of State responsibility might be in regard to the uses of international watercourses. He disagreed with Mr. Sette Câmara's² view that, if an upstream State diverted water for irrigation or for industry, the effects of its activities could simply form the subject of a claim for reparation. There was a wide variety of cases in which reparation was not enough and in which it was therefore necessary to rely on established co-operation between the riparian States concerned. Of course, the formulation of rules relating to the primary aspects of State responsibility must be an important part of the Commission's work, but there were also other principles to be taken into account. For example, Mr. Calle y Calle had referred³ to the principle of sovereign control over natural resources and to the principle of ecological good neighbourliness. Clearly, both those principles had to be taken into account, although some adjustments would have to be made as between them, so that both would apply to the uses of international watercourses. Although the process of harmonizing those two principles would certainly be very difficult, he thought it would be defeatist for the Commission to say that it must concentrate only on one or the other.
6. The Commission's discussion had also shown that there must be a clear understanding of what was meant by sovereignty over a natural resource such as water, which was in a particular State only on a transitory basis. If the Commission decided that sovereignty meant that the State had complete authority over the water, could deprive the downstream riparian State of any share of it or could, by pollution, destroy its quality as usable water, it would be accepting the absurd opinion which had become known as the Harmon doctrine,⁴ and was the very heart of imperialism. As a matter of fact, the United States had never adopted that doctrine as part of its foreign policy, and the difference which had arisen with Mexico over the Rio Grande in 1875 had been settled by agreement on the good neighbour basis.
7. Mr. Tabibi had referred to the Harmon doctrine in connexion with the view that sovereignty was being limited by the rise of "involuntary obligations in international law",⁵ which seemed to be a way of referring to yet another area of law which the Commission should take into account in its future work. He himself believed that there was substantial concurrence between "involuntary obligations in international law" and Professor Tammes's reference to the concept of "abuse of right",⁶ and that the developing doctrine of "abuse of right"

² See 1406th meeting, para. 19.

³ *Ibid.*, para. 34.

⁴ See *Yearbook... 1974*, vol. II (Part Two), p. 78, document A/5409, part two, chap. III, paras. 201-205 and foot-note 175.

⁵ See 1406th meeting, para. 25.

⁶ See 1407th meeting, para. 28.

¹ See 1407th meeting.

might, in fact, become the nexus between the principle of sovereignty over natural resources and the principle of co-operation. Other members of the Commission had also referred to various aspects of the concept of co-operation. For instance, Mr. Yasseen had said that co-operation was a principle of humanity⁷ and Mr. Ushakov had said that water must be dealt with as a social resource for the use of humanity.⁸

8. Another issue on which the members of the Commission seemed to agree was that the rules to be formulated should be general, and of a residual character. Mr. Ustor had said that the adoption of the general principle of "*sic utere tuo ut alienum non laedas*" would be a great step forward,⁹ that was no doubt true, but it was not unreasonable to hope that something more in the way of general principles might be achieved. As Mr. Ushakov,¹⁰ Mr. Calle y Calle¹¹ and Mr. Quentin-Baxter¹² had said, the Commission should confine itself to the formulation of general rules, because detailed rules for individual river systems must be formulated by the riparian States themselves. That view was certainly correct, because every river system was different and the requirements for regulation were also different. The Commission's policy of formulating general and residual rules must therefore be accepted as a matter of necessity.

9. Nevertheless, the Commission would have to decide to what extent a rule could be general and still be adequate for the problems of river use. One example was to be found in flood control, which required co-operation between all the States concerned, so that any general rules would have to include a requirement of co-operation in gathering the necessary information. Moreover, if it did not go into details of the type of information required, a general rule might be so general that it would not be useful in practice. The Commission must therefore make every effort to devise rules which maintained a delicate balance between being too detailed to be generally applicable and being so general that they amounted to nothing more than an expression of hope that the riparian States would not behave too badly towards each other.

10. The general rules to be formulated by the Commission should be designed to promote the adoption of régimes for individual international rivers, not to hinder the development of such rivers. In addition, they should be acceptable to all States and should take account of the sensitivity of States regarding rivers. It was, for example, perfectly understandable that a State which had a river system the size of the Amazon almost completely within its borders should be reluctant to give to another State, in which only a small proportion of the Amazon headwaters rose, a voice in determining the uses to which the waters of the entire Amazon basin

might be put. It was also perfectly understandable that some States should be concerned about references to the hydrographic unity of rivers or to international drainage basins, because acceptance of such concepts might adversely affect their interests. It should be noted, however, that the words "international drainage basin" were used merely to refer to the effects that activities in one part of the basin might produce in other parts of the basin; and expressing the unity of the water in a river in that way did not prejudice the content of the rules of co-operation to be adopted. Moreover, recognition of the unity of the water in a basin did not mean that there was common ownership of the water or that there must be common control over the water. The concept of unity merely implied efforts, made in good faith, to avoid causing downstream injury and to promote co-operation between riparian States to reduce adverse downstream effects. The task the Commission now faced was that of determining what the content of the rules should be and how the rules would be used to promote co-operation.

11. The Governments which had replied to the questionnaire (see A/CN.4/294 and Add.1) and the members of the Commission had agreed that work should proceed on the uses of international watercourses, the different aspects of pollution being dealt with in conjunction with the consequences of the various uses. The Commission had also agreed that the new Special Rapporteur should continue to develop contacts with the various international organizations concerned with the uses of international watercourses and that, if more formal arrangements were needed at a later stage, they could be made when the need arose.

12. He thought the Commission had thus agreed on most aspects of the topic under consideration and on the scope of its future work. It seemed to have gone a long way towards clarifying its approach.

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

13. The CHAIRMAN invited the Commission to consider the draft report on the work of its twenty-eighth session paragraph by paragraph, beginning with chapter III.

Chapter III. STATE RESPONSIBILITY (A/CN.4/L.247 and Add.1-3)

A. INTRODUCTION (A/CN.4/L.247)

Paragraphs 1 and 2

Paragraphs 1 and 2 were approved.

Paragraph 3

14. Mr. KEARNEY, referring to the first part of the first sentence, said that, technically, it was the General Assembly which had adopted the conclusions in question.

15. The CHAIRMAN suggested that the beginning of paragraph 3 should read: "These conclusions having

⁷ *Ibid.*, para. 25.

⁸ *Ibid.*, para. 2.

⁹ *Ibid.*, para. 15.

¹⁰ *Ibid.*, para. 4.

¹¹ See 1406th meeting, para. 33.

¹² See 1408th meeting, para. 2.

been approved by the members of the Sixth Committee and adopted by the General Assembly.”.

It was so agreed.

Paragraph 3, as amended, was approved.

Paragraph 4

16. The CHAIRMAN suggested that a similar amendment should be made in the first sentence of *paragraph 4*.

It was so agreed.

17. Mr. ŠAHOVIĆ suggested that in the second sentence of the French text the expression “*question séparée*” should be replaced by the expression “*question distincte*”, since the latter expression was used in the relevant General Assembly resolutions.

It was so agreed.

Paragraph 4, as amended, was approved.

Paragraph 5

Paragraph 5 was approved.

Paragraph 6

18. Sir Francis VALLAT suggested the insertion, in the last sentence, of the dates of adoption of the General Assembly resolutions mentioned in it.

It was so agreed.

Paragraph 6, as amended, was approved.

Paragraphs 7 and 8

Paragraphs 7 and 8 were approved.

Paragraph 9

19. After an exchange of views in which Mr. KEARNEY, Mr. AGO (Special Rapporteur), Sir Francis VALLAT and Mr. ROSSIDES took part, the CHAIRMAN suggested that the words “the aims they pursue”, in the fourth sentence, should be replaced by the words “their objectives”.

It was so agreed.

20. Mr. ROSSIDES suggested that the expression “peace-keeping”, in the third sentence, should be replaced by the words “maintenance of peace and security”.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

21. After an exchange of views in which Sir Francis VALLAT, Mr. ŠAHOVIĆ and the CHAIRMAN took part, Mr. AGO (Special Rapporteur) suggested that in the last sentence the words “The international responsibility of the State is a situation which results” should be replaced by the words “The international responsibility of the State is made up of a set of legal situations which result”; that formula would cover both the obligation to make reparation and subjection to a sanction, for example.

It was so agreed.

Paragraph 10, as amended, was approved.

Paragraph 11

22. Mr. KEARNEY proposed that, in the third sentence, the words “in different hypothetical cases” should be replaced by the words “on the basis of different hypotheses”.

It was so agreed.

23. Sir Francis VALLAT suggested that, in the fourth sentence, the incidental clause “if it sees fit” should be deleted, and that the words “*the settlement of disputes and the ‘implementation’ (‘mise en œuvre’) of international responsibility*” should be replaced by the words “*the ‘implementation’ (‘mise en œuvre’) of international responsibility and the settlement of disputes*”.

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

24. Sir Francis VALLAT, referring to the third sentence of paragraph 12, suggested that, in the English text, the article “a” before the words “particular conduct” should be deleted.

It was so agreed.

Paragraph 12, as amended, was approved.

Paragraph 13

25. Sir Francis VALLAT suggested that the commas in the last sentence should be deleted.

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

26. Sir Francis VALLAT suggested that the word “possibly” in the penultimate line should be deleted, because it made the text too tentative.

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraphs 15 to 17

Paragraphs 15 to 17 were approved.

Section A of chapter III of the draft report, as a whole, as amended, was approved.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (A/CN.4/L.247).

Paragraph 18

Paragraph 18 was approved.

1. *Text of all the draft articles adopted so far by the Commission*

Section 1 was approved.

2. *Introductory commentary to chapter III of the draft and text of articles 16 to 19, with commentaries thereto, adopted by the Commission at the present session*

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

27. Mr. KEARNEY said that the fourth sentence was not clear and meant very little in common law.

28. Sir Francis VALLAT said he agreed with Mr. Kearney that the sentence was very difficult for jurists from common law countries to understand. Moreover, the reference in paragraph 4 to a "subjective right" complicated the issue still further.

29. The CHAIRMAN suggested that the difficulties of some members of the Commission with regard to the concepts of an "obligation" and a "subjective right" should be reflected in the summary record of the meeting.

It was so agreed.

30. Mr. ROSSIDES suggested that, in the last part of the fourth sentence, the word "is" should be replaced by the word "be", so that that phrase would read "whether it be in compliance with the obligation or in breach of it".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Mr. El-Erian took the Chair.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

31. Mr. KEARNEY suggested that the first clause of the third sentence should be amended to read: "If one admits the existence in international law of a rule limiting the exercise by a State of its rights and capacities and prohibiting their *abusive exercise*,".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

32. Mr. KEARNEY suggested that, in the first sentence, the word "first" after the word "considered" should be deleted, and that the words "has any bearing on" should be replaced by the words "does not affect".

It was so agreed.

33. Mr. USTOR suggested that the word "contractual" in the first sentence should be replaced by "conventional".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

Paragraph (11)

34. Mr. KEARNEY suggested that the word "plausible", in the second sentence, should be replaced by the word "acceptable".

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

35. Mr. REUTER suggested that, in the first sentence, the words "be read" should be replaced by the words "be understood".

It was so agreed.

36. Mr. KEARNEY suggested that the word "always", in the first sentence, should be deleted.

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

37. Mr. SETTE CÂMARA questioned whether it was necessary to include the words "pure and simple" in the final sentence.

38. Mr. AGO (Special Rapporteur) pointed out that codification as such covered both the codification pure and simple of already existing rules and their transformation and development. It should therefore be made clear that what was meant was codification "pure and simple".

39. Mr. REUTER suggested that the words "codification pure and simple" should be replaced by the words "codification in the strict sense".

40. Mr. KEARNEY said that, in its consideration of the topic of State responsibility, the Commission was concerned with both the codification and the progressive development of international law. It might therefore be preferable to delete the last sentence entirely.

41. Mr. AGO (Special Rapporteur) said that the last sentence was not merely a general observation, in chapter III of the draft, the Commission was concerned with the progressive development of international law.

42. Sir Francis VALLAT said he favoured the deletion of the last sentence. The less the Commission called attention to the distinction between codification and progressive development, the better. It was for those who would interpret and apply the rules devised by the Commission to decide, at the appropriate time, what constituted codification and what progressive development. The Commission was constantly contributing to the development of international law by indirect means. To stress in any particular context that it was concerned with progressive development might have a harmful effect on its work.

43. Mr. ŠAHOVIĆ said that the last sentence of paragraph (13) had a very precise meaning, which the Special Rapporteur had explained. He was in favour of retaining the sentence with the amendment suggested by Mr. Reuter.

44. Mr. ROSSIDES said that any attempt to reduce the importance of the Commission's work on the progressive development of international law would be contrary to its Statute, which gave such development precedence over codification. In a rapidly changing world, it was more than ever essential that the Commission should perform its proper function in that regard. He thought the last sentence of paragraph (13) was most helpful and necessary.

45. Mr. BILGE also supported the retention of the last sentence.

46. The CHAIRMAN observed that the last sentence helped to focus the idea expressed in the remainder of the paragraph and, thanks to the use of the word "sometimes", did not prejudice the approach to be adopted in formulating certain rules.

47. Mr. TSURUOKA said that in the past the Commission had made every effort not to over-emphasize the distinction between progressive development of international law and codification pure and simple.

48. Mr. YASSEEN said that he thought the last sentence of paragraph (13) reflected the discussion which had taken place in the Commission on the basis of the report submitted by the Special Rapporteur. In his introductory statement¹³ the Special Rapporteur had said that there were not many precedents or rules, but that the Commission need not adhere to the inductive method and could, through the progressive development of international law, formulate new rules. Hence it was necessary to prepare States for that mode of procedure.

49. Mr. USTOR said he was inclined to agree with Sir Francis Vallat about the final sentence.

50. Since the Commission had already done part of the work on chapter III of the draft, it was inappropriate to use the future tense in paragraph (13).

51. Mr. ROSSIDES said that the words "to be included in", in the first sentence, should be replaced by the words "which is the subject-matter of".

52. Mr. AGO (Special Rapporteur) agreed that, in the English text, the words "to be included" were an inaccurate rendering of the French expression "*qui fait l'objet*". He suggested that throughout paragraph (13) the present tense should be used instead of the future tense.

It was so agreed.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved paragraph (13) together with the amendment just adopted and the amendments suggested by Mr. Reuter and Mr. Rossides.

It was so agreed.

Commentary to article 15 bis [16]¹⁴ (Existence of a breach of an international obligation) (A./CN.4/L.247/Add.1)

Paragraph (1)

54. Mr. KEARNEY suggested that the words "according to" in the first sentence should be replaced by the words "in the light of".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

55. Mr. SETTE CÂMARA said that he had some doubts about the use of the words "whose breach is defined" in the first sentence.

56. Mr. REUTER suggested that the word "defined" should be replaced by the word "envisaged".

It was so agreed.

57. Mr. ROSSIDES said that it was not clear whether the expression "norms of international law", in the second sentence, was intended to cover the obligations imposed on States by the United Nations Charter, particularly in matters relating to international peace and security.

58. The CHAIRMAN confirmed that the Charter contained norms of international law.

59. Mr. SETTE CÂMARA suggested that the words "for example" in the second sentence should be deleted.

60. Mr. AGO (Special Rapporteur) said it was necessary to retain these words so as to cover other possible obligations of a non-legal nature.

61. Mr. ROSSIDES said that the way the second sentence was phrased made it appear that moral obligations were negligible, whereas in fact they were extremely important.

62. Mr. AGO (Special Rapporteur) said he agreed that moral obligations were extremely important. Under the draft articles, however, only the breach of a legal obligation constituted an internationally wrongful act.

63. Sir Francis VALLAT proposed that the words "for example" in the second sentence should be placed before the words "obligations of a moral nature".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

64. Mr. KEARNEY said that there were a great many agreements and contracts concluded between States; consequently, the words "in rare cases", in the first sentence, seemed inappropriate. It might also be more accurate to refer to "commercial matters" rather than to "economic matters".

65. Mr. AGO (Special Rapporteur) said that the words "in rare cases" might be replaced by "sometimes"; but the replacement of the word "economic" by "commercial" might have an unduly restrictive effect.

66. Mr. REUTER suggested that, in the first line of the paragraph, the word "sometimes" appearing after the word "States" should be deleted, and that in the second line the words "in rare cases" should be replaced by "sometimes".

It was so agreed.

67. Mr. USTOR suggested that the word "individuals", in the first sentence of the English text, should be replaced by the word "persons".

It was so agreed.

68. Mr. REUTER said that a State was always entitled to require that all the agreements it concluded with another State be governed by international law. That

¹³ See 1361st meeting, para. 13.

¹⁴ Figures in square brackets represent the numbers of the articles as they appear in the report.

fact was confirmed by judicial decisions. For example, the charter agreements concluded between the United Kingdom and Greece had been the subject of international arbitration, in the course of which the question whether they were agreements under international law or agreements under internal law had been examined. Thus there were cases in which States exercised a choice, and that was what the Special Rapporteur had wished to emphasize by using the expression "in rare cases".

69. Mr. USHAKOV said that, in his opinion, every agreement between States was governed by international law. A State could agree to be bound by the internal law of another State, but only of its own free will.

70. Mr. USTOR said he could not conceive of a case in which an obligation assumed under a contract between two States was not in some degree governed by international law.

71. Mr. HAMBRO said that the wording of the final clause of the first sentence appeared to discount the possibility of obligations deriving from the international legal order. It would therefore be preferable to replace the words "international legal order" by the words "international public law in the ordinary sense".

72. Mr. AGO (Special Rapporteur) said that the idea expressed by Mr. Hambro was precisely that contained in the text: what was involved was a legal order which was neither public international law nor internal law.

73. Mr. KEARNEY suggested that foot-note 3 should be deleted.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were approved.

The commentary to article 15 bis [16], as amended, was approved.

The meeting rose at 6.15 p.m.

1410th MEETING

Tuesday, 20 July 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Paul REUTER

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-eighth session (continued)

Chapter II. THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.246 and Add.1-3)

1. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, chapter II of its draft

report, relating to the most-favoured-nation clause (A/CN.4/L.246 and Add.1-3).

A. INTRODUCTION (A/CN.4/L.246)

1. Summary of the Commission's proceedings

Paragraphs 1-27

Paragraphs 1-27 were approved.

2. The most-favoured-nation clause and the principle of non-discrimination

Paragraphs 28 and 29

Paragraphs 28 and 29 were approved.

Paragraph 30

2. Mr. KEARNEY said he was not sure that the first sentence accurately reflected the Commission's deliberations. Since the most-favoured-nation clause was based on the theory that a State selected its partners, it might be more appropriate to say that the clause "may be used as a technique or means for promoting the equality of States or non-discrimination".

3. Mr. USTOR (Special Rapporteur) pointed out that the same wording had been used in previous reports.

4. Mr. REUTER suggested that the French version of the passage should be amended to read *comme une des techniques ou un des moyens de promouvoir...*

It was so agreed.

Paragraph 30 was approved.

Paragraph 31

5. Mr. CALLE y CALLE said he had the impression that an article similar to that quoted in paragraph 31 was also contained in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. If that was the case, a reference to the latter Convention might be included.

6. The CHAIRMAN said that a similar provision might also be contained in the Convention on Special Missions. He suggested that the Secretariat should be requested to look into that matter and to insert a reference to those two Conventions in paragraph 31, if they proved to be relevant.

Paragraph 31 was approved on that understanding.

3. The most-favoured-nation clause and the different level of economic development

Paragraphs 32 and 33

Paragraphs 32 and 33 were approved.

Paragraph 34

7. Mr. ŠAHOVIĆ, referring to the penultimate sentence of paragraph 34, said he was not sure that article 21 should be considered as resulting from progressive development of international law.

8. Mr. USTOR (Special Rapporteur) said he believed the statement in question to be accurate, since the specific provision drafted by the Commission represented a considerable step forward as compared with the previous vague practice and the vague understandings reached in UNCTAD bodies.

Paragraph 34 was approved.

4. *The general character of the draft articles*

Paragraphs 35-37

Paragraphs 35-37 were approved.

Paragraphs 38 and 39

9. Mr. KEARNEY said that the words "which belong to fields outside its functions" in the last sentence of paragraph 38 and the words "not included in its functions" in the first sentence of paragraph 39 were perhaps not altogether appropriate, since there was nothing to prevent the Commission from taking up, for instance, certain aspects of countervailing duties, beyond the fact that GATT was already active in that field. He therefore suggested that those phrases should be replaced by the words "which belong to fields specifically entrusted to other international organizations".

It was so agreed.

10. Mr. SETTE CÂMARA proposed that the word "highly", in the last sentence of paragraph 38, should be deleted.

It was so agreed.

Paragraphs 38 and 39, as amended, were approved.

Paragraphs 40-45

Paragraphs 40-45 were approved.

Paragraph 46

11. Mr. KEARNEY said he was not sure that the fourth sentence gave a full or accurate account of the reasons for which the Commission had decided not to include a provision on the settlement of disputes. He therefore suggested that the words, "in the light of past experience... and treaty interpretation," should be deleted.

It was so agreed.

Paragraph 46, as amended, was approved.

Paragraphs 47-50

Paragraphs 47-50 were approved.

Section A of chapter II, as a whole, as amended, was approved.

B. RESOLUTION ADOPTED BY THE COMMISSION (A/CN.4/L.246)

Section B of chapter II was approved.

C. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.246/Add.1-3)

Articles 1-14 (A/CN.4/L.246/Add.1)

Commentary to article 1 (Scope of the present articles)

The commentary to article 1 was approved.

Commentary to article 2 (Use of terms)

Paragraphs (1)-(9)

Paragraphs (1)-(9) were approved.

Paragraph (10)

12. Mr. USTOR (Special Rapporteur) suggested that, in order to bring the wording of paragraph (10) into line with that of draft article 2, subparagraph (e), the words "the same" as", in the second sentence, should be replaced by the words "equivalent" to".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

13. Mr. KEARNEY suggested that the word "practically" should be inserted before "never", in the second sentence.

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

Paragraph (12) was approved.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (Clauses not within the scope of the present articles)

The commentary to article 3 was approved.

Commentary to article 4 (Most-favoured-nation clause)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

14. Mr. KEARNEY suggested that the words "on grounds of precision", in the last sentence, should be replaced by the words "as imprecise".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

15. Mr. KEARNEY proposed that the words "such stipulations, sometimes lengthy, which make up a whole treaty", in the third sentence, should be replaced by the words "any combination of such provisions, including entire treaties when appropriate".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4)-(9)

Paragraphs (4)-(9) were approved.

Paragraph (10)

16. Mr. KEARNEY suggested that the following words be added at the end of the last sentence: ", although the concession can be withdrawn from all members by the granting State subject to any temporal commitment in effect".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

Paragraph (11) was approved.

Paragraph (12)

17. The CHAIRMAN said that, if relevant, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character should also be referred to in paragraph (12).

Paragraph (12) was approved on that understanding.

Paragraphs (13)-(15)

Paragraphs (13)-(15) were approved.

Paragraph (16)

18. Mr. KEARNEY said he was not sure whether the expression "*cautio judicatum solvi*" in subparagraph (f) would be readily understandable in all legal systems.

19. Sir Francis VALLAT said that the expression normally used in English law was "security for costs".

20. Mr. CALLE Y CALLE suggested that the words "security for costs" should be inserted before the expression "*cautio judicatum solvi*", which should be placed in brackets. The same procedure should be followed at other points in the draft report where that expression was used.

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraph (17)

Paragraphs (17) was approved.

The commentary to article 4, as amended, was approved.

*Commentary to article 5 (Most-favoured-nation treatment)**Paragraph (1)*

Paragraph (1) was approved.

Paragraph (2)

21. Sir Francis VALLAT said he had the impression that, in the second sentence, the words "beneficiary State" should read "granting State".

22. Mr. USTOR (Special Rapporteur) confirmed that that was the case.

Paragraph (2) was approved with that correction.

Paragraph (3)

23. Sir Francis VALLAT proposed that, in the fourth sentence, the words "The most frequent such relationship is" should be replaced by the words "Such relationships are".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

24. Mr. KEARNEY suggested that the seventh sentence, beginning with the words "In other words, while most-favoured-nation treatment..." should be clarified

by the addition, at the end, of the following clause: "although it may be required to accord such preferential treatment under other most-favoured-nation clauses".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

25. Sir Francis VALLAT suggested that, in the second sentence, the words "the clause comes into operation" should be replaced by the words "the clause begins to operate", and that in the penultimate sentence the word "patently" should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

Paragraph (8)

26. Sir Francis VALLAT suggested that the word "explicit", in the penultimate sentence, should be deleted.

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 5, as amended, was approved.

*Commentary to article 6 (Legal basis of most-favoured-nation treatment)**Paragraphs (1)-(4)*

Paragraphs (1)-(4) were approved.

Paragraph (5)

27. Mr. USHAKOV proposed that the words "a legal obligation", in the first sentence, should be replaced by the words "an international legal obligation".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 6, as amended, was approved.

Commentary to article 7 (The source and scope of most-favoured-nation treatment)

28. Mr. USHAKOV pointed out that the commentary to article 7, and paragraph 2 of the article itself, referred to "the third State", whereas article 5 referred to "a third State". That point should be considered during the Commission's second reading of the draft articles.

The commentary to article 7 was approved.

*Commentary to article 8 (Unconditionality of most-favoured-nation clauses), article 9 (Effect of an unconditional most-favoured-nation clause) and article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity)**Paragraphs (1)-(20)*

Paragraphs (1)-(20) were approved.

Paragraph (21)

29. Mr. USHAKOV suggested that the Special Rapporteur should add one or two sentences at the end of the paragraph summing up his findings on "more recent practice and doctrinal views."

Paragraph (21) was approved on that understanding.

Paragraphs (22)-(29)

Paragraphs (22)-(29) were approved.

Paragraph (30)

30. Mr. ŠAHOVIĆ suggested that it might be advisable to bring the French text of the heading preceding paragraph (30) into line with the English text by using the words "*réciprocité matérielle*", since that was the expression used in article 10.

31. Mr. USTOR (Special Rapporteur) supported that suggestion.

It was so agreed.

Paragraph (30) was approved.

Paragraphs (31)-(36)

Paragraphs (31)-(36) were approved.

Paragraph (37)

32. Mr. REUTER suggested that the first two sentences of paragraph (37) should be joined together, using the conjunction "*alors que*" (whereas) in the French text.

It was so agreed.

Paragraph (37), as amended, was approved.

Paragraphs (38)-(42)

Paragraphs (38)-(42) were approved.

The commentary to articles 8, 9 and 10, as amended, was approved.

Commentary to article 11 (Scope of rights under a most-favoured-nation clause) *and article 12* (Entitlement to rights under a most-favoured-nation clause)

Paragraphs (1)-(9)

Paragraphs (1)-(9) were approved.

Paragraph (10)

33. Mr. USHAKOV said it might be advisable to give some information on the content of the *ejusdem generis* rule.

34. Sir Francis VALLAT suggested that the words "which derives from the very nature of the most-favoured-nation clause", in the first sentence, should be replaced by the words "which, for the purposes of the most-favoured-nation clause, derives from its very nature".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

35. Mr. REUTER suggested that, in the French version of the first sentence, the verb "*attirer*" should be replaced by the verb "*étendre*".

It was so agreed.

36. Mr. KEARNEY suggested that the word "expressly" in the last sentence, should be deleted.

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraphs (12)-(26)

Paragraphs (12)-(26) were approved.

The commentary to articles 11 and 12, as amended, was approved.

Mr. Reuter, First Vice-Chairman, took the Chair.

Commentary to article 13 (Irrelevance of the fact that treatment is extended gratuitously or against compensation)

The commentary to article 13 was approved.

Commentary to article 14 (Irrelevance of restrictions agreed between the granting and third States)

37. Sir Francis VALLAT said that the use of the word "States" at the end of the English text of the article could cause confusion. It would be better to bring the English text into line with the French so that it would read: "the granting State and the third State".

It was so agreed.

The commentary to article 14 was approved.

Article 15-20 (A/CN.4/L.246/Add.2)

Commentary to article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multi-lateral agreement)

Paragraphs (1)-(25)

Paragraphs (1)-(25) were approved.

Paragraph (26)

38. Mr. KEARNEY referring to the last sentence, said that the "Customs-union issue" could not be considered to be "settled" by article XXIV of the General Agreement on Tariffs and Trade. He therefore suggested that the words "in this respect the matter is settled by article XXIV of that Agreement" should be replaced by the words "in this respect provision for settlement is contained in article XXIV of that Agreement". He also suggested that the semi-colon following that phrase should be replaced by a full stop.

It was so agreed.

Paragraph (26), as amended, was approved.

Paragraph (27)

39. Mr. KEARNEY suggested that, in the first sentence, the words "and that that was a prerogative" should be replaced by the words "which was recognized as a prerogative". In the second sentence, he suggested that the word "rule" after the word "exception" should be deleted, and that the words "no such rule" should be replaced by "no rule".

It was so agreed.

40. Mr. KEARNEY, referring to the third sentence, said that he was not sure in what context a new right was to be accepted as a "superior right".

41. Mr. USTOR (Special Rapporteur) explained that the third sentence reflected the opinion of a member of the Commission as expressed during the discussions.

42. The CHAIRMAN* suggested that the words "As one member put it" at the beginning of that sentence should be replaced by the words "According to one member".

It was so agreed.

Paragraph (27), as amended, was approved.

Paragraphs (28)-(37)

Paragraphs (28)-(37) were approved.

The commentary to article 15, as amended, was approved.

Commentary to article 16 (Right to national treatment under a most-favoured-nation clause)

The commentary to article 16 was approved.

Commentary to article 17 (Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter)

The commentary to article 17 was approved.

Commentary to article 18 (Commencement of enjoyment of rights under a most-favoured-nation clause)

The commentary to article 18 was approved.

Commentary to article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause)

Paragraphs (1)-(9)

Paragraphs (1)-(9) were approved.

Paragraph (10)

43. Mr. USTOR (Special Rapporteur), referring to the second sentence, suggested that the words "union of those States" be replaced by the words "uniting of the granting State and the third State".

It was so agreed.

Paragraph (10), as amended, was approved.

The commentary to article 19, as amended, was approved.

Commentary to article 20 (The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State)

Paragraphs (1)-(6)

Paragraphs (1)-(6) were approved.

Paragraph (7)

44. Sir Francis VALLAT said he thought the expression "in a certain relationship", used in the first sen-

tence, required some clarification. An example of a rule analogous to the rule in article 20 should be given.

45. The CHAIRMAN suggested that the Special Rapporteur should include such an example in paragraph (7).

It was so agreed.

Paragraph (7) was approved on that understanding.

Paragraph (8)

Paragraph (8) was approved.

The commentary to article 20, as amended, was approved.

Articles 21-27 (A/CN.4/L.246/Add.3)

Commentary to article 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)

Paragraphs (1)-(13)

Paragraphs (1)-(13) were approved.

Paragraph (14)

46. Mr. QUENTIN-BAXTER said that the second sentence placed too much emphasis on the temporary nature of the generalized system of preferences. He suggested that it should be amended to read: "It is aware that the initial duration of the system has been set at ten years".

It was so agreed.

47. Mr. CALLE Y CALLE said that, in the third sentence, it should be stated that the resolution referred to was a resolution of the General Assembly.

It was so agreed.

Paragraph (14), as amended, was approved.

Paragraphs (15) and (16)

Paragraphs (15) and (16) were approved.

Paragraph (17)

48. Mr. QUENTIN-BAXTER said that, in the last sentence, the word "assumes" was inappropriate. He therefore suggested that the full stop at the end of the penultimate sentence should be replaced by a semicolon and that the remainder of the paragraph should read: "but there is also the expectation that the right of self-selection will be exercised with reasonable restraint".

49. Mr. USTOR (Special Rapporteur) said that Mr. Quentin-Baxter's suggestion was acceptable.

It was so agreed.

Paragraph (17), as amended, was approved.

Paragraphs (18)-(20)

Paragraphs (18)-(20) were approved.

The commentary to article 21, as amended, was approved.

Commentary to article 22 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic)

Paragraphs (1)-(4)

Paragraphs (1)-(4) were approved.

* Mr. Reuter.

Paragraph (5)

50. Mr. QUENTIN-BAXTER said that the expression "traffic in persons", used in the second sentence, had a more sinister connotation in English than had probably been intended. He suggested that the words "traffic in goods and traffic in persons" should be replaced by the words "movement of goods or of persons or of both".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

Paragraph (8)

51. Mr. QUENTIN-BAXTER said that article 22, paragraph 2, was constructed in exactly the same way as article 23, paragraph 2. He noted that, in paragraph (8) of the commentary to article 23, it was quite correctly stated that article 23, paragraph 2, somewhat restricted the rules embodied in articles 11 and 12. He thought that the same was true of article 22, paragraph 2, which contained the same basic wording as article 23, paragraph 2, in particular, the key words "relates especially to", which did not appear in articles 11 and 12. He therefore suggested that the last sentence of paragraph (8) of the commentary to article 22 should be amended to read: "The Commission considered, however, that this requirement should be stated restrictively...", in order to produce a clearer balance between that paragraph and paragraph (8) of the commentary to article 23.

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 22, as amended, was approved.¹

Commentary to article 23 (The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State)

52. Mr. USTOR (Special Rapporteur) drew attention to the fact that it would be necessary to harmonize the texts of article 22, paragraph 1, and article 23, paragraph 1, since the words "in order to facilitate" were used in the former paragraph, and the words "to facilitate" in the latter.

53. Sir Francis VALLAT said that, in the interests of simplicity, the words "in order" should be deleted from article 22, paragraph 1.

It was so agreed.

Paragraphs (1)-(6)

Paragraphs (1)-(6) were approved.

Paragraphs (7) and (8)

54. Mr. KEARNEY objected to the use of the word "undoubtedly" in the second sentence of paragraph (7) and suggested that it should be deleted. Moreover, in his opinion it was not the clause which was *ejusdem generis*, but the treatment. In that connexion, he drew

attention to the wording of paragraph (8) of the commentary to article 22 and suggested that, in the third sentence of that paragraph, the phrase "the most-favoured-nation clause attracts the relevant benefits only if it conforms to the requirements..." should be amended to read "the most-favoured-nation clause attracts the relevant benefits only if the treatment conforms to the requirements...". He suggested that a similar wording should be used in paragraph (7) of the commentary to article 23.

It was so agreed.

Paragraphs (7) and (8), as amended, were approved.

Paragraph (9)

55. Mr. QUENTIN-BAXTER, supported by Mr. PINTO, said he had understood that, with regard to the question raised in paragraph (9), the Commission's view was that it should not express an opinion on matters under active negotiation in another international forum. He believed that the last sentence could be regarded as stating an opinion on the merits of the question, and therefore suggested that it should be amended to read: "The Commission believed, however, that it would not be appropriate to pursue this question at the present time".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

56. Mr. CALLE Y CALLE said that paragraph (11) was unnecessary because, in paragraph (5), the Commission had stated that it "did not propose to enter into the study of the rights and facilities which are needed by land-locked States or which are due to them under general international law". He therefore proposed that paragraph (11) should be deleted.

It was so agreed.

The commentary to article 23, as amended, was approved.

*Commentary to article 24 (Cases of State succession, State responsibility and outbreak of hostilities)**Paragraph (1)*

Paragraph (1) was approved.

Paragraph (2)

57. Mr. QUENTIN-BAXTER, referring to the third sentence, said that while the violation of primary rules could certainly entail consequences, he found it difficult to see how the violation of such rules could prejudice the consequences. He suggested that that sentence should be amended to read: "These primary rules would entail certain consequences, namely, the application of the "secondary rules" of international responsibility; therefore, the violation of the rules could be said, in a certain sense, to prejudice the consequences".

58. Mr. USHAKOV said that the amendment proposed by Mr. Quentin-Baxter expressed an idea which differed

¹ See para. 54 below.

from the one originally intended by the Special Rapporteur.

59. The CHAIRMAN suggested that it should be left to the Special Rapporteur whether or not to find less abstract wording for the third sentence of paragraph (2).

It was so agreed.

Paragraph (2) was approved on that understanding.

Paragraphs (3)-(5)

Paragraphs (3)-(5) were approved.

The commentary to article 24 was approved.

Commentary to article 25 (Non-retroactivity of the present articles)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

60. Mr. SETTE CÂMARA pointed out a typographical error at the end of the paragraph: the Latin words should be corrected to read: "*ex abundanti cautela*".

Paragraph (2) was approved with that correction.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 25 was approved.

Commentary to article 26 (Freedom of the parties to agree to different provisions)

61. Mr. PINTO said that in his opinion article 26 did not fulfil the promise of the article D originally proposed by the Special Rapporteur (A/CN.4/293 and Add.1, para. 30); it should therefore be given careful consideration on second reading.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (The relationship of the present articles to new rules of international law in favour of developing countries)

Paragraphs (1)-(7)

Paragraphs (1)-(7) were approved.

Paragraph (8)

62. Mr. PINTO said he had doubts about the need to include article 27 in the draft. He was aware that the Commission considered that such an article should be included, but article 27 seemed inadequate to meet the wishes of the Sixth Committee, as expressed in paragraph (1) of the commentary. Moreover, he thought that the penultimate sentence of paragraph (8) should be deleted.

63. Mr. USTOR (Special Rapporteur) said that Mr. Pinto's comments were justified, but he did not think the penultimate sentence should be deleted. He therefore

suggested that it should be amended to read: "The Commission, however, with a view to the possibility of the development of such new rules, decided to include in the draft articles a general reservation concerning the possible establishment of new rules of international law in favour of developing countries".

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 27, as amended, was approved.

Section C of chapter II, as a whole, as amended, was approved.

Chapter II, as a whole, as amended, was approved.

The meeting rose at 1 p.m.

1411th MEETING

Wednesday, 21 July 1976, at 10.50 a.m.

Chairman: Mr. Abdullah EL-ERIAN

later: Mr. Paul REUTER

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-eighth session (continued)

Chapter I. ORGANIZATION OF THE SESSION (A/CN.4/L.245 and Corr.1)

1. The CHAIRMAN invited the Commission to examine, paragraph by paragraph, chapter I of its draft report, on the organization of the session (A/CN.4/L.245 and Corr.1).

2. Mr. CALLE Y CALLE suggested that, in the list of abbreviations at the beginning of chapter I, the abbreviation "ILC" and the corresponding title should be added after the abbreviation "I.C.J. Reports".

It was so agreed.

The list of abbreviations, as amended, was approved.

Paragraph 1

3. Mr. ŠAHOVIĆ pointed out that, in the first sentence of the French text, the words "*vingt-septième session*" should be corrected to read "*vingt-huitième session*".

With that correction, paragraph 1 was approved.

Paragraphs 2 and 3

Paragraphs 2 and 3 were approved.

Paragraph 4

4. The CHAIRMAN drew attention to document A/CN.4/L.245/Corr.1 relating to the first sentence of

paragraph 4 in the English and Russian texts, in which the words "twenty-seventh session" should be corrected to read "twenty-eighth session".

5. Sir Francis VALLAT, supported by Mr. ŠAHOVIĆ, said that the statement made in the second sentence was not entirely correct, because some members had been unable to attend meetings for other reasons, such as illness. He therefore suggested that that sentence should be deleted.

6. Mr. SETTE CÂMARA, supported by Mr. HAMBRO, said that he thought the second sentence should be retained as it stood.

7. The CHAIRMAN suggested that, since the summary records showed the attendance of members at meetings, it would be sufficient to say that "All members attended meetings during the twenty-eighth session of the Commission".

It was so agreed.

Paragraph 4, as amended, was approved.

Paragraphs 5 to 7

Paragraphs 5 to 7 were approved.

Paragraph 8

8. Mr. HAMBRO asked when the Commission had discussed item 8 of the agenda (Organization of future work).

9. The CHAIRMAN said that that item had been discussed by the Enlarged Bureau of the Commission.

Paragraph 8 was approved.

Paragraph 9

Paragraph 9 was approved.

Chapter I of the draft report, as a whole, as amended, was approved.

Chapter IV. SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES (A/CN.4/L.248 and Add.1-4)

10. The CHAIRMAN invited the members of the Commission to examine, paragraph by paragraph, chapter IV of the draft report, on the succession of States in respect of matters other than treaties (A./CN.4/L.248 and Add.1-4).

A. INTRODUCTION (A/CN.4/L.248)

1. *Historical review on the work of the Commission Paragraphs 1-17*

Paragraphs 1-17 were approved.

2. *General remarks concerning the draft articles*

Paragraphs 18-25

Paragraphs 18-25 were approved.

Paragraph 26

11. Mr. SETTE CÂMARA pointed out that, in order to bring the English text into line with the French text

of the sub-title preceding paragraph 26, the word "characters" should be in the singular.

It was so agreed.

Paragraph 26, as amended, was approved.

Section A of chapter IV, as a whole, as amended, was approved.

B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES (A/CN.4/L.248 and Add.1-4)

Paragraph 27 (A/CN.4/L.248)

Paragraph 27 was approved.

1. *Text of all the draft articles adopted so far by the Commission (A./CN.4/L.248)*

Section I was approved.

2. *Introductory commentary to section 2 of Part I of the draft and text of articles 12 to 16 and of article 3, subparagraph (f), with commentaries thereto, adopted by the Commission at the present session (A/CN.4/L.248/Add.1)*

Section 2. Provisions relating to each type of succession of States

Paragraph (1)

12. Mr. USHAKOV, referring to the last sentence, suggested that, after the words "a change of sovereignty", the words "or a change in the responsibility for the international relations of the territory to which the succession of States relates" should be inserted, so as to conform with the wording used in article 3, subparagraph (d).

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

13. Mr. QUENTIN-BAXTER observed that the reservations in the second sentence were excessive, and suggested that the words "the parallelism... should be sought whenever possible as a desirable objective" should be replaced by the words "the parallelism... should be regarded as a desirable objective."

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

14. Mr. USHAKOV said that the question whether archives were State property had not yet been settled. He therefore suggested that, in the penultimate sentence, the words "that kind of State property" should be replaced by the words "that matter" and that, in the last

sentence, the words "of State property" should be deleted.

It was so agreed.

Paragraph (7), as amended, was approved.

Mr. Reuter, First Vice-Chairman, took the Chair.

Paragraph (8)

15. Mr. SETTE CÂMARA suggested that in order to tone down the statement in the English text of the penultimate sentence, the words "has nothing to do with" should be replaced by the words "differs from".

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

Paragraph (11)

16. Mr. USHAKOV pointed out that the slight difference in drafting between paragraph 2 (a) of article 12 and paragraph 2 of article 13, on the one hand, and paragraph 1 (a) of articles 15 and 16, on the other hand, to which attention was drawn in paragraph (11), was not due to the different nature of the various types of succession. He therefore suggested that the penultimate sentence should be deleted.

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

17. The CHAIRMAN* suggested that the French text of the sub-title preceding paragraph (12) should be brought into line with the English text by replacing the words "spécificités dues" by the words "aspects spécifiques liés".

It was so agreed.

18. Mr. QUENTIN-BAXTER pointed out that, in the second sentence, there was some confusion between the legal situation and the physical situation of movable property. What the Commission intended to convey was that the moving of movable property had no effect on a succession of States. He therefore suggested that the words "to place it out of reach of any succession" should be replaced by the words "to place it physically out of reach of any succession".

19. Mr. SETTE CÂMARA said he too believed that, as it stood, that sentence did not reflect the Commission's opinion. Even Mr. Quentin-Baxter's proposal was not entirely satisfactory because what the Commission had had in mind was a change in the location of the movable property involved in the succession.

Mr. El-Erian resumed the Chair.

20. Sir Francis VALLAT suggested that the last part of the second sentence of paragraph (12) should be

amended to read "makes it easy to change the control over the property".

It was so agreed.

21. Mr. QUENTIN-BAXTER proposed that the fourth sentence should be amended to read "In order for the predecessor State to retain or the successor State to receive such property, other conditions must be fulfilled."

It was so agreed.

22. Mr. USTOR proposed that the words "'natural' limits", in the last sentence, should be replaced by the words "limits imposed by good faith".

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraphs (13)-(15)

Paragraphs (13)-(15) were approved.

Paragraph (16)

23. Sir Francis VALLAT, referring to paragraph (16) and to the subsequent paragraphs, said he thought that the viability of the territory was one of the equitable considerations to be taken into account; he was not happy about the contradistinction between equity, on the one hand, and the viability of the territory on the other. But since it would be difficult to alter the draft at the present stage, he would be satisfied if that point was included in the summary record.

24. Mr. QUENTIN-BAXTER suggested that the words "principles subjacent", in the first sentence of paragraph (16), should be replaced by the words "underlying principles".

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraphs (17)-(20)

Paragraphs (17)-(20) were approved.

Paragraph (21)

25. Mr. REUTER said he did not think that the last two sentences accurately reflected the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases.

26. Sir Francis VALLAT said that he had the same impression. Without having the exact wording of the Court's judgment to hand, he suggested that the last two sentences of the paragraph should be replaced by a text on the following lines: "In its judgment, the Court decided that the parties should apply equitable principles in their subsequent negotiations."

27. Mr. REUTER said that, while he could accept that suggestion, he himself had drafted a text which read: "In its judgment, the Court considered that, in the cases before it, international law referred back to equitable principles, which the parties should take into account in their negotiations".

28. The CHAIRMAN suggested that the Secretariat should be requested to examine the exact wording of the Court's judgment and to reformulate the last two

* Mr. Reuter.

sentences of paragraph (21) on the basis of the texts proposed by Sir Francis Vallat and Mr. Reuter.

Paragraph (21) was approved on that understanding.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were approved.

Paragraph (24)

29. Mr. USHAKOV said that, to his mind, it was incorrect to draw, from the Court's elaboration of the concept of equity, the conclusion that equity was a rule of positive international law. In its judgment in the *North Sea Continental Shelf* cases, as quoted in paragraph (22) of the commentary, the Court had stated that "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".

30. Mr. SETTE CÂMARA agreed with Mr. Ushakov.

31. Mr. REUTER said that if rules of law based on equitable principles were established, they were still rules of law. He saw no need to philosophize about equity.

32. Mr. YASSEEN said that equity had two roles, on which he believed there was general agreement. First, it was a source of law. In fact, in certain circumstances, the judge could, and even should, rule *ex aequo et bono*, and in an international context the judge could proceed similarly if he had been so authorized by the parties to the dispute. Secondly, when a rule of positive international law provided that a matter should be settled by reference to equitable principles, a tribunal should base its decision on such principles, without the agreement of the parties being required. He considered that the Commission should confine itself to those two roles and avoid the more controversial theory that equity also had a corrective role.

33. Mr. TSURUOKA proposed that, in the first part of paragraph (24), the word "corrective" should be replaced by the word "supplementary".

It was so agreed.

34. Mr. RAMANGASOAVINA said that the expression "positive international law" was perhaps too strong, since equity was not a rule of the kind contained in conventions or generally accepted sets of regulations. It might be more appropriate to replace the word "positive" by the word "applicable".

35. Sir Francis VALLAT proposed that the words "is, when used in the present Section as part of the material content of specific provisions, a rule of positive international law, and not the notion of equity", should be replaced by the words "is also used in the present Section as part of the material content of specific provisions and not as the equivalent of the notion of equity. . ."

It was so agreed.

Paragraph (24), as amended, was approved.

The introductory commentary, as amended, was approved.

The meeting rose at 12.20 p.m.

1412th MEETING

Thursday, 22 July 1976, at 10.50 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-eighth session (continued)

Chapter III. STATE RESPONSIBILITY (continued)* (A/CN.4/L.247 and Add.1-8)

1. The CHAIRMAN invited the Commission to continue its examination, paragraph by paragraph, of section B of chapter III of its draft report.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)*

2. *Introductory commentary to chapter III of the draft and text of articles 16 to 19 with commentaries thereto, adopted by the Commission at the present session (continued)**

Commentary to article 16 [17]¹ (Irrelevance of the origin of the international obligation breached) (A/CN.4/L.247/Add.2).

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Sir Francis VALLAT, referring to the last sentence, observed that customary law constituted a source of obligation at least as important as a statute or a set of regulations. He therefore suggested that the word "custom" should be added to the examples given in parentheses, and that the words "a set of regulations" be replaced by the words "or regulation".

3. Mr. AGO (Special Rapporteur) supported that suggestion.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4)-(7)

Paragraphs (4)-(7) were approved.

Paragraph (8)

4. Sir Francis VALLAT suggested that in the English text of the third sentence, and in the rest of the com-

* Resumed from the 1409th meeting.

¹ The figures in square brackets represent the numbers of the articles as they appear in the report.

mentary, the words “source of the obligation” should be replaced by the words “origin of the obligation”.

It was so agreed.

Paragraph (8) was approved.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

5. Mr. SETTE CÂMARA, referring to the first sentence, said he doubted whether silence really was negative action, and suggested that the beginning of the sentence should be amended to read: “Silence may also be evidence...”.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11)-(18)

Paragraphs (11)-(18) were approved.

Paragraph (19)

6. Sir Francis VALLAT suggested that, in the last sentence of the English text, the words “peculiar to internal law” should be replaced by the words “in internal law”.

It was so agreed.

Paragraph (19), as amended, was approved.

Paragraph (20)

7. Sir Francis VALLAT suggested that the word “merely”, in the first sentence, should be deleted. In the third sentence, the use of the word “voluntary” seemed to him to be incorrect, and he suggested that the phrase in question should be amended to read “...there is no authoritative instrument...”.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were approved.

Paragraph (23)

8. Sir Francis VALLAT suggested that, in the third sentence, the word “unenforceable” should be replaced by the words “ineffective to the extent of the conflict”.

It was so agreed.

Paragraph (23), as amended, was approved.

Paragraphs (24) to (27)

Paragraphs (24) to (27) were approved.

The commentary to article 16 [17], as amended, was approved.

Commentary to article 17 [18] (Requirement that the international obligation be in force for the State) (A/CN.4/L.247/Add.3)

9. Mr. PINTO said he wished to make a comment on paragraphs 1 and 2 of article 17 [18], referring in particular

to paragraphs (11), (16) and (18) of the commentary, and to foot-note 12. He did not intend to propose any change in the text of the article or the commentary, or to go into details on the substance of the question. He simply wished to make a reservation regarding the possibility of transferring unconditionally to the sphere of international law the principle, universally accepted in internal law, that an individual cannot be held criminally liable for an act which was not prohibited at the time when he committed it (*nullum crimen sine lege praevia*).

10. The Special Rapporteur had, admittedly, based his position on many examples drawn from the international sphere, but he thought that those examples were perhaps not sufficient to establish the principle in question as a principle of international law. The situation in internal law was not the same as that in international law. In internal law, there was a very clear distinction between the government and the legislators, on the one hand, and the individual governed on the other; but in the international sphere the entities which established the rules were also those which had to apply them. Thus the legislators could establish rules which were in conformity with their own interests. He therefore considered that the principle stated in paragraph 1 of article 17 [18], while perfectly justified in internal law, could not be transferred, in that form, to international law.

Paragraphs (1)-(20)

Paragraphs (1)-(20) were approved.

Paragraph (21)

11. Sir Francis VALLAT suggested that, in the second sentence, the word “improper” should be replaced by the word “unjustified”; and that in the fifth and sixth sentences the word “expropriation” should be replaced by the word “confiscation”, since an act of expropriation was not necessarily wrongful.

12. Mr. USTOR suggested that the expression “wrongful confiscation” should be used, because in his view an act of confiscation was not necessarily wrongful either.

13. Mr. AGO (Special Rapporteur) accepted Sir Francis Vallat’s suggestion, at the same time observing that the reference was only to an act of the State, not to a wrongful act of the State.

Paragraph (21), as amended, was approved.

Paragraphs (22)-(26)

Paragraphs (22)-(26) were approved.

The commentary to article 17 [18], as amended, was approved.

Commentary to article 18 [19] (International crimes and international delicts) (A/CN.4/L.247/Add.4-8)

Paragraphs (1)-(48) (A/CN.4/L.247/Add.4-6)

Paragraphs (1)-(48) were approved.

Paragraphs (49) and (50) (A/CN.4/L.247/Add.6)

14. Mr. ROSSIDES said that the conclusions reached in paragraphs (49) and (50) of the commentary were

wholly satisfactory, stressing as they did the extent to which international law relating to matters of State responsibility had developed since the Second World War and the adoption of the United Nations Charter. Before the Second World War, State responsibility had been restricted to responsibility for damages; but now, wrongful acts by States could have far wider, and even global implications, rendering more compelling the need for the progressive development of international law.

Paragraphs (49) and (50) were approved.

**Chapter VI. OTHER DECISIONS AND CONCLUSIONS
OF THE COMMISSION**

(A/CN.4/L.250 and Add.1 and 2)

15. The CHAIRMAN invited the Commission to consider sections A, D, E, F, G and H of chapter VI of its draft report (A/CN.4/L.250).

**A. QUESTIONS OF TREATIES CONCLUDED BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN
TWO OR MORE INTERNATIONAL ORGANIZATIONS**

16. Mr. BILGE said that the explanation "due to the lack of time", in the second sentence, should be expanded.

17. Sir Francis VALLAT suggested that the words in question should be replaced by the words "due to the time required for other items".

It was so agreed.

Section A, as amended, was approved.

**D. PUBLICATION OF A NEW REVISED EDITION OF THE
HANDBOOK *The work of the International Law
Commission.***

Section D was approved.

E. DATE AND PLACE OF THE TWENTY-NINTH SESSION

18. The CHAIRMAN said that the next session of the Commission would be held from 2 May to 22 July 1977. The blank spaces in section E should be filled in accordingly.

Section E, as thus completed, was approved.

**F. REPRESENTATION AT THE THIRTY-FIRST SESSION OF
THE GENERAL ASSEMBLY**

Section F was approved.

G. GILBERTO AMADO MEMORIAL LECTURE

Section G was approved.

H. INTERNATIONAL LAW SEMINAR

19. Mr. TABIBI said that a reference might be included in section H to the view expressed by a number of representatives in the Sixth Committee of the General Assembly,² and held by members of the Commission, that

the time had come for the very useful International Law Seminar programme to be financed out of the United Nations regular budget. As stated in paragraph 12 of section H, several selected candidates had been unable to attend the twelfth session of the Seminar for lack of funds.

20. Mr. USHAKOV observed that a proposal to finance the International Law Seminar out of the United Nations regular budget would have to be accompanied by a statement of financial implications.

21. Mr. REUTER said that it was not within the Commission's competence to do more than make a recommendation on the matter.

22. Mr. SETTE CÂMARA said that the inclusion of such a recommendation might lead voluntary contributors to withhold their support, pending a decision by the General Assembly.

23. The CHAIRMAN said he would raise the matter in his statement on behalf of the Commission to the Sixth Committee at the thirty-first session of the General Assembly. If the proposal was taken up, the Secretariat would submit the required statement of financial implications. At the same time, he would explore with other bodies, such as UNITAR, the possibility of obtaining funds from sources outside the regular budget.

Section H was approved.

The meeting rose at 12.45 p.m.

1413th MEETING

Friday, 23 July 1976, at 9.45 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

**Draft report of the Commission on the work
of its twenty-eighth session (concluded)**

**Chapter III. STATE RESPONSIBILITY (concluded)
(A/CN.4/L.247 and Add.1-8)**

1. The CHAIRMAN invited the Commission to complete its examination, paragraph by paragraph, of chapter III of its draft report.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (concluded)

2. *Introductory commentary to chapter III of the draft and text of articles 16 to 19, with commentaries thereto, adopted by the Commission at the present session (concluded)*

² See *Official Records of the General Assembly, Thirtieth Session, Annexes, agenda item 108, document A/10393, para. 212.*

*Commentary to article 18 [19]*¹ (International crimes and international delicts) (*concluded*) (A/CN.4/L.247, Add.7 and 8)

Paragraphs (51)-(60)

Paragraphs (51)-(60) were approved.

Paragraph (61)

2. Mr. ROSSIDES, referring to the last sentence, observed that the words "all the main components of the international community" gave the impression that, in the view of the Commission, it was necessary for States to be unanimous in recognizing an internationally wrongful act as an "international crime". It should be made clear that the Commission did not have the rule of unanimity in mind, and he therefore suggested that the word "all" should be deleted.

3. Mr. AGO (Special Rapporteur) said he wished to reassure Mr. Rossides: the Commission had never considered that States must be unanimous in characterizing an internationally wrongful act as an international crime. The same explanations had been given regarding the concept of a "peremptory norm" at the United Nations Conference on the Law of Treaties. The words "all the main components of the international community" referred, not to States but to the main groups of States. The meaning was that an internationally wrongful act could not be characterized as an international crime unless all the main groups of States were in agreement. The word "all" was essential, since each main group of States must give its consent.

4. Mr. ROSSIDES reserved his position on that point.

Paragraph (61) was approved.

Paragraphs (62)-(65)

Paragraphs (62)-(65) were approved.

Paragraphs (66)-(69)

Paragraphs (66)-(69) were approved.

Paragraph (70)

5. Mr. ROSSIDES, referring to the second sentence, said that the expression "on a widespread scale" was incorrect. He suggested that it should be replaced by the words "massive, collective or systematic".

6. The CHAIRMAN reminded the Commission that several members had expressed misgivings about that expression when the text of article 18 proposed by the Drafting Committee had been considered.² He suggested that the Commission should take note of Mr. Rossides' reservations.

It was so agreed.

Paragraph (70) was approved.

Paragraph (71)

Paragraph (71) was approved.

Paragraph (72)

7. Mr. ROSSIDES, referring to the second sentence, proposed that the words "necessary and" should be inserted before the word "useful".

It was so agreed.

8. Mr. ROSSIDES, referring to the last two sentences, said that the English term "international delict" appeared in legal dictionaries, including that of Earl Jowitt.³ A "delict" was assimilated to a "tort" in civil law. Moreover, the *actio ex delicto* existed in English law.

9. The CHAIRMAN pointed out that the point raised by Mr. Rossides had been discussed at length in the Commission; he suggested that Mr. Rossides' reservation should be noted.

It was so agreed.

Paragraph (72), as amended, was approved.

Paragraph (73)

Paragraph (73) was approved.

The commentary to article 18 [19], as amended, was approved.

Section B of chapter III, as a whole, as amended, was approved.

Chapter III of the draft report, as a whole, as amended, was approved.

*Chapter IV. SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES (concluded)**
(A/CN.4/L.248 and Add.1-4)

10. The CHAIRMAN invited the Commission to complete its examination, paragraph by paragraph, of section B of chapter IV of its draft report.

B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES (concluded)*
(A/CN.4/L.248 and Add.1-4)

2. *Introductory commentary to section 2 of Part I of the draft and text of articles 12 to 16 and of article 3, subparagraph (f), with commentaries thereto, adopted by the Commission at the present session (concluded)**
(A/CN.4/L.248/Add.1-4)

*Section 2. Provisions relating to each type of succession of States (concluded)**

Commentary to article 12 (Transfer of part of the territory of a State) (A/CN.4/L.248/Add.2)

Paragraphs (1)-(25)

Paragraphs (1)-(25) were approved.

¹ Figures in square brackets represent the numbers of the articles as they appear in the report.

² See above, 1402nd and 1403rd meetings.

³ W. A. Jowitt, *The Dictionary of English Law*, vols. I and II, (London, Sweet and Maxwell, 1959).

* Resumed from the 1411th meeting.

Paragraph (26)

11. Mr. BEDJAOUÏ (Special Rapporteur) proposed that paragraph (26) should be transferred to the commentary to article 13, as a new paragraph (19).

It was so agreed.

Paragraph (26) was approved on that understanding.

Paragraph (27)

Paragraph (27) was approved.

Paragraph (28)

12. Mr. KEARNEY said he wished to point out that the nations of the world were interdependent and that international economic independence was not possible.

Paragraph (28) was approved.

Paragraphs (29) and (30)

Paragraphs (29) and (30) were approved.

The commentary to article 12, as amended, was approved.

Commentary to article 13 (Newly independent States) and article 3 (Use of terms), subparagraph (f) ("newly independent State") (A/CN.4/L.248/Add.3)

Paragraphs (1)-(12)

Paragraphs (1)-(12) were approved.

Paragraph (13)

13. Sir Francis VALLAT said that, like other members of the Commission who had done so previously, he wished to enter a reservation regarding the phrase "connected with the activity of the predecessor State".

Paragraph (13) was approved.

Paragraphs (14)-(31)⁴

Paragraphs (14)-(31) were approved.

The commentary to article 13 and article 3 (f) was approved.

Commentary to article 14 (Uniting of States) (A/CN.4/L.248/Add.4)

Paragraphs (1)-(9)

Paragraphs (1)-(9) were approved.

The commentary to article 14 was approved.

Commentary to article 15 (Separation of part or parts of the territory of a State) and article 16 (Dissolution of a State) (A/CN.4/L.248/Add.4)

14. Mr. USHAKOV drew attention to the fact that, as a result of the addition of the words "or parts" to the title of article 15, the wording of paragraph 1 of that article would have to be brought into line with the wording of paragraph 1 of article 16, at a later stage of the work on the topic.

Paragraphs 1 to 19

Paragraphs 1 to 19 were approved.

The commentary to articles 15 and 16 was approved.

Section B of chapter IV, as a whole, as amended, was approved.

Chapter IV of the draft report, as a whole, as amended, was approved.

*Chapter VI. OTHER DECISIONS AND CONCLUSIONS
OF THE COMMISSION (concluded)*

(A/CN.4/L.250 and Add.1 and 2, and A/CN.4/L.252)

15. The CHAIRMAN invited the Commission to complete its examination, paragraph by paragraph, of chapter VI of its draft report.

B. PROGRAMME AND ORGANIZATION OF WORK (A/CN.4/L.250/Add.1 and A/CN.4/L.252)

Paragraphs 1-3

Paragraphs 1-3 were approved.

Paragraphs 4 and 9

16. The CHAIRMAN drew attention to the amendments to paragraphs 4 and 9 submitted by Mr. Kearney (A/CN.4/L.252). With regard to the amendment to paragraph 4, he noted that some members of the Commission had expressed support for the idea of establishing a Programme and Planning Committee on a permanent basis, but that others had thought it was too early to take a decision on the matter, which should be considered at the Commission's twenty-ninth session. He expressed the hope that the Commission would now be able to reach a consensus, and asked Mr. Kearney whether he would press for a vote on the amendments he had submitted.

17. Mr. KEARNEY said that it might seem unusual for the Chairman of a Planning Group to submit amendments to a report which supposedly contained a record of that Group's work but, in view of the circumstances, he could see no means of avoiding a discussion on the issue. Moreover, he could not take part in any consensus on that issue and wished to make it clear that he had not participated in preparing or approving the final text of the report on the work of the Planning Group contained in document A/CN.4/L.250/Add.1.

18. After the first two meetings of the Planning Group, substantial agreement had been reached on the positions the Group should take. Four of the five members had been in favour of establishing a Programme and Planning Committee on a permanent basis. Moreover, he had the impression that all the members of the Planning Group had been in favour of adopting a series of proposals for eliminating delay resulting from translation and terminology problems, along the lines of the amendment he had proposed to what had become paragraph 9 of document (A/CN.4/L.250/Add.1). Subsequently, it had been agreed that the draft report on the work of the Planning Group should be considered in that Group with a view to its inclusion in chapter VI of the Com-

⁴ See above, para. 11.

mission's report. He had agreed that the final meeting of the Planning Group should be combined with a meeting of the Enlarged Bureau in order to speed up the Commission's work. At that meeting, one member of the Planning Group had strongly objected to the establishment of a Programme and Planning Committee on a permanent basis, and, again in order to speed up the Commission's work, the Enlarged Bureau had decided that such a Committee should not be established on a permanent basis at the present session. Shortly after that decision had been taken, he had had to leave the meeting to prepare the draft report on the law of the non-navigational uses of the international watercourses. Thus he had taken no part in the drafting of document A/CN.4/L.250/Add.1.

19. He had been inclined not to raise the issue of the establishment of a permanent Programme and Planning Committee at the present meeting, but, in view of what had happened at the combined meeting of the Planning Group and the Enlarged Bureau, had come to the conclusion that a matter of principle was involved. In proposing the establishment of a Programme and Planning Committee, he had had several considerations in mind. The first was the fact that it was far more efficient for planning activities to be carried out by a permanent committee than by the Enlarged Bureau. Such a committee should not be drawn solely from the members of the Enlarged Bureau which was, in general, composed of the members of the Commission with long periods of service. In his opinion, the members of the Programme and Planning Committee should have different levels of experience, and thus provide a means of generating new ideas for the Commission. In addition, the Programme and Planning Committee would not report to the Enlarged Bureau, but direct to the Commission, which would be a far more open and democratic procedure. As matters now stood, it was unfair for the members of the Commission who were not members of the Enlarged Bureau not to be allowed to know what the Planning Group had decided. That seemed to be an undemocratic and short-sighted approach for a body such as the International Law Commission.

20. He had been concerned for some time about the Commission's tendency to submerge differences of opinion only so that it might complete its work on time. That was a good system to follow up to a point, but he knew that in the Drafting Committee, for example, opposition by a member had sometimes led to the adoption, by the Commission as a whole, of decisions on which there was substantial disagreement or a majority view to the contrary.

21. He was not objecting to any member strongly urging his own point of view as to the law or a method of organization which that member considered right. What caused him concern was the Commission's practice of agreeing, because of the pressure of time, to formulations it considered second best, rather than insisting on the best. For all those reasons, he considered that a vote should be taken on the amendments he had proposed to paragraphs 4 and 9.

22. Mr. USHAKOV said he wished to make it clear that he in no way objected to the Planning Group.

Indeed, he had firmly supported the proposal to set up the Group and had participated actively in its work. It was he, for instance, who had proposed that the Commission should plan its work up to the conclusion of its five-year term of office ending in 1981. The Planning Group performed extremely useful work and should certainly be reconvened at future sessions of the Commission.

23. Mr. NJENGA said that the consensus method was an excellent method of work, which had been used to good effect in the General Assembly and at various United Nations conferences, as well as in the Commission itself. But when the absence of consensus became tantamount to a veto, the procedure was counterproductive. The proposals covered by Mr. Kearney's amendments had commanded the support of the great majority of the members of the Planning Group, yet they had emerged in quite a different form in the draft text of section B of chapter VI. He found it very difficult to endorse the present wording of that section as contained in document A/CN.4/L.250/Add.1.

24. At the thirtieth session of the General Assembly, nearly all the representatives in the Sixth Committee who had spoken on the matter had welcomed the establishment of a Planning Group as a means of expediting the Commission's work.⁵ In view of that general support, and of the convincing arguments advanced by Mr. Kearney, it seemed desirable to place the Group on a permanent footing.

25. Paragraph 9 of section B, while referring to the idea of establishing an advance review system, made no mention of how that idea could be put into practice. The text proposed by Mr. Kearney, on the other hand, was highly specific on that point and gave teeth to the proposal regarding terminological harmonization. He fully supported the two amendments proposed by Mr. Kearney.

26. Mr. HAMBRO said that he would support both amendments if they were put to the vote. He agreed with Mr. Njenga that the absence of a consensus must not be allowed to become a veto. It happened too often that the Commission as a whole deferred to the wishes of one or two of its members. A more desirable procedure would be for the Commission to take a majority decision, leaving individual members the option of expressing their dissent. If the Commission were always to adopt the principle of consensus, it would always adopt the principle of the lowest common denominator.

27. Sir Francis VALLAT said that, while he sympathized with much of what had been said by Mr. Kearney, who had raised a number of important points, he did not believe it possible for the Commission, at the present late stage of its session, to give Mr. Kearney's proposals the thorough consideration they warranted. In the circumstances, it seemed necessary to postpone a final decision. Accordingly, and on the basis of consultations with other members of the Commission, he wished formally to propose that the first sentence of paragraph 4

⁵ See *Official Records of the General Assembly, Thirtieth Session Annexes*, agenda item 108, document A/10393, para. 197.

should be replaced by the following text: "The Commission considered whether it would be desirable to establish the Group as a permanent committee. There was substantial support for this position, but as it would require adjustment in the activities of other groups, it was decided to leave the matter to be studied further and a final decision to be taken by the newly constituted Commission at its 1977 session."

28. As to paragraph 9, he proposed that the first sentence of the text in document A/CN.4/L.250/Add.1 should be retained; that the second sentence of that text should be amended to read "The Commission, owing to lack of time, decided to consider the proposals of the Planning Group at its next session"; and that the full text of Mr. Kearney's amendment to paragraph 9 (A/CN.4/L.252) should be inserted between those two sentences. In making that proposal, he did not wish to imply that the Planning Group's suggestions had been either approved or rejected, but merely to put them forward as a matter of record.

29. Mr. PINTO said that, although he fully agreed with the remarks made by Mr. Njenga and, by implication, with the ideas expressed by Mr. Kearney, the proposals made by Sir Francis Vallat constituted a very happy compromise to which he could subscribe. He was, however, rather at a loss to understand what was meant by the phrase "adjustment in the activities of other groups" in the proposed amendment to paragraph 4.

30. Sir Francis VALLAT said that the suggestions made by Mr. Kearney seemed clearly to imply that the proposed Planning Committee would report direct to the Commission. By implication, the relationship between that Committee, the Enlarged Bureau and the Commission would be involved. That was a matter requiring further reflection.

31. Mr. CALLE Y CALLE suggested that, out of respect for the newly constituted Commission, the word "final" should be omitted from the text of the amendment to paragraph 4 proposed by Sir Francis Vallat.

32. As to paragraph 9, he thought that Special Rapporteurs were sufficiently knowledgeable and cultured to deal with matters of terminology themselves, and that the Commission wasted very little time on purely terminological questions.

33. Sir Francis VALLAT said he had no objection to deleting the word "final" from the text of his amendment to paragraph 4, but he appealed to members of the Commission to refrain from redrafting a text which was generally acceptable.

34. Mr. ROSSIDES endorsed that appeal.

35. Mr. KEARNEY said that he was quite willing to accept the proposals made by Sir Francis Vallat.

36. Mr. USHAKOV said that he could accept the texts for paragraphs 4 and 9 proposed by Sir Francis Vallat.

37. With regard to paragraph 9, he wished to emphasize that, in principle, he supported Mr. Kearney's proposals concerning the institution of a system of terminological review. He had, however, a number of reservations on points of detail, in particular on paragraph 4 of Mr.

Kearney's amendment, which appeared to involve a question of substance, not merely a matter of terminology.

38. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the texts for paragraphs 4 and 9 proposed by Sir Francis Vallat, subject to the deletion of the word "final" in the text relating to the latter paragraph.

It was so agreed.

Paragraphs 4 and 9, as amended, were approved.

Paragraphs 5-8 and 10-11

Paragraphs 5-8 and 10-11 were approved.

Paragraphs 12 and 13

39. The CHAIRMAN introduced the text of the recommendations adopted by the Enlarged Bureau at its meeting held on 22 July 1976, which had been distributed to members of the Commission. The question of the seat of the Commission had been considered by the Enlarged Bureau, and he had informed the Bureau of his private talks with members of the Commission. He had expressed a reservation regarding the technical aspect of the matter, pointing out that the Commission was not seized of it by any official document. The Enlarged Bureau, however, had decided to recommend the Commission to include a paragraph in its report on the work of the present session, reiterating the position it had taken in 1974 and expressing the hope that no change in its arrangements or methods of work would be introduced without prior consultations with the Commission. The text adopted by the Enlarged Bureau for inclusion in section B as paragraphs 12 and 13, read:

12. The Commission also decided to reaffirm the conclusions it reached at its twenty-sixth session in 1974 in connexion with the report of the Joint Inspection Unit, including those reached on the seat of the Commission, which read as follows:

209. As to the seat of the Commission, the General Assembly in 1955 expressly amended article 12 of the Commission's Statute to provide that the Commission was to sit at the United Nations Office at Geneva. This decision of the General Assembly was not taken lightly but after a thorough examination of all aspects of the matter and on the basis of the requirements of the Commission's work. The basic assumption on which this decision of the Assembly was taken remains as valid today as it was in 1955. The United Nations Office at Geneva affords the best possible conditions for the Commission's work. The Palais des Nations has an exceptionally specialized library, originally constituted in the days of the League of Nations and including collections of works and periodicals going back for several decades. This is an absolutely indispensable working instrument both for the special rapporteurs—some of whom come to Geneva at their own expense between sessions expressly to prepare their work—and for the members of the Commission in general. The translators, revisers, interpreters, précis-writers and others of the staff of the Palais des Nations have, over the years, become familiar with the Commission's work. They are acquainted with the 25 years of accumulated precedent resulting from the work of the Commission. Besides, Geneva is the most suitable place for the work of a body such as the Commission which is called upon to solve legal problems in a quiet and studious atmosphere. Geneva is also the meeting-place of the International Law Seminar, organized annually by the United Nations Office at Geneva, which is closely linked with the Commission's sessions: members of the Commission give lectures to the Seminar and the participants

have the opportunity of attending the Commission's meetings—an arrangement which constitutes one of the salient features of the Seminar.

210. Another important factor to be borne in mind is that the members of the Commission, a body which is not in permanent session, are persons working in the academic and diplomatic fields with professional responsibilities outside the Commission, as required by their respective Governments or professions, a fact which enables the Commission to proceed with its work not in an ivory tower but in close touch with the realities of international life. Many of the members have made permanent arrangements to be present in Geneva and during the Commission's sessions. For instance, several members have been appointed permanent representatives in Geneva or have made Geneva one of the main centres of their activities. In this connexion, it should be recalled that, as already indicated, the members of the Commission being elected by the General Assembly in their personal capacity, cannot be replaced by alternates or advisers. If the seat of the Commission were transferred outside Geneva it would be extremely difficult for many members to attend meetings of the Commission, and this would negate one of the basic principles of the Statute of the Commission, namely to ensure the presence in the Commission of the most qualified representatives of the main forms of civilization and principal legal systems of the world. . . .⁶

13. Recalling that the procedures and organizational patterns of the Commission, as set forth in the Commission's Statute approved by the General Assembly and as evolved in practice, were conceived and determined bearing essentially in mind the very special nature of the task performed by the Commission and its needs, the Commission expressed confidence that no modifications of such procedures or patterns would be made without its having an opportunity to express its views thereon.

40. Mr. USTOR said that, as an outgoing member of the Commission, he did not think it would be appropriate for him to dissent from a decision concerning the Commission's future. He hoped, however, that members would understand him if he pointed out that Hungary was particularly interested in having as many United Nations bodies as possible at Vienna, in its immediate neighbourhood. As he had said in the Enlarged Bureau, it would be very pleasant for him personally to have to drive only 260 kilometres instead of 1,300 kilometres to attend a session of the Commission, if only as a listener.

41. The CHAIRMAN said that, in his capacity as a member of the Commission, he wished to reserve his position on the technical point that the Commission was not seized of any official document relating to its seat, so that it was not appropriate for it to take any decision on the matter.

Paragraphs 12 and 13 were approved.

Section B as a whole, as amended, was approved.

C. CO-OPERATION WITH OTHER BODIES (A/CN.4/L.250/Add.2)

Section C was approved.

Chapter VI of the draft report, as a whole, as amended, was approved.

Chapter V. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (A/CN.4/L.249 and Add.1)

42. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, chapter V of its draft report.

Paragraphs 1-42

Paragraphs 1-42 were approved.

Paragraph 43

43. Mr. USHAKOV said that it was not the Commission's task to discuss the replies of States to the questionnaire. He would prefer it to be recorded only that the Commission had discussed the Special Rapporteur's first report.

44. Mr. SETTE CÂMARA said it should be borne in mind that the preparation of the questionnaire addressed to States was the first stage of the Commission's work on the topic and that the replies to it would determine the future course of that work. It therefore seemed to him essential to say that the Commission had discussed the replies of States to the questionnaire it had itself prepared.

45. Mr. KEARNEY (Special Rapporteur) suggested saying that the Commission had discussed the question of the law of the non-navigational uses of international watercourses.

It was so agreed.

Paragraph 43, as amended, was approved.

Paragraphs 44-52

Paragraphs 44-52 were approved.

Paragraph 53

46. Sir Francis VALLAT suggested that the words "to the particular aspects of every river", at the end of the first sentence, should be replaced by "to all rivers".

It was so agreed.

Paragraph 53, as amended, was approved.

Paragraphs 54-58

Paragraphs 54-58 were approved.

Paragraph 59

47. Mr. KEARNEY (Special Rapporteur) suggested that the words "as wide as possible", in the last sentence, should be replaced by the words "as widely acceptable as possible".

It was so agreed.

Paragraph 59, as amended, was approved.

Paragraph 60

48. Mr. SETTE CÂMARA said that, in his view, the first sentence went much too far in referring to the exercise of sovereignty over natural resources in general. He therefore suggested that the latter part of the sentence, beginning with the words "to establish", should be deleted, and that the first part should be linked with the next sentence so as to read:

⁶ Yearbook... 1974, vol. II (Part One), p. 310, document A/9610/Rev.1, paras. 209 and 210.

"It would be necessary, in elaborating legal rules for water use, to explore such concepts as . . .".

It was so agreed.

Paragraph 60, as amended, was approved.

Paragraph 61

49. Mr. SETTE CÂMARA said he thought it was too soon to propose the establishment of a Committee of Experts. He suggested that the last sentence should refer solely to expertise.

50. Mr. TABIBI said that he was in favour of retaining the last sentence unchanged, since the law of the non-navigational uses of international watercourses was a highly technical subject and the Commission would not be able to accomplish its task without seeking advice from a Committee of Experts.

51. Mr. KEARNEY (Special Rapporteur) pointed out that 18 States had expressed support for the establishment of a Committee of Experts and none had opposed it. He was, however, prepared to agree to the words "the establishment of a Committee of Experts" being replaced by the words "securing technical advice".

It was so agreed.

Paragraph 61, as amended, was approved.

Chapter V of the draft report, as a whole, as amended, was approved.

The draft report of the Commission on the work of its twenty-eighth session, as a whole, as amended, was adopted.

Closure of the session

52. Mr. AGO congratulated the Chairman on the outstanding ability with which he had performed his duties. Under his Chairmanship, the Commission had completed an unprecedented amount of work during the present session. He also congratulated the other members of the Bureau, the members of the Drafting Committee and the Secretariat. Lastly, he wished to pay a tribute to four eminent members of the Commission—Mr. Kearney, Mr. Tammes, Mr. Ustor and Mr. Yasseen—who were not standing for re-election and who, through their participation in the Commission's work, had made an outstanding contribution to the codification and progressive development of international law.

53. Mr. SETTE CÂMARA, Mr. USHAKOV and Mr. ROSSIDES associated themselves with the congratulations extended by Mr. Ago.

54. Mr. KEARNEY, Mr. USTOR and Mr. YASSEEN also congratulated the Chairman and the other members of the Bureau and thanked all the members of the Commission who had wished them well on the occasion of their departure.

55. The CHAIRMAN, after thanking the members of the Bureau and the Drafting Committee, and the Secretariat staff, declared the twenty-eighth session of the International Law Commission closed.

The meeting rose at 1.30 p.m.

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